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DIGEST

OF

DECISIONS OF THE SUPREME COURTS OF MICHIGAN,
WISCONSIN, MINNESOTA, NEBRASKA, IOWA,
NORTH DAKOTA, AND SOUTH
DAKOTA

REPORTED IN THE

NORTHWESTERN REPORTER

VOLUMES 61-70

AND IN THE FOLLOWING VOLUMES OF STATE REPORTS

IOWA, ...	VOLS. *92-100†	NEBRASKA, . .	VOLS. *42-50†
MICHIGAN, . .	VOLS. *102-113†	NORTH DAKOTA, .	VOLS. *4- 6†
MINNESOTA, . .	VOLS. *59- 67†	SOUTH DAKOTA, .	VOLS. *6-10†
WISCONSIN, . .	. . . VOLS. *88-95†		

•Part of this volume only included.

† (Estimated.) Not yet published.

WITH TABLE OF CASES DIGESTED AND TABLE OF STATUTES CONSTRUED

EDITED BY MEMBERS OF THEEDITORIAL STAFF OF THE NATIONAL REPORTER SYSTEM

ST. PAUL
WEST PUBLISHING CO.

1897.

Letter B. V.S.
4.7.95

24.2.54

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PUBLISHERS' PREFACE.

This new volume of the Northwestern Digest, covering ten volumes of the Northwestern Reporter and about fifty volumes of the several state reports, includes some new features in addition to those of the earlier volumes of the series. Chief of these is the arrangement of paragraphs under the black-letter sections in the alphabetical order of the states, each paragraph being preceded by a small black-letter line showing the state and the date of the decision. This feature, together with the fact that the state report citations are given in the text for all cases which have been officially reported when this digest goes to press, and the table of statutes construed, enhances the value of the work as a local digest of the latest decisions for each state covered by the Northwestern Reporter. The black-letter sections are numbered, and the individual paragraphs marked by letters in brackets, for convenience of citation and reference. All these new features are borrowed from the style of the Century Edition of the American Digest.

WEST PUBLISHING COMPANY.

St. Paul, Minn., October, 1897.

DIGEST OF VOLS. 61-70

OF THE

NORTHWESTERN REPORTER.

A.

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I. IN GENERAL.

§ 1. Transfer of plaintiff's interest.

[a] (Iowa; 1897.)

When the cause of action is transferred after commencement of the action, the case may be allowed to proceed in the name of the original plaintiff.—*Kreuger v. Sylvester* (Iowa) 69 N. W. 1059.

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[b] (Neb.; 1897.)

Where a transfer of the subject of an action is made by the plaintiff during its pendency, the action may be prosecuted to judgment in the name of the original party plaintiff, or the party to whom the transfer is made may be substituted as plaintiff.—*Harrington v. Connor* (Neb.) 70 N. W. 911.

§ 2. Attainment of majority by ward.

(Iowa; 1895)

That a ward has attained her majority pending an action by her guardian to recover the amount of the indebtedness of a former guardian to the ward is not ground alone for the abatement of the action.—*Reed v. Lane* (Iowa) 65 N. W. 380.

§ 3. Objections to jurisdiction.

[a] (Neb.; 1896.)

Objections to the jurisdiction, which do not arise upon the summons, the indorsement, or service thereof, or upon the face of the petition, may be raised by answer in connection with matter in bar. *Hurlburt v. Palmer* (1894) 57 N. W. 1019, 39 Neb. 158, followed.—*Herbert v. Wortendyke*, 68 N. W. 350.

[b] (Neb.; 1896.)

The filing of a paper authorizing certain attorneys to appear for defendant and defend the action, after the filing of an answer pleading want of jurisdiction, does not waive such plea.—*Herbert v. Wortendyke* (Neb.) 68 N. W. 350.

II. ANOTHER ACTION PENDING.

Setting up garnishment proceedings, see "Garnishment," § 35.

§ 4. In general.

[a] (Iowa; 1895.)

In an action to set aside a mortgage of goods attached by plaintiff in an action against the debtor, an answer by the mortgagee alleging that, at the commencement of the attachment, he was in possession of the goods, and was garnished by plaintiff, and that the garnishment was afterwards dismissed, constitutes no defense.—*Toledo Sav. Bank v. Johnston* (Iowa) 62 N. W. 748.

[b] (Mich.; 1897.)

The pendency of an action by a purchaser of goods to rescind the contract, and for damages, is not a bar to an action by the seller for the price, where he has not attempted to use his claim as a set-off in the former suit.—*Jennison Hardware Co. v. Godkin* (Mich.) 70 N. W. 428.

[c] (Neb.; 1895.)

The fact that plaintiff in an action by a judgment creditor against the debtor and his vendee, to set aside a fraudulent conveyance,

attached the property conveyed to satisfy his judgment before bringing the action, and that the vendee thereupon brought an action of replevin for the property, which was pending, did not abate the action, where defendant did not show that plaintiff's attachment was in force.—*Monroe v. Reid*, 61 N. W. 983, 46 Neb. 316.

[Id] (Neb.; 1895.)

Evidence of the clerk of the district court out of which an attachment issued that no order was ever made dissolving the attachment was insufficient to show that the attachment was pending. *Monroe v. Reid* (Neb.) 61 N. W. 983, 46 Neb. 316.

[Id] (Neb.; 1895.)

A pending action at law may be pleaded in abatement of an equitable action.—*Monroe v. Reid*, 61 N. W. 983, 46 Neb. 316.

[Id] (Neb.; 1897.)

A plea of another suit pending is not sustained by proof of an order dismissing without prejudice a former suit on the same cause of action, and the filing by the plaintiff of a motion for a new trial, upon which, so far as the record discloses, no action has been taken.—*Council Bluffs Sav. Bank v. Griswold* (Neb.) 70 N. W. 376.

[Id] (Wis.; 1894.)

The circuit court may still have jurisdiction of a cause of action arising on a contract, as shown in one count of a complaint and the counterclaim thereto, though the parties have previously proceeded to trial on another count in the same complaint, arising on a tort out of which the contract grew, and have secured an adjudication therein, erroneous because of this partial contemplation of the pleadings.—*Gage v. Allen*, 61 N. W. 361, 89 Wis. 98.

§ 5. Foreclosure of mortgage pending partition.

(Wis.; 1894.)

Where a mortgagor sells an undivided part of the land to different persons, the pendency of partition by one of the purchasers against the other purchaser and the mortgagees, in which the latter made default, is not a bar, under Rev. St. § 3103, to an action by such mortgagees to foreclose the mortgage.—*Gibson v. Southwestern Land Co.* (Wis.) 61 N. W. 282, 89 Wis. 49.

§ 6. Replevin—Cross action.

[Id] (Mich.; 1895.)

A debtor executed a chattel mortgage to secure plaintiff and certain other creditors. The goods were replevied by other creditors from plaintiff's comortgagees, and plaintiff, to whom one of them subsequently assigned his interest, replevied the property from the sheriff. *Held*, that plaintiff's action was a cross replevin.—*Simon v. Leland* (Mich.) 63 N. W. 76, 105 Mich. 226.

[Id] (Minn.; 1895.)

One whose property was taken in replevin against his agent could not retake it from the plaintiff by replevin pending the first action.—*Larson v. Nichols* (Minn.) 64 N. W. 553, 62 Minn. 256.

§ 7. In another state.

(Iowa; 1896.)

Garnishee proceedings commenced in the state against a railroad company for wages due an employé are not abated by the commencement of an action, in another state, by the employé against the railroad for such wages.—*Willard v. Sturm* (Iowa) 65 N. W. 847.

§ 8. How question raised.

(Wis.; 1895.)

The defense of prior action pending is an affirmative defense, and must be pleaded.—*Witte v. Foote* (Wis.) 62 N. W. 1044, 90 Wis. 235.

III. DEATH OF PARTY—SUBSTITUTION AND REVIVAL.

§ 9. What causes of action survive.

[Id] (Mich.; 1895.)

Deceased, being indebted to plaintiff, assigned to him a note and mortgage under the false representation that the mortgage was good, though he knew that it was of no value. The amount of the mortgage plaintiff credited on deceased's debt to him. When plaintiff found that the mortgage was worthless, he asked deceased to make it good, and deceased told him to sue on the note, and that he (deceased) would pay the expense of the suit, and, if the note was not collected by suit, he would pay the amount thereof. Plaintiff sued the maker, but was unable to collect the judgment. *Held*, that the right of action on the promise of deceased to pay the amount of the note and the expense of suit survived his death.—*Bryant v. Rich's Estate* (Mich.) 62 N. W. 146, 101 Mich. 124.

[Id] (Mich.; 1897.)

A right to rescind a transfer of personal property survives to the transferor's executor.—*Coon v. Dennis* (Mich.) 69 N. W. 666.

§ 10. — Fraud and deceit.

(Minn.; 1896.)

Under Gen. St. 1891, § 5912, providing that "a cause of action arising out of an injury to the person, dies with the person of either party, except" a cause for death by wrongful act or omission (§ 5913), but that all other causes of action, whether arising on contract or not, survive, a cause of action for fraud and deceit, being for an injury to property, survives.—*Ware v. Linderbergh* (Minn.) 68 N. W. 771.

§ 11. — Personal injuries.

(Wis.; 1897.)

A cause of action for personal injuries through negligence is within Rev. St. § 4253, as amended by Laws 1887, c. 280, providing that actions for assault and battery, etc., "or other damage to the person," shall survive.—*Lehmann v. Deuster* (Wis.) 70 N. W. 170.

§ 12. Substitution of personal representatives.

[Id] (Iowa; 1895.)

Where an action is brought on a claim against an insane person, who is represented by a guardian appointed in another state, and the insane person dies before judgment, and his executor is made defendant, the guardian ceases to be a party, and the district court has jurisdiction.—*Findley v. Cowles* (Iowa) 61 N. W. 998, 93 Iowa, 589.

[Id] (Iowa; 1897.)

The death of plaintiff pending suit for wrongful attachment, and the substitution of his administrator, will not prevent the recovery of exemplary damages which might have been recovered by decedent himself.—*Union Mill Co. v. Prenzler* (Iowa) 69 N. W. 876.

ABETTERS.

Aiding and abetting in misdemeanor, see "Criminal Law," § 14.

ABORTION.

Evidence of other crimes, see "Criminal Law," § 123.

Homicide by, see "Homicide," §§ 9, 37.

Testimony of accomplice, see "Criminal Law," § 114.

[Id] (Wis.; 1896.)

The consent of a woman to the performance of an abortion upon her is not a defense to an

action for the actual damages thereby sustained by her.—*Miller v. Bayer* (Wis.) 68 N. W. 869.

[b] (Wis.; 1896.)

A complaint which charges that defendants "entered into collusion with defendant K. to cause a criminal operation to be performed upon the body of plaintiff, and to have the said K. perform an abortion upon her body," clearly charges defendants with entering into an unlawful combination to injure plaintiff by performing upon her an abortion.—*Miller v. Bayer* (Wis.) 68 N. W. 869.

[c] (Wis.; 1896.)

In an action for damages for causing an abortion, the exception contained in Rev. St. § 4352, where the act is justified on the ground of the necessity of saving life, is a matter of defense, and need not be negatived in the complaint.—*Miller v. Bayer* (Wis.) 68 N. W. 869.

ABSENCE.

Admissibility of declarations made in absence of person affected, see "Evidence," § 21.

Continuance in absence of accused, see "Criminal Law," § 47.

From state, effect on running of limitations, see "Limitation of Actions," § 23.

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Devised by will, see "Wills," § 45.

ABSTRACTS.

Of record on appeal, see "Appeal," §§ 124-126.

ABSTRACTS OF TITLE.

Duty of vendor to furnish, see "Vendor and Purchaser," § 21.

Right of access to records, see "Records," § 1.

(Neb.; 1896.)

Plaintiff purchased a real-estate mortgage relying on the certificate accompanying an abstract of title, which recited that the abstracter had carefully examined the records of the offices of the county clerk, the clerk of the district court, and the county treasurer, and that there were of record in said offices no liens on the property except as mentioned in the abstract. Held, that the abstracter was not liable on his bond because of the omission from the abstract of a prior mortgage of record in the office of the register of deeds, though the omission was the result of a conspiracy to defraud between the abstracter, the mortgagor, and the prior mortgagee.—*Thomas v. Carson* (Neb.) 65 N. W. 899, 46 Neb. 765.

ABUSE OF PROCESS.

(Iowa; 1895.)

An action will lie against one who maliciously, and without probable cause, garnishes the exempt earnings of his debtor, knowing them to be exempt, with the purpose of harassing the latter's employers, and thereby compel him to

pay the debt out of such exempt money in order to avoid discharge.—*Nix v. Goodhile* (Iowa) 63 N. W. 701.

ABUTTERS.

Assessments for public improvements, see "Municipal Corporations," §§ 127-155.

Liability of city for negligence of abutting owner as to streets and sidewalks, see "Municipal Corporations," § 79.

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ACCESSORY.

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See "Death by Wrongful Act"; "Negligence."

As ground for new trial, see "New Trial," § 32.

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ACCOMPLICE.

Testimony of, see "Criminal Law," §§ 114-118.

ACCORD AND SATISFACTION.

See, also, "Compromise"; "Payment"; "Release and Discharge."

§ 1. What constitutes.

[a] (Neb.; 1897.)

The assumption of obligations to third persons for a portion of the amount agreed on without the payment of such obligation is not a satisfaction.—*Omaha Fire Ins. Co. v. Thompson* (Neb.) 70 N. W. 30.

[b] (S. D.; 1895.)

On one day plaintiff wrote defendant accepting the latter's offer of compromise of a claim asserted against it by plaintiff, and on the following day wrote again, countermanding his acceptance, and sued on the claim. Immediately after defendant tendered him payment in full satisfaction of the claim the amount previously offered. *Held*, that there was no accord and satisfaction.—*Carpenter v. Chicago, M. & St. P. Ry. Co.* (S. D.) 64 N. W. 1120.

§ 2. — Receipt of part payment.**[a] (Mich.; 1895.)**

Where defendants deducted from plaintiff's wages the amount paid by them as railroad fare for plaintiff, which sum was claimed by plaintiff, but payment thereof denied by defendants, and plaintiff accepted the amount paid, and gave a receipt in full therefor, he is concluded from maintaining an action for the sum so deducted. *McGrath, C. J., and Montgomery, J., dissenting.*—*Tanner v. Merrill* (Mich.) 65 N. W. 664.

[b] (Minn.; 1895.)

The payment of a part of a debt will in no case discharge the whole without an agreement to release the balance, and an acceptance of the payment as an accord and satisfaction.—*Marion v. Heinbach* (Minn.) 64 N. W. 386.

62 Minn. 214.

[c] (Minn.; 1896.)

An employer arbitrarily, and without consent of the employé, made deductions from wages of the latter, on account of alleged destruction of property, and the servant signed receipts reciting a full payment of wages due, and that the signer assented to the deductions made by the employer for damage to its property. The employé did not demand the amount of the deductions during the time he was employed, for fear of being discharged. *Held*, that there was no accord and satisfaction of the employer's claim for property destroyed.—*Hennessey v. St. Paul City Ry. Co.* (Minn.) 67 N. W. 635.

[d] (Neb.; 1896.)

A., being indebted to B. in an uncertain amount, sent to the C. bank the amount which A. conceded to be due, with instructions to pay the sum to B., but only in full settlement, and on his signing a receipt to that effect. B., protesting that more was due, accepted the money, and signed the receipt, but caused the bank to send back, accompanying the receipt, a letter declaring that he only received the money on account, and not in settlement. *Held*, that the terms of the receipt, and the refusal of the bank to pay the money except upon his signing it, were notice to him that the bank had no authority to pay it except on the condition that it should be received in full settlement.—*Treat v. Price* (Neb.) 66 N. W. 834.

47 Neb. 875.

[e] (Neb.; 1896.)

A., being indebted to B. in an uncertain amount, sent to the C. Bank the amount which A. conceded to be due, with instructions to pay the sum to B., but only in full settlement, and on his signing a receipt to that effect. B., protesting that more was due, accepted the money, and signed the receipt, but caused the bank to send back, accompanying the receipt, a letter declaring that he only received the money on account, and not in settlement. *Held* that, by receiving the money, he had accepted the condition on which it was tendered, and that his protest availed nothing.—*Treat v. Price* (Neb.) 66 N. W. 834.

47 Neb. 875.

[f] (Neb.; 1896.)

A creditor who accepts money tendered by the debtor unconditionally, does not, by that act, estop himself from maintaining an action to recover any further sum that may be due.

Treat v. Price, 66 N. W. 834, 47 Neb. 875, distinguished.—*Beckman v. Birchard* (Neb.) 67 N. W. 781.

[g] (Neb.; 1897.)

A payment of a part only of a liquidated past-due debt, in full settlement, is not good as an accord and satisfaction.—*McIntosh v. Johnson* (Neb.) 70 N. W. 522.

[h] (S. D.; 1897.)

Where there is a dispute as to the amount of a debt, and the debtor pays less than the amount claimed by the creditor, an agreement by the latter at the time to accept the sum paid in full satisfaction need not be in writing.—*Miles v. Arp* (S. D.) 70 N. W. 1050.

§ 3. Pleading.**(Neb.; 1896.)**

A plea of accord and satisfaction, which does not show performance, is insufficient.—*Goble v. American Nat. Bank of Kansas City* 65 N. W. 1062, 46 Neb. 891.

ACCOUNT.

See, also, "Account Stated."

Books of account as evidence, see "Evidence," § 78.

Limitation of actions on, see "Limitation of Actions," § 5.

Reference for examination, see "Reference," § 2.

[a] (Neb.; 1896.)

A pleading in which the only cause of action is for "money due as per account hereto attached, and marked 'Exhibit B,'" but which is accompanied by no exhibit or allegation showing the nature of the alleged indebtedness, fails to state a cause of action.—*Home Fire Ins. Co. v. Arthur* (Neb.) 67 N. W. 440.

48 Neb. 461.

[b] (Neb.; 1896.)

Code Civ. Proc. § 129, provides, that in an action founded on an account, it is sufficient for plaintiff to give a copy of the account, with all credits and indorsements thereon, and to state that there is due him thereon from defendant a specified sum. *Held*, that where it appeared from a complaint on an account, and from the account annexed thereto, that goods were delivered to defendant, of a certain reasonable value, and that defendant was a debtor of plaintiff for the goods, in a certain sum, the complaint was sufficient on general demurrer.—*McArthur v. H. T. Clarke Drug Co.* (Neb.) 67 N. W. 861.

48 Neb. 899.

ACCOUNTING.

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Between partners, see "Partnership," §§ 21, 23-33.

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By guardian, see "Guardian and Ward," §§ 7-11.

By mortgagee, see "Mortgages," § 28.

By public officer, see "Office and Officer," § 23.

By receiver, see "Receivers," § 21.

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Settlement of accounts between old and new counties, see "Counties," § 7.

ACCOUNT STATED.

Limitation of action on, see "Limitation of Actions," § 5.

[a] (Mich.; 1895.)

Where, monthly statements are rendered by a creditor to a debtor on a running account, failure of the debtor to object to the account within a reasonable time is an admission by him of its correctness.—*Pabst Brewing Co. v. Lueders* (Mich.) 64 N. W. 872.

[b] (Neb.; 1896.)

The rendering of an account between parties, and agreeing upon the amount due as appearing therefrom, will support an action for the balance thereby shown, without an express promise to pay.—*Hendrix v. Kirkpatrick* (Neb.) 67 N. W. 759.

48 Neb. 670.

[c] (Neb.; 1896.)

The failure to object to an account rendered is admissible in evidence as tending to prove an acknowledgment of its correctness; its weight or sufficiency for such purpose being a question of fact for the consideration of the jury.—*Hendrix v. Kirkpatrick* (Neb.) 67 N. W. 759.

48 Neb. 670.

ACCRETION.

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ACCRUAL.

Of cause of action, see "Limitation of Actions," §§ 9-20.

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Assignment of unacknowledged mortgage, see "Chattel Mortgages," § 31.

Effect of admission after running of statute, see "Adverse Possession," § 32.

Interruption of adverse possession by acknowledgment, see "Adverse Possession," § 24.

Of agreement to submit to arbitration, see "Arbitration and Award," § 1.

Of assignment, see "Assignment for Benefit of Creditors," § 6.

Of debt barred by limitations, see "Limitation of Actions," § 32.

Of sheriff's deed at mortgage foreclosure sale, see "Mortgages," § 89.

Of title, effect of adverse possession, see "Adverse Possession," § 5.

§ 1. Necessity.

[a] (Neb.; 1895.)

A deed which is neither acknowledged nor recorded passes title to the grantee, so that the land may be levied on under judgment against him.—*Gallagher v. Connell* (Neb.) 64 N. W. 965, 46 Neb. 372.

[b] (Neb.; 1896.)

Under Comp. St. 1895, c. 36, § 4, a conveyance of the homestead is, unless acknowledged, absolutely void.—*Horbach v. Tyrrell* (Neb.) 67 N. W. 485.

48 Neb. 514.

§ 2. Sufficiency.

(Minn.; 1896.)

An acknowledgment of a deed of assignment executed by a corporation, that D. appeared before the notary, and "acknowledged that he is president of the within corporation, and that he signed the foregoing deed as its president, and that he has been duly authorized to sign the same by the board of directors of

said corporation, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed," was insufficient.—*Bennett v. Knowles* (Minn.) 68 N. W. 111.

§ 3. What officers may take—Disqualification.

[a] (Iowa; 1897.)

An acknowledgment of a mortgage, taken by a notary public who is a stockholder in a bank which is a beneficiary under the mortgage, is void.—*Smith v. Clark* (Iowa) 69 N. W. 1011.

[b] (Neb.; 1896.)

The act of an officer in taking the acknowledgment of a grantor to a conveyance of real estate is a ministerial one.—*Horbach v. Tyrrell* (Neb.) 67 N. W. 485.

48 Neb. 514.

[c] (Neb.; 1896.)

A notary public is not disqualified from taking an acknowledgment of a mortgage made to a corporation merely because it is shown that he was at the time secretary and treasurer of the mortgagee, it not appearing that he was a stockholder in such corporation, or otherwise beneficially interested in having the mortgage made. *Ryan, C., dissenting.*—*Horbach v. Tyrrell* (Neb.) 67 N. W. 485.

48 Neb. 514.

[d] (Neb.; 1896.)

An attorney, who is a notary public, is not disqualified from taking an acknowledgment of a mortgage made to his client merely because he holds for collection the claim secured by such mortgage; it not appearing that the attorney had any beneficial interest in having the mortgage made, nor that the amount of his compensation in any manner depended upon such mortgage being made. *Horbach v. Tyrrell* (Neb.) 67 N. W. 485, followed. *Ryan, C., dissenting.*—*Havemeyer v. Dahn* (Neb.) 67 N. W. 489.

48 Neb. 536.

§ 4. Certificate.

[a] (Mich.; 1897.)

The presumption in favor of a certificate of acknowledgment may be rebutted by clear and convincing proof that the certificate is false and fraudulent.—*Saginaw Building & Loan Ass'n v. Tennant* (Mich.) 69 N. W. 1118.

[b] (Minn.; 1895.)

The certificate of acknowledgment of a deed is prima facie evidence of the execution of the deed, which cannot be overcome by evidence not clear and satisfactory.—*Lennon v. White* (Minn.) 63 N. W. 620.

61 Minn. 150.

§ 5. Foreign acknowledgment.

[a] (Iowa; 1895.)

Acts 20th Gen. Assem. c. 203, validates the acknowledgments of deeds taken in a foreign state, "acknowledged or proven according to the laws and usages" of such state. The evidence showed that there was no law in the foreign state at the time of the acknowledgment prescribing the form of acknowledgments. *Held* that, in the absence of evidence that the acknowledgment conformed to the usage in such state in regard thereto, the record of the deed was inadmissible in evidence.—*Krueger v. Walker* (Iowa) 63 N. W. 320.

[b] (Neb.; 1896.)

A deed for lands in Nebraska, executed in Kansas, and acknowledged there before a notary public, who attached his official seal to the certificate of acknowledgment, is presumed to have been executed in accordance with the laws of Kansas; and hence, though not witnessed, it is entitled to be recorded and read in evidence in Nebraska without other proof that the grantor actually executed and delivered it.—*Schields v. Horbach* (Neb.) 68 N. W. 524.

(c) (Neb., 1896.)

The acknowledgment of a deed of lands in Nebraska executed in Iowa by P., as attorney, in fact, recited that P., "attorney in fact for," the grantors, came before the notary, "and acknowledged the same to be his voluntary act," etc. *Held*, under Gen. St. 1873, c. 61, §§ 4, 5, providing that a deed acknowledged and proved according to the laws of the state in which it is executed, and before an officer using an official seal, shall be entitled to record without further authentication, that said deed is presumed to have been acknowledged in conformity with the laws of Iowa, the notary having attached his official seal to the certificate of acknowledgment, and hence is entitled to record, and to be read in evidence without other proof of its execution.—*Dorsey v. Conrad* (Neb.) 68 N. W. 645.

ACQUIESCENCE.

Estoppel by, see "Estoppel," §§ 19-25.

Ratification of unauthorized act of agent, see "Principal and Agent," § 17.

ACTION.

Abatement, see "Abatement and Revival."

Accrual of cause of action, see "Limitation of Actions," §§ 9-20.

Adding new cause by amendment, see "Pleading," § 60.

Arrest in civil action, see "Arrest," §§ 1-3.

Authority of attorney as to conduct of litigation, see "Attorney and Client," § 3.

Changing form by amendment, see "Pleading," § 59.

Contracts not to sue, public policy, see "Contracts," § 20.

Demurrer for want of capacity to sue, see "Pleading," § 20.

Duress in procuring settlement of, see "Compromise," § 3.

Effect of pendency of other action, see "Abatement and Revival," §§ 4-8.

Entitling action, see "Pleading," § 2.

Injunction against, see "Injunction," §§ 8-10.

—aiding legal proceedings, see "Injunction," § 3.

Joining proceedings against corporation and stockholders, see "Corporations," § 84.

Limitation of, see "Limitation of Actions."

Nature of bastardy proceeding, see "Bastardy," § 1.

Presumption as to authority to sue, see "Appeal," § 210.

Restricting right to sue, see "Constitutional Law," § 66.

Transfer from equity to law docket, see "Practice in Civil Cases," § 19.

—from law to equity docket, see "Practice in Civil Cases," § 20.

—of cause of action pending suit, see "Abatement and Revival," § 1.

What causes of action are assignable, see "Assignment," § 4.

—survive, see "Abatement and Revival," §§ 9-11.

When principal action is commenced, see "Garnishment," § 14.

Actions between

Cotenants, see "Tenancy in Common," §§ 8-10.
Husband and wife, see "Husband and Wife," § 28.

Actions by and against

Assignee, see "Assignment," § 13; "Assignments for Benefit of Creditors," § 40; "Insolvency," § 9.

Attorney for compensation, see "Attorney and Client," § 17.

Bailee for possession, see "Bailment," § 6.

Actions by and against

Bailor or bailee, see "Bailment," § 5.

City, see "Municipal Corporations," §§ 195-202.
Client for accounting, see "Attorney and Client," § 7.

Contractor for public improvement, see "Municipal Corporations," § 163.

Corporation, see "Corporations," §§ 39-13.

County, see "Counties," §§ 54-57.

—for money paid at wrongful tax sale, see "Taxation," § 120.

Druggist for negligence, see "Druggists."

Executor or administrator, see "Executors and Administrators," §§ 47-50.

Firm, see "Partnership," §§ 51, 52.

Foreign corporation, see "Corporations," §§ 106, 107.

Guardian, see "Guardian and Ward," § 8.

—ad litem or next friend, see "Infancy," § 6.

Heir, see "Descent and Distribution," § 13.

Husband for attorney's fees in divorce case, see "Divorce," § 40.

Master for injuries caused by servant, see "Master and Servant," §§ 20, 21.

Member or stockholder in behalf of corporation, see "Corporations," § 68.

National bank for penalties for exacting usury, see "Usury," §§ 15, 16.

Next friend, see "Insanity," § 8.

—necessity of security for costs, see "Costs," § 19.

Officer of association, see "Associations," § 6.

Parent for injuries to child, see "Parent and Child," § 7.

—for services of child, see "Parent and Child," § 6.

Partner, see "Partnership," § 50.

Physician for compensation, see "Physicians and Surgeons," § 4.

Principal or agent, see "Principal and Agent," §§ 28-30.

Railroad company, see "Railroad Companies," § 16.

Receiver, see "Receivers," §§ 25-28.

School district, see "Schools and School Districts," §§ 32, 33.

Seller for breach of contract, see "Sale," § 42.

Sheriff for wrongful seizure, see "Sheriffs and Constables," §§ 11, 12.

State, see "States and State Officers," §§ 19, 20.

Sureties, see "Principal and Surety," § 22.

Telegraph companies, see "Telegraph Companies," § 8.

Town, see "Towns," §§ 8, 9.

Trustee of religious society in behalf of members, see "Religious Societies," § 5.

Wife, see "Husband and Wife," §§ 29, 31.

Actions for

Abortion, see "Abortion."

Accounting between partners, see "Partnership," §§ 25, 26.

—by guardian, see "Guardian and Ward," § 8.

Alienating affections of spouse, see "Husband and Wife," §§ 38-41.

Assault and battery, see "Assault and Battery," §§ 1-3.

Breach of contract, see "Contracts," §§ 61-74.

—of contract to exchange property, see "Exchange of Property," § 2.

—of covenant to repair, see "Landlord and Tenant," § 10.

—of warranty, see "Covenants," § 7; "Sale," §§ 37-41.

Civil damages for injuries from sale of intoxicating liquors, see "Intoxicating Liquors," §§ 54-63.

Commissions, see "Factors and Brokers," §§ 19-21.

Conspiracy, see "Conspiracy," § 2.

Contribution, see "Contribution."

—between sureties, see "Principal and Surety," §§ 25-27.

Criminal conversation with wife, see "Husband and Wife," §§ 36, 37.

Actions for

- Death by wrongful act, see "Death by Wrongful Act."
- Deceit, see "Deceit."
- Deficiency on mortgage foreclosure, see "Mortgages," § 66.
- Injuries at crossing, see "Railroad Companies," §§ 41-43.
- by fire from engine, see "Railroad Companies," §§ 74-80.
- by flowage, see "Waters and Water Courses," §§ 11, 12.
- by street car, see "Horse and Street Railroads," § 16.
- by vicious animals, see "Animals," §§ 3, 4.
- from careless use of firearms, see "Pointing Firearms," §§ 1, 2.
- from defects in bridges, see "Bridges," §§ 3-6.
- from defects in highways, see "Highways," § 35.
- from defects in streets or sidewalks, see "Municipal Corporations," §§ 92-97.
- to animals, see "Railroad Companies," §§ 64-66.
- to passengers, see "Carriers," §§ 51-54.
- to servants, see "Master and Servant," §§ 46-55.
- to wife, see "Husband and Wife," §§ 30-32.
- Malpractice, see "Malpractice," §§ 4, 5.
- Money had and received, see "Assumpsit," § 3.
- Negligence of inspector, see "Inspection."
- Obstruction of water courses, see "Waters and Water Courses," §§ 7, 8.
- Penalties, see "Qui Tam and Penal Actions."
- Price of goods, see "Sales," §§ 60-69.
- of land, see "Vendor and Purchaser," §§ 31, 32.
- Rent, see "Landlord and Tenant," §§ 47-51.
- Seduction, see "Seduction," §§ 1, 2.
- Supplies furnished to paupers, see "Poor and Poor Laws," § 3.
- Wages, see "Master and Servant," § 12.
- Waste, see "Waste."
- Wrongful attachment, see "Attachment," §§ 59-66.
- discharge of servant, see "Master and Servant," §§ 7-9.
- ejection of passengers, see "Carriers," §§ 69, 70.
- eviction, see "Landlord and Tenant," §§ 6, 7.

Actions in behalf of

- Infants, see "Infancy," §§ 6, 7.
- Insane persons, see "Insanity," § 8.
- Others similarly situated, see "Parties," § 2.

Actions on

- Account stated, see "Account Stated."
- Appeal bonds, see "Appeal," § 303.
- Attachment bonds, see "Attachment," § 23.
- Bills and notes, see "Negotiable Instruments," §§ 75-89.
- Bonds, see "Bonds," §§ 5-9.
- of county officers, see "Counties," § 56.
- of depositaries of county funds, see "Depositaries," § 4.
- of guardians, see "Guardian and Ward," §§ 16, 17.
- taken from public contractors, see "Municipal Corporations," § 60.
- to discharge garnishee, see "Garnishment," § 29.
- Certificates of mutual insurance, see "Insurance," §§ 181-184.
- Contracts, see "Contracts," §§ 61-74.
- of indemnity, see "Indemnity," § 4.
- to assume mortgage, see "Mortgages," § 35.
- to drive logs, see "Logs and Logging," § 6.
- Guaranty, see "Guaranty," §§ 15, 16.
- Implied contract, see "Assumpsit," § 2.
- Injunction bonds, see "Injunction," §§ 33, 34.
- Judgments, see "Judgment," §§ 115-117.
- Official bonds, see "Office and Officer," § 25.
- Policies, see "Insurance," §§ 104-133.

Actions on

- Recognizances, see "Bail," § 6.
- Replevin bonds, see "Replevin," § 34.
- Sheriffs' bonds, see "Sheriffs and Constables," § 14.
- Subscriptions see "Subscriptions," §§ 4, 5.
- Superedeas bonds, when cause of action accrues, see "Limitation of Actions," § 14.

Actions to

- Abate nuisance, see "Nuisance," § 7.
- obstruction in highway, see "Highways," § 27.
- Compel delivery of corporate stock, see "Corporations," § 45.
- issuance of new certificate after loss of original, see "Corporations," § 107.
- Construe wills, see "Wills," § 38.
- Determine adverse claims, see "Mines and Mining," §§ 1, 2; "Quieting Title—Removal of Cloud."
- title to office, see "Office and Officer," § 30.
- Dissolve corporations, see "Corporations," §§ 101-103.
- firms, see "Partnership," §§ 25, 26.
- Enforce judgments of other courts, see "Courts," § 26.
- liens, see "Mechanics' Liens," §§ 49-59.
- loggers' liens, see "Logs and Logging," §§ 8, 9.
- stockholders' liabilities, see "Banks and Banking," § 39; "Corporations," §§ 80-85.
- subscriptions to stock, see "Corporations," §§ 52, 53.
- Foreclose mortgage, see "Chattel Mortgages," § 46; "Mortgages," §§ 46-81.
- Realize on pledge, see "Pledge," § 10.
- Recover money won or lost in gaming, see "Gaming," §§ 1, 2.
- possession of leased premises, see "Landlord and Tenant," §§ 58, 59.
- Redeem from mortgage sales, see "Mortgages," § 100.
- from tax sales, see "Taxation," § 97.
- Reform contracts, see "Equity," § 5.
- Remove officers, see "Office and Officer," § 28.
- Rescind contracts in equity, see "Equity," § 15.
- Set aside award, see "Arbitration and Award," § 7.
- fraudulent conveyances, see "Fraudulent Conveyances," §§ 35-38.
- fraudulent conveyances by decedent, see "Executors and Administrators," § 8.
- street assessments, see "Municipal Corporations," § 151.
- Try and confirm titles under tax deeds, see "Taxation," §§ 110-115.

Particular actions.

- See "Account"; "Assault and Battery," §§ 1-3; "Assumpsit"; "Attachment"; "Conspiracy," § 2; "Death by Wrongful Act"; "Deceit"; "Divorce"; "Ejectment"; "False Imprisonment"; "Forcible Entry and Detainer"; "Garnishment"; "Injunction"; "Interpleader"; "Libel and Slander"; "Malicious Prosecution"; "Mandamus"; "Partition"; "Quieting Title—Removal of Cloud"; "Quo Warranto"; "Replevin"; "Specific Performance"; "Trespass"; "Trover and Conversion"; "Use and Occupation."

§ 1. By whom maintainable.

(Wis., 1895.)

Where a husband contracts to exchange his own property for land, and afterwards informs his wife of the contract, and directs that the land be conveyed to her, she cannot maintain an action against the grantor for false representations as to the character of the land.—*Tyson v. Ranney*, 61 N. W. 563, 89 Wis. 518.

§ 2. Motive in instituting suit.

(Neb., 1896.)

The motive of one in instituting a suit on a valid cause of action is immaterial to his right

of recovery. *Jacobson v. Van Boening* (Neb.) 66 N. W. 993.

48 Neb. 80.

§ 3. Premature action.

(Minn.; 1895.)

A creditor who extended the time of payment of a debt, so that the debt should be payable in installments, could not, on default in part of the installments, sue on the debt.—*Napa Val. Wine Co. v. Daubner* (Minn.) 65 N. W. 143.

63 Minn. 112.

§ 4. Form of action—Tort or contract.

(Wis.; 1896.)

A complaint, in an action to recover for personal injuries and maltreatment alleged to have been sustained by plaintiff while a passenger on a train of defendant railroad company, where she occupied a berth in a sleeper, by reason of the failure of defendant's servants to awaken her until the train had stopped at her place of destination, and by their hurrying her from the car without being dressed, states a cause of action in tort, and not for breach of contract.—*McKeon v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 175.

§ 5. Joinder of causes.

[a] (Iowa; 1896.)

Separate counts against the same defendant for the use of land, for trespass by such use, and for injury to the land by the obstruction of the highway in front of it, are properly joined in the same petition.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

[b] (Iowa; 1897.)

Where a buyer of personalty attached it to the realty, and sold the latter to one who assumed his debts, a complaint against the two, by the seller of the personalty, to foreclose a mechanic's lien, did not contain two causes of action, in violation of Code, § 2510, because it sought to recover against the purchaser of the realty on account of his having assumed the debt.—*Eagle Iron Works v. Des Moines Suburban Ry. Co.* (Iowa) 70 N. W. 193.

[c] (Mich.; 1896.)

Counts for alienating a wife's affections, and for seduction, causing alienation of her affections, may be joined.—*Mead v. Randall* (Mich.) 69 N. W. 506.

[d] (Minn.; 1895.)

A cause of action for failure of the defendant sheriff to levy an execution cannot be joined with a cause of action for a wrongful levy on and a conversion of the same judgment.—*Vaule v. Steenerson* (Minn.) 65 N. W. 257.

63 Minn. 110.

[e] (Minn.; 1896.)

A cause of action, under Gen. St. 1894, § 2600, subd. 3, against the officers of a corporation for their fraud, unfaithfulness, or dishonesty, resulting in loss to a particular creditor, cannot be joined with a cause of action to enforce the constitutional liability of the stockholders.—*Sturtevant-Larrabee Co. v. Mast, Buford & Burwell Co.* (Minn.) 69 N. W. 324.

[f] (Neb.; 1895.)

A joinder in a petition of a cause of action for malicious prosecution of one for the damage to plaintiff's business by arresting occupants of her place of business, and one for slander arising out of the same transaction, is proper.—*Dinges v. Riggs*, 62 N. W. 74, 43 Neb. 710.

[g] (S. D.; 1896.)

Under Corp. Laws, § 4932, subd. 1, authorizing the joinder of causes of action arising out of "the same transaction, or transactions connected with the same subject of action," the holder of a note secured by a trust deed may in one action seek to foreclose the trust deed, to set aside a prior foreclosure made by the trustee

without plaintiff's knowledge or consent, to enjoin the county treasurer from issuing to the trustee a tax deed for the mortgaged premises, and to adjust the equities of the various parties.—*Bush v. Froelick* (S. D.) 66 N. W. 939.

[h] (Wis.; 1895.)

An objection of misjoinder of causes of action may be taken by a defendant affected by only one of them.—*Plankinton v. Hildebrand* (Wis.) 61 N. W. 839, 89 Wis. 209.

[i] (Wis.; 1895.)

A complaint which states a cause of action against a corporation and its managing agent for the same acts of negligence is not demurrable on the ground that several causes of action are improperly united.—*Greenberg v. Whitcomb Lumber Co.* (Wis.) 63 N. W. 93.

90 Wis. 225.

[j] (Wis.; 1895.)

A domestic insurance company, on going out of business, reinsured its risks in a foreign company, and, to protect such reinsurance, deposited a bond with the state treasurer, after which the foreign company became insolvent. *Held*, that a complaint against the domestic company and the assignee of the foreign company to subject the bond to payment of claims, some arising under the reinsured policies, and some under judgments rendered on other policies issued by the foreign company, improperly joined two causes of action.—*Hughes v. Hunner*, 64 N. W. 887, 91 Wis. 116.

[k] (Wis.; 1896.)

Under Sanb. & B. Ann. St. § 2647, providing that actions, legal or equitable, or both, arising out of the same transaction, or transactions connected with the same subject of the action, may be united in the same complaint, actions for the detention of leased premises, and for conversion of personal property included in the lease by failure to surrender it at expiration of the lease, may be united, though the defendant, as lessee, is subject, under Rev. St. §§ 2185, 2186, to the liability of paying double rent, one-half of which at least is penal, for such detention.—*Alliance Elevator Co. v. Wells* (Wis.) 66 N. W. 796.

93 Wis. 5.

[l] (Wis.; 1896.)

In an action against several defendants for causing an abortion, the complaint charged, in effect, the pregnancy of plaintiff, and that it was the result of a rape committed upon her by defendant B.; that all the defendants entered into an unlawful conspiracy to produce the abortion; that the abortion was produced; and that plaintiff was damaged in a sum for which judgment was prayed. *Held*, that the complaint stated but one cause of action, and that against all the defendants.—*Miller v. Bayer* (Wis.) 68 N. W. 869.

[m] (Wis.; 1897.)

A complaint which alleges that one defendant procured from plaintiff an exchange of land by imposing on plaintiff's mental incompetency and business incapacity, and by fraudulently representing the quality of the land and the state of the title, and threatens to convey the property to a co-defendant, to whom he has given a contract for conveyance, and that the co-defendant threatens to dispose of his interest under such contract, and prays a rescission, damages, and an injunction against a transfer by either defendant, does not join different causes of action.—*Menz v. Beebe* (Wis.) 70 N. W. 468.

§ 6. — Legal and equitable.

(Wis.; 1895.)

Rev. St. § 2647, providing that legal and equitable causes of action may be united in one complaint when they arise out of the same transaction connected with the subject of the action, and affect all the parties to the action, does not authorize the joinder of a cause of action for the foreclosure of certain stock owned

by one defendant, which was pledged to plaintiff to secure a note, with a demand for a deficiency judgment against two other defendants, as maker and indorser of the note.—*Plankinton v. Hildebrand*, 61 N. W. 839, 89 Wis. 209.

§ 7. — Interest of parties.

[a] (Minn.; 1895.)

A complaint, in an action to foreclose a mortgage held as collateral, against the principal debtor and the mortgagor, which set out the mortgage note, which had been assigned to plaintiff, and also the note of the principal debtor, and demanded judgment against the mortgagor and the principal debtor for a deficiency, was not demurrable, on the ground that it united different causes of action.—*First Nat. Bank v. Lambert* (Minn.) 65 N. W. 451.
63 Minn. 263.

[b] (Wis.; 1896.)

One of several persons who together inherited from the same person two tracts of land may, without his complaint being open to the objection of improperly uniting several causes of action, maintain an action for partition of the two lots, against his co-heirs and persons to whom they have conveyed an interest in one or the other or both of the lots.—*Grady v. Cannon* (Wis.) 66 N. W. 808.

§ 8. Consolidation of actions.

[a] (Iowa; 1895.)

The owner of property filed a bill in equity against a contractor who had agreed to furnish material for and build a house thereon, alleging that the contractor had broken the contract, that thereby liens had been filed and foreclosed against the property, and that the petitioner had no knowledge as to the accuracy of the amounts claimed therein, and asking for an accounting and direction as to how the liens should be discharged, and damages for defective materials used. On the following day the contractor began an action at law on the contract, which the owner answered, raising the same issues as were presented by his bill in equity. *Held*, that it was proper for the court to consolidate the cases.—*Evans v. McConnell* (Iowa) 63 N. W. 570; *McConnell v. Evans*, Id.

[b] (Minn.; 1896.)

Two separate actions were brought by judgment creditors against an insolvent corporation and some of its stockholders, under Gen. St. 1894, c. 76. Thereafter the court made an order consolidating the two actions under the name and title of both plaintiffs, "against the defendants named therein." Six days before the making of this order, two stockholders, who were made defendants in one action, but not in the other, demurred to the complaint in the former action, which demurrer was brought on for hearing after the order of consolidation. *Held*, such order consolidated both complaints, so that the allegations contained in one aided the other, and the case stood as if the complaint demurred to had been amended after the demurrer was served, and before it was argued.—*Pioneer Fuel Co. v. St. Peter Street Imp. Co.* (Minn.) 67 N. W. 217.
64 Minn. 386.

[c] (S. D.; 1896.)

A mortgagee of chattels brought claim and delivery to recover possession of certain property described in the mortgage, which was given to secure the price of an engine sold by plaintiff to defendant, and afterwards commenced another action to foreclose such mortgage. Defendant, in its answer in each action, set up a breach of warranty of the engine, and in the second also claimed damages for a breach of a subsequent agreement relating to the engine. The parties then stipulated that "said foreclosure action shall stand for trial in said court before a trial of fact in said action in claim and delivery." *Held*, that it was within the discretion of the court to order such ac-

tions consolidated, notwithstanding the stipulation.—*Aultman Co. v. Ferguson* (S. D.) 66 N. W. 1081.

§ 9. — Between different parties.

(Wis.; 1896.)

Under the provisions of Laws 1893, c. 235, permitting a plaintiff in an action on insurance policies to join as parties defendant all insurance companies interested in the loss, and of Rev. St. § 2792, authorizing the consolidation of actions which might have been joined, a court may properly consolidate separate actions by the same plaintiff against different insurance companies, growing out of the same loss.—*Gross v. Milwaukee Mechanics Ins. Co.* (Wis.) 66 N. W. 712; *Same v. Western Assur. Co.*, Id. 92 Wis. 656.

ACT OF GOD.

See "Negligence," § 20.

ADEPTION.

Of legacy, see "Wills," § 60.

ADEQUATE REMEDY AT LAW.

See "Equity," § 2; "Injunction," § 1.

ADJOINING LANDOWNERS.

See, also, "Boundaries."

Liability for nuisance, see "Nuisance," § 3.
Right to obstruct or turn away surface water, see "Surface Water," §§ 2, 3.
Rights and liabilities as to party walls, see "Party Walls," 2.

§ 1. Lateral support.

[a] (Mich.; 1896.)

Where the inevitable result of the willful removal of the soil was the fall of plaintiff's house, the failure of plaintiff to take steps to avoid the injury does not prevent a recovery by him.—*Gildersleeve v. Hammond* (Mich.) 67 N. W. 519.

[b] (Mich.; 1896.)

To relieve plaintiff from the charge of contributory negligence in failing himself to take steps to protect his building, evidence that defendant promised to take such precautions is admissible.—*Gildersleeve v. Hammond* (Mich.) 67 N. W. 519.

[c] (Mich.; 1896.)

Where the excavation by defendant on land adjoining plaintiff's land causes the soil on plaintiff's land to give way, due to its gravelly and sandy condition, and not because of a building upon the land which was located 4½ feet from the division line, the failure of defendant to use any means to protect plaintiff's building, which could have been done at little expense, renders him liable for the damages to the land and building. *Hooker, J.*, dissenting.—*Gildersleeve v. Hammond* (Mich.) 67 N. W. 519.

[d] (Minn.; 1896.)

The defendant made an excavation on his land, which caused the soil of the adjoining land of the plaintiff to fall into it. *Held*, that the measure of the plaintiff's damages is not the depreciation of her land by reason of the existence of the excavation on the defendant's land, but the diminution of the value of the plaintiff's land by reason of the falling, caving, or washing of the soil of her land as the natural

result of removing its lateral support.—*Schultz v. Power* (Minn.) 66 N. W. 139.
61 Minn. 123.

(Ic-1 (S. D.) 1896.)

Comp. Laws, § 2784, requiring adjoining landowners to give reasonable notice to each other of intended excavations, does not require such notice to be given where the adjoining owner has, in fact, knowledge of the intended excavation.—*Novotny v. Danforth* (S. D.) 68 N. W. 749.

§ 2. Easement by wall.

(Wis.; 1897.)

Where a lot owner intrudes his foundation wall several inches across the line, under his neighbor's building, which extends to the line, the latter forfeits his right to treat such act as a disseisin, and bring ejectment, by continuing in undisturbed possession of his entire building.—*Zander v. Valentine Blatz Brewing Co.* (Wis.) 70 N. W. 164.

§ 3. Obstruction of light and air.

(Mich.; 1896.)

In an action to restrain an adjoining property owner from maintaining a fence 11 feet high on the division line, which shuts off the circulation of air from plaintiff's building, evidence that one of the defendants lived on the premises on which the fence was maintained, and that the other was the owner of an undivided interest therein as the heir of his mother, of whose estate he was administrator, and that he, in response to a letter in regard to the maintenance of the fence, wrote signifying his intention to fight its removal, is sufficient to show that both were responsible for its maintenance.—*Peck v. Roe* (Mich.) 67 N. W. 1080.

ADJOURNMENT.

See "Continuance."

ADJUTANT GENERAL.

See "Militia," § 2.

ADMINISTRATION.

See "Executors and Administrators."

ADMIRALTY.

See, also, "Maritime Liens"; "Shipping"; "Towage"; "Wharves."

§ 1. Appeal from territorial court.

(N. D.; 1895.)

Practice on appeal from a territorial court sitting in admiralty to the supreme court of the territory is regulated by the rules and usages of courts of admiralty, and not by the territorial statutes.—*Braithwaite v. Jordan* (N. D.) 65 N. W. 701.
5 N. D. 196.

§ 2. — Bonds.

[a] (N. D.; 1895.)

Where an undertaking given on appeal in a territorial court sitting in admiralty was treated by respondent as entitling appellants to a stay, and no attempt was made by respondent to enforce the judgment, the undertaking was valid as a common-law obligation.—*Braithwaite v. Jordan* (N. D.) 65 N. W. 701.
5 N. D. 196.

[b] (N. D.; 1895.)

Where the record showed that the vessel was, at the time of the appeal, in appellants'

possession, and the appeal was recited that the judgment was against appellants for delivery of possession to claimant, and was conditioned for payment of \$15,000, the bond was in the nature of a stipulation for value, and claimant having, in reliance thereon, refrained from disturbing appellants in their possession pending the appeal, the instrument was valid as a voluntary bond.—*Braithwaite v. Jordan* (N. D.) 65 N. W. 701.
5 N. D. 196.

ADMISSIONS.

As evidence, see "Criminal Law," §§ 100-113; "Evidence," §§ 18-42; "Homicide," §§ 32-34.
By failure to reply, see "Pleading," § 40.

ADOPTION.

(S. D.; 1895.)

A recital, in an order of adoption of an illegitimate child, of the fact that the mother of the child abandoned her for more than a year, was not overcome by recitals that the mother was living, and objected to the adoption, and appeared in court with her objections, and that eight months previously the mother applied to the court for a similar order for adoption of the child by another, so as to preclude the court from making the order for want of appearance of jurisdictional facts.—*Richards v. Matteson* (S. D.) 65 N. W. 428.

ADULTERY.

Sufficiency of proof, see, also, "Divorce," § 8.
Testimony of husband or wife, see "Witness," § 8.

§ 1. Who may institute prosecution.

[a] (Iowa; 1896.)

Code, § 4008, providing that no prosecution for adultery shall be commenced except on complaint of the husband or wife, does not prevent the prosecution of a man who was unmarried at the time the offense was committed, but who has been subsequently married.—*State v. Oden* (Iowa) 69 N. W. 270.

[b] (Mich.; 1895.)

Under How. Ann. St. § 9279, providing that no prosecution for adultery shall be commenced but on the complaint of the husband or wife, a married man who commits adultery with a married woman may be prosecuted by the husband of his paramour.—*Wilson v. Gratiot Circuit Judge* (Mich.) 62 N. W. 293.

§ 2. Indictment and information.

[a] (Iowa; 1895.)

Under Code, § 4008, declaring that "no prosecution for adultery can be commenced but on the complaint of the husband or wife," the indictment need not show that the prosecution was so commenced, but such fact may be shown without any averment; the provision not prescribing an element of the crime, but limiting the authority to punish it.—*State v. Andrews* (Iowa) 64 N. W. 404.

[b] (Mich.; 1896.)

The complaint, warrant, and information in a prosecution for adultery need not allege that the complainant was defendant's wife. It is enough that it appears that the marriage was admitted before the examining magistrate by defendant's attorney; the presumption being that the admission was in defendant's presence, and was binding on him.—*People v. Isham* (Mich.) 67 N. W. 819.

§ 3. Evidence.

[a] (Mich.; 1896.)

A marriage certificate, when accompanied by proof of the identity of the parties,

is admissible to prove marriage in a prosecution for adultery.—*People v. Isham* (Mich.) 67 N. W. 819.

[b] (Mich.; 1896.)

An extrajudicial confession by defendant of his marriage is not alone sufficient proof thereof to sustain a conviction of adultery.—*People v. Isham* (Mich.) 67 N. W. 819.

[c] (Mich.; 1896.)

A letter by defendant to the woman claimed by the state to be his wife, in which he addressed her as wife, is admissible.—*People v. Imes* (Mich.) 68 N. W. 157.

[d] (Mich.; 1896.)

Admissions of defendant that he cohabited for a certain time with the woman claimed by the state to be his wife are admissible.—*People v. Imes* (Mich.) 68 N. W. 157.

§ 4. Instructions.

(Mich.; 1896.)

On a trial for adultery it is enough to charge merely that sexual intercourse must be proven.—*People v. Payment* (Mich.) 67 N. W. 689.

ADVANCEMENT.

See "Descent and Distribution," §§ 8–11.

Rights of legatees and devisees, see "Wills," § 59.

ADVANCES.

By factor or broker, see "Factors and Brokers," § 6.

ADVERSE CLAIM.

See "Quieting Title—Removal of Cloud."

ADVERSE POSSESSION.

I. IN GENERAL, §§ 1–4.

II. CHARACTER AND SUFFICIENCY OF POSSESSION, §§ 5–22.

1. In General, §§ 5–14.

2. By and Against Whom, §§ 15–22.

III. LENGTH AND CONTINUITY OF POSSESSION, §§ 23–25.

IV. COLOR OF TITLE, §§ 26–29.

V. EFFECT, §§ 30–32.

See, also, "Limitation of Actions."

Adverse claim to mines, see "Mines and Mining," §§ 1, 2.

Effect on boundaries, see "Boundaries," §§ 7, 8.

—on right to redeem, see "Mortgages," § 96.

Highways by prescription, see "Highways," §§ 4, 5.

Purchase of land adversely held, see "Champerly and Maintenance," § 2.

Right to maintain nuisance by prescription, see "Nuisance," § 6.

Showing of title in ejectment, see "Ejectment," § 2.

Title to support suit to quiet title, see "Quieting Title—Removal of Cloud," § 3.

I. IN GENERAL.

§ 1. Statutory provisions.

(Wis.; 1896.)

Rev. St. §§ 4211, 4212, are intended to specify conditions which will be deemed sufficient, alone, to establish adverse possession, without regard to the requirements of the common law.—*Lampman v. Van Alstyne* (Wis.) 69 N. W. 171.

§ 2. Property subject to prescription.

[a] (Mich.; 1897.)

Title to land laid out as a public alley may be acquired by adverse possession.—*Vier v. City of Detroit* (Mich.) 70 N. W. 136.

[b] (Neb.; 1896.)

The statute of limitations will begin to run against the title of a party purchasing land from the United States, from the date of his compliance with all the requisites to entitle him to a patent therefor, in favor of one who holds adverse possession of the real estate.—*Dolen v. Black* (Neb.) 67 N. W. 760.

48 Neb. 688.

[c] (N. D.; 1896.)

Land in the "Indian country" cannot be held adversely until the Indians' right of occupancy thereof has been terminated by the United States.—*Kreuger v. Schultz* (N. D.) 70 N. W. 269.

[d] (Wis.; 1895.)

The fact that a person has for many years encroached on a highway by inclosing part thereof within his fence does not bar the town of the right to have the road opened to its full width.—*Nicolai v. Davis*, 64 N. W. 1001, 91 Wis. 370.

§ 3. Intent to acquire title or right.

(Iowa; 1896.)

Defendant received a quitclaim deed to the land in suit from an occupant who he knew had no title, under the belief that it was government land, and that, on termination of the litigation between plaintiff's grantor and the government, he would be able to secure title thereto. Defendant did not pay taxes on the land, record his deed, or claim title thereunder until the litigation was decided in favor of plaintiff's grantor. *Held*, that defendant's possession prior thereto was not adverse.—*Litchfield v. Sewell* (Iowa) 66 N. W. 104.

§ 4. Evidence.

(Wis.; 1895.)

Evidence that a person took adverse possession of land "about" May 1, 1866, and remained in possession until "about" May 1, 1886, is not sufficient to prove title by adverse possession, the statute of limitations being 20 years.—*Allis v. Field*, 62 N. W. 85, 89 Wis. 327.

II. CHARACTER AND SUFFICIENCY OF POSSESSION.

1. IN GENERAL.

§ 5. Possession subservient to or consistent with title of another.

[a] (Mich.; 1896.)

After a right to use land as part of its right of way had been granted to a railroad company, such company fenced its right of way excluding such land; and thereafter the grantor conveyed the land to plaintiff, who inclosed the same, and used it for crops and pasturage, openly and continuously, without the assent of the company, for more than 15 years. *Held*, that plaintiff acquired title by adverse possession.—*Matthews v. Lake Shore & M. S. Ry. Co.* (Mich.) 67 N. W. 1111.

[b] (Minn.; 1897.)

An acknowledgment, by one holding title by adverse possession, of the former owner's title, by accepting a lease, is competent to prove his possession not adverse.—*Sage v. Rudnick* (Minn.) 69 N. W. 1096.

[c] (Neb.; 1896.)

Where a tenant in possession orally contracts for the purchase of the leased premises, his subsequent possession will be presumed to be under the lease, unless it be clearly shown that he holds under the contract of purchase. *Big-*

ler v. Baker (1894) 58 N. W. 1026, 40 Neb. 325, followed.—Schells v. Horbach, 68 N. W. 521.

§ 6. Knowledge of or notice to former owner.

(Mich.; 1896.)

The court, after correctly charging that, in order to constitute adverse possession, the acts of possession must be such as, if seen by plaintiff, would clearly apprise him that the party doing the acts claimed ownership, added: "That is the case, gentlemen. By seeking the record, by titles, leasing, deriving a profit, driving any one off,—these acts must be such that, if [plaintiff] was there in the vicinity, and knew about it, that that would be notice to him." *Held*, that the additional instruction rendered the charge erroneous.—*Chabert v. Russell* (Mich.) 67 N. W. 902.

§ 7. Permissive entry and occupation.

(a) (Neb.; 1895.)

One occupying land under an agreement with the owner, whereby he was to have the use of the land in consideration of his paying the taxes thereon, was not in adverse possession.—*Johnson v. Butt*, 64 N. W. 691, 46 Neb. 220.

(b) (Wis.; 1895.)

The use of a ditch on another's land under a parol license cannot ripen into title by prescription until the revocation of the license.—*Thoenke v. Fiedler*, 64 N. W. 1030, 91 Wis. 386.

(c) (Wis.; 1896.)

The fact that one in possession of land acquiesced in its being flowed by the owner of a milldam, under the supposition that the mill owner had the right of flowage, is not inconsistent with his claim of title, and will not prevent his possession from being deemed adverse.—*Lampman v. Van Alstyne* (Wis.) 69 N. W. 171.

§ 8. Possession not adverse to owner of legal title.

(Wis.; 1895.)

Possession which was not adverse to that of the owner of the legal title is not sufficient to support title by prescription.—*Chloupek v. Perotka*, 62 N. W. 537, 89 Wis. 551.

§ 9. Inclosing land with fence.

(a) (Mich.; 1895.)

The fact that when defendants removed a fence dividing their land from plaintiff's from the line claimed by plaintiff to be the true boundary, where the fence had existed many years, and built it on the boundary line as claimed by them, plaintiff stated that he would have a resurvey to determine the boundary, and would not abide by the survey which defendants caused to be made, did not preclude plaintiff from setting up a claim to the land between the disputed boundary lines by adverse possession.—*Van Der Groef v. Jones* (Mich.) 65 N. W. 602.

(b) (Mich.; 1896.)

On an issue as to whether plaintiff acquired title to a strip of land by its inclosure within his fence, evidence that a surveyor acting for plaintiff located his line 15 years before so as not to include the strip was admissible.—*Beecher v. Ferris* (Mich.) 68 N. W. 269.

§ 10. Extension of possession to fences.

(Wis.; 1895.)

That one, from the time of receiving a deed of a farm, occupies it up to an existing fence, which is beyond the true boundary line, is not enough to show that his possession of the intervening strip is adverse.—*Fuller v. Worth* (Wis.) 64 N. W. 995, 91 Wis. 406.

§ 11. Cultivation.

(a) (Minn.; 1895.)

Where it appeared, on an issue of adverse possession, that defendant, believing the

strip of land in dispute to be on his side of the boundary between his land and plaintiff's, staked out the land, plowed it, and planted trees thereon, and cultivated it for the statutory period, during which time, without objection, he frequently cut the trees down and removed the brush, and that in setting out the trees he employed plaintiff's grantor to aid him, it was error to take the issue from the jury.—*Butler v. Drake* (Minn.) 61 N. W. 559.

62 Minn. 229.

(b) (Neb.; 1896.)

Where one took possession of hay land under a void tax deed, and dug out small trees from the growing grass, so as to improve the land, and made hay thereon, and permitted others to do the same, and permitted the land to be inclosed, and granted privileges in regard to the same, his possession was sufficient, when continued for the statutory period, to give him title.—*Twohig v. Leamer* (Neb.) 67 N. W. 152.

48 Neb. 247.

§ 12. Pasturage.

(Iowa; 1896.)

In an action to quiet title it appeared that defendants' grantors, claiming under color of title, had entered upon the lands while they were unfenced, wild, prairie land, and that by themselves or their lessees they had occupied the lands continuously as a pasture for cattle from 1881 to 1891, paying taxes thereon. *Held*, that this was sufficient occupation to give defendants title by adverse possession.—*Dice v. Brown* (Iowa) 67 N. W. 253.

§ 13. Cutting timber.

(Minn.; 1895.)

One who took possession of timber lands and built a shanty thereon, and cut timber at various times preparatory to cultivation, and remained in possession off and on for the statutory period, acquired title, since he actually occupied the land in the only manner and for the only purposes for which it was reasonably capable of being used and occupied.—*Backus v. Burke* (Minn.) 65 N. W. 459.

63 Minn. 272.

See, also, post, § 14.

§ 14. Sufficiency of acts of possession.

(a) (Mich.; 1895.)

The fact that one occupied a shanty on certain wild lands while removing timber therefrom does not show a bona fide and actual possession thereof as against the legal owner.—*McKinnon v. Meston* (Mich.) 62 N. W. 1014.

104 Mich. 642.

(b) (Mich.; 1895.)

The fact that lands were assessed to plaintiffs' grantors, and the taxes paid by them, for a portion of the time, is not of itself sufficient to constitute adverse possession.—*Miller v. Davis* (Mich.) 64 N. W. 338.

(c) (Mich.; 1896.)

In an action to recover land to which defendants claimed title by adverse possession, a refusal to direct a verdict for plaintiff was proper, there being evidence that defendants and their predecessors claimed to be the owners, and exercised acts of ownership by driving stakes to mark boundaries, by fishing, hunting, and trapping, by leasing to others, by the erection of signs warning off trespassers, and by building a dike around the land.—*Chabert v. Russell* (Mich.) 67 N. W. 902.

(d) (Mich.; 1896.)

For plaintiff to recover on the ground of adverse possession, he must show actual adverse possession under claim of right, and his claim cannot rest upon the acts of the defendant, but upon his own acts only, and his possession must have been continuous, notorious, distinct, and hostile.—*Beecher v. Ferris* (Mich.) 68 N. W. 269.

[e] (Wis.; 1895.)

In trespass for cutting willows it appeared that they grew on a narrow strip of marsh land lying between two ditches on the north and south respectively. Plaintiff, who owned the farm on the south, planted the willows, in 1871 and 1873, as a wind-break on the south side of the north ditch, and put up a fence on the south to keep his cattle from them. Defendant, in 1874, purchased the farm on the north without notice that his grantor agreed, as claimed by plaintiff, that the north ditch should be the boundary between his and plaintiff's farms, and it did not appear that defendant knew who planted the willows. He built a fence on the north side of the north ditch, which was subsequently removed, and he denied that it was built as a division fence. There was no cultivation or use of the strip in dispute by plaintiff, and the question of the boundary did not arise till 1891, when the willows were cut, and before which time it did not appear that any cutting was done. *Held*, that it was error to instruct that the fact that plaintiff planted the willows up to the south of the north ditch, protected them by a fence, always claimed them, and the right to cut them, and did cut some, constituted adverse possession of the land up to said ditch.—*Kurz v. Miller*, 62 N. W. 182, 89 Wis. 426.

[f] (Wis.; 1896.)

Good faith, by which is meant a claimant's belief that he has a good title, is not essential to the acquiring of ownership by adverse possession in any case under the statute. A hostile entry, with intent to hold the land, and its actual occupancy for the statutory period, is sufficient.—*Lampman v. Van Alstyne* (Wis.) 69 N. W. 171.

[g] (Wis.; 1896.)

In an action where the acts of ownership and possession relied on to constitute adverse possession were the cutting of timber from the land, and the evidence showed that no act of ownership was exercised during the time by the true owner, an instruction that the possession must be continuous, hostile, and notorious was not erroneous because it did not state that the possession must be visible and exclusive.—*Lampman v. Van Alstyne* (Wis.) 69 N. W. 171.

2. BY AND AGAINST WHOM.

By tenants in common, see "Tenancy in Common," § 5.

§ 15. Between heirs.**(Mich.; 1896.)**

Where the heirs agree to allow the widow to have for life the use of intestate's land, the division between the heirs to be postponed until her death, the fact that one of the heirs lived on the premises with the widow does not render his possession, prior to the widow's death, adverse to the other heirs.—*Beck v. Schick* (Mich.) 68 N. W. 984.

§ 16. By donee.**(Mich.; 1897.)**

Where the donee of lands under a parol gift goes into possession, and claims to be the owner, there is the beginning of an adverse possession against the donor.—*Schafer v. Hauser* (Mich.) 70 N. W. 136.

§ 17. By wife.**(Iowa; 1896.)**

Where a wife conveys her separate property in consideration of an assignment to her husband of a contract for the purchase of land, with full knowledge of the nature of the contract, and that the transfer is to him, their possession under the contract does not enable the wife to claim adversely to the landowner.—*Laraway v. Zenor* (Iowa) 69 N. W. 416.

§ 18. By transferee of licensee.**(Minn.; 1895.)**

The possession of a transferee of a mere licensee is not adverse, so as to set in operation the statute of limitation, unless his adverse holding is declared, and brought to the knowledge of the licensor.—*Cameron v. Chicago, M. & St. P. Ry. Co.* (Minn.) 61 N. W. 814, 60 Minn. 100.

§ 19. Landlord and tenant.**(Neb.; 1896.)**

A tenant who holds over does not hold adversely unless he first surrenders possession to the landlord, or by some unequivocal act notifies the landlord that he no longer holds under the lease.—*Schields v. Horbach* (Neb.) 68 N. W. 524.

§ 20. Parent and child.**(Minn.; 1896.)**

Possession and cultivation from year to year by a mother, for her exclusive benefit, of land belonging to her children, do not, in view of the relation of the parties, constitute her possession adverse, without an open assertion of hostile title brought to the children's notice in some way other than by possession alone.—*O'Boyle v. McHugh* (Minn.) 69 N. W. 37.

§ 21. By vendee.**[a] (Iowa; 1895.)**

The statute of limitations will not begin to run in favor of a grantee in possession of premises under a deed absolute in terms, but in fact a mortgage, against the right of the grantor to pay the debt and demand a reconveyance, so long as the deed is treated by the grantee as a mortgage to secure a valid claim, upon which he applies the rents and profits of the premises.—*Dunton v. McCook* (Iowa) 61 N. W. 977.

93 Iowa, 258.

[b] (Mich.; 1896.)

Evidence that the grantee in a deed from one who had no title to the land failed to take possession thereunder, but that the real owner of the property was in possession, and that the grantor remained with her under an agreement for support, without evidence that such grantor remained under any arrangement with the grantee, failed to show adverse possession by such grantee.—*Beanfait v. Dolson* (Mich.) 67 N. W. 1110.

§ 22. Against remainder-men.**[a] (Mich.; 1896.)**

The possession of a life tenant cannot be adverse to the remainder-man.—*Lumley v. Haggerty* (Mich.) 68 N. W. 243.

[b] (Mich.; 1896.)

Under How. Ann. St. § 5744, providing that, "when a widow is entitled to dower in the lands of which her husband died seized she may continue to occupy the same with the children or other heirs, * * * without having the dower assigned," a widow who declines to take under a will giving her a life estate, and continues in possession of the homestead, with the minor children, without objection on the part of the heirs or other persons interested in the estate, cannot claim adversely to the remainder-man; her right to occupy the premises continuing until dower is assigned, or until steps are taken for partition.—*Lumley v. Haggerty* (Mich.) 68 N. W. 243.

[c] (Neb.; 1896.)

A mortgagee under a mortgage purporting to encumber the fee sought to foreclose against the fee, and bought the land at the foreclosure sale, and the sheriff's deed purported to convey the fee, and was immediately recorded. He entered into actual possession of the land. The foreclosure was void. The plaintiffs undertook to annul the deed. They were remaindermen after a life estate, the tenant of which was

not a party to the suit. By their petition they admitted that the mortgagee had by the proceeding obtained the life estate, but the proof showed that the proceedings were void as to the life tenant as well as to the plaintiffs. *Held*, that the mortgagee's possession was adverse to the plaintiffs, and not merely for the life estate. —Hall v. Hooper (Neb.) 66 N. W. 33.
—17 Neb. 111.

III. LENGTH AND CONTINUITY OF POSSESSION.

Effect of admission after running of statute, see post, § 42.

§ 23. Interruption.

(Mich.; 1895.)

In ejectment it appeared that plaintiff claimed title by adverse possession for 10 years under void tax deeds of 1876-1878, and defendant as purchaser at a foreclosure sale by advertisement. There was evidence that plaintiff's grantor was in possession from 1873 to 1878 under a lease; that defendant in 1884 obtained possession by judgment in ejectment against him, and in 1889, discovering that the foreclosure sale was void, surrendered possession, and in 1890 regained possession under a decree of foreclosure of the mortgage, and continued the possession to the commencement of the action; that plaintiff's deed was duly recorded before the suit for foreclosure was commenced, but plaintiff was not made a party to the suit. *Held* title by adverse possession was not shown.—Millard v. Hayward (Mich.) 65 N. W. 104.

§ 24. — By acknowledgment.

(Iowa; 1896.)

An offer, by an occupant of land which he is holding adversely, to purchase it from the owner within the statutory period, not made to settle any real or threatened litigation, is a recognition of the owner's title, and will interrupt the running of the statute.—Litchfield v. Sewell (Iowa) 66 N. W. 104.

(Minn.; 1895.)

A petition by a railroad company to the city council for the vacation of certain streets and parts of a levee held by the company adversely to the city is such a recognition of the rights of the city in the property as to break the continuity of the adverse claim.—City of St. Paul v. Chicago, M. & St. P. Ry. Co. (Minn.) 63 N. W. 267.
63 Minn. 330.

§ 25. Tacking.

(Neb.; 1896.)

If the adverse possession of an occupant is a continuation of the possession of a prior adverse possessor, claiming title, and the occupant claims title through such prior possession, the possession of the occupant may be tacked to that of the prior possessor.—Lantry v. Wolff (Neb.) 68 N. W. 494.

(Wis.; 1895.)

Defendant's grantor, who had been in the adverse possession of a strip of land as against the adjoining landowner, but who had not yet acquired title thereby, leased his land to one G. There was no evidence that the strip of land was included in the lease. The deed to defendant, to whom G. attorned, executed soon after the lease, by its description excluded the strip, but his grantor subsequently quitclaimed it to him. *Held*, that the evidence did not show such privity between G. and defendant's grantor, as regarded the strip in suit, that defendant, to prove title thereto by adverse possession, could tack the possession of his grantor to that of G.—Allis v. Field (Wis.) 62 N. W. 85, 89 Wis. 327.

(Ic) (Wis.; 1896.)

Where defendants set up as a defense adverse possession by themselves and their predecessors in title, and fail to show such transfer of the possession of the land in dispute as will enable them to tuck the previous possession of such predecessors to their possession, the defense fails.—Ryan v. Schwartz (Wis.) 69 N. W. 178.

IV. COLOR OF TITLE.

§ 26. In general.

(Ia) (Iowa; 1896.)

The owner of land adjoining a highway legally established cannot, by encroaching on it with his fence, acquire title to any portion of it by adverse possession. Being charged with notice of its width as established, he is without color of title to support his possession.—Itae v. Miller (Iowa) 68 N. W. 899.

(Ib) (Mich.; 1895.)

One who enters on land as heir of the patentee, though the patent is not in his possession, does so with color of title.—Miller v. Davis (Mich.) 64 N. W. 338.

(Ic) (Mich.; 1897.)

Adverse possession need not be based on paper title.—Vier v. City of Detroit (Mich.) 70 N. W. 139.

(Id) (Mich.; 1897.)

Error in refusing to instruct that, to entitle plaintiff in ejectment to recover under a claim of adverse possession, he need not show any deed, survey, or anything of that kind, as evidence of ownership, is cured by an instruction that plaintiff's adverse possession would become perfect with the lapse of 15 years, even if he originally had no shadow of title, provided such possession was so open that any other person could bring suit to eject him.—Beecher v. Ferris (Mich.) 70 N. W. 1106.

(Ic) (Neb.; 1896.)

It is not essential that the claim of right or title to the land by the adverse occupant should be a valid legal claim, in order that the statute may run in his favor.—Lantry v. Wolff (Neb.) 68 N. W. 494.

§ 27. What constitutes.

(Iowa; 1896.)

A quitclaim deed given by a husband holding a contract for the purchase of land to a wife, who afterwards forfeits the contract by her failure to make the required payments, does not constitute color of title in the wife.—Laraway v. Zenor (Iowa) 69 N. W. 416.

§ 28. Tax title.

(Mich.; 1896.)

Defendant in ejectment, who held a tax title to certain land, to which plaintiff otherwise had the paper title, deeded it to W., and took back a purchase-money mortgage. W. left the land in 1875, and there was evidence that, when W. left, he orally authorized defendant to take possession. Defendant took possession in 1877, and continued in open and hostile possession for more than 10 years before suit was brought. *Held* to establish adverse possession.—Harrison v. Spencer (Mich.) 68 N. W. 125.

§ 29. Constructive possession.

(Minn.; 1896.)

An entry under a deed or other written instrument of title purporting by sufficient description to convey certain premises, although void on its face, will give constructive possession of the whole tract described in the deed, although not all inclosed or improved, provided it is not in the adverse possession of any one else, and the premises consist of a single tract adapted to be managed and used as one body, according to the usual manner of business.—Murphy v. Doyle, 33 N. W. 220, 37 Minn. 113,

followed.—*Miesen v. Canfield* (Minn.) 67 N. W. 632.

64 Minn. 513.

V. EFFECT.

§ 30. Title acquired.

[a] (Iowa: 1895.)

Actual adverse possession of land by a school district for 10 years under a claim of absolute ownership creates a title by prescription, which will support an action to quiet title.—*Independent Dist. of Oak Dale v. Fagen* (Iowa) 63 N. W. 456.

[b] (Neb.: 1897.)

One in open, notorious, exclusive, and adverse possession for 10 years becomes vested with a valid title.—*City of Florence v. White* (Neb.) 70 N. W. 50.

§ 31. Premises described in same instrument.

(Minn.: 1895.)

The adverse possession of one distinct piece of land will not draw to it constructive possession of another vacant and distinct piece owned by another person, though the adverse occupant holds a paper title, in which the described boundaries are coextensive with both pieces.—*McRoberts v. McArthur* (Minn.) 64 N. W. 903.

62 Minn. 310.

§ 32. Effect of admissions after running of statute.

[a] (Mich.: 1895.)

Where title by adverse possession is complete, it is not affected by a parol promise of the person holding the title to join with an adjacent owner in a survey to determine the true line between their respective lands.—*Lamoreaux v. Creveling* (Mich.) 61 N. W. 783.

103 Mich. 501.

[b] (Minn.: 1897.)

After the statute of limitation has run in favor of a disseisor, no acknowledgment of the former owner's title, except by deed sufficient to pass title to land, will divest the title acquired by adverse possession.—*Sage v. Rudnick* (Minn.) 69 N. W. 1096.

ADVERTISEMENT.

For bids on city contract, see "Municipal Corporations," § 66.

Foreclosure by, see "Mortgages," §§ 82-93.

ADVICE OF COUNSEL

See "Malicious Prosecution," §§ 9, 10.

AFFIDAVIT.

Accompanying requisition papers, see "Extradition."

Admissibility to contradict record on appeal, see "Appeal," § 150.

Bringing affidavits into record on appeal, see "Appeal," § 137; "Criminal Law," § 211.

For arrest, see "Arrest," § 2.

For attachment, see "Attachment," §§ 11-17.

For examination of debtor in supplementary proceedings, see "Execution," § 38.

For garnishment, see "Garnishment," § 21.

For publication, see "Writs and Notice of Suits," § 18.

In action for false imprisonment, see "False Imprisonment," § 4.

In contempt proceeding, see "Contempt," § 12.

In replevin, see "Replevin," §§ 7-9.

Matters presented by, how matters brought into record, see "Appeal," § 138.

On motion for appointment of receiver, see "Receivers," § 3.

— for new trial, see "Criminal Law," §§ 193, 194; "New Trial," §§ 13, 14.

— to discharge attachment, see "Attachment," § 52.

Verification of pleading, see "Pleading," § 44.

§ 1. Jurat or certificate of officer.

[a] (Neb.: 1895.)

An affidavit of publication, required by Code Civ. Proc. § 78, in an action against one on whom personal service cannot be had, is not fatally defective because a jurat is not attached thereto, if it was in fact sworn to by affiant.—*Bantley v. Finney*, 62 N. W. 213, 43 Neb. 794.

[b] (Neb.: 1895.)

The certificate of a notary public to an affidavit is presumptive evidence of the facts stated in such certificate, including the statement that affiant signed the affidavit.—*Smith v. Johnson*, 62 N. W. 217, 43 Neb. 754.

§ 2. By corporate officer.

(Mich.: 1895.)

An affidavit of account, in an action by a corporation, which states that the affiant is treasurer of the company, sufficiently shows his authority to make it.—*Forbes Lithograph Manufacturing Co. v. Winter* (Mich.) 64 N. W. 1053.

§ 3. Impeachment by affiant.

(Neb.: 1896.)

On the trial of an action on a life policy, an affidavit of the beneficiary, which tended to show that, contrary to the representation of the assured in his application, said insured had been subject to epileptic fits, having been introduced, it was proper to permit affiant to show that she never knowingly subscribed to or made the statements in the affidavit contained.—*Bankers' Life Ass'n v. Lisco* (Neb.) 66 N. W. 412.

47 Neb. 340.

§ 4. Recitals as to qualification of affiant.

(Mich.: 1897.)

Under a statutory provision that "any person familiar with the facts" may make an affidavit as to the publication of a petition, the affidavit need not recite that affiant is familiar with the facts.—*Muirhead v. Sands* (Mich.) 69 N. W. 826.

AFFIRMANCE.

See "Appeal," §§ 275-277.

AFFREIGHTMENT.

See "Shipping."

AFTER-ACQUIRED PROPERTY.

Operation of judgment lien, see "Judgment," § 65.

— of mortgage, see "Chattel Mortgages," § 7;

"Mortgages," § 19.

— of will, see "Wills," § 43.

AFTER-ACQUIRED TITLE.

Estoppel to assert, see "Estoppel," § 1.

AGE.

Of consent, see "Rape," § 1.

Proof of, see "Evidence," § 84.

AGENCY.

See "Principal and Agent."

AGISTMENT.

Lien of livery stable keepers, see "Livery Stable Keepers."

Lien.

[a] (Iowa: 1895.)

Laws 1880, c. 25, § 1, which provides that the keepers of livery and feed stables, herders, and feeders of stock for hire, shall have a lien for their charges and expenses as such, does not give a lien to one who is "a professional trainer of horses for speed," on horses which he has in his possession under contract to train.—*Scott v. Mercer* (Iowa) 63 N. W. 325.

[b] (Iowa: 1896.)

A person who keeps and trains a horse, under a contract with the owner, has a lien at common law for the labor, skill, and expense bestowed, and which has enhanced the value of the horse.—*Scott v. Mercer* (Iowa) 67 N. W. 108.

[c] (Mich.: 1895.)

One who boards a horse under contract with a person not the owner thereof has no right to the lien provided by 2 How. Ann. St. § 8399, unless it is shown that such person had authority to act for the owner.—*Elliott v. Martin* (Mich.) 63 N. W. 525.

105 Mich. 506.

[d] (Mich.: 1897.)

Where an amount less than that claimed for keeping a horse was tendered in full payment, and possession of the horse demanded, and the keeper accepted the money, saying that he would apply it on his claim, but the other insisted on the condition, though the horse was not delivered, the lien upon it was discharged.—*Rosema v. Porter* (Mich.) 70 N. W. 316.

AGREEMENT.

See "Contracts."

AGRICULTURAL SOCIETIES.

(Minn.: 1895.)

The State Agricultural Society is not exempt from liability to persons injured through its negligence.—*Lane v. Minnesota State Agricultural Soc.* (Minn.) 64 N. W. 382.

62 Minn. 175.

AGRICULTURE.

Threshers' liens, see "Liens," § 4.

ALCOHOLIC LIQUORS.

See "Intoxicating Liquors."

ALIAS WRITS.

See "Execution," § 7; "Writs and Notice of Suits," § 2.

ALIBI.

Evidence of, see "Criminal Law," § 107. Instructions stating rule of evidence, see "Criminal Law," § 164. Necessity of instruction as to, see "Criminal Law," § 135.

ALIENATING AFFECTIONS.

Of spouse, see "Husband and Wife," §§ 38-41.

ALIENATION.

Suspension of power, see "Wills," § 52.

ALIENS.

Right to hold land—Inheritance.

[a] (Iowa: 1895.)

Under Acts 22d Gen. Assem. c. 85, declaring that nonresident aliens cannot acquire title to or take or hold any lands, except that the widow and heirs of aliens who have acquired lands may hold them by devise or descent for 10 years, the widow and heirs may hold for such period without reference to whether or not they are aliens or residents.—*Easton v. Huott* (Iowa) 64 N. W. 408.

[b] (Iowa: 1896.)

Under Acts 22d Gen. Assem. c. 85, § 1, prohibiting nonresident aliens from acquiring title to, or taking, or holding lands in this state by devise, descent, purchase, or otherwise, only as thereafter provided, and section 2, providing that a nonresident alien may acquire and hold real estate if, within five years from the date of purchase, the same is placed in actual possession of a relative of such purchaser, related within the third degree, and, further, that such occupant becomes a naturalized citizen 10 years from the purchase, nonresident aliens can acquire and hold lands by purchase only, and not by devise or descent.—*Burrow v. Burrow* (Iowa) 67 N. W. 287.

[c] (Iowa: 1896.)

Under Const. U. S. art. 6, providing that the constitution, laws made in pursuance thereof, and federal treaties with foreign countries shall be the supreme law of the land, notwithstanding anything in the constitution or laws of a state to the contrary, a federal treaty with a foreign country, conferring on its subjects, notwithstanding their alienage, a qualified right to take by inheritance lands in the United States, under the laws here controlling its descent, must prevail over a state law prohibiting aliens from taking lands by descent.—*Opel v. Shoup* (Iowa) 69 N. W. 560.

ALIMONY.

See "Divorce," §§ 20-40.

ALLOWANCE.

Of claims against decedents' estates, see "Executors and Administrators," §§ 15-18.

To widow, see "Executors and Administrators," §§ 45, 46.

ALTERATION.

Of drain, see "Drainage," § 6.

Of highway, see "Highways," §§ 17-21.

ALTERATION OF INSTRUMENTS.

See, also, "Contracts," §§ 51-54; "Forgery."

Effect on rights of bona fide purchaser, see "Negotiable Instruments," § 57.

Release of sureties, see "Principal and Surety," § 16.

§ 1. What constitutes.**(Iowa; 1895.)**

After defendant signed a subscription to a fund for the erection of a creamery, the names of signers of a duplicate subscription were detached therefrom, and appended to the paper signed by defendant. *Held*, that such transfer of names was not an alteration of defendant's contract of subscription.—*Davis v. Campbell* (Iowa) 61 N. W. 1053.

93 Iowa, 524.

§ 2. Materiality and effect.**[a] (Iowa; 1896.)**

Alteration of a mortgage by an agent, authorized to loan money for his principal on mortgages, so as to increase the mortgage debt, made without any fraudulent intent, and without the knowledge of the principal, does not invalidate the mortgage as against a subsequent mortgagee.—*Mathias v. Leathers* (Iowa) 68 N. W. 449.

[b] (Mich.; 1895.)

Where an assignment of a debt, which does not contain any guaranty of its payment, contains the clause, "I do not, however, guaranty its payment," the removal of such clause by cutting it out is not such a material alteration of the assignment as will avoid it.—*Prudden v. Nester* (Mich.) 61 N. W. 777.

103 Mich. 540.

[c] (Neb.; 1895.)

An alteration of a written instrument after its execution by one party thereto, without the knowledge or consent of the other, which neither varies its meaning nor changes its legal effect, is immaterial.—*Fisherdick v. Hutton*, 62 N. W. 488, 44 Neb. 122.

§ 3. — Alteration of notes.**[a] (Iowa; 1895.)**

Where a note provided that the makers, indorsers, and guarantors waived presentment of payment, notice of nonpayment, protest, notice of protest, and due diligence in bringing suit, it was not a material alteration thereof to write over the blank indorsement of the payee, "Payment guaranteed."—*Iowa Valley State Bank v. Sigstad* (Iowa) 65 N. W. 407.

[b] (Neb.; 1895.)

The erasure of the name of the payee of a note, and the substitution of another without consent of the maker, renders the note void, even in the hands of a bona fide purchaser.—*Erickson v. First Nat. Bank* (Neb.) 62 N. W. 1078.

44 Neb. 622.

[c] (Neb.; 1896.)

The addition of the name of a surety to a note without the maker's knowledge, after its delivery to the payee, is not such an alteration as will release the maker.—*Royse v. State Nat. Bank* (Neb.) 69 N. W. 301.

[d] (N. D.; 1894.)

Erasing from a note after delivery the words, "agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorney's fees," is a material alteration, which renders the note void, since without such words the note is negotiable.—*First Nat. Bank v. Laughlin* (N. D.) 61 N. W. 473.

4 N. D. 391.

[e] (S. D.; 1895.)

An alteration of a note, without the knowledge of the maker, by filling up a blank space in a printed form, thus increasing the amount, avoids it as to the maker.—*Searles v. Seipp* (S. D.) 61 N. W. 804.

6 S. D. 472.

§ 4. Signing paper in blank—Negligence.**[a] (Iowa; 1894.)**

The signing of a paper with unfilled blanks is not in itself negligence.—*First Nat. Bank v. Zeims* (Iowa) 61 N. W. 483.

93 Iowa, 140.

4 N.W.DIG.—2

[b] (Iowa; 1894.)

In an action on an instrument which was signed by defendant merely as a means of identification, but was filled up by the holder so as to form a note, negligence on the part of defendant in signing such instrument cannot be claimed in the absence of an allegation in the pleadings to that effect.—*First Nat. Bank v. Zeims* (Iowa) 61 N. W. 483.

93 Iowa, 140.

§ 5. Pleading.**(Neb.; 1895.)**

Where a holder of a note that has been materially altered without the maker's consent relies on the maker's ratification of such alteration, such ratification must be pleaded.—*Erickson v. First Nat. Bank* (Neb.) 62 N. W. 1078.

44 Neb. 622.

§ 6. Evidence—Presumption and burden of proof.**[a] (Iowa; 1894.)**

The burden of proving that a note was altered after delivery is on the person who claims that the alteration was made.—*Farmers' Loan & Trust Co. v. Olson* (Iowa) 61 N. W. 199.

92 Iowa, 770.

[b] (Iowa; 1895.)

Where plaintiff claims that a deed under which defendant claims title has been fraudulently altered, the burden is on plaintiff to show it.—*Magee v. Allison* (Iowa) 63 N. W. 322.

[c] (Neb.; 1896.)

Where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered. *Johnson v. Bank*, 45 N. W. 161, 23 Neb. 792, and *Courcamp v. Weber*, 58 N. W. 187, 39 Neb. 533, overruled. *Bank v. Morrison*, 22 N. W. 782, 17 Neb. 341, and *Goodin v. Plugge*, 66 N. W. 407, 47 Neb. 284, followed. —*Dorsey v. Conrad* (Neb.) 68 N. W. 645.

[d] (S. D.; 1897.)

On proof of the genuineness of the signature to a note, the note should be received in evidence, to be considered with other evidence on the question of alterations in it, the burden of proof as to the alterations being placed by such proof on the maker.—*Moddie v. Breiland* (S. D.) 70 N. W. 637.

[e] (S. D.; 1897.)

An instrument whereby plaintiff sold to N. certain goods, and defendants guarantied payment therefor, is admissible in evidence, notwithstanding that over the printed word "July," designating the term of credit, is written the word "October"; it not being claimed that plaintiff obtained any advantage by extension of the term of credit, and the presumption therefore being that the alteration was before or at the time of execution and delivery of the instrument, and the burden being on defendant to show that it was material and subsequent to the execution and delivery.—*Foley-Wadsworth Implement Co. v. Solomon* (S. D.) 70 N. W. 639.

§ 7. Admissibility of instrument.**[a] (Iowa; 1895.)**

The fact that the name of plaintiff had been inserted as payee after a note was executed, and after defendant had signed his name thereto as surety, or the fact that the terms thereof were subsequently altered, does not render the note itself inadmissible as evidence, in an action to recover on the contract of suretyship.—*Dwinnell v. McKibben* (Iowa) 61 N. W. 985.

93 Iowa, 331.

[b] (Neb.; 1896.)

It was proper to receive in evidence the note sued on, which was alleged to have been altered, upon proof by the payee that the altera-

tion was made previous to its receipt by him on the day of its date from one of the joint makers.—*Stough v. Ogden* (Neb.) 68 N. W. 516.

§ 8. Province of court and jury.

(a) (Neb.; 1895.)
Whether an alteration in a writing is material is a question for the court.—*Fisherick v. Hutton* (Neb.) 62 N. W. 488.
44 Neb. 122.

(b) (Neb.; 1896.)
Where a promissory note is offered in evidence, and it is apparent from an inspection that there has been a material alteration of it, whether so altered prior or subsequent to its execution and delivery is a question finally for the determination of the trial court or the jury, as is any controverted fact in the case, from a consideration of all the competent evidence adduced by the parties explanatory or tending to settle the disputed point.—*Goodin v. Plugge* (Neb.) 66 N. W. 407.
47 Neb. 284.

AMENDMENT.

Of affidavit, see "Attachment," § 17; "Replevin," § 7.
Of assignments of error, see "Appeal," § 98.
Of bill of exceptions, see "Exceptions, Bill of," § 8.
Of claim against decedent's estate, see "Executors and Administrators," § 18.
Of constitution, see "Constitutional Law," §§ 3, 4.
Of indictment, see "Indictment and Information," § 26.
Of judgment, see "Judgment," §§ 89-93.
Of lien, see "Mechanics' Liens," § 30.
Of notice of appeal, see "Appeal," § 60.
Of petition in error, see "Error, Writ of," § 3.
Of pleading, see "Pleading," §§ 56-73.
Of record, see "Records," § 2.
—on appeal, see "Appeal," § 155.
Of statute, see "Statutes," §§ 6-9.
Of verdict, see "Trial," § 101.
Of writ of attachment, see "Attachment," § 33.

ANCILLARY ADMINISTRATION.

See "Executors and Administrators," § 51.

ANIMALS.

See, also, "Agistment"; "Livery Stable Keepers."
Exemption from forced sale, see "Exemptions," § 5.
Expert testimony as to diseases, see "Evidence," § 63.
Frightening horses, see "Negligence," §§ 6, 7, 13.
Injury to frightened or runaway animals, proximate cause, see "Negligence," § 13.
Killed or injured on track, see "Railroad Companies," §§ 54-67.
Lien of agistor, see "Agistment."
Live-stock shipments, see "Carriers," § 14.
Maliciously injuring horse, see "Malicious Mischief."
Mortgage on, see "Chattel Mortgages," § 6.

§ 1. Trespassing animals—Lien of land-owner for trespass.

(a) (Neb.; 1895.)
A landowner who holds trespassing animals under Comp. St. art. 3, c. 2, to secure his lien for the trespass, is liable to the owner for injuries to the animals resulting from his failure to feed and care for them.—*Richardson v. Halstead* (Neb.) 62 N. W. 1077.
44 Neb. 606.

(b) (Neb.; 1895.)
The herd law (Comp. St. c. 2, art. 3), giving the owner of cultivated land a lien on

trespassing stock, is applicable to cultivated lands within the limits of cities of the metropolitan class, notwithstanding the charter of such cities, granting power to the mayor and council by ordinance to provide for impounding animals running at large.—*Lingonner v. Ambler* (Neb.) 62 N. W. 486.

44 Neb. 316.

(c) (Neb.; 1896.)

The fact that one taking up stock trespassing on his cultivated lands did not give notice thereof to the owner for 15 days did not deprive him of his statutory lien, in the absence of a showing that he knew who the owner was a material length of time before giving the notice.—*Sloan v. Bain* (Neb.) 66 N. W. 1013.

47 Neb. 914.

§ 2. Running at large—Injury to other animals.

(Neb.; 1895.)

Where a bull escaped from the owner's premises into those of another, and, by agreement with such other, was allowed to remain over night, where he killed a horse belonging to a third person, being pastured there for hire, the bull was "running at large in the night-time," within Comp. St. 1893, c. 2, art. 3, § 14, making the owner liable for resulting damage in such case.—*Duggan v. Hansen* (Neb.) 61 N. W. 622, 43 Neb. 277.

§ 3. Vicious dogs.

(a) (Iowa; 1896.)

In an action to recover for personal injuries, under Code 1873, § 1485, which, among other things, provides that "the owner shall be liable to the party injured for all damages done by his dog except when the party injured is doing an unlawful act," it is incumbent on plaintiff to show himself free from contributory negligence. *Deemer, J., dissenting.*—*Stuber v. Gannon* (Iowa) 67 N. W. 105.

(b) (Mich.; 1895.)

Where the owner of a dog knows that he has a disposition to bite mankind, he is liable to a person bitten by it, though the dog's general disposition is peaceable.—*Kennett v. Engle* (Mich.) 63 N. W. 1009.

105 Mich. 693.

§ 4. — Injuries to other animals.

(Mich.; 1895.)

In an action for the killing of plaintiff's chickens by defendant's dog, a declaration alleging that defendant was the owner or possessor of the dog, and knew it to be mischievous, and in the habit of killing fowls, need not allege that he negligently allowed it to run at large.—*Snow v. McCracken* (Mich.) 64 N. W. 866.

ANNEXATION.

Of territory to city, see "Municipal Corporations," § 18.

—to county, see "Counties," § 2.

ANNUITIES.

(Mich.; 1896.)

Where a son contracted to pay to his father "an annual annuity" on a certain day in each year, the sum payable was not apportionable; and therefore the latter's administrator could not recover a fractional part of the yearly payment, computed from the last payment to the father's death.—*Chase v. Darby* (Mich.) 68 N. W. 159.

ANSWER.

See "Pleading," §§ 31-38.

APPEAL.

- I. APPELLATE JURISDICTION, §§ 1-45.
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 2. Who May Appeal, §§ 9-14.
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- IX. PRACTICE ON APPEAL FROM INFERIOR TRIBUNALS, §§ 161-176.
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 6. Weight and Sufficiency of Evidence, §§ 221-231.
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- XI. REVIEW OF QUESTIONS OF LAW, §§ 262, 263.
- XII. EFFECT OF APPEAL—SUPERSEDEAS, §§ 264-272.
- XIII. DECISION, §§ 273-301.
 1. In General, §§ 273, 274.
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 4. Reversal, §§ 285-288.
 5. Modification, §§ 289, 290.
 6. Reversal or Modification—Directing Proper Decree, §§ 291, 292.
 7. When New Trial Ordered, § 293.
 8. Excessive Judgment Given Below, §§ 294, 295.
 9. Mandate and Proceedings Below, §§ 296-301.
- XIV. JURISDICTION OF APPELLATE COURT AFTER REMAND, § 302.
- XV. LIABILITIES ON APPEAL BONDS, §§ 303-308.

See, also, "Certiorari"; "Error, Writ of"; "Exceptions, Bill of"; "New Trial."

By board of equalization, see "Taxation," § 44.
 Constitutionality of act regulating right of appeal, see "Constitutional Law," § 67.
 Costs on appeal, see "Costs," §§ 27-32.
 Estoppel to appeal from decree for alimony, see "Divorce," § 33.
 From board of equalization, see "Taxation," § 46.
 — decision granting or refusing license, see "Intoxicating Liquors," § 13.
 — decision of school board, see "Schools and School Districts," § 12.
 — decision of secretary of state on objections to certificate of nomination, see "Elections and Voters," § 9.
 — taxation of costs, see "Costs," §§ 26-40.
 — territorial admiralty court, see "Admiralty," § 1.
 In bastardy proceedings, see "Bastardy," § 11.
 In condemnation proceedings, see "Eminent Domain," § 22.
 In contempt proceedings, see "Contempt," §§ 17, 18.
 In criminal cases, see "Criminal Law," §§ 200-240.
 In divorce proceedings, see "Divorce," § 19.
 In drainage proceedings, see "Drainage," § 10.
 In will contest, see "Wills," §§ 29, 30.
 Remedy by, see "Mandamus," § 3.
 — for erroneous street assessment, see "Municipal Corporations," §§ 150, 151.
 Right of party refusing to plead over, see "Pleading," § 90.
 — to appeal from order denying writ of habeas corpus, see "Habeas Corpus," § 4.
 — to appeal from tax judgment, see "Taxation," § 80.
 Trial of appeal to determine right to costs, see "Costs," § 7.
 Use of depositions on appeal, see "Deposition," § 8.
 When cause of action on supersedeas bond accrues, see "Limitation of Actions," § 14.

I. APPELLATE JURISDICTION.

After remand, see post, § 302.
 Certifying questions from lower court, see post, §§ 262, 263.
 In condemnation proceedings, see "Eminent Domain," § 22.
 Of courts as between one another, see "Courts," §§ 12-14.
 Proceedings in error, see "Error, Writ of," § 1.

1. IN GENERAL.

§ 1. In general.

(Iowa; 1896.)

Where, at the close of plaintiff's evidence, defendant's motion for judgment was regularly made and determined, the appellate court has jurisdiction to consider the merits of the controversy.—*McClain v. Capper* (Iowa) 67 N. W. 102.

§ 2. Necessity of statute.

[a] (Mich.; 1895.)

The right of appeal is not a constitutional one, but is subject to the control of the legislature.—*Messenger v. Teagan* (Mich.) 64 N. W. 499; *Engel v. Donovan*, Id.

[b] (Neb.; 1895.)

In the absence of a statutory provision therefor, an appeal does not lie from the judgment of a board of supervisors removing a county officer for malfeasance.—*State v. Bethea* 61 N. W. 578, 43 Neb. 451.

[c] (Wis.; 1896.)

Since appeals from orders made in actions in the circuit court can be taken only in cases specified by Rev. St. § 3069, as amended

by Laws 1895, c. 212, the supreme court has no jurisdiction of an appeal from an order denying a motion supported by affidavits, to make certain other persons parties to the action, such order not being specified in the statute.—*Smith v. Scott* (Wis.) 67 N. W. 705.

93 Wis. 553.

§ 3. After remand by appellate court.

(Wis.; 1896.)

A judgment entered in substantial accordance with the mandate of the supreme court is, in legal effect, the judgment of such court, and an appeal therefrom will be dismissed.—*Patton Paper Co. v. Green Bay & M. Canal Co.* (Wis.) 66 N. W. 601.

93 Wis. 283.

§ 4. Premature appeal.

(Neb.; 1895.)

A cause tried in the district court to a jury cannot be reviewed before a final judgment has been entered on the verdict.—*Seven Valleys Bank v. Smith*, 61 N. W. 606, 43 Neb. 237.

See, also, post, § 17.

§ 5. Nature of proceeding—Appeal or error.

[a] (Neb.; 1895.)

Where one seeking a review files a petition in error in connection with the transcript, he will be deemed to have elected to proceed in error, and not by appeal.—*Baird v. Woodard* 61 N. W. 612, 43 Neb. 310.

[b] (Neb.; 1895.)

Where a case could have been brought to the supreme court for review either by petition in error or by appeal, and the aggrieved party filed a petition in error, the case could not be considered as an appeal as well as a proceeding in error.—*Monroe v. Reid* (Neb.) 64 N. W. 983, 46 Neb. 316.

[c] (Neb.; 1896.)

When a party seeking a review of an appealable judgment files a petition in error with the transcript, the judgment will be reviewed on error, and not as on appeal.—*Beatrice Paper Co. v. Beloit Iron Works* (Neb.) 65 N. W. 1059, 46 Neb. 900.

[d] (Neb.; 1896.)

Where a case is presented for review within the time allowed in which to perfect an appeal, but a petition in error is filed therewith, the party bringing the case here will be presumed to have elected the remedy by error, and the case will be so considered.—*Childerson v. Childerson* (Neb.) 66 N. W. 281.

47 Neb. 162.

[e] (Neb.; 1896.)

Where a party presenting a case to the supreme court for review files a petition in error therein, he will be presumed to have elected to proceed by error, and not by appeal.—*Thomas v. Thomas* (Neb.) 67 N. W. 182.

48 Neb. 266.

[f] (Neb.; 1897.)

When a case, in its nature appealable, is brought up for review, the filing of a petition in error will be construed as an abandonment of an attempted appeal from the same judgment or decree.—*Shaw v. Robinson & Stokes Co.* (Neb.) 70 N. W. 953.

[g] (Neb.; 1897.)

Where, within a year from the rendition of a decree, plaintiff filed with the clerk of the court a paper substantially a petition in error, denominated "Assignment of Error on Appeal," and within six months a summons in error was issued by the clerk of the supreme court, and plaintiff made no application before the submission of the case to dismiss its petition in error and stand on its appeal, it will be held to have elected to have the case tried on error.—*Chicago, P. & O. R. Co. v. Cass County* (Neb.) 70 N. W. 955.

§ 6. — In action at law.

[a] (Neb.; 1895.)

A mandamus proceeding is an action at law, and is reviewable only on error, and not by appeal. *State v. Lancaster Co.*, 13 N. W. 212, 13 Neb. 223, followed.—*State v. Affholder* (Neb.) 62 N. W. 871.

44 Neb. 497.

[b] (Neb.; 1896.)

An action by a depositor in a bank against a bank formed after the deposit was made, based on the claim that the old bank merely changed its name to that of defendant, without destroying its identity, and on the further claim that defendant assumed the obligations of the old bank, is an action strictly legal in its nature; hence an appeal does not lie from a judgment rendered therein.—*Campbell v. Farmers' & Merchants' Bank* (Neb.) 68 N. W. 344.

§ 7. From writ of mandamus.

(S. D.; 1891.)

An appeal does not lie from a peremptory writ of mandamus, as such.—*State v. Young* (S. D.) 61 N. W. 165.

6 S. D. 406.

§ 8. Effect of appearance.

(Neb.; 1896.)

An appellate court acquires no jurisdiction of the subject-matter, where the tribunal or body from which the appeal was taken possessed none, though the respondent appears and contests the case on the merits.—*Stenberg v. State* (Neb.) 67 N. W. 190.

48 Neb. 299.

2. WHO MAY APPEAL.

Affirmance on ground that appellant is not person aggrieved, see post, § 275.

§ 9. Persons aggrieved.

[a] (Minn.; 1895.)

An insolvent for whom a receiver has been appointed may appeal from an order allowing the receiver compensation in excess of the limit fixed by law in ordinary cases.—*In re Smith* (Minn.) 63 N. W. 633; *Reeves v. Hastings*, Id.

61 Minn. 254.

[b] (Neb.; 1895.)

Where, on a mortgage foreclosure, defendants, against whom no personal relief is sought, disclaim all interest in the equity of redemption, they cannot appeal from a judgment affecting only the land.—*Myers v. Mahoney* 61 N. W. 589, 43 Neb. 208.

§ 10. Executors or administrators.

[a] (Neb.; 1895.)

An order for distribution among certain persons of the amount shown by the executor's final account to remain in his hands for distribution could not be appealed from by the executor, as such, since he was not "aggrieved" thereby, within Comp. St. c. 23, § 304.—*Merrick v. Kennedy*, 64 N. W. 989, 46 Neb. 264.

[b] (Neb.; 1895.)

Under Comp. St. c. 23, § 304, limiting the right to appeal from orders of the county court to "any person aggrieved," an executor may appeal from an adverse decision on his petition to correct an error in the settlement of his account, whereby he charged himself with the receipt of a certain sum in cash instead of in negotiable paper, though the sole distributee filed an agreement in the county court to accept the paper as cash.—*Merrick v. Kennedy* (Neb.) 64 N. W. 989, 46 Neb. 264.

[c] (S. D.; 1896.)

Insurance policy which is protected from the claims of creditors by a decree directing the proceeds to be paid to the beneficiary of insurance upon his death, is not subject to appeal by the decree,

so as to entitle him to appeal therefrom.—*Schlegel v. Sisson* (S. D.) 66 N. W. 1087.

§ 11. Who are parties.

(Wis.; 1895.)

The common council is not a party to the proceedings by which it removes a city official for misconduct, nor to an action of certiorari to review such proceedings, and cannot appeal from the judgment of the circuit therein.—*State v. Common Council of City of Milwaukee* (Wis.) 63 N. W. 751.

90 Wis. 487.

§ 12. Waiver and estoppel.

(Iowa; 1896.)

An agreement between defendant and plaintiff, after an execution was levied on defendant's property, that the property might be sold, and the proceeds applied on the execution, is not a recognition of the judgment, preventing defendant from proceeding with an appeal therefrom.—*Gilbert v. Adams* (Iowa) 68 N. W. 883.

§ 13. — Pursuing other remedies.

[a] (Minn.; 1897.)

Where plaintiff moves in the alternative, for judgment notwithstanding the verdict, pursuant to Laws 1895, c. 320, or for a new trial, and a new trial is granted, he cannot appeal from the denial of the judgment.—*St. Anthony Falls Bank v. Graham* (Minn.) 69 N. W. 1077.

[b] (Wis.; 1895.)

After judgment was rendered against the assignee of an insolvent debtor, in an action by him to set aside a mortgage given by the debtor, the assignee, in good faith and upon the advice of counsel, sold the mortgaged property by permission of the mortgagee, and applied the proceeds on the mortgage debt, and the mortgage was then discharged. *Held*, that the right of appeal was thereby waived by the assignee and the creditors whom he represented.—*Ray v. Hixon* (Wis.) 62 N. W. 922.

90 Wis. 39.

§ 14. — Accepting benefits of judgment.

[a] (N. D.; 1894.)

One does not waive his right to appeal from a judgment by accepting a benefit thereunder, if the benefit is one to which he is so absolutely entitled that a reversal of the judgment will not affect his right to it.—*Tyler v. Shea* (N. D.) 61 N. W. 468.

4 N. D. 377.

[b] (N. D.; 1894.)

A judgment declared that respondents would be entitled to a deed of certain land from appellant if they paid him a sum of money within 90 days after date of the decree, and, on their failure so to do, their rights were to be barred, and appellant to be immediately entitled to possession of the property. Appellant applied for an order awarding him possession of the land, claiming that respondents were in default. His application having been denied, he appealed from the judgment. *Held* that, by thus accepting a benefit under the judgment by applying for possession thereunder, he had waived his right to appeal.—*Tyler v. Shea* (N. D.) 61 N. W. 468.

4 N. D. 377.

3. APPEALABLE JUDGMENTS AND ORDERS.

In insolvency proceedings, see "Insolvency," § 14.

§ 15. What judgments or orders appealable.

[a] (Iowa; 1895.)

A ruling amending the entry of the grant of a new trial, made without notice to the de-

fendant at a subsequent term, is not ground for appeal by plaintiff long after defendant perfected its appeal.—*Cox v. Chicago & N. W. Ry. Co.* (Iowa) 63 N. W. 450.

[b] (Iowa; 1897.)

An order for a change of venue is not appealable.—*Kay v. Pruden* (Iowa) 69 N. W. 1137.

[c] (Minn.; 1895.)

An order setting aside an order vacating a judgment, and declaring the motion to vacate open and for trial, to be heard on notice by either party, was not appealable.—*State v. Crosley Park Land Co.* (Minn.) 65 N. W. 268.

63 Minn. 205.

[d] (Minn.; 1896.)

No appeal lies from an order denying a motion to strike out and dismiss objections filed to the allowance of the account of a trustee.—*Minneapolis Trust Co. v. Menage* (Minn.) 69 N. W. 224.

[e] (Neb.; 1897.)

Under Code Civ. Proc. § 275, making "all orders appointing receivers, giving them further directions, and disposing of the property," appealable, an insolvent corporation may appeal from an order refusing to vacate an ex parte order directing the receiver to sue stockholders for their unpaid subscriptions.—*State v. German Sav. Bank* (Neb.) 70 N. W. 221.

[f] (S. D.; 1896.)

Under Laws 1887, c. 20, regulating appeals to the supreme court, an order setting aside a sale in a foreclosure proceeding, though discretionary, is appealable.—*Kirby v. Ramsey* (S. D.) 68 N. W. 328.

[g] (Wis.; 1895.)

An order extending the time for filing a bill of exceptions, made after waiver of the right of appeal, is appealable.—*Ray v. Hixon* (Wis.) 62 N. W. 922.

[h] (Wis.; 1897.)

An order refusing to compel plaintiff to elect on which cause of action he will rely is not appealable, not being included in the appealable orders enumerated in Laws 1895, c. 212.—*Milbauer v. Schotten* (Wis.) 69 N. W. 984.

[i] (Wis.; 1897.)

An appeal does not lie from an order vacating and setting aside a lis pendens, which is not within any of the classes of orders from which the right of appeal is given by Laws 1895, c. 212.—*Kunze v. Kunze* (Wis.) 70 N. W. 162.

§ 16. Presumption.

(S. D.; 1895.)

An order made by a circuit judge within his circuit, in an action tried without a jury, will be presumed to be a court order, and not simply an order by the judge, unless the contrary is clearly made to appear.—*Lawrence County v. Meade County* (S. D.) 62 N. W. 957.

6 S. D. 626.

§ 17. Necessity of formal entry of judgment.

[a] (Neb.; 1896.)

A memorandum of a judgment made on the trial docket will not authorize a review before the extension of such judgment on the journal of the court.—*Hornick v. Maguire* (Neb.) 66 N. W. 867.

47 Neb. 826.

[b] (S. D.; 1896.)

Under Comp. Laws, §§ 5215, 5236, no appeal lies until the judgment or order has been "entered" as a permanent record of the court below.—*State v. Lamm* (S. D.) 69 N. W. 592.

See, also, ante, § 4.

§ 18. Orders affecting substantial rights.

[a] (Iowa; 1897.)

An order striking out an amendment of the complaint, which added another defendant, al-

leged that he was jointly liable with the original defendant, and set up ground for attachment as against him, is appealable (Code, § 3161) as affecting a substantial right.—*Kay v. Pruden* (Iowa) 69 N. W. 1137.

[b] (Neb.; 1895.)

An order of the district court refusing to require the approval, by the clerk, of an appeal bond, is appealable; it being "an order affecting a substantial right in a summary proceeding after judgment," within Code, § 581.—*State v. Baker* (Neb.) 63 N. W. 139.

45 Neb. 39.

[c] (S. D.; 1896.)

Plaintiff gave notice of a motion for new trial on specified grounds, to be made on bill of exceptions. No bill was settled, and afterwards plaintiff moved for an order fixing a time when he might move for new trial on the ground of newly-discovered evidence. *Held*, that an order denying such motion as being beyond the discretion of the court, in that newly-discovered evidence was not specified as one of the grounds in the former notice, raises a question of law, affecting substantial rights, and is appealable.—*Daley v. Forsythe* (S. D.) 67 N. W. 948.

§ 19. — Orders in special proceedings.

[a] (Neb.; 1896.)

An ex parte order in a proceeding in aid of execution, based on Code Civ. Proc. §§ 534, 538, requiring a defendant against whom judgment has been rendered to appear and answer under oath all such questions concerning his property as may be put to him, is an order affecting a substantial right in a special proceeding, and is made on a summary application in an action after judgment, within section 581, and hence is appealable as a final order.—*Clarke v. Nebraska Nat. Bank* (Neb.) 69 N. W. 104.

[b] (S. D.; 1896.)

In habeas corpus proceedings the decision of the circuit court is a final order affecting a substantial right, made in a special proceeding, from which an appeal will lie to the supreme court.—*In re Hammill* (S. D.) 69 N. W. 577.

[c] (Wis.; 1896.)

Under Laws 1895, c. 212, providing that a final order affecting a substantial right made in a special proceeding may be reviewed on appeal, an appeal will lie from an order denying a motion by the claimant of a fund in court that the fund be paid to it or an issue awarded to try the question of ownership.—*Ellis v. Southwestern Land Co.* (Wis.) 69 N. W. 363.

§ 20. Order involving merits.

[a] (Iowa; 1895.)

In an action to foreclose a mortgage, an order denying a motion to strike from the petition those portions thereof which referred to and set out the mortgage, and the subsequent recognition of it by the mortgagors in a second mortgage to other persons, is within Code, § 3164, providing that an appeal may be taken from an intermediate order involving the merits.—*Seiffert & Wiese Lumber Co. v. Hartwell* (Iowa) 63 N. W. 333.

[b] (Iowa; 1896.)

Orders of the court directing the construction of weirs, and that the property be repaired and improved preliminary to a final decree of partition in kind, involve the merits of the case, and are appealable.—*Brown v. Cooper* (Iowa) 67 N. W. 378.

[c] (Iowa; 1897.)

An order striking out part of a pleading as surplusage is not appealable (Code, § 3164), as an intermediate order involving the merits, and materially affecting the final decision.—*Allen v. Church* (Iowa) 70 N. W. 127.

[d] (Neb.; 1896.)

Under Code Civ. Proc. § 508, there must be a final order or judgment on the merits in

the court below before there can be a review on appeal. *Hall County v. Smith* (Neb.) 68 N. W. 481.

[e] (Wis.; 1895.)

An order denying a motion to strike out a certain allegation in an answer as scandalous, irrelevant, and immaterial does not involve the merits of the action.—*Dewald v. Dewald*, 62 N. W. 175, 89 Wis. 353.

§ 21. Interlocutory orders and judgments.

[a] (Neb.; 1896.)

The record showing merely that the court overruled a motion, and that the movant excepted thereto, no appeal would lie from the ruling because of the absence of a final order.—*Sims v. Davis* (Neb.) 67 N. W. 765.

48 Neb. 720.

[b] (Wis.; 1896.)

In an action against a mutual relief association to enforce an assessment to pay a death loss under the contract of insurance, it was decided on appeal that there was no liability for such death, because it was the result of suicide; but the court left it open to be determined whether a recovery could be had for a percentage of the assessments paid by deceased under the contract, and remanded the case for further proceedings. *Held*, that the denial by the trial court of plaintiffs' motion for permission to introduce additional evidence or for a new trial, and ordering judgment to be entered as therein directed, was an interlocutory order, and not appealable.—*Johns v. Northwestern Mut. Relief Ass'n* (Wis.) 69 N. W. 160.

§ 22. Finality of decision appealed from.

[a] (Mich.; 1895.)

A decree need not, in order to be appealable, dispose of all the merits of the case.—*Hake v. Coach* (Mich.) 63 N. W. 306.

105 Mich. 425.

[b] (Mich.; 1895.)

The answer to a bill for the accounting of a partnership alleged that certain transactions claimed in the bill to be partnership matters were in fact defendant's individual enterprises, the profits of which he alone was entitled to. By its decree the court found absolutely against the defendant with regard to these transactions, fixed the period over which the accounting should extend, and directed the referee to state an account on the basis of the decree. *Held*, that such decree was final as to the matters in dispute, and therefore appealable.—*Hake v. Coach* (Mich.) 63 N. W. 306.

105 Mich. 425.

[c] (Neb.; 1895.)

In an action by a widow for judgment confirming a partition of real estate, or for a sale and division of the proceeds, a statement in the record that there was "judgment of a partition, as prayed for in the petition," is not a final judgment.—*Atwood v. Atwood* (Neb.) 63 N. W. 362.

45 Neb. 201.

[d] (Neb.; 1896.)

An order sustaining a motion to quash a summons is not reviewable until followed by a final judgment of dismissal.—*Lewis v. Barker* 65 N. W. 778, 46 Neb. 662.

[e] (Neb.; 1896.)

A general finding adverse to a plaintiff, in the absence of a final disposition of the case as to him, though there be a judgment for costs, does not constitute a final judgment from which appeal or error will lie.—*Barnhouse v. Village of Adams* (Neb.) 66 N. W. 826.

47 Neb. 756.

§ 23. Orders concerning attachments.

[a] (Minn.; 1895.)

An appeal does not lie from an order refusing to dissolve an attachment after the at-

tachment levy has been released on a bond.—*Thomas v. Craig* (Minn.) 62 N. W. 1133.
60 Minn. 501.

[b] (Wis.; 1896.)

An order refusing to set aside proceedings under a writ of attachment "continues a provisional remedy," within Laws 1895, c. 212, § 1, subd. 3, granting appeals from such orders.—*Shakman v. Koch* (Wis.) 67 N. W. 925.
93 Wis. 595.

§ 24. Orders relating to injunctions.

[a] (Neb.; 1895.)

An order continuing in force, during the pleasure of the court, a temporary injunction, previously issued, is not appealable.—*Einspahr v. Smith*, 64 N. W. 698, 46 Neb. 138.

[b] (Neb.; 1896.)

An order dissolving or modifying a temporary injunction is not appealable.—*Bartram v. Sherman*, 65 N. W. 789, 46 Neb. 713.

[c] (Neb.; 1896.)

An order for the dissolution of a temporary restraining order, or an order in denial of a temporary injunction, is not a final order.—*Manning v. Connell* (Neb.) 66 N. W. 17.
47 Neb. 83.

[d] (Wis.; 1894.)

An order in a foreclosure suit restraining defendant from collecting the rents pending the decision of a motion for a receiver is not appealable.—*Nash v. Meggett* (Wis.) 61 N. W. 283, 89 Wis. 486.

§ 25. Orders relating to receivers.

[a] (Mich.; 1897.)

An order, made pendente lite, appointing a receiver, and requiring defendants to deliver to the receiver all property constituting a stock of goods owned by persons named, which is in possession of other defendants as mortgagees, is appealable.—*Hall v. Donovan* (Mich.) 69 N. W. 643.

[b] (Wis.; 1894.)

An order refusing to allow a party to file his affidavit contradicting an affidavit filed on a motion for a receiver in a foreclosure suit is not appealable.—*Nash v. Meggett* (Wis.) 61 N. W. 283, 89 Wis. 486.

§ 26. Order appointing receiver.

[a] (Minn.; 1895.)

An order appointing a receiver in a foreclosure suit pending the action is an order granting a provisional remedy, within Gen. St. 1894, § 6140, subd. 2, and is hence appealable.—*State v. Egan* (Minn.) 64 N. W. 813.
62 Minn. 280.

[b] (Wis.; 1894.)

As a motion for a receiver in a foreclosure suit is addressed to the discretion of the court, an order appointing a receiver will not be disturbed, where no abuse of discretion is shown.—*Nash v. Meggett* (Wis.) 61 N. W. 283, 89 Wis. 486.

§ 27. Orders relating to pleading and parties.

[a] (Mich.; 1895.)

An appeal will lie from a decree dismissing a crossbill on demurrer before the final determination of the original bill.—*Clutton v. Clutton* (Mich.) 64 N. W. 744; *Same v. Donovan*, Id.

[b] (Neb.; 1897.)

An order striking a petition of intervention because not filed within the time allowed therefor is not a final order reviewable on error.—*Whitney v. Spearman* (Neb.) 70 N. W. 240.

[c] (Wis.; 1896.)

An order striking out material parts of an answer in an action for libel is appealable.—*Adamson v. Raymer* (Wis.) 68 N. W. 1000.

[d] (Wis.; 1897.)

An order denying a motion to vacate an order bringing in additional parties is not appealable.—*Cook v. City of Menasha* (Wis.) 70 N. W. 289.

Orders involving merits, see ante, § 20.

§ 28. Decisions on demurrer.

[a] (Wis.; 1896.)

Under Laws 1895, c. 212, amending Rev. St. § 3069, by dropping therefrom subdivision 4, which provided that an appeal might be prosecuted from an order striking off a demurrer "on account of the frivolousness thereof," no appeal can be taken from an order striking off a demurrer, on motion, as frivolous.—*Gianella v. Bigelow* (Wis.) 65 N. W. 1030.
92 Wis. 267.

[b] (Wis.; 1897.)

Laws 1895, c. 212, allowing appeals from orders overruling demurrers, does not authorize an appeal from an order striking out a demurrer as frivolous, and, since such order is not appealable, an order refusing to vacate it is not appealable (section 1, subd. 4).—*Jacobs v. Beebe* (Wis.) 70 N. W. 468.

§ 29. Order for judgment non obstante veredicto.

(Minn.; 1896.)

An order under Laws 1895, c. 320, providing that when a party was entitled, on the trial, to have a verdict directed in his favor, and duly moved for the same, the court may, on a motion for a new trial, order a judgment in his favor notwithstanding the verdict, is appealable.—*Kernan v. St. Paul City Ry. Co.* (Minn.) 67 N. W. 71.
64 Minn. 312.

§ 30. Order vacating judgment.

[a] (Neb.; 1896.)

There cannot be a review of an order of the district court opening a judgment and permitting an answer to be filed in the case until there has been a further order or judgment in its nature final.—*Merle & Heaney Manuf'g Co. v. Wallace* (Neb.) 67 N. W. 883.
48 Neb. 886.

[b] (S. D.; 1895.)

An order reciting at its close: "And, the court being fully advised in the premises, it is ordered and adjudged that said objection be sustained, and the complaint herein be dismissed, with costs," etc.,—is a final judgment.—*Lawrence County v. Meade County* (S. D.) 62 N. W. 957.
6 S. D. 626.

§ 31. Refusal to dismiss.

(Minn.; 1895.)

An order denying a motion to dismiss an action is not appealable.—*Pillsbury v. Foley*, 63 N. W. 1027, 61 Minn. 434.

§ 32. Order on motion for continuance.

(Wis.; 1895.)

An order refusing a continuance is not appealable, and can be reviewed only upon appeal from final judgment.—*Whitefoot v. Lefingwell* (Wis.) 63 N. W. 82.
90 Wis. 182.

§ 33. Order directing reference.

(Minn.; 1895.)

An order directing a compulsory reference of an action is not appealable. *Railroad Co. v. Gardner*, 19 Minn. 132 (Gil. 99), distinguished.—*Bond v. Welcome* (Minn.) 63 N. W. 3.

§ 34. Orders in special proceedings.

(Wis.; 1895.)

Under Rev. St. § 3069, as amended by Laws 1895, c. 212, providing that appeals shall lie only from final orders in special proceedings, an order of reference of the issues in a proceed-

ing for the incorporation of a village is not appealable.—*In re Schumaker* (Wis.) 63 N. W. 1050.

90 Wis. 488.

Orders affecting substantial rights, see ante, § 18.

§ 35. Reviewing decision of intermediate court.

[a] (Minn.: 1896.)

Under Laws 1895, c. 24, providing that, when an appeal from a justice court shall be dismissed in the district court, the latter shall enter judgment affirming the judgment of the justice, with costs, no appeal lies from the order of dismissal, but should be taken from the judgment entered in the district court pursuant thereto.—*Graham v. Conrad* (Minn.) 69 N. W. 215.

[b] (Neb.: 1895.)

An order of the district court, determining that an appeal from an inferior court has been perfected in due time, is not appealable.—*Edgar v. Keller*, 61 N. W. 587, 43 Neb. 263.

[c] (S. D.: 1897.)

An appeal lies from an order of the circuit court refusing to dismiss an appeal from a justice on the ground that no undertaking was filed on appeal.—*Smith v. Coffin* (S. D.) 70 N. W. 636.

§ 36. Order on motion for new trial.

[a] (Minn.: 1895.)

Where, on the trial of issues of fact, judgment is ordered on the pleadings, an order on a motion for a new trial is appealable.—*Hine v. Myrick* (Minn.) 62 N. W. 1125.

60 Minn. 518.

[b] (Wis.: 1896.)

Under Laws 1895, c. 212, designating what orders are appealable, an appeal will not lie from an order granting or denying a new trial.—*Daivison v. Brown* (Wis.) 67 N. W. 42.

93 Wis. 85.

[c] (Wis.: 1897.)

Under Laws 1895, c. 212, an order refusing a new trial is not appealable.—*Hawkins v. Lutton* (Wis.) 70 N. W. 483.

§ 37. Ruling on questions of costs.

[a] (Neb.: 1896.)

A mere judgment for costs in favor of the defendant, in whose favor a verdict has been returned without a final disposition of the cause in the district court, cannot be reviewed in the supreme court.—*Little v. Gamble* (Neb.) 66 N. W. 849.

47 Neb. 827.

[b] (Neb.: 1896.)

There having been a verdict for defendant, and an order denying a new trial, it was "considered by the court that the said defendant recover of the said [plaintiff] its costs herein expended, as heretofore by the verdict of the jury found." Held a judgment for costs merely, which would not support an appeal.—*Reynolds v. City of Tecumseh* (Neb.) 67 N. W. 792.

48 Neb. 785.

[c] (Wis.: 1895.)

A nonappealable order, by erroneously imposing costs in an appealable amount, is rendered appealable.—*Kingsley v. Great Northern Ry. Co.*, 64 N. W. 1036, 91 Wis. 380.

§ 38. Order preventing judgment from which appeal may be taken.

[a] (Wis.: 1895.)

Where plaintiff in ejectment is entitled to recover because of a defect in the tax deed under which defendant claims, an order, under Rev. St. § 3087, that the amount for which the land was sold, the costs of executing and recording the tax deed, and the sum paid by defendant for taxes, with interest, etc., shall be set off against the amount of plaintiff's verdict, and that, if there be any excess, plaintiff shall pay the same, as a condition of judgment in his fa-

vor, is not appealable, under Rev. St. § 3069 (as amended by Laws 1895, c. 212), as an order which "prevents a judgment from which an appeal might be taken."—*Cook v. McComb* (Wis.) 65 N. W. 181, 91 Wis. 445.

[b] (Wis.: 1896.)

An order of the circuit court denying a motion to dismiss an appeal thereto is not appealable, as it does not "determine the action," or "prevent a judgment from which an appeal might be taken." Rev. St. § 3069, subd. 1, as amended by Laws 1895, c. 212.—*Reinhart v. Fire Ass'n of Philadelphia* (Wis.) 67 N. W. 701.

93 Wis. 452.

4. JURISDICTIONAL AMOUNT.

Presumption of jurisdiction in absence of certain matters from record, see post, § 216.
On certiorari, see "Certiorari," § 1.

§ 39. Amount in controversy.

[a] (Wis.: 1896.)

Where it appears that under no aspect of the case plaintiff could recover an amount sufficient to give the supreme court jurisdiction on appeal, an appeal will be dismissed, regardless of the amount claimed.—*Burkhardt v. Elgee* (Wis.) 66 N. W. 1137.

93 Wis. 29.

[b] (Wis.: 1897.)

Laws 1895, c. 215, providing that no appeal lies to the supreme court where the amount involved is less than \$100, does not affect proceedings to try title to office.—*State v. McKone* (Wis.) 70 N. W. 164.

§ 40. Amount claimed in pleadings.

[a] (Iowa: 1895.)

Where the complaint asks \$49 actual damages, and \$150 exemplary damages, the case is appealable to the supreme court.—*Thompson v. Jackson* (Iowa) 61 N. W. 1004.

93 Iowa, 376.

[b] (Iowa: 1897.)

The amount in controversy, as shown by the pleadings, and not the amount recovered, determines the jurisdiction on appeal.—*Fullerton v. Cedar Rapids & M. C. Ry. Co.* (Iowa) 70 N. W. 106.

[c] (Iowa: 1897.)

The amount in controversy is determined by the averments of the pleadings, not by the demand for judgment.—*Incorporated Town of Central City v. Treat* (Iowa) 70 N. W. 110.

[d] (Wis.: 1896.)

Where it affirmatively appears that the amount involved in a case is but 50 cents, exclusive of costs, though the complaint alleges damages of \$100, and there is no certificate to make the judgment rendered therein an exception, it is within Laws 1895, c. 215, providing that no appeal can be taken from a judgment where the amount involved, exclusive of costs, is less than \$100, unless the trial judge shall certify that the case involves certain difficult or constitutional questions.—*Burkhardt v. Elgee* (Wis.) 66 N. W. 525.

93 Wis. 29.

§ 41. Appeal from intermediate court.

(Wis.: 1896.)

Where the garnishee of a corporation appeals from a justice's court to the superior court, the amount in controversy in the latter court, determining the jurisdiction of the supreme court on appeal therefrom, is the amount of the judgment recovered against the corporation in the justice's court.—*Mayo v. Hansen* (Wis.) 69 N. W. 344.

§ 42. Appeal from justice.

[a] (Neb.: 1896.)

Code Civ. Proc. §§ 985, 1017, denying appeals from judgments of justices of the peace

where the amount claimed does not exceed \$20, are not repugnant to Bill of Rights, § 24, declaring that the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied.—*Chicago, B. & Q. R. Co. v. Headrick* (Neb.) 68 N. W. 489.

[D] (Neb.; 1896.)

Whether the judgment of a justice of the peace is appealable depends on the amount claimed in the bill of particulars filed by plaintiff or defendant (Code Civ. Proc. § 985), and not on the amount of the judgment recovered.—*Bates v. Phoenix Pub. Co.* (Neb.) 69 N. W. 305.

§ 43. Remittitur to defeat jurisdiction.

[a] (Iowa; 1895.)

An amendment to his pleading, after verdict, by the successful party in an action, reducing the amount in controversy below \$100, in order to defeat the right of appeal, must be made before the adjournment of the term of court at which the judgment is rendered.—*Sharp v. Phoenix* (Iowa) 61 N. W. 946.

93 Iowa, 466.

[b] (Iowa; 1896.)

In an action in a justice's court, the jury, at 9 o'clock p. m., returned a verdict for plaintiff for \$40, whereupon defendant tendered an appeal bond, which was filed and approved by the justice. Before judgment was entered, plaintiff filed a remittitur of all demands sued on in excess of \$24.50. Held that, as no appeal would lie until judgment after the filing of the remittitur, the amount in controversy was less than \$25, and consequently no appeal would lie.—*Knox v. Nicoli* (Iowa) 66 N. W. 876.

[c] (Iowa; 1896.)

The filing of a remittitur in the office of a justice, reducing the amount of a judgment to less than \$25, before an appeal bond has been filed by the defendant, defeats the right of appeal from such judgment, under Code, § 3575, providing that no appeal shall be allowed where the amount in controversy does not exceed \$25.—*Lynch v. Bruner* (Iowa) 68 N. W. 908.

5. APPEALS FROM INFERIOR TRIBUNALS.

Jurisdictional amount, see ante, § 42.

Act denying right of appeal from justice, taking property without due process of law, see "Constitutional Law, §§ 41, 42.

To what court appeal lies from justice, see "Courts," § 17.

§ 44. When appeal lies.

(Neb.; 1896.)

It is only from a final judgment of a justice of the peace that an appeal lies.—*Denslow v. Dodendorf* (Neb.) 66 N. W. 409.

§ 45. Matters considered in determining jurisdiction.

(Neb.; 1896.)

To determine its jurisdiction, under Code Civ. Proc. § 985, of an appeal from a justice, the district court must look only to the transcript certified to it from the justice.—*Bates v. Phoenix Pub. Co.* (Neb.) 69 N. W. 305.

II. REQUISITES.

Necessity of filing briefs, see post, § 102.

Showing in record as to taking of appeal, see post, § 118.

1. IN GENERAL.

§ 46. Necessity of first filing judgment roll.

(S. D.; 1895.)

Where the record shows that the judgment appealed from was not perfected by the

filing of a judgment roll prior to the taking of the appeal, the appeal must be dismissed.—*Greenly v. Hopkins* (S. D.) 64 N. W. 1128.

2. TIME OF TAKING.

See, also, ante, § 22.

In election contest, see "Elections and Voters," § 32.

§ 47. Application of statute.

(S. D.; 1895.)

Comp. Laws, § 5216, limiting the time in which an appeal from an order may be taken to 60 days, has no application to an order denying a new trial, made before the entry of the judgment appealed from.—*Granger v. Roll* (S. D.) 62 N. W. 970.

6 S. D. 611.

§ 48. Necessity of taking within statutory time.

[a] (Neb.; 1897.)

An appeal not taken within the statutory time will be dismissed.—*Renard v. Thomas* (Neb.) 69 N. W. 932.

[b] (Wis.; 1896.)

Under Rev. St. § 3039, limiting the time for taking an appeal to two years from the entry of judgment, and section 3049, providing that "the appeal shall be deemed taken by service of the notice of appeal, and perfected by serving the undertaking for costs, or the deposit of money instead, or the waiver thereof as herein provided," the appellate court is without jurisdiction unless an appeal is perfected, as therein required, within the two years.—*Munk v. Anderson* (Wis.) 68 N. W. 407.

§ 49. When time begins to run.

[a] (Minn.; 1896.)

The last of two orders was the final one where the court made findings of fact and an order thereon, and subsequently, by agreement, made additional findings and an order thereon, and filed the same.—*Billson v. Lardner* (Minn.) 69 N. W. 477.

[b] (S. D.; 1896.)

Under Comp. Laws, § 5216, providing that appeal must be "within sixty days after written notice of the order shall have been given the party appealing," it is not necessary that notice of "entry" of the order be given to set in operation the 60-days limitation.—*Brooks v. Bigelow* (S. D.) 68 N. W. 286.

§ 50. Extension of time.

(Wis.; 1895.)

Under Rev. St. § 3042, limiting the time within which an appeal from an order may be taken to 30 days from the date of the service of a copy of the order, with a written notice of its entry, the time cannot be extended by stipulation of the parties, after a copy of the order, with notice, has been served.—*Hall v. Gilman* (Wis.) 63 N. W. 1044.

90 Wis. 455.

§ 51. Excuse for delay.

(Neb.; 1895.)

Where the failure to have the appeal docketed is due to the neglect of the proper officer to prepare the transcript, the appeal will not be dismissed.—*Continental Building & Loan Ass'n v. Mills* (Neb.) 62 N. W. 478.

44 Neb. 136.

§ 52. Appeal from judgment as modified.

(Minn.; 1896.)

The original judgment was remanded with directions to modify it. Held, that an appeal lies from the judgment as modified, though the time for appealing from the original judgment had expired.—*Malmgren v. Phinney* (Minn.) 67 N. W. 649.

3. NOTICE.

Dismissal for failure to serve, see post, § 281.
On appeal from justice, see post, § 162.
Showing in record as to, see post, § 117.

§ 53. Necessity.

(Iowa; 1896.)

Lien claimants who were made defendants in a suit by another lien claimant cannot, without serving notice of appeal from the judgment rendered in such action, assign error there to on an appeal by the plaintiff.—Epeneter v. Montgomery County (Iowa) 67 N. W. 93.

§ 54. Where two judgments were rendered.

(Iowa; 1897.)

Where there was an interlocutory judgment for costs against defendant on a plea in abatement, and also a final judgment against it on the merits, a notice of appeal served after the expiration of the time for appealing from the interlocutory judgment, conceding it to be appealable, which stated that an appeal had been taken from "the judgment," refers to the final judgment.—Lesure Lumber Co. v. Mutual Fire Ins. Co. (Iowa) 70 N. W. 761.

§ 55. Time of serving.

(Iowa; 1895.)

Under Code, § 3173, providing that appeals may be taken within six months from judgment, and not afterwards, and section 3178, providing for service of a notice, to give the appellate court jurisdiction it must affirmatively appear from the record that notice was served within six months from the rendition of the decree.—Taylor v. Taylor (Iowa) 63 N. W. 180.

§ 56. Who entitled to notice.

(Iowa; 1896.)

In an action against both husband and wife for necessities, where no judgment is rendered against the wife, and there is nothing to indicate that she will be affected by an appeal by the husband from judgment against him, notice of an appeal by him need not be served on the wife.—Menefee v. Chesley (Iowa) 66 N. W. 1038.

(Mich.; 1896.)

How. Ann. St. § 6781, providing for an appeal from the probate of a will, requires that notice of such appeal be given to the adverse party; and where it is shown to the circuit court that some, but not all, of the persons interested adversely to appellant have been served with notice, the court may properly require notice to be given the others.—Strang v. Hillsdale Circuit Judge (Mich.) 65 N. W. 968.

§ 57. — Co-parties.

(Iowa; 1895.)

After judgment against a principal and two sureties on a bond, one of said sureties cannot appeal without serving notice on the other, as required by Code, § 3174, as the judgment could not be modified or reversed without affecting the rights of said other surety.—Fisher v. Chaffee (Iowa) 64 N. W. 662.

(Minn.; 1896.)

On appeal by an insolvent from the denial of a discharge applied for under Laws 1895, c. 67, resident creditors, whose debts were contracted before the law was enacted, but on whom citation for discharge was personally served within the state, and who failed to appear, are adverse parties, entitled to notice of appeal (Gen. St. 1894, § 6134); section 5212, providing that a defendant who has not appeared need not be served with notices in ordinary proceedings, having no application.—Lambert v. Scandinavian-American Bank (Minn.) 68 N. W. 834.

§ 58. Persons to be served.

(Iowa; 1896.)

In an action against a city and its board of equalization, notice of appeal served on the mayor or city clerk is a sufficient service as to both defendants when such persons are ex officio officers of the board.—Farmers' Loan & Trust Co. v. City of Newton (Iowa) 60 N. W. 781.

(Iowa; 1896.)

Service of notice of appeal on the proper party or his attorney, and on the clerk of the trial court, is essential to give the appellate court jurisdiction.—Flagler v. Cameron (Iowa) 68 N. W. 580.

§ 59. Service on clerk of court.

(Iowa; 1895.)

It is essential to the perfection of an appeal that notice thereof be served on the clerk of court.—Ainslie v. Wynn (Iowa) 65 N. W. 401.

(N. D.; 1894.)

The service of the notice of appeal on the clerk of the lower court is jurisdictional, and, where the record fails to show such service, there can be no review.—Hoffman v. Bank of Minot (N. D.) 61 N. W. 1031.

4 N. D. 473.

(S. D.; 1896.)

Service of notice of appeal, as required by Comp. Laws, § 5215, on the clerk of the court, is essential to an appeal.—Pierre Sav. Bank v. Ellis (S. D.) 68 N. W. 545.

(S. D.; 1896.)

Delivery to the clerk of the court of the original notice of appeal, with direction to file the same, is not a service on the clerk of notice of such appeal, as required by Comp. Laws, § 5215.—Pierre Sav. Bank v. Ellis (S. D.) 68 N. W. 545.

§ 60. Amendment.

(Mich.; 1895.)

Where it appears on the face of the papers that the omission of the name of a party from the written claim of appeal was a mere oversight, an amendment to accord with his intention to appeal may be made.—In re Flint & P. M. R. Co. (Mich.) 63 N. W. 303.

105 Mich. 289.

4. BONDS.

On appeal from justice, see post, § 163.

Supersedeas bonds, see post, § 269.

On appeal in admiralty, see "Admiralty," § 2.
Power of corporate officer to execute, see "Corporations," § 35.

§ 61. Necessity.

(Neb.; 1895.)

When a school district appeals to the district court from a judgment rendered by a justice of the peace, it must file an appeal bond, as required by Code Civ. Proc. § 1007.—School Dist. No. 6, Cass County, v. Traver (Neb.) 61 N. W. 720, 43 Neb. 524.

(S. D.; 1896.)

Comp. Laws, § 5215, provides that an appeal must be taken by service of notice, and perfected on service of the undertaking for costs, or a deposit of money instead, or a waiver thereof. Section 5219 provides that, to render an appeal effectual for any purpose, an undertaking must be executed, or a deposit, with service of notice, or waiver thereof, made. Section 5231 provides that the undertaking must be filed, and a copy thereof served with the notice of appeal. Held, that where no undertaking was executed, or deposit made, or waiver thereof, the appeal was a nullity.—Bonnell v. Van Cise (S. D.) 67 N. W. 685.

§ 62. Sufficiency.

[a] (Neb.; 1895.)

A writing obligatory, whether called a "bond" or "undertaking," executed in accordance with Code Civ. Proc. § 1030, providing for the execution of a bond on appeal from a justice court in actions of forcible entry and detainer, is not void because of a failure to specify a certain sum of money as a penalty.—*Morrison v. Boggs* (Neb.) 62 N. W. 473. 44 Neb. 248.

[b] (Wis.; 1894.)

The charter of Eau Claire provides that an appeal to the district court, on failure of the council to take action on a claim against the city for personal injuries within a certain time, shall be perfected by giving a "bond" conditioned for the faithful prosecution of "such appeal," and the payment of all costs adjudged against appellant. *Held*, that a bond conditioned on the prosecution of the "appeal in said circuit court aforesaid," and the payment of all costs, etc., is a sufficient compliance with the requirement.—*West v. City of Eau Claire*, 61 N. W. 313, 89 Wis. 31.

§ 63. Amount of bond.

[a] (Neb.; 1895.)

Code Civ. Proc. § 677, subd. 1, providing that when the decree appealed from directs the payment of money the bond shall be double the amount thereof, does not apply to a supersedeas bond given on appeal from an order in foreclosure proceedings confirming the sale of land.—*Kountze v. Erck* (Neb.) 63 N. W. 804. 45 Neb. 288.

[b] (Neb.; 1896.)

Neither the district court, nor the judge thereof, has the power to fix the amount of the penalty of the bond to be given on appeal from a decree awarding alimony, since the amount is prescribed by statute.—*State v. Cornish* (Neb.) 67 N. W. 481. 48 Neb. 614.

§ 64. Service.

(S. D.; 1895.)

Comp. Laws, § 5231, relating to the service of undertakings on appeal, does not require service to be made on the clerk.—*Tolerton & Stetson Co. v. Casperson* (S. D.) 63 N. W. 908.

§ 65. Dismissal of appeal for defects.

(Mich.; 1895.)

How. Ann. St. §§ 7018, 7020, providing that no appeal shall be dismissed for any imperfection in the bond provided a new bond is given, cannot be invoked where the party does not offer to substitute a new bond.—*Cole v. Donovan* (Mich.) 64 N. W. 741.

§ 66. Objections to sureties.

[a] (Neb.; 1895.)

Under Civ. Code, § 898, providing that the sureties on a supersedeas bond must be residents of the state, and worth double the sum to be secured above their debts, a bond executed by several sureties but one of whom resides in the county, the others being residents of the state, should not be rejected on the ground that the resident surety lacks the necessary qualifications, if the co-sureties are qualified.—*State v. Baker* (Neb.) 63 N. W. 139. 45 Neb. 39.

[b] (S. D.; 1896.)

Service of notice of exception to sureties on appeal bond, when personal, may be at any time before 12 p. m. of the last of the 10 days allowed by Comp. Laws, § 5232, therefore; the limitation as to 9 p. m., in section 5328, providing "the service may be personal, * * * or where there is no person in the office, by leaving it between" 6 a. m. and 9 p. m., not applying to personal service.—*Haseltine v. Browne* (S. D.) 69 N. W. 579.

§ 67. Justification by sureties.

[a] (S. D.; 1895.)

Where the affidavit to an undertaking on appeal does not aver that the sum in which the surety justifies, above his debts and liabilities, is in property in the state not exempt from execution, as required by Comp. Laws, § 5232, the undertaking is invalid.—*Tolerton & Stetson Co. v. Casperson* (S. D.) 63 N. W. 908.

[b] (S. D.; 1896.)

Under Comp. Laws, § 5232, declaring that unless the sureties on an appeal bond, being excepted to by respondent, justify within 10 days, "the appeal shall be regarded as if no undertaking had been given," their failure to justify leaves the appeal ineffectual for any purpose, it being declared by section 5219 that, "to render the appeal effectual for any purpose, an undertaking must be executed."—*Haseltine v. Browne* (S. D.) 69 N. W. 579.

§ 68. Approval.

(Neb.; 1895.)

A bond on appeal from a justice of the peace to the district court is approved by the justice if he receives it, examines it, and expresses himself as "satisfied," and retains it in his custody.—*Bingham v. Shadle* (Neb.) 63 N. W. 143. 45 Neb. 82.

§ 69. Curing defects by filing new bond.

(S. D.; 1895.)

Under Comp. Laws, § 5235, providing for amendments, on appeal, of errors resulting from omissions through mistake, the supreme court may permit a new undertaking to be filed in place of an invalid one previously filed.—*Tolerton & Stetson Co. v. Casperson* (S. D.) 63 N. W. 908.

§ 70. Waiver of bond or defects therein.

[a] (S. D.; 1896.)

Comp. Laws, § 5219, makes an undertaking, or a deposit in lieu thereof, or a waiver, an essential requisite of an appeal. *Held*, that an offer of waiver by an appellee, refused by the appellant, will not confer jurisdiction on the appellate court.—*Bonnell v. Van Cise* (S. D.) 67 N. W. 685.

[b] (S. D.; 1896.)

Under Comp. Laws, § 5218, providing that an undertaking on appeal "may be waived in writing," it is not waived by the parties stipulating for extension of time for serving abstracts and briefs, and respondent serving and filing a brief in the appellate court, after expiration of the 10 days after exception to sureties, allowed by section 5232 for justification by them.—*Haseltine v. Browne* (S. D.) 69 N. W. 579.

III. PARTIES.

On appeal from justice, see post, § 164.

Who may allege error or assert objections, see post, §§ 187, 188.

§ 71. Necessary parties.

[a] (Iowa; 1897.)

An appeal will not be dismissed, on motion of sureties on the bond sued on, on the ground that no notice of appeal was served on the principal, who was named as a co-defendant with them, but not served; plaintiff having the right, under Code, §§ 2550, 2551, to sue any or all parties to a contract, either jointly and severally, or severally only, and the court being authorized to determine any controversy between the parties before it when it can be done without prejudice to the rights of others.—*Marshall County v. Knoll* (Iowa) 69 N. W. 1146.

[b] (Neb.; 1895.)

Though, when the interests of several defendants are inseparable, an appeal by one

brings up the whole case to secure a review, all persons interested must be made parties to the record.—*Polk v. Covell*, 62 N. W. 240, 43 Neb. 884.

[c] (Neb.: 1895.)

Only the parties who are liable for the judgment rendered are necessary parties to proceedings in error.—*Kuhl v. Pierce County* (Neb.) 62 N. W. 1066.

44 Neb. 584.

§ 72. Joining co-parties as appellants.

(Neb.: 1895.)

One of several defendants having separate defenses may prosecute an appeal from the county court to the district court without joining his codefendants.—*Polk v. Covell* (Neb.) 62 N. W. 240, 43 Neb. 884.

§ 73. Substitution.

[a] (Iowa: 1895.)

A motion in the supreme court to substitute another person as plaintiff on the death of the first will be overruled when the substitution could in no event change the result.—*Kinney v. Kinney* (Iowa) 63 N. W. 452.

[b] (Iowa: 1897.)

Where before appeal by plaintiff, in an action to set aside a conveyance as fraudulent, the judgment debtor dies, and his administrator and heirs are made defendants, the administrator need not be made a party to the appeal, it not appearing that he has any interest which can be affected thereby, but merely that, by agreement of parties, he, as guardian of the minor heirs and as administrator, was authorized to lease the land on specified terms, and produce the proceeds in court.—*Brundage v. Cheneworth* (Iowa) 70 N. W. 211.

IV. TIME AND MANNER OF BRINGING OBJECTIONS TO ATTENTION OF TRIAL COURT.

Mode of taking advantage of insufficiency of plaintiff's evidence, see "Trial," § 92.
Objections to instructions, see "Trial," §§ 81-87.

1. IN GENERAL.

§ 74. Necessity of exceptions.

[a] (Iowa: 1896.)

Objections not raised on the trial by proper exceptions will not be considered on appeal.—*Casey v. Ballou Banking Co.* (Iowa) 67 N. W. 98.

[b] (Iowa: 1896.)

An appeal will not lie from a judgment to which no exception was reserved.—*Smith v. Smith* (Iowa) 68 N. W. 721.

[c] (Mich.: 1895.)

A ruling of the trial court on the admission of evidence to which no exception is taken will not be reviewed. *Haines v. Saviers* (1892) 53 N. W. 531, 93 Mich. 440, and *Cumming Tp. v. Shick* (1892) 54 N. W. 40, 94 Mich. 222, followed.—*Barnum v. Andrews* (Mich.) 63 N. W. 983.

[d] (Mich.: 1896.)

Assignments of error based on rulings to which no exceptions were taken cannot be considered.—*Banks v. Cramer* (Mich.) 66 N. W. 946.

[e] (Neb.: 1895.)

An exception to a final judgment is unnecessary to a review of the cause.—*Erck v. Omaha Nat. Bank*, 62 N. W. 67, 43 Neb. 613.

[f] (Neb.: 1896.)

To secure a review of alleged error in sustaining a demurrer to a petition an exception is indispensably necessary, even though the action is solely for equitable relief.—*Abbott v. Barton* (Neb.) 66 N. W. 838.

47 Neb. 822.

[g] (Neb.: 1896.)

Error as to the form in which an issue of fact in an equity cause is submitted to the jury for decision is not available in this court, where no exception was taken thereto in the trial court, and the judgment is not assailed on that ground in the petition in error.—*Hay v. Miller* (Neb.) 66 N. W. 1115.

48 Neb. 156.

[h] (Neb.: 1897.)

To preserve for review error in permitting improper remarks by counsel, objection must be made at the time, a ruling obtained, and exception taken.—*Golder v. Lund* (Neb.) 70 N. W. 379.

[i] (S. D.: 1896.)

Where the trial court was neither called upon to decide, as a matter of law, that an offer to rescind was made too late, nor to submit the question to a jury, a holding that such offer was made with sufficient promptness will not be disturbed, in the absence of an available exception thereto.—*Hilton v. Advance Thresher Co.* (S. D.) 66 N. W. 816.

§ 75. — To order refusing new trial.

(Neb.: 1894.)

Neither the sufficiency of the evidence to support the findings, nor the rulings on objections to evidence, will be reviewed where no exception was taken to the order overruling a motion for new trial.—*Tuomey v. Willman* 61 N. W. 126, 43 Neb. 28.

§ 76. Time of taking objections or exceptions.

[a] (Iowa: 1895.)

Error cannot be assigned on the action of the trial court in receiving a special verdict and not requiring a general verdict, in the absence of an exception taken at the time of receiving the special verdict.—*National Horse-Importing Co. v. Novak* (Iowa) 64 N. W. 616.

[b] (Neb.: 1895.)

Objections to the form and terms of a verdict must be made at the time of its rendition.—*Brumbaek v. German Nat. Bank* (Neb.) 65 N. W. 198, 46 Neb. 540.

§ 77. Sufficiency and scope of exceptions.

(Wis.: 1895.)

A general exception to the court's order and finding, dismissing an appeal from the taxation of costs by the clerk, does not bring up for review any ruling upon any specific item of costs, or as to whether the costs allowed were excessive.—*Wirth v. Bartell* (Wis.) 62 N. W. 408, 89 Wis. 594.

§ 78. — To findings of fact and conclusions of law.

[a] (N. D.: 1894.)

Where exceptions to findings of fact do not specify wherein such findings are not justified by the evidence, the record will not be explored to determine whether the evidence is sufficient.—*Hosstetter v. Brooks Elevator Co.* (N. D.) 61 N. W. 49.

4 N. D. 357.

[b] (Wis.: 1895.)

An exception "to the finding of fact as stated therein, because the same is contrary to the evidence," is sufficiently specific where, in the finding, there is but a single proposition to which it is pertinent.—*Henrizi v. Kehr* (Wis.) 63 N. W. 285.

90 Wis. 344.

[c] (Wis.: 1896.)

An exception that a party excepts to a finding of fact or conclusion of law, designated by number, without stating the grounds of exception, is sufficient, if the finding or conclusion involves only a single proposition.—*Reinke v. Wright* (Wis.) 67 N. W. 737.

93 Wis. 288.

[d] (Wis.; 1896.)

An exception that a party excepts to a finding of fact, designated by number, without stating the grounds of exception, is sufficient, though the finding joins several propositions, if the finding as to all the propositions is wrong.—*Reinke v. Wright* (Wis.) 67 N. W. 737. 93 Wis. 368.

2. MOTION FOR NEW TRIAL AND OBJECTIONS THEREON.

Necessity of motion for new trial, see, also, "Error, Writ of," § 5.

—of raising objection on motion for new trial, see, also, "Error, Writ of," § 6.

§ 79. Affidavits on motion for new trial. (Neb.; 1895.)

In order to obtain a review for misconduct of the jury, the facts showing such misconduct must be submitted by affidavits to the district court on a motion for a new trial.—*Houston v. City of Omaha* (Neb.) 62 N. W. 251. 44 Neb. 63.

§ 80. Necessity of motion for new trial.

[a] (Neb.; 1895.)

A judgment will not be disturbed for errors occurring during the trial and in the rendition of the judgment, if a ruling on a motion for a new trial is not shown to have been made in the court below.—*Leech v. Renwald* (Neb.) 63 N. W. 387.

45 Neb. 207.

[b] (Neb.; 1895.)

In order to review the sufficiency of evidence, a motion for a new trial assigning insufficiency must be filed and ruled on in the lower court.—*Losure v. Miller*, 63 N. W. 863, 45 Neb. 465; *Same v. Thompson*, 63 N. W. 863, 45 Neb. 466.

[c] (Neb.; 1896.)

The record may be reviewed on appeal to ascertain whether the pleadings support the judgment, though there was no motion for new trial.—*Farris v. State*, 65 N. W. 890, 46 Neb. 857.

[d] (Neb.; 1896.)

A motion for a new trial is unnecessary to present to this court the question whether the petition states a cause of action.—*Scarborough v. Myrick* (Neb.) 66 N. W. 867.

47 Neb. 794.

[e] (S. D.; 1895.)

An appeal from a judgment entered before a new trial is applied for presents for review only errors of law brought up by a bill of exceptions.—*Baird v. Gleckler* (S. D.) 64 N. W. 118.

[f] (S. D.; 1895.)

Where, in an election contest, the question is as to the legal effect of ballots before the court, to be gathered without evidence aliunde, the question is one of law, so that the decision thereon may be reviewed on appeal without a motion for new trial.—*Le Claire v. Wells* (S. D.) 64 N. W. 519.

[g] (Wis.; 1896.)

A motion for new trial before judgment is not necessary to review error in directing a verdict.—*Plankinton v. Gorman* (Wis.) 67 N. W. 1128.

93 Wis. 560.

§ 81. — Review of decision of intermediate court.

[a] (Neb.; 1896.)

A ruling of the district court dismissing an appeal taken from an inferior court may be reviewed, without an exception having been taken, or a motion for new trial having been made.—*Claffin v. American Nat. Bank* (Neb.) 65 N. W. 1056, 46 Neb. 884.

[b] (Neb.; 1896.)

A motion for a new trial is not necessary to obtain a review of a decision of a district court reversing a cause brought to that court on error from a county court.—*Weitz v. Walter A. Woods Reaping & Mowing Mach. Co.* (Neb.) 68 N. W. 613.

§ 82. — Review of sufficiency of evidence.

[a] (Neb.; 1895.)

Where no motion for new trial was made, the supreme court will not inquire into the sufficiency of the evidence to support the verdict or findings.—*Hansen v. Kinney* (Neb.) 64 N. W. 710, 46 Neb. 207.

[b] (Neb.; 1897.)

An objection that the finding and judgment are unsupported by the evidence will not be considered, unless presented to the district court by means of a motion for a new trial, and a ruling had thereon.—*Shaw v. Robinson & Stokes Co.* (Neb.) 70 N. W. 953.

[c] (Wis.; 1896.)

In the absence of a motion for new trial before judgment, the sufficiency of the evidence to sustain the verdict cannot be considered.—*Plankinton v. Gorman* (Wis.) 67 N. W. 1128.

93 Wis. 560.

§ 83. Necessity of making objections on motion for new trial.

[a] (Neb.; 1896.)

If an objection that the verdict exceeds the sum prayed for in the petition, is not raised on motion for new trial, it is waived.—*Fox v. Graves*, 65 N. W. 887, 46 Neb. 812.

[b] (Neb.; 1896.)

By failure to mention, in a motion for a new trial, the ruling upon a motion to make more specific and certain the averments of a pleading, the party complaining waives his right to have reviewed the ruling complained of.—*Barker v. Davies* (Neb.) 66 N. W. 11.

47 Neb. 78.

[c] (Neb.; 1896.)

Objections to the competency of jurors cannot be reviewed in the supreme court when no such question was raised in the motion for a new trial.—*Mengedocht v. Von Dorn* (Neb.) 67 N. W. 858.

48 Neb. 880.

[d] (S. D.; 1895.)

Where an appeal is taken only from an order denying a new trial, errors which were neither urged nor presented in the bill of exceptions at the hearing of the motion will not be reviewed.—*Tootle v. Petrie* (S. D.) 65 N. W. 43.

[e] (S. D.; 1896.)

The insufficiency of the evidence to justify the findings or verdict will only be reviewed when made one of the grounds for a new trial.—*Gade v. Collins* (S. D.) 66 N. W. 466.

[f] (S. D.; 1897.)

To exclude after trial, without notice to plaintiff, the note sued on and admitted in evidence, is "an irregularity in the proceedings of the court," by which a "party was prevented from having a fair trial" (Comp. Laws, § 5088, subd. 1), which cannot be reviewed on appeal; such statutory ground of new trial not having been designated, as required by section 5090, in notice of intention to move for new trial.—*Moddie v. Breiland* (S. D.) 70 N. W. 637.

§ 84. — Instructions.

[a] (Iowa; 1895.)

Instructions cannot be complained of, if not excepted to at the time, and no ground of exceptions is stated in the motion for a new trial.—*Thompson v. Anderson*, 63 N. W. 355; *Dean v. Zenor*, 65 N. W. 410.

[b] (Neb.)

Exceptions as to the giving or refusal of instructions will not be considered, unless spe-

cially assigned in the motion for new trial.—(1895) *Hamilton v. Goff*, 63 N. W. 807, 15 Neb. 559; (1896) *Denise v. City of Omaha*, 69 N. W. 119; (1897) *Behrends v. Beyschlag*, 69 N. W. 835.

[c] (Neb.; 1896.)

The neglect of the district court to file with the clerk instructions given, in order to be available as ground for reversal, must be called to the attention of that court by means of the motion for a new trial.—*Chicago, R. & Q. R. Co. v. Shafer* (Neb.) 68 N. W. 342.

[d] (Neb.; 1897.)

Instructions given cannot be reviewed if not called to the attention of the trial court in the motion for new trial.—*Union Pac. Ry. Co. v. Thorne* (Neb.) 70 N. W. 1119.

[e] (N. D.; 1895.)

Error in instructions may be reviewed on appeal from the judgment without a motion for a new trial having been made.—*McPherrin v. Jones* (N. D.) 65 N. W. 685, 5 N. D. 261.

§ 85. Necessity of assigning error in denial of motion for new trial.

(S. D.; 1897.)

An assignment of error based on the direction of a verdict presents a reviewable question of law, though the denial of a new trial is not assigned as error.—*Carroll v. Nisbet* (S. D.) 70 N. W. 634.

§ 86. Ruling on motion made after judgment.

[a] (S. D.; 1896.)

An appeal from the judgment alone does not bring to this court for review an order denying or granting a new trial made after judgment.—*Gale v. Collins* (S. D.) 66 N. W. 466.

[b] (S. D.; 1896.)

Where the order denying a new trial is made after judgment, an appeal from the judgment does not bring up for review the sufficiency of the evidence.—*Hagaman v. Gillis* (S. D.) 68 N. W. 192.

V. ASSIGNMENT OF ERRORS.

Sufficiency of briefs, see post, § 103.

Waiver of objections by failure to argue assignments, see post, § 261.

In proceedings in error, see "Error, Writ of," § 4.

§ 87. Necessity.

[a] (Iowa; 1895.)

An appeal from a judgment sustaining a demurrer to a petition in equity cannot be considered, assignments of error not having been made; the right of the supreme court to try equity cases anew being limited by Code, § 2742, to cases where issues of fact are joined, and evidence taken thereon.—*Exchange Bank v. Pottorfe* (Iowa) 65 N. W. 312.

[b] (Iowa; 1896.)

Where there is no assignment of errors, an order of the trial court sustaining a demurrer will not be reviewed on appeal.—*Marshall v. Westrope* (Iowa) 67 N. W. 257.

[c] (Mich.; 1896.)

A judgment will not be reversed on a point not presented to the trial court, and which is not covered by an assignment of error.—*Graves v. Lyon Bros. & Co.* (Mich.) 68 N. W. 985.

[d] (Neb.; 1895.)

An error which has not been assigned will not be reviewed on appeal.—*Erick v. Omaha Nat. Bank*, 62 N. W. 67, 43 Neb. 613.

[e] (Neb.; 1895.)

Errors in the admission or rejection of testimony cannot be considered, unless the particular rulings complained of are specified by as-

signment of error.—*Edney v. Baum* (Neb.) 62 N. W. 161.

41 Neb. 294.

[f] (N. D.; 1895.)

Errors not specified in the bill of exceptions or assigned in appellant's brief will not be considered.—*First Nat. Bank v. Merchants' Nat. Bank*, 64 N. W. 941, 5 N. D. 161; *Schmitz v. Heger*, 61 N. W. 943, 5 N. D. 165.

§ 88. In bill of exceptions.

(N. D.; 1894.)

The rule that, where the bill of exceptions contains no specifications of errors of law, such errors will not be considered on appeal, applies to a trial by the court, where no motion for a new trial is made.—*Hostetter v. Brooks Elevator Co.* (N. D.) 61 N. W. 49, 4 N. D. 357.

§ 89. Sufficiency.

[a] (Iowa; 1894.)

Under Code, § 3207, requiring an assignment of error to point out the very error objected to, where it is impossible to know what particular error is relied upon, except by resort to the argument, the assignment is not sufficient.—*Calkins v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 423, 92 Iowa, 714.

[b] (Minn.; 1895.)

"That the court erred in granting defendant's motion to dismiss the action" is a good assignment of error.—*Ermentrout v. American Fire Ins. Co. of Philadelphia* (Minn.) 62 N. W. 543, 60 Minn. 418.

[c] (Neb.; 1895.)

Under an assignment of error, "Misconduct by the jury," the action of the jury which it is claimed amounted to misconduct must be stated in the petition in error.—*Houston v. City of Omaha* (Neb.) 62 N. W. 251, 44 Neb. 63.

[d] (Neb.; 1895.)

An assignment of error that the verdict is against the weight of the evidence is not good, but should be that the verdict is not sustained by sufficient evidence.—*Barmby v. Wolfe* (Neb.) 62 N. W. 318, 44 Neb. 77.

[e] (Neb.; 1897.)

Whether there was error in the assessment of the amount of recovery will not be considered unless raised by a proper assignment.—*Montgomery v. Albion Nat. Bank* (Neb.) 70 N. W. 239.

[f] (N. D.; 1894.)

Where assignments of error do not refer to the abstract, they are insufficient assignments, under Sup. Ct. Rule 15, and will not be considered unless, for satisfactory reasons, said rule is relaxed, in furtherance of justice, and on such terms as may be deemed just.—*Hostetter v. Brooks Elevator Co.* (N. D.) 61 N. W. 49, 4 N. D. 357.

§ 90. Indefiniteness.

[a] (Iowa; 1895.)

Assignments that the court erred in sustaining defendant's demurrer to plaintiff's reply, and in entering judgment against plaintiff for costs, and in dismissing plaintiff's petition, are too general, in not pointing out any particular ground as error.—*Esty v. Magee* (Iowa) 62 N. W. 673.

[b] (Iowa; 1895.)

Code, § 3207, provides that an assignment of error must, in a way as specific as the case will allow, point out the very error objected to. *Held*, that assignments that the court erred in sustaining or overruling objections to the testimony of certain witnesses, in giving instructions referred to only by numbers, in holding the verdict not contrary to law and sustained by the evidence, in overruling a motion for a new trial, and in ren-

dering judgment on the verdict, are insufficient.—*Keokuk Stove Works v. Hammond* (Iowa) 63 N. W. 563.

[c] (Iowa; 1895.)

Assignments of error which state that the court erred in giving instructions of certain numbers, and in refusing instructions asked of certain numbers, are too indefinite.—*Koenigs v. Chicago, M. & St. P. R. Co.* (Iowa) 63 N. W. 314.

[d] (Iowa; 1896.)

An assignment that the court erred in sustaining a motion for default and judgment, and to strike an amended and substituted petition, is not sufficiently specific.—*Guyar v. Minnesota Thresher Manuf'g Co.* (Iowa) 66 N. W. 83.

[e] (Iowa; 1896.)

Assignments of error that do not point out the specific grounds of objection will not be considered.—*Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.* (Iowa) 66 N. W. 96.

[f] (Iowa; 1896.)

Assignments that the court erred in overruling a motion in arrest of judgment, and in overruling a motion to set aside the verdict, are not sufficiently specific.—*Moffitt v. Albert* (Iowa) 66 N. W. 162.

[g] (Iowa; 1896.)

When a motion to direct a verdict was based on several grounds, an assignment predicated error merely on the sustaining of the motion is insufficient.—*Shakman v. Potter* (Iowa) 66 N. W. 1045.

[h] (Mich.; 1896.)

An assignment of error, that "the court erred in directing a verdict for the defendants," is sufficiently specific under Sup. Ct. Rule No. 12 (68 N. W. xiv.).—*Conely v. Dudley* (Mich.) 69 N. W. 151.

[i] (Minn.; 1896.)

The trial court, by its judgment, made several separate and distinct directions as to the application of the proceeds from the sale of the real estate to the payment of the several lien claimants. *Held*, that a general assignment of error, that the court erred in directing the application of the proceeds of the property, is insufficient to call in question the correctness of the judgment as to the order of the sale of the real estate, or as to the application of the proceeds thereof.—*Malmgren v. Phinney* (Minn.) 67 N. W. 649.

[j] (Minn.; 1896.)

The trial court made 11 separate findings of fact, and the motion for a new trial was made on 4 distinct grounds. *Held*, that neither an assignment of error that the findings of fact are not justified by the evidence, nor that the court erred in denying a new trial, is sufficient to present for review any specific errors.—*Mahler v. Merchants' Nat. Bank* (Minn.) 67 N. W. 655.

[k] (Neb.; 1895.)

An assignment, "errors of law occurring at the trial," is insufficient to authorize a review in the supreme court on a petition in error.—*Risse v. Gascon*, 61 N. W. 616, 43 Neb. 287.

[l] (Neb.; 1895.)

An assignment, "Errors of law occurring at the trial," in a petition in error is too indefinite.—*Houston v. City of Omaha* (Neb.) 62 N. W. 251.

44 Neb. 63.

[m] (Neb.; 1895.)

An assignment of error, "Irregularity in the proceedings of the court and jury, by which plaintiff was prevented from having a fair trial," is too indefinite.—*Houston v. City of Omaha* (Neb.) 62 N. W. 251.

44 Neb. 63.

[n] (Neb.; 1895.)

An assignment of error that "there was error of law occurring at the trial, duly excepted to," is not sufficient to obtain a review on the

admission of testimony.—*Schelly v. Schwank*, 62 N. W. 1069, 44 Neb. 504; *Moore v. Hubbard*, 63 N. W. 847, 45 Neb. 612.

[o] (Neb.; 1896.)

An assignment that a verdict is "contrary to the instructions of the court" will be overruled if the verdict is in accordance with any one of the instructions.—*Aetna Ins. Co. v. Simmons* (Neb.) 69 N. W. 125.

[p] (S. D.; 1895.)

Where the instructions are not questioned, and the verdict is consistent therewith, there is nothing to examine on appeal under an assignment that "the verdict is against the law."—*Bauder v. Schamber* (S. D.) 63 N. W. 227.

§ 91. Scope.

[a] (Iowa; 1896.)

In an action against a mortgagee for conversion the defendant cannot, on appeal, raise the objection that conversion, being a possessory action, will not lie against a mortgagee of chattels under general assignments of error that the verdict is contrary to the law, and that the court erred in overruling a motion for a new trial.—*Casey v. Ballou Banking Co.* (Iowa) 67 N. W. 98.

[b] (Minn.; 1897.)

The correctness of a charge that the measure of damages on breach of a contract to deliver a certain separator was the difference in value as it was when the contract was made and what it would have been if defendant had complied with the contract cannot be questioned under an assignment that the court erred when charging that the measure of damages was "what the machine would have been worth if it had been as warranted."—*Hanson v. Gaar, Scott & Co.* (Minn.) 70 N. W. 853.

[c] (Neb.; 1896.)

An assignment of error that "the verdict is contrary to the evidence, and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means," does not raise the question of error in assessment of the amount of recovery by the jury independently or aside from the consideration of the influence of passion, prejudice, or undue means.—*Beavers v. Missouri Pac. R. Co.* (Neb.) 66 N. W. 821.

47 Neb. 761.

[d] (Neb.; 1896.)

Neither is such question presented by the portion of the assignment quoted, contained in the following words: "The verdict is contrary to the evidence."—*Beavers v. Missouri Pac. R. Co.* (Neb.) 66 N. W. 821.

47 Neb. 761.

[e] (Neb.; 1896.)

An assignment of error that the verdict is contrary to law does not present for review errors in the instructions.—*Drexel v. Daniels* (Neb.) 68 N. W. 399.

[f] (Neb.; 1896.)

An assignment of error that the verdict is contrary to law raises the question whether it is contrary to the law as contained in the charge.—*Drexel v. Daniels* (Neb.) 68 N. W. 399.

[g] (Neb.; 1897.)

Under an assignment that the damages are excessive, the admission of evidence of items of damage will not be reviewed.—*Roberts v. Hopper* (Neb.) 70 N. W. 244.

§ 92. Rulings on pleadings.

[a] (Iowa; 1894.)

Where the petition contained but one count, and the demurrer thereto was general, an assignment that "the court erred in overruling defendants' demurrer to the petition" is sufficiently specific.—*Sneer v. Stutz* (Iowa) 61 N. W. 397.

93 Iowa, 62.

[16] (Iowa; 1896.)

An assignment of error that the trial court erred in sustaining a demurrer is not sufficiently specific to be considered. *Guyar v. Minnesota Thresher Manuf'g Co.* (Iowa) 66 N. W. 83.

§ 93. Ruling on evidence.**[1a] (Iowa; 1895.)**

An assignment of error, that the "court erred in his rulings on the objections to the questions, where the questions and objections are set out in the foregoing abstract," is too general to be considered on appeal.—*Dungan v. Iowa Cent. Ry. Co.* (Iowa) 64 N. W. 762.

[1b] (Iowa; 1895.)

Assignments of error that the court erred in "overruling defendant's objections to the evidence offered by plaintiff," and "in sustaining plaintiff's objections to evidence offered by defendant," are too general to be considered on appeal.—*Burnside v. Eaton* (Iowa) 64 N. W. 786.

[1c] (Iowa; 1895.)

An assignment of error which states that "the court erred in admitting testimony objected to by the defendant, and in excluding testimony offered by the defendant," is too indefinite.—*Buford v. Devoe* (Iowa) 65 N. W. 413.

[1d] (Neb.; 1895.)

To obtain a review of the rulings on the admission and rejection of evidence, the petition in error must specifically designate the rulings complained of.—*City of Chadron v. Glover* (Neb.) 62 N. W. 62, 43 Neb. 732.

[1e] (Neb.; 1895.)

An assignment of error as "errors of law occurring at the trial, excepted to at the time," is too indefinite to secure a review of the rulings on the admission or exclusion of testimony.—*Mullen v. Morris*, 62 N. W. 74, 43 Neb. 596.

[1f] (Neb.; 1895.)

An assignment of error in admitting evidence of a certain witness will be overruled if any of such evidence was properly received.—*Sigler v. McConnell*, 63 N. W. 870, 45 Neb. 598; *Kearney Electric Co. v. Langhlin*, 63 N. W. 941, 45 Neb. 390.

[1g] (Neb.; 1895.)

An assignment of error that the court erred in admitting the evidence of a certain witness will be overruled if any of that witness' evidence is competent.—*Eagle Fire Co. v. Globe Loan & Trust Co.* (Neb.) 62 N. W. 895, 44 Neb. 380.

[1h] (Neb.; 1895.)

This court will not review the rulings of a trial court admitting testimony, unless the particular rulings claimed to be erroneous are definitely pointed out in the allegations of the petition in error.—*Stoppert v. Nierle* (Neb.) 63 N. W. 382, 45 Neb. 105.

[1i] (Neb.; 1895.)

Alleged error in the admission or rejection of evidence will not be considered where the evidence admitted or rejected is not specifically assigned in the petition in error.—*Redman v. Voss*, 64 N. W. 1094, 46 Neb. 512.

[1j] (Neb.; 1896.)

An assignment that "the court erred in excluding certain evidence offered by the plaintiffs in error, to the excluding of which the plaintiffs in error then and there excepted," is too indefinite to be considered.—*Coburn v. Watson* (Neb.) 67 N. W. 171, 48 Neb. 257.

[1k] (Neb.; 1896.)

An assignment in a petition in error of "errors at law occurring at the trial and duly excepted to" is not sufficiently specific to raise and present questions pertaining to rulings of the trial judge in regard to the admission of

evidence. *Imhoff v. Richards* (Neb.) 67 N. W. 483.

48 Neb. 590.

[11] (Neb.; 1896.)

Alleged errors in the admission of evidence, to be available, must be specifically assigned.—*Graham v. Frazier* (Neb.) 68 N. W. 367.

[1m] (Neb.; 1897.)

An assignment that the court erred in permitting the introduction of evidence must specifically designate the ruling complained of.—*Woodbridge v. De Witt* (Neb.) 70 N. W. 506.

§ 94. Ruling on motion for new trial.**[1a] (Iowa; 1895.)**

Under Code, § 3207, requiring assignments of error to be as specific as the case will allow, and point out the error objected to, an assignment of error which states that "defendant specifically claims that the court erred in each and every particular mentioned in his motion for a new trial, to which reference is here made, and which is made a part hereof," will not be considered where the motion for a new trial contained 16 grounds.—*Koenigs v. Chicago, M. & St. P. R. Co.* (Iowa) 65 N. W. 314.

[1b] (Iowa; 1895.)

An assignment of error that "the court erred in overruling the motion for new trial" is sufficient, and does not attack the sufficiency of the evidence; there having been four other separate grounds for the motion for new trial, in addition to the one that the verdict was contrary to the evidence.—*Dean v. Zenor* (Iowa) 65 N. W. 410.

[1c] (Neb.; 1895.)

An assignment in the petition in error that the court erred in overruling the motion for a new trial is too indefinite, where the motion for a new trial assigns several different grounds therefor.—*City of Chadron v. Glover* 62 N. W. 62, 43 Neb. 732.

[1d] (Neb.; 1895.)

An assignment of error in denying a new trial, which fails to specify to which of the several points made by the motion the assignment applies, is insufficient.—*Moore v. Hubbard* 63 N. W. 847, 45 Neb. 612; *Pearce v. McKay*, 63 N. W. 851, 45 Neb. 296; *Sigler v. McConnell*, 63 N. W. 870, 45 Neb. 598.

§ 95. Necessity of incorporating assignments in bill of exceptions or statement.**(S. D.; 1895.)**

It is not sufficient that specifications of error of law or particulars in which evidence is insufficient be contained in the notice of intention to move for a new trial, or elsewhere than in the bill of exceptions or statement on motion for new trial, except when the motion is made on the minutes of the court.—*Chandler v. Kennedy* (S. D.) 65 N. W. 439.

§ 96. Joint assignment by several parties.**[1a] (Neb.; 1895.)**

A joint assignment of errors, which cannot be sustained as to all who joined therein, is bad as to all.—*Small v. Sandall*, 63 N. W. 824, 45 Neb. 306; *Harold v. Moline, Milburn & Stoddard Co.*, 63 N. W. 929, 45 Neb. 618.

[1b] (Neb.; 1897.)

Where two defendants join in a petition in error, an assignment of error which is not good as to all who join must be overruled as to all.—*Minneapolis Threshing-Mach. Co. v. Regier* (Neb.) 70 N. W. 934.

§ 97. Including several propositions in one assignment—Instructions.**[1a] (Minn.; 1897.)**

Assignments that "the court erred in its instructions to the jury," and that "the court erred in refusing the instructions requested by

defendant," are too general where there were several exceptions and requests.—*Carpenter v. Eastern Ry. Co.* (Minn.) 69 N. W. 720.

[d] (Neb.: 1895.)

Where instructions are grouped in the petition in error in which the giving and refusal of them is assigned as error, such error will be examined no further than to determine that, of those given, one was correct, or, of those refused, the refusal of one was proper.—*Schelly v. Schwank* (Neb.) 62 N. W. 1069.

44 Neb. 504.

[e] (Neb.: 1895.)

When any one of several instructions asked was erroneous, or any one of the several given was proper, an assignment of error that the court erred in refusing to give the instructions asked, or erred in giving those given, which refers to the several instructions by number merely, is without foundation.—*Ripp v. Hale*, 64 N. W. 454, 45 Neb. 567.

[d] (Neb.: 1896.)

An assignment of error that "the court erred in giving instructions Nos. 1 and 2 on its own motion" will be considered no further than to learn that either instruction was proper.—*McCormal v. Redden*, 65 N. W. 881, 46 Neb. 776.

[e] (Neb.: 1896.)

An assignment of error as to the giving of a number of instructions grouped in the assignment will be considered no further than to ascertain that any one of the group was correctly given.—*Oltmanns v. Findlay* (Neb.) 66 N. W. 425.

47 Neb. 289.

[f] (Neb.: 1896.)

Errors in respect to giving instructions must be assigned separately, and, if assigned in groups, will be considered no further than to ascertain that one of the instructions complained of was properly given.—*Fairfield v. Kerns* (Neb.) 67 N. W. 166.

48 Neb. 254.

[g] (Neb.: 1896.)

An assignment of errors in a group, as to giving or refusing to give instructions, will be examined no further, when it is found that one of the first-indicated group was properly given, or of the last-indicated group, one was properly refused.—*Newman v. Ryne* (Neb.) 67 N. W. 189.

48 Neb. 362.

[h] (Neb.: 1896.)

An assignment of error as to the giving or refusing to give a group of instructions will be considered no further than to ascertain that any one of such group was properly given or refused.—*Woodworth v. Parrott* (Neb.) 67 N. W. 761.

48 Neb. 675.

[i] (Neb.: 1896.)

An assignment of error that "the court erred in giving instructions 2, 3, 5, 6, 7, and 8, and each of them, asked for by plaintiff," is sufficiently specific to call for review of each of the instructions specified. *Russel v. Rosenbaum* (1888) 40 N. W. 287, 24 Neb. 769, overruled.—*C. Aultman & Co. v. Martin* (Neb.) 68 N. W. 340.

[j] (Neb.: 1896.)

An assignment of error based on the giving of a group of instructions is insufficient if any one of the instructions included in the group was proper.—*Dempster Mill Manuf'g Co. v. First Nat. Bank* (Neb.) 68 N. W. 477.

[k] (Neb.: 1896.)

Where several instructions are grouped in one assignment of error, they will be examined no further than to determine that a single one thereof was rightly given or rightly refused.—*Stough v. Ogden* (Neb.) 68 N. W. 516.

[l] (Neb.: 1897.)

An assignment of error as to instructions made in gross will be overruled if any one of

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the instructions was correct.—*Behrends v. Bayschlag* (Neb.) 69 N. W. 835.

[m] (Neb.: 1897.)

If instructions are grouped in an assignment of error, the determination that the action of the court complained of was proper as to one of such instructions disposes of the entire assignment.—*Town v. Missonri Pac. Ry. Co.* (Neb.) 70 N. W. 402.

[n] (Neb.: 1897.)

Where several instructions are grouped in a single assignment of the motion for a new trial, they will be examined so far only as is necessary to determine whether all were rightly given or refused.—*Kliment v. Corcoran* (Neb.) 70 N. W. 910.

§ 98. Amendment.

[a] (Minn.: 1896.)

The assignment of errors cannot be amended by the appellant, after his time for serving them has passed, without the consent of the respondent or leave of the court.—*Minneapolis, St. P. & S. M. Ry. Co. v. Home Ins. Co.* (Minn.) 66 N. W. 132.

64 Minn. 61.

[b] (Minn.: 1897.)

Appellant cannot amend his assignments of error after time for serving them has passed, except by consent of the respondent or leave of court.—*Carpenter v. Eastern Ry. Co.* (Minn.) 69 N. W. 720.

§ 99. Time of filing.

[a] (Iowa: 1895.)

The assignment of errors was not filed 10 days before the trial term, as required by Code. § 3183, and appellee moved to strike it from the files. The motion was submitted with the case, and in his argument, subsequently filed, appellee discussed the merits of the case, and considered the motion. Afterwards an affidavit was filed excusing the delay in filing the assignment of errors. *Held*, that the assignment should be treated as filed with the affidavit, and be stricken from the files because filed after argument.—*Young v. Scoville* (Iowa) 63 N. W. 607.

[b] (Iowa: 1896.)

Assignments of error will not be stricken out because not filed within the time required by the rules (section 51), where they were filed more than 10 days before the commencement of the term, and before it was necessary for appellee to make his argument.—*Lundon v. Waddick* (Iowa) 67 N. W. 388.

§ 100. — Waiver of failure to file.

(Iowa: 1895.)

Code, § 3183, gives appellant till 10 days before the first day of the trial term in which to file and serve an assignment of errors. Sup. Ct. Rule 51, 67 Iowa, 753, provides that, in all cases where an assignment of errors is necessary, the same shall be served on the opposite party at the time the abstract is filed. *Held*, that as, notwithstanding the rule, appellant is not bound to serve and file the assignment with the abstract, if the latter be filed before the time limited by the Code for filing the assignment, appellee does not waive the failure to file the assignment of errors within the time provided by the Code by not objecting at the time that it was not served on him with the abstract.—*Exchange Bank v. Pottorfe* (Iowa) 65 N. W. 312.

§ 101. Variance from record.

(Mich.: 1895.)

Where the record recited that the court charged that "newspapers, if they act honestly as to the sources of the reliability of their information, are excused from liability, so far as malice and exemplary damages, or any damages, are concerned," but the assignment of error complaining of the charge omitted the words "or any damages," it will be presumed that the

charge was given without the words complained of. *Maguire v. Vaughan* (Mich.) 64 N. W. 44.

VI. BRIEFS.

Matters not urged in, see post, § 261.

§ 102. Effect of failure to file.

(Neb.; 1894.)

Where no brief has been filed by either party a judgment, conforming to the pleadings and evidence will be affirmed. — *Langdon v. Campbell*, 61 N. W. 81, 43 Neb. 67.

§ 103. Sufficiency.

[a] (Mich.; 1895.)

Where, on appeal, counsel claim that a statement in the instructions as to the evidence is erroneous, the testimony in the record on which the error is based must be pointed out, or it will not be considered. — *Rogers v. Ferris* (Mich.) 61 N. W. 1018.

[b] (Neb.; 1896.)

After an argument on certain branches of law, the brief recited that "the other errors referred to appear seriatim upon the record, at pages 1, 5," etc. "A reference to the record we think a sufficient presentation of these various assignments, to which we ask the attention of the court without further argument." *Held*, that the errors would not be reviewed. — *Actua Ins. Co. v. Simmons* (Neb.) 69 N. W. 125.

VII. RECORD.

On appeal from justice, see post, § 165.

Expense of, see "Costs," § 31.

In proceedings in error, see "Error, Writ of," § 7.

1. IN GENERAL.

§ 104. In general.

[a] (Iowa; 1896.)

A full transcript of the proceedings in the court below, and a reference to its pages, made by counsel, in their argument, in citing material evidence, are not sufficient, under the rules, to present the case. — *Maher v. Shenhall* (Iowa) 65 N. W. 978.

[b] (Neb.; 1896.)

A bill of exceptions which has been quashed cannot be considered to determine whether the evidence supports the verdict. — *City Nat. Bank v. Thomas*, 65 N. W. 895, 46 Neb. 861.

[c] (Neb.; 1896.)

An order will not be made in the supreme court requiring a reporter of the district court to prepare a transcript of evidence preliminary to the settlement of a bill of exceptions, when the record discloses that a like order has been made by the district judge on condition that the reporter's legal fees should first be paid, and it does not appear that the order was complied with, and there is no attempt to have it reviewed. — *Argabright v. State*, 65 N. W. 886, 46 Neb. 822.

[d] (S. D.; 1894.)

In an appeal from a judgment awarding a preliminary writ of mandamus, there having been no alternative writ, the record is the affidavit of plaintiff, the answer of defendant, and the judgment of the court certified, as required by Comp. Laws, § 5217, for the certification of a judgment roll. — *Hardy v. Purinton* (S. D.) 61 N. W. 158.

6 S. D. 382.

§ 105. Duty to file transcript.

(Neb.; 1895.)

An appeal will be dismissed where the appellant fails to file a certified transcript of the proceedings in the court below as they appeared

of record in the office of the clerk of that court. — *Felber v. Boyd* (Neb.) 62 N. W. 1959, 44 Neb. 700.

§ 106. Bringing in original bill of exceptions.

(Neb.; 1896.)

The original bill of exceptions will not be examined, unless authenticated in the manner prescribed by statute. — *Andres v. Kridler* (Neb.) 66 N. W. 649.

47 Neb. 585.

§ 107. Sending up original papers.

[a] (Neb.; 1895.)

Where an appeal is required to be heard on a certified transcript of the proceedings (Code Civ. Proc. § 586), an appeal cannot be heard on the original pleadings, though the parties may so stipulate. — *School Dist. No. 49 of Adams County v. Cooper* (Neb.) 62 N. W. 1084.

44 Neb. 714.

[b] (Neb.; 1897.)

The filing of the original pleadings and documents belonging to the record, instead of the certified transcript required by statute, will not give jurisdiction, though the parties stipulate to that effect. — *Smith v. Beagle* (Neb.) 69 N. W. 936.

[c] (Neb.; 1897.)

The requirement that a transcript of the proceedings be filed in the supreme court is not complied with by filing the original pleadings with a certified transcript of the record showing the entry of a judgment. — *Peck v. Nebraska Loan & Trust Co.* (Neb.) 69 N. W. 777.

§ 108. Preservation of objections and exceptions.

[a] (Iowa; 1895.)

That the uniform mode of practice in any county in the state has been to consider that exceptions were taken to instructions of the court without having them shown of record, cannot dispense with the statutory requirement for the taking of exceptions and making them appear of record. — *Bowman v. Western Fur Manufg Co.* (Iowa) 64 N. W. 775.

[b] (Neb.; 1896.)

Assignments of error relating to the giving and refusal of instructions cannot be considered unless the record discloses that exceptions were taken at the trial. — *City of Kearney v. Smith* (Neb.) 66 N. W. 538.

47 Neb. 408.

[c] (Neb.; 1896.)

To present for review the propriety of instructions, it is indispensable that it should appear affirmatively from the record that exceptions were taken to the giving of the instructions complained of. — *Lowe v. Vaughn* (Neb.) 67 N. W. 464.

48 Neb. 651.

[d] (S. D.; 1896.)

An appellant is not required to recite in his abstract the exceptions to evidence reserved during the trial. — *Peart v. Chicago, M. & St. P. Ry. Co.* (S. D.) 67 N. W. 837.

§ 109. Effect of stipulation.

[a] (Minn.; 1895.)

Compliance with Sup. Ct. Rule 9, as amended, requiring paper books and briefs to be filed three days before the day of argument, cannot be dispensed with by a stipulation of the parties. — *Lehigh Coal & Iron Co. v. Scallen* (Minn.) 63 N. W. 245.

61 Minn. 63.

[b] (Neb.; 1895.)

A stipulation of the parties that the transcript contains all the proceedings will not supply the omission of the certificate of the clerk of the trial court to that effect. — *McDonald v. Grabow*, 64 N. W. 1093, 46 Neb. 406.

[c] (Neb.; 1896.)

A stipulation "that the within is a complete transcript of the evidence and all exhibits introduced in the above-entitled cause, and that the same may be filed as the bill of exceptions in said cause, and made a part of the record therein," is not sufficient to authorize an examination of the matters referred to.—*Denise v. City of Omaha* (Neb.) 69 N. W. 119.

[d] (Neb.; 1896.)

The supreme court cannot review a judgment of the district court in the absence of a certified transcript thereof; a stipulation as to the character of the judgment, or a recital thereof in the petition in error, being insufficient.—*Wachsmuth v. Orient Ins. Co.* (Neb.) 68 N. W. 935.

2. TIME OF TRANSMISSION AND FILING.

Time of settling case on appeal, see post, § 130.

§ 110. Effect of failure to file in time.

[a] (Iowa; 1895.)

A case in equity, requiring a transcript of the shorthand notes of the evidence to be filed, cannot be tried *de novo*, where such transcript is not filed within six months from the entering of the judgment, as required by law.—*Independent School-Dist. of Milford v. Ross* (Iowa) 63 N. W. 576.

[b] (Neb.; 1895.)

Where the transcript of the judgment complained of is not filed within six months from the date of the rendition thereof, it cannot be reviewed.—*Hansen v. Kinney* (Neb.) 63 N. W. 926.

[c] (S. D.; 1897.)

An appeal will not be dismissed for delay in filing the record, and serving abstract and briefs, except in an extreme case.—*King v. Waite* (S. D.) 70 N. W. 1056.

§ 111. — Review of sufficiency of evidence.

(Iowa; 1895.)

An exception to a decree, for insufficiency of the evidence to support it, will not be considered, where the transcript of the evidence has not been filed within the time required.—*Independent School-Dist. of Milford v. Ross* (Iowa) 63 N. W. 576.

3. AUTHENTICATION—CERTIFICATE OF JUDGE OR CLERK.

Authentication of bill of exceptions, see post, § 131.

—original bill of exceptions, see ante, § 106.
Certificate as to evidence, see post, §§ 144, 145.

§ 112. Necessity of certificate.

[a] (Neb.; 1895.)

A petition in error, founded on a transcript not authenticated by the certificate of the clerk of the trial court, will be dismissed.—*Otis v. Butters*, 64 N. W. 1093, 46 Neb. 492.

[b] (Neb.; 1895.)

In order to authenticate a document attached to a record as the bill of exceptions, a certificate of the clerk of court is necessary. *Moore v. Waterman* (1894) 58 N. W. 940, 40 Neb. 498, followed.—*Martin v. Fillmore County*, 62 N. W. 363, 44 Neb. 719; *Yenney v. Central City Bank*, 62 N. W. 872, 44 Neb. 402.

[c] (Neb.; 1896.)

A paper purporting to be a motion for a new trial cannot be considered, unless certified to in the transcript by the clerk of the district court.—*Romberg v. Fokken* (Neb.) 66 N. W. 282, 47 Neb. 198.

[d] (Neb.; 1896.)

Instructions which are not authenticated will not be reviewed.—*Burlingim v. Bader* (Neb.) 66 N. W. 288.

47 Neb. 204.

[e] (N. D.; 1897.)

Exhibits offered in the lower court in an action for divorce, under Laws 1893, c. 82, whether received or not, should be identified in the supreme court on appeal, under said act, by the certificate of the trial judge.—*Taylor v. Taylor* (N. D.) 63 N. W. 893.

5 N. D. 58.

§ 113. Sufficiency of certificate.

(Wis.; 1896.)

Under Rev. St. § 3050, providing that on appeal from an order the clerk shall transmit the order and the papers used on application for the order, and shall certify that they are such papers, and are transmitted pursuant to the appeal, he should certify that the papers returned on the appeal are the papers "used on the hearing" of the motion, not that they are the "papers on file in my office."—*Glover v. Wells & Mulrooney Grain Co.* (Wis.) 66 N. W. 799.

93 Wis. 13.

§ 114. Alteration of certificate.

(Neb.; 1895.)

Where the certificate of a clerk attached to the record on appeal is materially altered, with the evident intention of misleading the court, the transcript will be stricken from the files.—*Felber v. Boyd* (Neb.) 62 N. W. 1039.

44 Neb. 700.

§ 115. Matters included in certificate.

(Minn.; 1895.)

Where, on the hearing of a motion in foreclosure proceedings to appoint a receiver pending the action, the court overruled relator's objections to affidavits offered by plaintiff, and sustained plaintiff's objections to affidavits offered by relator, relator was entitled, on appealing from the order appointing the receiver, to have those facts certified by the court.—*State v. Egan* (Minn.) 64 N. W. 813.

62 Minn. 280.

4. NECESSARY CONTENTS—ABSTRACTS.

Review of particular points in absence of certain matters from record, see post, §§ 232-242.

§ 116. Necessary contents.

[a] (Iowa; 1894.)

Where the grounds of appellant's motion for a new trial are not set forth, a denial of that motion cannot be reviewed.—*State v. Bevins* (Iowa) 61 N. W. 187.

92 Iowa, 765.

[b] (Iowa; 1895.)

Where the record on appeal shows that exceptions to instructions on a motion for a new trial were not taken within three days after verdict as required by Code, § 2789, the fact that it does not appear from the record that the time for filing the motion for a new trial was not extended by consent does not entitle appellant to a consideration of such exceptions.—*Hallenbeck v. Garst* (Iowa) 65 N. W. 417.

[c] (Iowa; 1895.)

On appeal from an order taxing attorney fees for the wrongful suing out of an attachment, the evidence with reference to the taxing of such fees is all that is required.—*Dickinson v. Athey* (Iowa) 65 N. W. 326.

[d] (Iowa; 1895.)

In the absence of anything in the abstract to show that it contains all the evidence, it cannot be determined whether the verdict is supported by the evidence, or whether instructions complained of, which properly stated the

law, were applicable.—*State v. Strohbehn* (Iowa) 65 N. W. 304.

[*lc*] (*Mich.*; 1895.)

A record on appeal in an action for an accounting should show the items allowed and disallowed, with exceptions pointing out the disputed items and rulings of the court thereon.—*Loveland v. Peter* (*Mich.*) 65 N. W. 748.

[*ld*] (*Minn.*; 1895.)

An appeal from an order denying a motion for new trial will be dismissed, where that order does not appear to have been made.—(*Granite Savings Bank & Trust Co. v. Weinberg* (*Minn.*) 64 N. W. 380. 62 *Minn.* 202.

[*lg*] (*Minn.*; 1896.)

It must appear on appeal that all the records and proceedings considered below have been returned to the supreme court.—*Firth v. Brack* (*Minn.*) 66 N. W. 987. 64 *Minn.* 242.

[*lh*] (*Minn.*; 1897.)

The record, on an appeal from an order granting a preliminary injunction, is insufficient, where there is no certificate of the judge that the return shows all that was considered by him on the hearing, or certificate of the clerk that the return contains copies of all the papers filed in the case.—*Aure v. Board of Com'rs of Becker County* (*Minn.*) 70 N. W. 791.

[*li*] (*Neb.*; 1895.)

A judgment of the district court, affirming, on error, a judgment of the county court discharging an attachment, cannot be reviewed unless the record contains a complete transcript of the record before the district court.—*Goldsmith v. Wix*, 61 N. W. 718, 43 *Neb.* 573.

[*lj*] (*Neb.*; 1895.)

The word "proceedings," in Code Civ. Proc. § 586, relating to the transcript on appeal, includes the certified copies of the pleadings on which the case was tried.—*School Dist. No. 49 of Adams County v. Cooper* (*Neb.*) 62 N. W. 1084. 44 *Neb.* 714.

[*lk*] (*Neb.*; 1896.)

Should a party desire to urge in the supreme court that he was entitled to a judgment in his favor upon the pleadings, they must be copied into the transcript.—*Lewis Inv. Co. v. Boyd* (*Neb.*) 67 N. W. 456. 48 *Neb.* 604.

[*ll*] (*Neb.*; 1896.)

The supreme court can take notice of no proceedings in the lower court which are not recited in the record.—*Brown v. Fitzpatrick* (*Neb.*) 68 N. W. 937.

[*lm*] (*Wis.*; 1897.)

The findings of fact by the trial court cannot be reviewed where the bill of exceptions does not contain all the evidence given at the trial.—*Williamson v. Neeves* (*Wis.*) 69 N. W. 806.

§ 117. — Showing as to notice of appeal.

[*a*] (*Iowa*; 1895.)

Where the abstract does not show that a notice of appeal was served upon the clerk of the district court, the appeal must be dismissed.—*Merchant v. Soleman* (*Iowa*) 63 N. W. 464.

[*b*] (*Iowa*; 1896.)

Appeal cannot be entertained, the record not affirmatively showing that notice thereof was served, as required by Code, § 3178.—*Norwegian Plow Co. v. Bruning* (*Iowa*) 65 N. W. 984.

[*c*] (*Iowa*; 1897.)

Notice of appeal is not shown to have been served on an administrator substituted for a deceased defendant, it being merely recited in the abstract that there was legal service of the notice on all the defendants, and the name of the administrator not appearing in the list of

defendants set out in the notice.—*Brundage v. Cheneworth* (*Iowa*) 70 N. W. 211.

[*d*] (*Iowa*; 1897.)

It being recited in the abstract that notice of appeal was served on all the defendants according to statute, and a minor being named as a defendant in the notice, and service on a minor over 14 years old being sufficient (Code, § 2614), proper service to give jurisdiction as to the minor and his guardian will be held to be shown, though it does not appear how old he was.—*Brundage v. Cheneworth* (*Iowa*) 70 N. W. 211.

Curing failure to show service of notice, see post, § 159.

§ 118. — Showing that judgment was rendered and appeal taken.

[*a*] (*Iowa*; 1896.)

A case presented, on bill of exceptions and argument, for review of a refusal of mandamus, will be dismissed, the record not showing that an appeal was taken from the judgment of the lower court.—*Sanger v. Skidmore* (*Iowa*) 66 N. W. 176.

[*b*] (*Iowa*; 1896.)

A proceeding will be dismissed in the supreme court where the record fails to show the taking of an appeal.—*Swigart v. Jackson County* (*Iowa*) 66 N. W. 881.

[*c*] (*Iowa*; 1896.)

Where the record fails to show that an appeal was taken, the appellate court acquires no jurisdiction.—*Brandenburg v. Keller* (*Iowa*) 69 N. W. 448.

[*d*] (*Iowa*; 1897.)

An appeal will be dismissed where the abstract does not show judgment rendered or an appeal.—*Beiter v. Shadle* (*Iowa*) 70 N. W. 722.

§ 119. — Showing as to motion for new trial.

(*Iowa*; 1896.)

Where exceptions taken on motion for a new trial are relied on (Code, § 2789) for the review of instructions, the record must show that the motion was filed within three days after the verdict, as required by the statute.—*Rowen v. Sommers* (*Iowa*) 66 N. W. 897.

§ 120. — On review of ruling on motion for new trial.

[*a*] (*Neb.*; 1896.)

In order to entitle the unsuccessful party to a petition for a new trial under Civ. Code, § 318, to a review in this court, the evidence on the former trial must, when material, be preserved in the bill of exceptions.—*Western Gravel Co. v. Gauer* (*Neb.*) 67 N. W. 150. 48 *Neb.* 246.

[*b*] (*S. D.*; 1896.)

Where an appeal is from the order denying a motion for new trial, the record need not show a judgment.—*Bedford v. Kissick* (*S. D.*) 67 N. W. 609.

§ 121. Necessity of certificate that all the evidence is in.

[*a*] (*Minn.*; 1896.)

Where it is assigned as error that the court refused to make an additional finding, the case or bill of exceptions must show that it contains all the evidence upon the issue upon which the finding was requested.—*Leyne v. Lancashire Ins. Co.* (*Minn.*) 68 N. W. 855.

[*b*] (*Neb.*; 1896.)

On appeal from the granting of a motion which was resisted, the judge certified that the bill of exceptions consisted of fourteen pages. Eight of those pages, however, were absent on appeal, and there was no certification that the bill contained any of the evidence submitted on the hearing of the motion. *Held*, that the bill would not be considered.—*Van Etten v. Test* (*Neb.*) 68 N. W. 1023.

[c] (Wis.; 1896.)

The allowance by a referee of items of account will not be disturbed where there is no certificate in the bill of exceptions that it contains all the evidence.—*Casgrain v. Hamilton* (Wis.) 66 N. W. 118.

92 Wis. 179.

See, also, post, § 123.

§ 122. Essentials to review sufficiency of evidence.

[a] (Iowa; 1895.)

Assignment of error that the verdict is excessive cannot be reviewed, unless the record contains all the evidence.—*Farwell v. Zenor* (Iowa) 65 N. W. 317.

[b] (Iowa; 1896.)

Where the evidence heard on a motion for a new trial is not preserved, and the abstract does not purport to contain all the evidence, it is assumed that there was sufficient evidence before the court to support its finding.—*Maher v. Shenball* (Iowa) 65 N. W. 978.

[c] (Minn.; 1894.)

The sufficiency of the evidence will not be considered where it is not set forth in the case or bill of exceptions.—*Lawrence v. Dalrymple* (Minn.) 61 N. W. 559.

59 Minn. 463.

[d] (Minn.; 1896.)

In the absence of a case or a bill of exceptions, it is presumed that the judgment is supported by the evidence.—*Brigham v. Paul* (Minn.) 66 N. W. 203.

64 Minn. 95.

[e] (Minn.; 1896.)

Where the question to be determined depends on an issue of fact, all the testimony pertaining to such issue must be brought up.—*In re Schmidt's Estate*, 66 N. W. 721, 64 Minn. 211; *Spiesterbach v. Schmidt*, Id.

[f] (Neb.; 1895.)

An assignment that the verdict is not sustained by the evidence cannot be considered where, from the bill of exceptions, it appears that important evidence has been omitted therefrom.—*Omaha Fire Ins. Co. v. Berg* (Neb.) 62 N. W. 862.

44 Neb. 522.

[g] (Neb.; 1896.)

The supreme court will not weigh the evidence when the bill of exceptions reveals that a deposition read upon the trial has been omitted therefrom, even though the trial judge has certified that the bill contains all the evidence offered or given upon the trial.—*Storz v. Finkelstein* (Neb.) 66 N. W. 1020.

48 Neb. 27.

[h] (Neb.; 1896.)

The evidence cannot be reviewed in the absence of a bill of exceptions.—*Winters v. Means*, 67 N. W. 155, 48 Neb. 333; *McKenna v. Dietrick*, 67 N. W. 181, 48 Neb. 433.

[i] (Neb.; 1896.)

Where it is apparent, from an inspection of a bill of exceptions, that material evidence has been omitted therefrom, the judgment or order complained of will not be reversed on account of the insufficiency of the proof.—*Warner v. Hutchins* (Neb.) 67 N. W. 745.

48 Neb. 672.

[j] (Neb.; 1896.)

In the absence of a bill of exceptions, there must be an affirmance of the decree sought to be reviewed, when there is presented by the record no question aside from the sufficiency of the evidence to sustain it.—*Aultman, Miller & Co. v. Welch* (Neb.) 68 N. W. 364.

[k] (S. D.; 1896.)

Where there has been a motion to direct a verdict, the court is required, on appeal, to review the evidence, in order to determine whether, as a matter of law, the verdict was properly directed, or the motion denied; and in such case it is not necessary that the bill of exceptions

should specify the particulars in which the evidence is insufficient.—*Brady v. Kreuger* (S. D.) 66 N. W. 1083.

[l] (Wis.; 1895.)

Where there is no bill of exceptions, the only question presented on appeal is whether the pleadings and findings sustain the judgment.—*Griggs v. Doctor*, 61 N. W. 761, 89 Wis. 161.

[m] (Wis.; 1895.)

Where it does not appear from the bill of exceptions that the record contains all the evidence, a reversal cannot be had on the ground that it does not sustain the judgment.—*In re Meseberg's Estate*, 64 N. W. 1002, 91 Wis. 399; *In re Steiner's Estate*, Id.

§ 123. — Necessity of certificate that all the evidence is in.

[a] (Minn.; 1896.)

The direction of a verdict cannot be reviewed when the bill of exceptions fails to show affirmatively that it contains all the evidence on the issues involved.—*Board of Trustees of Ripon College v. Brown* (Minn.) 68 N. W. 837.

[b] (Wis.; 1895.)

Where the bill of exceptions fails to recite that it contains all the evidence, it will be presumed that the findings of fact were justified by the evidence.—*Davis & Rankin Bldg. & Manufg Co. v. Cupp*, 62 N. W. 520, 89 Wis. 673.

[c] (Wis.; 1895.)

In the absence of a certificate by the trial judge that the bill of exceptions contains all the testimony given, it will be presumed that every fact in issue essential to support the judgment was proved.—*Disotell v. Henry Luther Co.*, 64 N. W. 425, 90 Wis. 635.

§ 124. Abstracts.

[a] (Iowa; 1895.)

The supreme court will take notice of its decision, and the record of a case in which, on rehearing, it has entered a procedendo, so that an abstract on appeal from a decree entered in accordance with the procedendo need not set out the evidence in the case.—*Pitkin v. Peet* (Iowa) 64 N. W. 793.

[b] (Iowa; 1895.)

Under Sup. Ct. Rules, § 117, requiring an abstract on appeal to show the name of the trial judge, it is sufficient if the name of the trial judge appear in any part of the abstract.—*Pitkin v. Peet* (Iowa) 64 N. W. 793.

[c] (Iowa; 1895.)

Where it is not shown that the abstract contains all the evidence, it is insufficient.—*Ainslie v. Wynn* (Iowa) 65 N. W. 401.

[d] (Iowa; 1895.)

Appellant's abstract will not be stricken from the files because not filed within the time fixed by the supreme court rules, it not appearing that appellant was prejudiced thereby in the preparation of the case for submission.—*Gregg v. Spencer* (Iowa) 65 N. W. 411.

[e] (Iowa; 1896.)

An abstract cannot be considered on appeal, it not being certified, and not being stated to be full and complete, and its correctness being denied by appellee.—*Avery Planter Co. v. Martz* (Iowa) 65 N. W. 989.

[f] (Iowa; 1896.)

A denial of an abstract in an argument will not be considered on appeal.—*Kunz v. Young* (Iowa) 66 N. W. 879.

[g] (Iowa; 1896.)

The correctness of appellant's abstract cannot be successfully attacked in argument, when no basis therefor has been laid by filing an amended abstract questioning its correctness.—*McFarland v. City of Muscatine* (Iowa) 67 N. W. 233.

[h] (Iowa; 1896.)

Court rule 97, requiring an index to the abstract, will be enforced, so as to require an appellant to point out the part of the abstract in

which the evidence complained of is contained.—**§ 128. Additional or amended abstract.**
State v. Aegglen (Iowa) 69 N. W. 256.

[11] (Iowa; 1897.)

On appeal, what purported to be certificates of the reporter, judge, and clerk, were printed in the abstract; the certificates of the judge and clerk, dated more than four months after judgment, appearing to have been attached to the translation of the shorthand notes, and the clerk's certificate purporting to be attached to a transcript of the record. But it was not alleged that these certificates referred to the contents of the abstract, nor that they were in fact made by the officers whose names they bore; and to appellee's additional abstract, denying that a bill of exceptions was taken in time, or that the abstract was a true abstract of the evidence or rulings below, there was no response. *Held*, that the judgment could not be reviewed.—*Mahr v. Hanford Produce Co.* (Iowa) 69 N. W. 1019.

[11] (Neb.; 1897.)

In a case submitted, under rule 2 (65 N. W. v.), on an agreed printed abstract, the court will not look beyond the abstract.—*Closson v. Roman* (Neb.) 69 N. W. 760.

[11] (Neb.; 1897.)

The supreme court cannot, for any purpose, look into the record certified by the clerk when the case has been submitted on a printed abstract, in pursuance of its rules.—*North Platte Waterworks Co. v. City of North Platte* (Neb.) 70 N. W. 393.

[11] (S. D.; 1896.)

The abstract on appeal need not contain the evidence in full, by question and answer, as it is set out in the bill of exceptions.—*Bedford v. Kissick* (S. D.) 67 N. W. 609.

[10] (S. D.; 1897.)

That a note sued on by plaintiff, and excluded for alleged alterations, may be inspected on appeal, it is not enough that it is a part of the bill of exceptions, but plaintiff should, in his abstract, print a fac simile, or allege that there was no alteration apparent on its face; and, if not denied by additional abstract, this contention would be conceded, or, if denied, the original could be examined.—*Moddie v. Breiland* (S. D.) 70 N. W. 637.

§ 125. — Presumptions.

[10] (S. D.; 1891.)

In the absence of an amended abstract, it is presumed that all necessary evidence is in appellant's abstract.—*Davenport v. Buchanan* (S. D.) 61 N. W. 47.
 6 S. D. 376.

[10] (S. D.; 1895.)

A statement in appellant's abstract that due service of the notice of appeal and undertaking was made and admitted is presumed to be true.—*Bell v. Thomas* (S. D.) 63 N. W. 907.

[10] (S. D.; 1895.)

It is presumed that appellant's abstract contains all the pleadings, files, and evidence necessary to the determination of the appeal.—*Bell v. Thomas* (S. D.) 63 N. W. 907.

§ 126. — Setting out pleadings.

(Iowa; 1896.)

Where a case on appeal goes to the supreme court on a certificate of questions of law, appellant need not abstract the pleadings.—*Menefee v. Chesley* (Iowa) 66 N. W. 1038.

§ 127. Supplemental abstracts.

(S. D.; 1896.)

Leave to file a supplemental abstract for the sole purpose of presenting a corrected printer's affidavit of publication, not before the trial court, but filed therein, *nunc pro tunc*, long after an appeal had been perfected, will not be allowed.—*Iowa State Sav. Bank v. Jacobson* (S. D.) 66 N. W. 453.

§ 128. Additional or amended abstract.

[10] (Iowa; 1896.)

An additional abstract, filed after the time fixed by the rules of the court, to show an admission by the appellee of an uncontroverted fact, will not be stricken out, where the filing of such abstract has not delayed the submission of the cause.—*McDivitt v. Des Moines St. R. Co.* (Iowa) 68 N. W. 555.

[10] (S. D.; 1895.)

It was proper for a respondent moving to correct appellant's abstract by striking out matters not in the original record to bring the matter to the attention of the supreme court by filing an additional abstract.—*Tolerton & Stetson Co. v. Casperson* (S. D.) 63 N. W. 908.

[10] (S. D.; 1896.)

A motion to strike out appellant's bill of exceptions and all the evidence contained in his abstract, because the particular errors relied upon are not specified in the bill of exceptions, cannot be considered, the question not being raised in an additional abstract.—*Plymouth County Bank v. Gilman* (S. D.) 68 N. W. 735.

Filing additional abstract on rehearing, see post, § 159.

§ 129. Failure to deny averments in appellee's abstract.

[10] (Iowa; 1891.)

Where appellant fails to deny an allegation by appellee that the abstract does not contain all the evidence, it will be treated as true, and therefore questions depending on a consideration of the evidence cannot be considered.—*Turner v. Ottumwa Railway, Electric & Steam Co.* (Iowa) 61 N. W. 415.

[10] (Iowa; 1895.)

Uncontroverted allegations, in an appellee's abstract, denying the correctness of appellant's abstract, and averring that both abstracts do not contain all the evidence, will be taken as true, in a case submitted on the abstracts of the respective parties; and assignments of error that the verdict was not sustained by the evidence, or in accordance with the instructions, and that the court erred in refusing a new trial and in giving certain instructions, cannot be considered.—*Hendericks v. City of Council Bluffs* (Iowa) 62 N. W. 675.

[10] (Iowa; 1895.)

Where appellants fail to deny an allegation in the appellee's additional abstract that the record does not contain all the evidence, the allegation will be taken as true.—*Cleveland v. Atkinson* (Iowa) 63 N. W. 465.

[10] (Iowa; 1895.)

Where appellant fails to deny an allegation by appellee that the abstract and amendment do not contain all the evidence, questions involving a consideration of the testimony cannot be considered.—*Turner v. Steam Co.* (1894) 61 N. W. 415, followed.—*Wilmering v. Western Union Tel. Co.*, 63 N. W. 677.

[10] (Iowa; 1895.)

Where appellee files an abstract of additional evidence, but states that the two abstracts do not contain all the evidence, and such statement is not denied by appellant, the supreme court will not consider questions growing out of the evidence.—*Hopkins v. Chicago, R. I. & P. Ry. Co.* (Iowa) 64 N. W. 603.

[10] (Iowa; 1895.)

Where appellee, by an additional abstract, not denied by appellant, has alleged that the several abstracts, taken together, do not contain all the evidence of the case on the trial, it will be presumed that the verdict and judgment were fully authorized by the evidence actually submitted.—*Bowman v. Western Fur Manuf'g Co.* (Iowa) 64 N. W. 775.

[10] (Iowa; 1895.)

On failure of appellant to deny an allegation in appellee's abstract, that all the evidence is not before the court in the several ab-

stracts, assignments of error requiring a consideration of the evidence will not be reviewed.—*Farwell v. Zenor* (Iowa) 65 N. W. 317.

[h] (Iowa.)

Where appellee files an additional abstract, in which he denies that appellant's abstract is an abstract of all the evidence, and states that both abstracts do not contain all the evidence, which statement is not denied by appellant, the supreme court cannot review any question arising on the facts.—(1895) *Dungan v. Iowa Cent. Ry. Co.* (Iowa) 64 N. W. 762; (1896) *Kunz v. Young* (Iowa) 66 N. W. 879; (1896) *Purenes v. Servertson* (Iowa) Id. 918.

[i] (Iowa; 1896.)

Appellee's amended abstract stating that appellant's abstract does not contain an abstract of all the evidence, and that no certificate of the evidence was made out, will be taken as true where it is not denied, and appellant's abstract is silent as to the certification of the evidence.—*Crawford v. Berrybill* (Iowa) 66 N. W. 876.

[j] (Iowa; 1896.)

Appellee filed an abstract denying the correctness of appellant's abstract, and that it contained all the evidence, and averred that both abstracts did not contain all the evidence offered or introduced on the trial. Appellant filed an amendment containing new matter, averring that its abstract, appellee's abstract, and appellant's reply abstract contained all the evidence. Appellee filed an additional and reply abstract, averring that all the abstracts did not contain all the evidence. *Held*, that the latter statement of appellee would be deemed true, in the absence of a denial by appellant.—*Prescott v. Riverside Park Ry. Co.* (Iowa) 68 N. W. 831.

[k] (Iowa; 1896.)

Appellant filed abstracts which recited that they contained all the evidence. Appellee thereafter filed an amendment, presenting additional evidence, and alleging that it and appellant's abstracts did not contain all the evidence. *Held* that, in the absence of a response by appellant, the statement in appellee's abstract would be treated as correct.—*Clark v. Tracy* (Iowa) 68 N. W. 425.

[l] (Iowa; 1896.)

Where the statement by appellee in his amended abstract that his abstract, together with appellant's, does not contain all the evidence, is not denied by appellant, the evidence will not be reviewed.—*Hiatt v. Nelson* (Iowa) 69 N. W. 553.

[m] (Iowa; 1897.)

A stipulation for the submission of a case on appeal on the two abstracts filed, waiving a transcript, does not authorize the court to review questions of fact when the additional abstract filed by appellee states that all the evidence is not contained in the abstracts, which statement is not denied.—*Koster v. Seney* (Iowa) 69 N. W. 865.

[n] (Iowa; 1897.)

Where the appellee's abstract states that it and the original abstracts do not contain all the evidence, and the fact is not put in issue by appellant, and a review of the evidence is necessary, the decree will be affirmed.—*Capital City State Bank v. Hammer* (Iowa) 70 N. W. 89.

[o] (Iowa; 1897.)

A judgment will not be reversed, as contrary to the evidence in the record, where there was no response to denials in appellee's additional abstract that the two abstracts contain all the evidence, or that it was preserved or made of record by bill of exceptions.—*Smith v. Allen* (Iowa) 70 N. W. 694.

5. CASE-MADE.

§ 130. Time of settling.

(Mich.; 1897.)

Under 2 How. Ann. St. § 6738 (limiting the right to appeal to 40 days after settlement

of a case), where a case was not settled until nearly 2 years after the statutory time for settling the same had expired, the appeal will be dismissed.—*Waterman v. Bailey* (Mich.) 69 N. W. 1109.

6. OBJECTIONS RELATING TO BILL OF EXCEPTIONS.

Necessity of bill to bring matters into record, see post, § 135.

Objection first raised on appeal, see post, § 193.

§ 131. Authentication and certificate to bill.

[a] (Neb.)

A bill of exceptions cannot be considered where it is not authenticated by certificate of the clerk of the trial court.—(1896) *Felber v. Gooding*, 66 N. W. 39, 47 Neb. 38; (1896) *Childerson v. Childerson*, 66 N. W. 281, 47 Neb. 162; (1896) *Romberg v. Fokken*, 66 N. W. 282, 47 Neb. 198; (1896) *First Nat. Bank v. Cass County*, 66 N. W. 300, 47 Neb. 172; (1896) *German Nat. Bank v. Terry*, 67 N. W. 856, 48 Neb. 863; (1897) *Chicago Lumber Co. v. Benjamin*, 69 N. W. 769; (1897) *Reuther v. Zimelman*, Id. 837.

[b] (Neb.; 1896.)

In the absence of a certificate of the clerk of the district court authenticating the bill of exceptions, it will be presumed that every essential averment in the petition, not negatived by the verdict, was proven, and that the instructions refused were properly denied.—*Romberg v. Hediger* (Neb.) 66 N. W. 283.

47 Neb. 201.

[c] (Neb.; 1896.)

If a bill of exceptions has not been authenticated by the certificate of the clerk of the trial court, as required by law, matters contained therein will not be considered though no objection be made to the sufficiency of the bill.—*Union Pac. R. Co. v. Kinney* (Neb.) 66 N. W. 449.

47 Neb. 393.

[d] (Neb.; 1896.)

A bill of exceptions in a cause tried in the district court must be filed with the clerk of that court, and, if the original bill is to be used in the supreme court, it must be authenticated by the certificate of the clerk of the trial court.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Gerhold*, 66 N. W. 538, 47 Neb. 397.

[e] (Neb.; 1896.)

A bill of exceptions, though signed and allowed by the clerk of the district court in pursuance of the stipulation therefor required by statute, cannot be used in this court for any purpose, unless the clerk also certifies such bill of exceptions to be the original or a true copy.—*J. F. Seiberling & Co. v. Fletcher* (Neb.) 66 N. W. 839.

47 Neb. 847.

[f] (Neb.; 1896.)

A bill of exceptions should be authenticated by the certificate of the clerk of the trial court, to entitle it to examination in the supreme court.—*Spurck v. Dean* (Neb.) 68 N. W. 375.

[g] (Neb.; 1896.)

A bill of exceptions must be certified by the clerk of the trial court as being a part of the record in said court, or as being the original bill of exceptions in the case, in order that the matters therein may be considered by the supreme court. *Wax v. State* (1894) 61 N. W. 117, 43 Neb. 18, followed.—*Yankton, N. & S. W. Ry. Co. v. State*, 68 N. W. 487.

[h] (Neb.)

A bill of exceptions must be authenticated by the certificate of the clerk of the trial court.—(1896) *Derse v. Straus*, 68 N. W. 1021; (1897) *Talcott v. Field*, 70 N. W. 229; (1897) *State v. School Dist. of Norfolk*, 70 N. W. 948.

[1] (Neb.; 1897.)

Where there is satisfactory evidence that there had been a proper authentication of a bill of exceptions attached thereto, which by accident has become detached and lost, the bill may be considered.—*Winters v. Means* (Neb.) 69 N. W. 753.

[1] (Neb.; 1897.)

A statute allowing the clerk of the district court, instead of the judge, to settle and sign a bill of exceptions, must be strictly construed, and, where the statute requires a showing of the facts to be by affidavit, a statement by the clerk, in the certificate, that he has personal knowledge of the facts, is not sufficient.—*Scott v. Overall* (Neb.) 69 N. W. 777.

[1] (Neb.; 1897.)

A decree supported by the pleadings will be affirmed if the bill of exceptions is not certified by the clerk.—*Berger v. Lincoln County* (Neb.) 70 N. W. 235.

[1] (Neb.; 1897.)

An unauthenticated bill of exceptions will be disregarded.—*Union Pac. Ry. Co. v. Thorne* (Neb.) 70 N. W. 1119.

§ 132. Time of making objection.

[1] (Neb.; 1897.)

A bill of exceptions, not presented to the adverse party within the time fixed by law or order of court, will be quashed when objection to its allowance on that ground is made to the judge before its allowance, and the objection is renewed at the earliest opportunity in the appellate court, and before the cause is briefed on the merits.—*Trumble v. Trumble* (Neb.) 69 N. W. 968.

[1] (Neb.; 1897.)

A motion to quash a bill of exceptions because not presented in due time, made 18 months after filing transcript, and after service of briefs, comes too late.—*Nash v. Costello* (Neb.) 69 N. W. 969.

[1] (Neb.; 1897.)

A motion to quash a bill of exceptions properly allowed and authenticated, made a year after the filing of the bill, and after service of briefs, comes too late.—*Thompson v. Missouri Pac. Ry. Co.* (Neb.) 70 N. W. 385.

7. HOW MATTERS BROUGHT INTO RECORD.

§ 133. What is part of record.

[1] (Iowa; 1897.)

The allowance of an amendment to the pleadings after judgment being in the discretion of the court, where it is allowed it is a part of the record.—*Squires v. Jeffrey* (Iowa) 70 N. W. 730.

[1] (Neb.; 1896.)

A recital in the caption of a transcript on appeal, inserted by the clerk of the lower court, is not a part of the record, and cannot be considered in ascertaining when the decree appealed from was filed.—*Omaha Loan & Trust Co. v. Hogeboom* (Neb.) 66 N. W. 14.

47 Neb. 7.

[1] (S. D.; 1897.)

The mere fact that a notice of application for leave to file an amended answer fixed the hearing "at the hearing of plaintiff's motion to strike out defendant's answer" does not make the application to amend a proper part of the record on appeal from an order granting the motion to strike out, where it was no part of either party's case on such motion.—*King v. Waite* (S. D.) 70 N. W. 1056.

§ 134. — Opinion of trial court.

[1] (Iowa; 1895.)

The opinion of the judge of the district court is a convenient, though not essential, part of the record on appeal, and will not be strick-

en out on motion.—*McLean v. Ficke* (Iowa) 62 N. W. 753; *Beach v. Same*, *Id.*

[1] (Iowa; 1895.)

A motion in the supreme court to strike from the abstract of a party on appeal the written opinion of the court below on making the order appealed from will be denied.—*Mellrup v. Travelers' Ins. Co.* (Iowa) 63 N. W. 665.

[1] (Iowa; 1895.)

An opinion of the trial court is properly made part of the record.—*Gregg v. Spencer* (Iowa) 65 N. W. 411.

§ 135. Necessity of bill of exceptions or statement of facts.

[1] (Iowa; 1895.)

An objection that the trial court erred in striking out appellant's amendment to its motion for a new trial, grounded upon alleged misconduct of defendant's counsel while making his argument to the jury, must be preserved by bill of exceptions.—*Little Sioux Sav. Bank v. Freeman* (Iowa) 61 N. W. 936.

93 Iowa, 426.

[1] (Iowa; 1895.)

The pleadings, instructions to the jury, verdict, and special findings form part of the record without a bill of exceptions.—*Davis v. Campbell* (Iowa) 61 N. W. 1053.

93 Iowa, 524.

[1] (Neb.; 1896.)

A written stipulation of facts or mode of proof filed in a cause forms no part of the record, unless made so by a bill of exceptions.—*State Ins. Co. v. Buckstaff Bros. Manuf'g Co.* (Neb.) 66 N. W. 27.

47 Neb. 1.

[1] (Neb.; 1896.)

To present errors alleged to have occurred during the trial of a cause in the district court, a bill of exceptions settled and allowed in accordance with the legal requirements is indispensable.—*Oltmanns v. Findlay* (Neb.) 66 N. W. 425.

47 Neb. 289.

[1] (Neb.; 1896.)

Where an order permitting a complaint to be amended is sought to be reviewed, a statement of what was allowed to be done, and the matter of the amendment, should be made a part of the bill of exceptions.—*Imhoff v. Richards* (Neb.) 67 N. W. 483.

48 Neb. 590.

[1] (S. D.; 1896.)

On appeal from an order denying a motion to fix a time when a party might move for new trial on the ground of newly-discovered evidence, a bill of exceptions is not necessary.—*Daley v. Forsythe* (S. D.) 67 N. W. 948.

§ 136. Necessity of incorporating exceptions in bill of exceptions.

[1] (Wis.; 1896.)

The sufficiency of the evidence cannot be reviewed, exceptions to the findings not having been incorporated in the bill of exceptions.—*Newton v. Williams* (Wis.) 68 N. W. 990.

[1] (Wis.; 1897.)

In order to obtain a review of a referee's rulings on the admission of evidence, the objections must be renewed on the motion to confirm or set aside the report, and the exceptions to the rulings on such objections so renewed must be preserved in the bill of exceptions.—*Hinz v. Van Dusen* (Wis.) 70 N. W. 657.

Raising question by additional abstract, see ante, § 128.

§ 137. Method of bringing in affidavits.

[1] (Neb.; 1895.)

Affidavits used on the hearing of a motion for new trial will not be considered on appeal unless included in a bill of exceptions.—*Gray v. Godfrey*, 62 N. W. 41, 43 Neb. 672.

[d] (Neb.; 1895.)

Affidavits used on the hearing of a motion for a continuance cannot be considered on review, unless preserved by a bill of exceptions.—*Nelson v. Johnson* (Neb.) 62 N. W. 244.

44 Neb. 7.

[e] (Neb.; 1895.)

An affidavit in support of a motion for a new trial, to be available on appeal, must be embodied in a bill of exceptions.—*Chicago, R. I. & P. R. Co. v. Griffith* (Neb.) 62 N. W. 868.

44 Neb. 690.

[d] (Neb.; 1896.)

Affidavits used in evidence, to be available for the purpose of review by proceedings in error or appeal, must be embodied in a bill of exceptions duly allowed and certified.—*Norfolk Nat. Bank v. Job* (Neb.) 67 N. W. 781.

48 Neb. 774.

[e] (Neb.; 1896.)

Affidavits used in the district court cannot be considered on appeal, unless embodied in the bill of exceptions.—*Minnick v. Minnick* (Neb.) 68 N. W. 374.

[f] (Wis.; 1897.)

An appeal from an order will be dismissed if the affidavits on which the order was based were not filed in the lower court, so as to be made part of the return.—*Hoffman & Billings Manufg Co. v. Burdick* (Wis.) 70 N. W. 470.

§ 138. Matters presented by affidavit.**[a] (Iowa; 1894.)**

Affidavits of counsel cannot be considered on appeal to show misconduct of opposing counsel in his address to the jury.—*Knaebel v. Wilson* (Iowa) 61 N. W. 178.

92 Iowa, 536.

[b] (Iowa; 1896.)

Alleged misconduct of counsel cannot be shown on appeal by affidavit aliunde the record.—*Puth v. Zimbleman* (Iowa) 68 N. W. 895.

[c] (Minn.; 1895.)

Matters occurring out of court, or in another action, should be presented, for the purpose of new trial or appeal, by affidavit.—*Perry v. Miller* (Minn.) 63 N. W. 1040.

61 Minn. 412.

§ 139. Instructions.**[a] (Neb.; 1895.)**

Instructions given and refused, being a part of the record, should not be embodied in the bill of exceptions.—*Blumer v. Bennett* (Neb.) 63 N. W. 14.

44 Neb. 873.

[b] (Neb.; 1896.)

In reviewing a judgment on petition in error without a bill of exceptions, the propriety of refusing instructions cannot be considered.—*City Nat. Bank v. Thomas* (Neb.) 65 N. W. 895, 46 Neb. 861.

[c] (Neb.; 1897.)

The propriety of instructions, abstractly correct, cannot be considered in the absence of a bill of exceptions.—*Reynolds v. McCandless* (Neb.) 69 N. W. 760.

[d] (Neb.; 1897.)

If the case is presented on a transcript unaccompanied by a bill of exceptions, and a state of facts may possibly have been disclosed by the evidence, which would warrant the refusal of an instruction, such refusal is not ground for reversal.—*Lauder v. State* (Neb.) 69 N. W. 776.

8. BRINGING UP THE EVIDENCE.

Amendment of bill of exceptions, see post, § 155. Essentials to review sufficiency of evidence, see ante, § 122.

Necessity of certificate that all the evidence is in, see ante, §§ 121, 123.

Presumption in absence of certain matters from record, see post, § 216.

—where evidence is not preserved, see post, §§ 217, 218.

Supplying omissions, see post, § 154.

§ 140. How evidence brought into record.**[a] (Iowa; 1895.)**

The fact that the official reporter was ill during the trial will not authorize the rejection of his report of the evidence, where no substantial inaccuracies are shown.—*Hood v. Chicago & N. W. Ry. Co.* (Iowa) 64 N. W. 261.

[b] (Iowa; 1897.)

Only such questions will be considered as may be determined without reference to the evidence, where appellee denies that appellant's abstract contains all the evidence, and the bill of exceptions filed in support thereof is not certified by the reporter as a transcript of his notes, and the judge's certificate does not state that it contains all the evidence.—*Hillbrick v. Town of University Place* (Iowa) 70 N. W. 618.

[c] (Neb.; 1896.)

A ruling excluding a document as evidence cannot be considered when such document has not been embodied in the bill of exceptions.—*Graham v. Frazier* (Neb.) 68 N. W. 367.

[d] (Neb.; 1897.)

A reference in a bill of exceptions to evidence in a bill in another case does not incorporate such evidence in the bill.—*Tecumseh Nat. Bank v. Best* (Neb.) 70 N. W. 41.

[e] (S. D.; 1895.)

On appeal from an order made on oral evidence, all of such evidence must be brought into the record by a bill of exceptions or a statement settled by the judge.—*Foley-Wadsworth Implement Co. v. Porteous* (S. D.) 63 N. W. 155.

§ 141. Stipulation of facts.**[a] (Neb.; 1895.)**

A stipulation of facts filed in the district court after the rendition of judgment cannot be considered by the supreme court in reviewing the judgment, though the questions presented in error depend on the existence of facts which do not appear in the record.—*Bowen v. State* 64 N. W. 353, 46 Neb. 23.

[b] (Neb.; 1896.)

A written stipulation of facts or mode of proof cannot make a part of the record of the cause in which it is filed a bill of exceptions settled and allowed in another cause.—*State Ins. Co. v. Buckstaff Bros. Manufg Co.* (Neb.) 66 N. W. 27.

47 Neb. 1.

§ 142. Sufficiency of recital that all the evidence is in.**[a] (Iowa; 1896.)**

A certificate by the clerk of the court that the printed abstract on appeal contains an abstract of all the evidence introduced in the case, as shown by the transcript made by the official reporter, is insufficient to show that a record on appeal contains all the evidence.—*Collins v. Wilson* (Iowa) 68 N. W. 916.

[b] (Mich.; 1897.)

The trial court's certificate that, "forasmuch as the matters set forth do not fully appear of record, [appellant] tenders this bill of exceptions, and prays the same may be signed and sealed by the judge of this court, and that said testimony be set forth in full, questions and answers, for a necessary and full understanding of the same, which said bill of exceptions is accordingly signed," etc., indicates that all of the evidence is set out in the record.—*Hatch v. Reid* (Mich.) 70 N. W. 889.

[c] (Wis.; 1896.)

A bill of exceptions, reciting, at the close, that "the foregoing is all the material evidence in the action" when duly certified by the trial court, sufficiently shows that it contains all the

evidence.—*Reinke v. Wright* (Wis.) 67 N. W. 737.

93 Wis. 368.

Necessity of certificate that all the evidence is in, see ante, §§ 121, 123.

§ 143. Necessity of bill of exceptions.

[a] (Iowa; 1896.)

Where a proceeding under Code, § 3092, praying the court to award execution against the land of one deceased, was commenced by petition, and issues were taken by answer, and the judgment was a statement of the facts found, the procedure was that of an ordinary action, and it was therefore necessary, to file a bill of exceptions within the time allowed for that purpose, to incorporate the evidence in the record.—*Drake v. Fulliam* (Iowa) 67 N. W. 225.

[b] (Neb.; 1897.)

In the absence of a bill of exceptions, issues of fact cannot be considered on appeal, though the transcript recites that the cause was determined on an agreed statement of facts copied in the transcript.—*Stuart v. Burcham* (Neb.) 70 N. W. 383.

[c] (Neb.; 1897.)

One desiring to secure a review of a ruling upon a question of fact must preserve the evidence by means of a bill of exceptions, allowed in the manner provided by law.—*Douglas v. Smith* (Neb.) 70 N. W. 511.

§ 144. Certificate as to evidence.

[a] (Iowa; 1896.)

Code, § 2742, requires all evidence on appeals in equitable actions to be certified by the judge. Section 3184 provides that, in equitable actions tried upon written testimony, all depositions and papers which were used as evidence are to be certified, not by transcript, but in the original form. *Held*, that the certificate must be by the judge, notwithstanding the cause was tried on written testimony alone, the office of the clerk's certificate, under section 3184, being merely to identify and authenticate the record. *Cross v. Railroad Co.* (1882) 12 N. W. 71, 58 Iowa, 65, overruled. *Runge v. Hahn* (1888) 38 N. W. 389, 75 Iowa, 734, followed.—*Teague v. Fortsch* (Iowa) 66 N. W. 1056.

[b] (Iowa; 1896.)

Under Code, § 2742, the certificate must be made by the judge who tried the case, and one made by his successor in office is insufficient.—*Teague v. Fortsch* (Iowa) 66 N. W. 1056.

[c] (Iowa; 1896.)

Under Code, § 2742, requiring all evidence on appeals in equitable actions to be certified by the judge, a certificate made by a judge after he has retired from office is insufficient.—*Teague v. Fortsch* (Iowa) 66 N. W. 1056.

[d] (Iowa; 1896.)

Under Code, § 2742, providing that in equitable actions, where an issue is joined, all the evidence shall be certified by the judge, and go on appeal to the supreme court, which shall try the case anew, the evidence in an equity case tried before a referee must be certified to by the court.—*Young v. Scoville* (Iowa) 68 N. W. 670.

[e] (N. D.; 1895.)

A certificate of the judge that the record contained all testimony "taken" at the trial did not bring the case within Laws 1893, c. 82, relating to trials de novo in the supreme court, which requires that all evidence "offered" shall be "taken down in writing" and certified by the judge.—*First Nat. Bank v. Merchants' Nat. Bank* (N. D.) 64 N. W. 941.

5 N. D. 161.

§ 145. — Certificate by referee.

(Iowa; 1895.)

Under Code, § 2742, providing that in equitable actions, where the issue of fact is joined, the evidence shall be in writing, and be certified by the judge within a certain time,

and be made a part of the record on appeal, it was not sufficient that the evidence in an equitable action was certified by the referee to whom the cause was referred for the taking of testimony.—*Young v. Scoville* (Iowa) 63 N. W. 697.

§ 146. Time of filing evidence.

(Iowa; 1895.)

Code, § 2742, provides that in equitable actions the evidence shall be certified by the judge within the time allowed for an appeal in the action. *Held*, that where, after the entry of a decree, an order is made correcting an error therein by oversight, the time within which the evidence must be filed commences to run from the date of entry.—*Calef v. Cole* (Iowa) 62 N. W. 24.

9. CONTRADICTING RECORD—CONFLICT IN RECORD.

Conflict between record and assignments of error, see ante, § 101.

§ 147. Conclusiveness of record and impeachment.

[a] (Minn.; 1896.)

Where a settled case certified that it contained all the evidence introduced and all the proceedings had, it could not be shown by recitals in a motion and affidavits for the same that proceedings took place on the trial which were not disclosed by the settled case.—*Hemstad v. Hall* (Minn.) 66 N. W. 366.

64 Minn. 136.

[b] (Neb.; 1895.)

The recital in a transcript on appeal that a jury was waived cannot be impeached.—*Davis v. Snyder* (Neb.) 63 N. W. 789.

45 Neb. 415.

[c] (Neb.; 1896.)

The authenticated transcript of the record of the trial court imports absolute verity on appeal, and cannot be impeached by mere statements of counsel in the brief filed.—*Lewis Inv. Co. v. Boyd* (Neb.) 67 N. W. 456.

48 Neb. 604.

[d] (Neb.; 1896.)

The transcript of the record of the district court imports absolute verity.—*Minnick v. Minnick* (Neb.) 68 N. W. 374.

[e] (Neb.; 1897.)

The certified record of the trial court, for the purpose of all appellate proceedings, imports absolute verity.—*Merchants' Sav. Bank of Providence v. Noll* (Neb.) 70 N. W. 247.

[f] (Neb.; 1897.)

The record prevails as to the time a finding was made as against an objection based on the hypothesis that the finding was earlier, in the absence of some showing of record in support of the objection.—*Seaver v. Hall* (Neb.) 70 N. W. 373.

[g] (Wis.; 1895.)

The supreme court cannot question the correctness of a bill of exceptions as settled by the trial court.—*Deuster v. Milwaukee St. Ry. Co.*, 61 N. W. 766, 89 Wis. 191.

[h] (Wis.; 1896.)

The recital in a judgment as to a matter of fact will not be held conclusive on appeal, where an inspection of the record shows that such recital was erroneous.—*Gile v. Colby* (Wis.) 66 N. W. 802.

92 Wis. 619.

§ 148. Contradicting record of justice.

(Neb.; 1895.)

The record of the proceedings in a justice court, as embodied in a duly-certified transcript, imports absolute verity, and cannot be contradicted by extrinsic evidence in the appellate court.—*Dreyfus v. Moline, Milburn & Stoddard Co.*, 61 N. W. 599, 43 Neb. 233.

§ 149. Of district court on appeal from justice.

(Neb.; 1897.)

The record of a district court showed that a transcript to perfect an appeal from a justice was filed within the statutory time. On a motion to dismiss, the court considered the filing mark and a certificate of the clerk to the same effect, and also an affidavit of the appellee's attorney that he had searched the records after the time for filing the transcript, and had not found it, and also hearsay evidence of statements which the deputy clerk had made to him with regard to the clerk's acts. *Held* insufficient to contradict the record.—*Fenton v. American Jewelry Co.* (Neb.) 70 N. W. 931.

§ 150. Admissibility of affidavits.

(Neb.; 1895.)

An affidavit filed with the record in the supreme court as to the time of holding the terms of the district court is incompetent to contradict a contrary showing in the transcript of the record.—*Baird v. Woodard* (Neb.) 61 N. W. 612, 43 Neb. 310.

§ 151. Conflict in record.

[a] (Iowa; 1895.)

Where appellants' abstract alleges and appellee's abstract denies that certain documents were put in evidence, the question as to their admissibility cannot be considered.—*Duer v. Allen* (Iowa) 64 N. W. 682.

[b] (Mich.; 1894.)

The verdict as entered by the clerk is not conclusively presumed to be the verdict as rendered, where the bill of exceptions shows otherwise.—*Guerold v. Holtz* (Mich.) 61 N. W. 278.

103 Mich. 118.

[c] (Neb.; 1896.)

When it appears from statements in the bill of exceptions that it does not contain all the evidence, such must be taken to be the fact, in the absence of other proof on the subject than the certificate to the bill to the effect that it contains all the evidence.—*Green v. Green* (Neb.) 68 N. W. 947.

[d] (Wis.; 1895.)

When the bill of exceptions and the printed record are confused and contradictory, exceptions being printed in the case which were filed, but not made a part of the bill, and the claim being made that matter so printed had been stricken out by agreement, the appellate court will not review the findings of fact on which the bill is based.—*Green v. Stacy* (Wis.) 62 N. W. 627.

90 Wis. 46.

§ 152. Conclusiveness of recital or certificate that all the evidence is in.

[a] (Minn.; 1897.)

A certificate of the trial court that the settled case contains all the evidence is not conclusive when the case itself shows the contrary.—*Sage v. Rudnick* (Minn.) 69 N. W. 1696.

[b] (Neb.; 1895.)

Where the bill of exceptions disclosed that important evidence is omitted therefrom, the recitation therein that it contains all the evidence will not control.—*Conger v. Dodd* (Neb.) 63 N. W. 125.

45 Neb. 36.

10. CORRECTIONS AND AMENDMENTS.

§ 153. Correction.

[a] (Mich.; 1897.)

Where the assignments of error were not embodied in the bill of exceptions, but the record clearly shows that the question involved was fully presented and argued before the trial court, the

appeal may be considered without remanding the record for correction.—*Coon v. Dennis* (Mich.) 69 N. W. 606.

[b] (Neb.; 1897.)

If the record is incorrect or incomplete, the remedy is by proceedings in the lower court for its correction.—*Merchants' Sav. Bank of Providence v. Noll* (Neb.) 70 N. W. 247.

[c] (N. D.; 1894.)

When on appeal the original papers have been sent to the supreme court, the trial court has no power to amend the record, unless it is remanded for that purpose.—*Moore v. Booker* (N. D.) 62 N. W. 607.

4 N. D. 543.

§ 154. Supplying omissions.

(S. D.; 1895.)

Where, on appeal from an order, the respondent claims that all the evidence is not in the record, the proper practice is to move for a correction of the record based on affidavits, or the certificate of the judge, and not by filing an additional abstract.—*Foley-Wadsworth Implement Co. v. Porteous* (S. D.) 63 N. W. 155.

§ 155. Amending bill of exceptions.

[a] (Neb.; 1896.)

Plaintiff in error filed a bill of exceptions from which two exhibits were omitted. These exhibits, when introduced, were, by leave of the court, withdrawn, and counsel did not furnish the reporter with copies thereof. *Held*, that leave would be granted to withdraw the record for the purpose of submitting the bill of exceptions to the trial judge for amendment.—*McFarland v. West Side Imp. Co.* (Neb.) 66 N. W. 637.

47 Neb. 661.

[b] (Neb.; 1896.)

A motion to correct a bill of exceptions by supplying evidence omitted therefrom through inadvertence will not be entertained by this court.—*Warner v. Hutchins* (Neb.) 67 N. W. 745.

48 Neb. 672.

VIII. HEARING AND REHEARING.

§ 156. Matters considered at hearing.

(Wis.; 1894.)

An objection that an appeal is barred by the dismissal for want of prosecution of a previous appeal taken from the same judgment cannot be raised for the first time at the oral argument.—*Gage v. Allen* (Wis.) 61 N. W. 361.

89 Wis. 98.

§ 157. Trial de novo.

(N. D.; 1895.)

Where, after counsel for both sides rested, the jury was discharged by consent, and the case submitted to the court, which filed its findings and entered judgment thereon, the case was not triable anew in the supreme court, under Laws 1893, c. 82, applying to cases tried by the district court without a jury.—*First Nat. Bank v. Merchants' Nat. Bank* (N. D.) 64 N. W. 941.

5 N. D. 161.

§ 158. Rehearing.

[a] (S. D.; 1895.)

A rehearing will not be granted on the suggestion that petitioner can satisfy the court that its former decision was wrong.—*Grigsby v. Minnehaha County* (S. D.) 64 N. W. 179.

[b] (S. D.; 1895.)

Where a case was submitted and decided on a defective abstract, to which no objection was made, the fact that respondent was, because of sickness, unable to submit a corrected abstract within the time required, does not warrant a rehearing on a corrected abstract.—*Harrison v.*

Chicago, M. & St. P. Ry. Co. (S. D.) 62 N. W. 376.

6 S. D. 572.

[c] (S. D.: 1895.)

A rehearing will not be granted for the discussion of the constitutionality of a law in a respect not affecting the controversy.—*Vallier v. Brakke* (S. D.) 64 N. W. 1119.

§ 159. — On original record.

(Iowa: 1896.)

Where a rehearing is granted the case must be submitted on the original record, and where it appears that the supreme court had no jurisdiction at the time the original opinion was filed, because the abstract did not show service of a notice of appeal upon the clerk of the district court, the defect cannot be cured by filing an additional and amended abstract.—*Iowa City v. Johnson County* (Iowa) 68 N. W. 815.

§ 160. Effect of ordering rehearing.

[a] (Iowa: 1895.)

A rehearing of a case on appeal suspends the former opinion rendered, and no portion of the former opinion will be operative unless affirmatively adopted on the final determination on rehearing.—*Pitkin v. Peet* (Iowa) 64 N. W. 793.

[b] (Iowa: 1896.)

Where a rehearing is ordered, the original opinion is suspended, and ceases to have any effect, except as incorporated in or approved by the opinion filed on the rehearing.—*Stewart v. Stewart* (Iowa) 65 N. W. 976.

IX. PRACTICE ON APPEAL FROM INFERIOR TRIBUNALS.

§ 161. Allowance of appeal.

(Mich.: 1895.)

Local Acts 1895, Act No. 460, providing that an appeal from the judgment of a justice of the peace in Detroit may be authorized by the circuit court of Wayne county when a party has been prevented from making a defense on the merits by circumstances not under his control, does not give to the circuit court discretionary power to allow an appeal after the statutory time therefor has elapsed.—*Goldhamer v. Lillibridge* (Mich.) 65 N. W. 97.

§ 162. Notice.

[a] (Mich.: 1897.)

Under Loc. Acts 1895, No. 460, § 10, providing for appeals from justice's courts to the circuit court of Wayne county, the party seeking the appeal must give notice to the opposite party of the petition and the grounds of the motion and the affidavit on which the same is based.—*J. P. Scranton Lumber Co. v. Donovan* (Mich.) 70 N. W. 145.

[b] (Minn.: 1896.)

Proof of service, under Gen. St. 1894, § 5068, subd. 3, of a notice of appeal from a judgment rendered in a justice court on "Empey and Empey, the attorneys of the plaintiff," is not proof of service of such notice on "E. E. Empey," who, according to the record, was the only attorney appearing for plaintiff.—*Graham v. Conrad* (Minn.) 69 N. W. 334.

[c] (Minn.: 1896.)

Proof of service of a notice of appeal from a judgment of a justice of the peace cannot be amended, so as to show due service, after the expiration of the 10 days within which the proof must be filed with the justice.—*Graham v. Conrad* (Minn.) 69 N. W. 334.

[d] (Wis.: 1895.)

A notice of appeal in replevin from a justice to the circuit court, which fails to mention the value of the property as determined, and that such property was ordered to be delivered to plaintiff, is sufficient if it identifies the party ap-

pealing, and the cause in which and the judgment from which the appeal is taken.—*Hender v. Ring* (Wis.) 63 N. W. 282.
90 Wis. 358.

§ 163. Bonds.

[a] (Iowa: 1896.)

Under Code, § 3580, providing that an appeal from a justice shall in no case be allowed until a bond is taken and filed in the office of the justice, an appeal is not taken until such bond is filed, though notice of appeal has been given and entered on the docket of the justice.—*Lynch v. Bruner* (Iowa) 68 N. W. 908.

[b] (Mich.: 1895.)

Under 2 How. Ann. St. § 8307, providing that appeals from judgments of commissioners shall be conducted as near as may be as on appeals from justices; and the subsequent enactment (3 How. Ann. St. § 7000), providing that on appeal from a justice the bond may be taken by the county clerk,—the county clerk may approve a bond on appeal from a commissioner.—*Cole v. Donovan* (Mich.) 64 N. W. 741.

[c] (Mich.: 1895.)

After a general appearance on appeal from a justice of the peace, a party is not entitled, in response to a motion for security for costs, to have the appeal dismissed because the sureties on the appeal bond did not justify before the justice, as required by How. Ann. St. § 7000.—*Sherwood v. Ionia Circuit Judge* (Mich.) 64 N. W. 1045.

[d] (Neb.: 1896.)

If, in an appeal to the district court from a judgment of a justice of the peace, the appeal bond is believed to be insufficient, it is proper, under Code Civ. Proc. § 1016, for the appellee to file a motion asking the court to order a change or renewal of such undertaking.—*Gallagher v. Wolf* (Neb.) 66 N. W. 645.
47 Neb. 589.

[e] (Neb.: 1896.)

If the court is satisfied of the insufficiency of the appeal undertaking, it is proper practice to fix the time within which a renewal shall be effected, and to enter a dismissal of the action for a noncompliance with such order.—*Gallagher v. Wolf* (Neb.) 66 N. W. 645.
47 Neb. 589.

[f] (S. D.: 1896.)

The return of a notice of exceptions to the sufficiency of an undertaking on appeal from justice court recited that it came into the hands of the officer July 2d and was served August 3d. The undertaking was filed on August 1st. *Held*, that the notice, having been served after the exceptions were filed, was valid, though given to the officer before the undertaking was filed.—*McDonald v. Paris* (S. D.) 68 N. W. 737.

[g] (S. D.: 1896.)

Under Comp. Laws, § 6133, providing that, upon filing the bond on appeal from a justice court, the adverse party may except to its sufficiency, and unless the sureties justify within five days thereafter, upon notice to such adverse party, the appeal must be regarded as if no such undertaking had been given, a justification without notice to the adverse party confers no jurisdiction on the circuit court.—*McDonald v. Paris* (S. D.) 68 N. W. 737.

[h] (S. D.: 1896.)

The sufficiency of the sureties to an undertaking on appeal from justice court having been excepted to, the appellant offered new sureties, but failed to serve notice of their justification upon the adverse party as required by Comp. Laws, § 6133. Upon motion in the circuit court to dismiss the appeal on the ground that there was no undertaking, the appellant asked to file a new undertaking. *Held*, that the application was properly refused.—*McDonald v. Paris* (S. D.) 68 N. W. 737.

[i] (S. D.; 1896.)

Though a bond on appeal from the county to the circuit court is defective, as not running to the state, nor specifying the residences of the sureties, if it contains all the essential elements of a common-law bond, and the appeal is taken in good faith, the circuit court, under Comp. Laws, § 5235, may, on the trial, permit a sufficient undertaking to be filed.—*Skinner v. Holt* (S. D.) 69 N. W. 595.

[j] (S. D.; 1897.)

Comp. Laws, § 6133, provides that no appeal from a justice shall be effectual unless an undertaking be filed in the sum of \$100 for payment of the costs of appeal; or, if a stay be claimed, in a sum twice the amount of the judgment, "including the costs, when the judgment is for the payment of money"; and that "a deposit of the amount of the judgment, including all costs," is equivalent to the filing of the undertaking. *Held*, that the undertaking for costs in the sum of \$100 must in all cases be given.—*Smith v. Coffin* (S. D.) 70 N. W. 636.

[k] (S. D.; 1897.)

Where no sufficient undertaking has been filed in time on appeal from a justice, as required by Comp. Laws, § 6133, the circuit court has no jurisdiction, and cannot permit appellant to file a new undertaking.—*Smith v. Coffin* (S. D.) 70 N. W. 636.

§ 164. Parties.**[a] (Neb.; 1896.)**

One of several defendants having separate and distinct defenses may prosecute an appeal from justice court without joining his co-defendants.—*Claffin v. American Nat. Bank* 65 N. W. 1056, 46 Neb. 884.

[b] (Neb.; 1896.)

When the interests of several defendants in an action in justice court are inseparably connected, an appeal by one brings up the entire case.—*Claffin v. American Nat. Bank* (Neb.) 65 N. W. 1056, 46 Neb. 884.

§ 165. Record.**[a] (S. D.; 1895.)**

The mere fact that the certified copy of the justice's docket transmitted on appeal to the circuit court fails to show the receipt of a notice of appeal, and the filing of an undertaking, does not divest the circuit court of jurisdiction.—*Warder, Bushnell & Glessner Co. v. Raymond* (S. D.) 64 N. W. 525.

[b] (S. D.; 1896.)

When an appeal is taken from a justice's court upon questions of both law and fact, and the case is tried anew in the appellate court, and no statement of the case is provided for, the appellate court cannot review alleged errors of the justice's court.—*City of Yankton v. Douglass* (S. D.) 66 N. W. 923.

[c] (S. D.; 1896.)

Justices' Code, § 6130, providing that, when a party appeals to the circuit court on questions of law alone, he must prepare a statement of the case, and file the same with the justice, which "must contain the grounds upon which the party intends to rely," etc., is mandatory; and, in the absence of such statement, the circuit court has no jurisdiction.—*Tschetter v. Heiser* (S. D.) 68 N. W. 744.

Contradicting record, see ante, § 148.

§ 166. Filing of transcript.**[a] (Neb.; 1896.)**

In an appeal from justice or county court, if the appellant fails to file a transcript within 30 days, and a transcript is produced and filed by appellee, or one has been filed by appellant out of time, it is proper, under Code Civ. Proc. § 1011, to move to dismiss.—*Schoonover v. Saunders* (Neb.) 67 N. W. 442.

48 Neb. 463.

[b] (Neb.; 1896.)

The filing in the district court of a petition in error, and the allowance of a summons in error to review the judgment of a county court, within one year from the date of its rendition, are not, alone, sufficient to invest the court with jurisdiction; it being also indispensable, under Code Civ. Proc. §§ 584, 586, 592, that there should be filed a transcript of the proceedings of the county court, and that the transcript be filed within one year from the rendition of the judgment.—*Dane County Bank v. Garrett* (Neb.) 67 N. W. 884.

48 Neb. 916.

§ 167. Issues tried.**[a] (Neb.; 1896.)**

It did not appear that defendant, in an action in the county court, was required to file the bill of particulars mentioned in Code Civ. Proc. § 951, and there was nothing to show that he did not interpose the defense of infancy. The record transmitted from the county judge to the district court on appeal failed to advise the latter court as to what issues were tried below. *Held*, that the district court did not err in overruling plaintiff's motion to strike out a defense of infancy set up in the answer.—*Cobbey v. Buchanan* (Neb.) 67 N. W. 176.

48 Neb. 391.

[b] (Neb.; 1896.)

In a case brought to the district court by appeal, the rule restricting the parties to the issues raised in the lower court must be invoked in framing the issues; it cannot be invoked by objection at the trial to the introduction of evidence in support of the new issue.—*First Nat. Bank v. Carson* (Neb.) 67 N. W. 779.

48 Neb. 763.

[c] (Neb.; 1897.)

In an appeal from the county court to the district court, the cause must be tried on the same issues as were tried in the county court, unless some new matter has arisen since the trial there, such as payment, etc.—*Bellamy v. Chambers* (Neb.) 69 N. W. 770.

§ 168. Time of hearing or trial.**(Wis.; 1895.)**

Rev. St. § 2831, provides that the court may, on good cause shown, allow any proceedings in any action to be taken after the time limited by statute or by order of court has expired. Section 3766 provides that if neither party shall bring an appeal from justice court to a hearing in the appellate court "before the end of the second term after filing the return of the justice therein, such court shall dismiss the appeal, unless it shall continue the same by special order for cause shown." *Held*, that the appellate court has discretion, on a proper showing, to allow a continuance after the second term from the filing of the return has expired, though neither party has previously brought the appeal to a hearing, and its refusal to exercise such discretion is reversible error.—*Whitham v. Mappes*, 62 N. W. 430, 39 Wis. 668.

§ 169. Voluntary dismissal.**(Mich.; 1897.)**

Plaintiff, after appeal from justice's court to circuit court, where the suit is for trial de novo, and subject to the same rules as though originally brought there (How. Ann. St. § 7014), may there dismiss the suit without reviving the justice's judgment, as in case of dismissal of the appeal.—*French v. Weise* (Mich.) 70 N. W. 1101.

§ 170. Pleadings.**(Iowa; 1896.)**

It is within the discretion of the district court, on appeal from the board of equalization, to allow pleadings to be filed, though the statutes make no provision therefor.—*Farmers' Loan & Trust Co. v. City of Newton* (Iowa) 66 N. W. 784.

§ 171. Amendment of pleading.

[a] (Iowa; 1896.)

In an action before a justice to recover land held by defendant under a written lease, for failure to pay the stipulated rent, defendant denied generally, and pleaded a tender of the rent claimed to be due, and that the action was barred because he had been in peaceable possession, with plaintiff's knowledge, for more than 30 days after the alleged violation of the lease. On appeal to the district court defendant amended by pleading a subsequent oral agreement by plaintiff to accept a smaller rent than that provided for in the lease. *Held*, that such amendment was allowable.—Boos v. Dulin (Iowa) 68 N. W. 707.

[b] (Mich.; 1896.)

In an action in justice's court, plaintiff declared verbally for work and labor done for defendants, at their request, during four certain months, at \$75 per month. *Held* that, on appeal by defendants to the circuit court, plaintiff could not amend his declaration so as to allege a breach of a contract of hiring for one year from November 1st, at \$900 per year, in that defendants discharged him on January 1st without cause.—Loranger v. Davidson (Mich.) 68 N. W. 426.

[c] (S. D.; 1897.)

On appeal on law and facts from a judgment of a justice in an action for the keep of cattle, the complaint was amended so as to show that defendant was a sheriff, and as such seized the cattle under a writ, and delivered them to plaintiff, as bailee, to keep pendente lite. No contest was made on the merits on either trial, and judgment in both trials went against defendant individually. *Held*, that the amendment was not reversible error.—Butler v. Ash (S. D.) 70 N. W. 833.

[d] (S. D.; 1897.)

On a trial de novo on an appeal from justice court such amendments of the pleadings filed with the justice or entered by him in his docket may be allowed as might have been allowed by him.—Butler v. Ash (S. D.) 70 N. W. 833.

[e] (Wis.; 1895.)

An appeal from a justice to the superior court of Milwaukee, under Rev. St. § 3768, is triable as if originally brought there; and the court, under Rev. St. § 2830, can amend the proceedings at any time.—Marlett v. Doctor 61 N. W. 1125, 89 Wis. 347.

[f] (Wis.; 1895.)

A complaint in a justice's court cannot, on appeal to the superior court, be so amended as to increase the amount of damages claimed, and add a new and independent cause of action.—Carlson v. Stocking (Wis.) 65 N. W. 58, 91 Wis. 432.

[g] (Wis.; 1896.)

Under Rev. St. § 2886, providing that the relief granted plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, where, in a replevin suit commenced in justice court, defendant, after appeal of plaintiff to the circuit court, withdrew his answer, plaintiff was not entitled to amend his complaint (which, by section 3759, is the affidavit) so as to increase the amount alleged therein as the value of property, and to judgment, in case of nondelivery of the property, to the amount of the amended complaint.—Geer v. Holcomb (Wis.) 66 N. W. 793.

92 Wis. 661.

§ 172. Review—Objections not raised before justice.

[a] (Mich.; 1896.)

A judgment rendered by a justice of the peace will not be reversed because the testimony admitted was not the best evidence, if no objection was made to it on the trial.—Martin v. Smith (Mich.) 66 N. W. 61.

[b] (Neb.; 1895.)

Where a petition was filed in the district court in a cause appealed from the county court, it was erroneous to overrule a demurrer to such petition because the question presented by the demurrer had not been urged in the county court.—Thompson v. Campbell (Neb.) 61 N. W. 725, 43 Neb. 556.

[c] (Neb.; 1895.)

A party to an action in justice court, who failed to object to the receiving of the verdict on the ground that one of the jurors was absent, could not raise that ground of objection on error in the district court.—Jones v. Driscoll, 65 N. W. 194, 46 Neb. 575.

[d] (Neb.; 1896.)

Objection that a plaintiff has not sued in his full Christian name may be first made in the district court on appeal from justice court.—Small v. Sandall (Neb.) 67 N. W. 156, 48 Neb. 318.

§ 173. — Presumptions.

(Mich.; 1896.)

Under How. Ann. St. § 7008, requiring a justice of the peace, in his return to the circuit court in case of appeal, to give copies of the pleadings, if in writing, where the return does not show and the record does not state whether the pleadings were written or verbal, it will be presumed that they were verbal.—Kerr v. Bennett (Mich.) 67 N. W. 564.

§ 174. — Waiver of objections.

(Neb.; 1896.)

After both parties to an appeal from justice court, taken within the prescribed time, appear in the appellate court, and file pleadings, and notice the case for trial, without objections, neither can question the validity of the appeal.—Chaffin v. American Nat. Bank (Neb.) 65 N. W. 1056, 46 Neb. 884.

§ 175. Decision.

[a] (Mich.; 1895.)

On appeal from a judgment of a justice court for the jurisdictional amount, judgment may be rendered for that amount, with interest from the date of the judgment below, without amending the ad damnum clause.—Stanley v. Anderson (Mich.) 65 N. W. 217.

[b] (Minn.; 1897.)

Where, in a suit on a note in a justice court, the maker admitted execution, but alleged usury, and plaintiff introduced the note in evidence and rested, and defendant also rested, and the justice erroneously rendered judgment for defendant, on appeal, on questions of law alone, the court should have rendered judgment on the merits in favor of plaintiff, and not merely reversed the judgment of the justice.—Thorson v. Sauby (Minn.) 70 N. W. 1083.

[c] (Neb.; 1895.)

In an action begun in the county court, that court made an order sustaining an attachment, and rendered judgment in the action for plaintiff. Defendant took the case to the district court, assigning error in both orders. The district court reversed the judgment, but made no express order in relation to the order sustaining the attachment. Defendant did not except to this ruling, and did not thereafter call on the district court to rule on the order sustaining the attachment. *Held*, that this amounted to an affirmation of the order of the county court sustaining the attachment, and justified the district court in refusing to entertain an independent motion to discharge for the same reasons as alleged in the motion in the county court.—Stutzner v. Printz (Neb.) 61 N. W. 620, 43 Neb. 306.

[d] (Neb.; 1895.)

Where, on a failure of appellant to file a transcript on appeal from a justice's judgment, the appellee files the same, the district court can, on its own motion, either dismiss the appeal,

or give judgment for the appellee.—*Scott v. Bur-rill* (Neb.) 62 N. W. 1093.
44 Neb. 755.

[c] (Neb.; 1896.)

On appeal from the judgment of the county judge in an action wherein he exercised the ordinary jurisdiction of a justice of the peace, the district court could not, on dismissing the appeal for the reason that the judgment was one for costs alone, and hence not appealable, remand the cause to the county court for final judgment.—*Best v. Stewart* (Neb.) 67 N. W. 881.
48 Neb. 859.

[f] (S. D.; 1895.)

On appeal from justice to county court on questions of law only, the appellate court may "set aside, affirm, or modify" the judgment appealed from, or may order a new trial in the justice court (Comp. Laws, § 6136), but cannot set aside the judgment, and render a new judgment on the merits against the opposite party.—*Couchran v. Wilson* (S. D.) 63 N. W. 774.

[g] (S. D.; 1895.)

Under Comp. Laws, § 5976, providing for a trial de novo on appeal to the circuit court on questions of law and fact from an order of probate court appointing a guardian for a minor, the circuit court has power, after retrying the case, to pronounce judgment.—*Engle v. Yorks* (S. D.) 64 N. W. 132.

§ 176. — Dismissal of appeal.

[a] (Iowa; 1895.)

Under Code, § 4702, providing that, where an appeal is taken from a justice's court in a criminal case, the cause shall be tried anew in the district court without regard to technical errors; and section 4703, declaring that no appeal from a justice's court shall be dismissed,—the failure of a justice to make proper and timely entries, and to order a second trial until nine days after the first jury was discharged, does not affect the rights of the parties after an appeal to the district court has been taken.—*State v. Valure* (Iowa) 64 N. W. 280.

[b] (Mich.; 1896.)

Under How. Ann. St. § 7014, relating to appeals from a justice to the circuit court, and providing that "on filing the return of the justice the circuit shall become possessed of the cause the same as if it had been originally commenced in said appellate court," appellant cannot dismiss his appeal against appellee's objections.—*Peterson v. Frey* (Mich.) 67 N. W. 974.

[c] (Mich.; 1896.)

Under How. Ann. St. § 7021, providing that, on dismissal or discontinuance of an appeal from a justice, the court shall enter judgment in favor of appellee for costs, where the court makes an erroneous order permitting an appellant to discontinue his appeal on payment of part of the costs only, the remedy of the appellee is by motion to set such order aside, and not by a motion based thereon for judgment for full costs.—*Swe-gles v. Donovan* (Mich.) 68 N. W. 649.

[d] (Minn.; 1896.)

On dismissing an appeal from justice court because of the failure to file a return, the district court cannot enter against defendant a judgment of affirmance, in which is included the supposed amount of the justice's judgment, under Gen. St. 1894, § 5071, as amended by Laws 1895, c. 24, providing that, where an appeal is allowed by a justice, and "a return thereof made to the district court," on dismissing it for any cause the district court shall enter a judgment of affirmance.—*Rowell v. Zier* (Minn.) 69 N. W. 222.

[e] (N. D.; 1896.)

An order of the district court, entered in its minutes by the clerk, directing the dismissal of an appeal taken to that court from a judgment of the county court, does not accomplish the dismissal without the entry of a judgment in the district court upon such order,

whether or not the motion to dismiss was made by appellant.—*Field v. Great Western Elevator Co.* (N. D.) 67 N. W. 147.
5 N. D. 400.

X. REVIEW.

See, also, "Certiorari," § 8.

Of questions of law, see post, §§ 262, 263.

Of action for injuries to servant, see "Master and Servant," § 55.

— to abate liquor nuisance, see "Intoxicating Liquors," § 52.

Of condemnation proceedings, see "Eminent Domain," §§ 23, 24.

Of contempt proceedings, see "Contempt," § 18.

Of decision of board of equalization, see "Taxation," § 46.

Of divorce proceedings, see "Divorce," § 19.

Of guardianship accounting, see "Guardian and Ward," § 11.

Of partnership accounting, see "Partnership," § 33.

Of proceedings for accounting by executor or administrator, see "Executors and Administrators," § 32.

— on claims against decedents' estate, see "Executors and Administrators," § 24.

Of report of referee, see "Reference," § 7.

Of taxation of costs, see "Costs," § 26.

Of will contest, see "Wills," §§ 29, 30.

1. IN GENERAL.

Time and manner of bringing objections to attention of lower court, see ante, §§ 74–86.

§ 177. In general.

[a] (Iowa; 1895.)

Where no appeal was taken by appellee, objections not embraced within the conclusions of law on which the judgment is based will not be considered.—*Fred Miller Brewing Co. v. Council Bluffs Ins. Co.* (Iowa) 63 N. W. 565.

[b] (Iowa; 1896.)

Where a question presented by a party has been adversely ruled on by the trial court, an appeal must be taken from such ruling in order to present it for review.—*Findlay v. Carson* (Iowa) 66 N. W. 759.

[c] (Minn.; 1895.)

On appeal from a judgment without a settled case or bill of exceptions, the findings of fact, conclusions of law, and order for judgment are immaterial so far as they award the prevailing party any greater relief than the judgment itself.—*Johnson v. Deforge* (Minn.) 63 N. W. 174.
61 Minn. 72.

[d] (Neb.; 1895.)

Where, in ejectment, the evidence fails to show that plaintiff has any title, questions of law raised by him will not be examined.—*Wildman v. Shambaugh* (Neb.) 61 N. W. 578.
43 Neb. 371.

[e] (Neb.; 1896.)

Where a county court makes an order in reference to the disposition of the assets of a decedent's estate, having at the same time jurisdiction of the subject-matter and the parties, the supreme court will not pass upon the validity of such order, unless presented for review by a direct proceeding.—*Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.) 67 N. W. 158.
48 Neb. 386.

§ 178. Constitutional question.

[a] (Minn.; 1894.)

The question whether the provision of Laws 1893, c. 206, § 8, that, after an assessment for city improvements has been confirmed by the court, it shall be enforced and collected in the manner other assessments by the same municipal corporations are enforced and collect-

ed, is void as being local or special legislation, will not be considered on appeals from orders confirming assessments.—*In re City of Duluth*, 61 N. W. 678, 59 Minn. 522; *Reynolds v. City of Duluth*, 1d.; *In re Piedmont Ave. East*, 1d.; *Seaville v. City of Duluth*, 1d.

[b] (Neb.; 1895.)

Where the question of the constitutionality of the act under which the action was commenced was attempted to be raised only by objecting to the admission of evidence under the petition, and on error the brief of the plaintiff in error failed to state the particular section of the constitution claimed to be infringed, the question will not be considered.—*Boyes v. Summers*, 61 N. W. 1066, 46 Neb. 308.

§ 179. Matters not submitted on motion for new trial.

(Mich.; 1896.)

A statement claiming to contain all the undisputed items on both sides of an account in controversy, which was not submitted to the court below on a motion for a new trial, will not be considered on appeal.—*Rohde v. Biggs* (Mich.) 66 N. W. 331.

§ 180. Extent of review.

[a] (Iowa; 1896.)

In an action to recover from H. the balance of the price of land, the rest of the price having been applied to discharge liens as provided by the parties, H. declined to pay, on the ground that defendant C. had a judgment lien against it, which was not included in the liens agreed to be paid. The petition which stated the facts under which C.'s judgment was obtained, and alleged that the same was void, was demurred to by C.; and, his demurrer being sustained, plaintiff excepted, and refused to plead further. Thereupon H. filed a supplemental answer, pleading the adjudication on C.'s demurrer; and, the cause being submitted on an agreed statement of facts, the court held C.'s judgment a lien on the land, and adjudged that the same be discharged with the balance of the purchase money; such decree, which was the only judgment entered, reciting that "the whole cause was submitted on a written agreement of facts signed by the attorneys of the parties." Plaintiff appealed "from the judgment and decree entered in the above-entitled cause." *Held*, that the judgment appealed from included the adjudication on the demurrer.—*Henkle v. Holmes* (Iowa) 66 N. W. 910.

[b] (Iowa; 1897.)

An appeal from an order striking an amendment of the complaint from the files brings up for review an order for a change of venue made at the same time.—*Kay v. Pruden* (Iowa) 69 N. W. 1137.

[c] (Iowa; 1897.)

On appeal from a final judgment the court may review an interlocutory judgment rendered more than six months before the appeal was taken.—*Lesure Lumber Co. v. Mutual Fire Ins. Co.* (Iowa) 70 N. W. 761.

[d] (Minn.; 1896.)

Where the question whether the place of trial had been legally changed was raised by objecting to the hearing of a demurrer to the complaint in a county which, if the action had been removed, was not the proper county, the question is reviewable on appeal from an order overruling the demurrer.—*Flowers v. Bartlett* (Minn.) 68 N. W. 976.

[e] (Minn.; 1897.)

Where a cross complaint was demurred to on two grounds: First, that several causes of action were improperly joined; and, second, that it did not state a cause of action,—and the court erroneously sustained the demurrer on the first ground, and failed to dispose of the second ground, the court, on appeal, cannot

pass on that issue for the purpose of affirmance.—*Northwestern Railroad v. Prior* (Minn.) 70 N. W. 869.

[f] (Neb.; 1895.)

Where relief is sought in equity on two distinct grounds, and it is shown by the record that the decree for plaintiff rests on one ground only, and that the court reserved its decision on the other, the examination on appeal will be confined to the issue determined by the district court.—*Coombs v. MacDonald* (Neb.) 62 N. W. 41, 43 Neb. 632.

[g] (Neb.; 1895.)

On appeal from a refusal to set aside a sale on foreclosure, only such matters will be reviewed as were brought to the attention of the court below in the motion for that purpose.—*Hooper v. Castetter* (Neb.) 63 N. W. 135, 45 Neb. 67.

[h] (Neb.; 1896.)

In a proceeding in error from a decree confirming a judicial sale, the merits of the decree under which the sale was made cannot be inquired into.—*Beatrice Paper Co. v. Beloit Iron Works*, 65 N. W. 1059, 46 Neb. 900.

[i] (N. D.; 1894.)

When one appeals for a new trial of a case in the appellate tribunal, the whole case is open to investigation, and not merely that portion of the judgment which is adverse to appellant.—*Tyler v. Shea* (N. D.) 61 N. W. 468.

4 N. D. 377.

[j] (S. D.; 1894.)

An order for temporary alimony cannot be reviewed as an intermediate order on an appeal from the judgment and order denying a new trial.—*Williams v. Williams* (S. D.) 61 N. W. 38.

6 S. D. 284.

[k] (S. D.; 1895.)

An order denying a new trial, made before judgment, is reviewable on appeal from the judgment, where the order is assigned as error.—*Granger v. Roll* (S. D.) 62 N. W. 970.

6 S. D. 611.

[l] (S. D.; 1897.)

On appeal from the judgment alone, no appeal being taken from the order denying a new trial, the sufficiency of the evidence to support the findings of fact will not be reviewed.—*Taylor v. Bank of Volga* (S. D.) 70 N. W. 834.

[m] (Wis.; 1895.)

The right of a receiver of a millers' mutual insurance company to make an assessment cannot be questioned when the order appointing him has not been appealed from.—*Seamans v. Millers' Mut. Ins. Co.* (Wis.) 63 N. W. 1059.

90 Wis. 490.

[n] (Wis.; 1896.)

Matters arising after judgment, such as a claim that a portion of a judgment has been paid, pending appeal by defendants not appealing, will not be considered.—*Belden v. Hurlbut* (Wis.) 69 N. W. 357.

§ 181. — On appeal from decision on motion for new trial.

(Minn.; 1896.)

An order allowing an amendment of the complaint, made before the trial, and not as a part of it, cannot be reviewed on appeal from an order denying a motion for a new trial.—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.* (Minn.) 66 N. W. 132.

64 Minn. 61.

Motion for new trial made after judgment, see ante, § 86.

§ 182. Necessity of obtaining ruling of lower court.

[a] (Iowa; 1895.)

Where the record shows that a motion, the alleged ruling on which is assigned as error, was not passed on by the court, it will be pre-

sumed that the motion was not called to the court's attention, and that the ruling was waived.—*Corey v. Gillespie* (Iowa) 62 N. W. 837.

[b] (Iowa; 1896.)

Where the record does not disclose that objections to the form of a motion for a new trial on the ground of newly-discovered evidence was passed on by the trial court, the question will not be considered on appeal.—*Means v. Yeager* (Iowa) 65 N. W. 993.

[c] (Iowa; 1896.)

Where the record discloses no ruling on a party's objection to the introduction of testimony, an exception thereto cannot be considered.—*Nagle v. Fulmer* (Iowa) 67 N. W. 369.

[d] (Iowa; 1897.)

Assignments of error not based on the action of the lower court will not be considered.—*Boyd v. Watson* (Iowa) 70 N. W. 120.

[e] (Neb.; 1895.)

Where the record does not show any ruling by the court on a motion for judgment "non obstante veredicto," there is nothing in relation to such motion to be reviewed.—*Barr v. Kimball*, 62 N. W. 196, 43 Neb. 766.

Objections and issues not raised below, see post, §§ 193–201.

§ 183. Reasons for decision of lower court.

[a] (Iowa; 1895.)

Where defendant's motion for a verdict, containing several grounds, is sustained generally, the ruling of the court must be sustained, if any one of the grounds is well taken.—*Dungan v. Iowa Cent. Ry. Co.* (Iowa) 64 N. W. 762.

[b] (Iowa; 1896.)

On an appeal from an order sustaining a motion for a new trial on the ground that the court erred in applying the doctrine of contributory negligence, and in submitting that question to the jury, appellee cannot urge that the motion was properly sustained because some of the instructions on that issue were erroneous.—*Stuber v. Gannon* (Iowa) 67 N. W. 105.

[c] (Minn.; 1896.)

The fact that an erroneous reason is assigned by the trial court for granting a new trial is no ground for reversing the order, if it was properly granted on another ground.—*Morrow v. St. Paul City Ry. Co.* (Minn.) 67 N. W. 1002.

[d] (Neb.; 1896.)

Where a district court has properly dismissed an appeal from a justice of the peace, such order of dismissal will not be reversed merely because a bad reason was assigned for the decision.—*Denslow v. Dodendorf* (Neb.) 66 N. W. 409, 47 Neb. 328.

[e] (Neb.; 1896.)

It is not ground of reversal, in favor of a party who complains of a ruling by which a general objection to some offered evidence was sustained, that the objection was not specific, if the evidence which was objected to was for any reason properly excluded.—*Imhoff v. Richards* (Neb.) 67 N. W. 483.
48 Neb. 590.

§ 184. Adhering to theory pursued below.

[a] (Iowa; 1895.)

Plaintiff alleged that defendant company had notice of the defective sidewalk on its premises by which he was injured, and the case was tried on the theory that notice was necessary to hold defendant liable. Held that, plaintiff not having requested a charge that no notice was necessary, he could not on appeal avail himself of an alleged error in charging that notice was necessary.—*Moloney v. Chicago & N. W. Ry. Co.* (Iowa) 63 N. W. 690.

[b] (Mich.; 1897.)

Where the answer to a bill to quiet title asserts rights of defendant in the premises,
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defendant cannot, on appeal, disclaim interest, and have the bill dismissed because he is not a proper party.—*Vier v. City of Detroit* (Mich.) 70 N. W. 139.

[c] (Neb.; 1897.)

Where, in an action by receiver of an insolvent bank against one who had transferred his stock for the balance of the subscription, the contention is that his liability resulted from fraud in the transfer, he cannot be made liable on appeal on a different theory.—*Morrill v. Crawford* (Neb.) 70 N. W. 954; *Same v. Shaw*, Id.

[d] (S. D.; 1897.)

An appellate court will not, for the purpose of reversal, adopt a theory different from that upon which the action was tried in the court below.—*Noyes v. Brace* (S. D.) 70 N. W. 846.

§ 185. Basing contention on new grounds.

[a] (Minn.; 1895.)

An appellant is bound, on appeal, by the attitude taken by him through his attorney on the trial as to the nature of the action, though, on appeal, he is represented by a different attorney.—*Peteler Portable Railway Manuf'g Co. v. Northwestern Adamant Manuf'g Co.* (Minn.) 61 N. W. 1024.
60 Minn. 127.

[b] (Minn.; 1895.)

Where a partnership suing for a conversion admitted that defendant seized the property in attachment against one of the partners, and that the attachment was valid, and sought to recover on the ground that the interest of one partner in the partnership property could not be levied on under process against him alone, it could not on appeal urge that the court erred in ordering judgment for defendant on such admissions, without further evidence, on the ground that plaintiff had a right to prove a subsequent wrongful conversion which would render defendant a trespasser ab initio.—*Moquist v. Chapel* (Minn.) 64 N. W. 567.
62 Minn. 258.

[c] (N. D.; 1894.)

Where, on a motion to direct a verdict for plaintiff, the attention of the court and opposing counsel was directed to certain specific grounds, no other grounds will be considered in reviewing the ruling on the motion.—*First Nat. Bank v. Laughlin* (N. D.) 61 N. W. 473.
4 N. D. 391.

§ 186. Raising new grounds to support decision.

(Mich.; 1896.)

Where, in an action for slander, a verdict for defendant was erroneously directed, on the ground that the communication was privileged, the judgment will not be sustained on appeal because the evidence shows the action to have been barred by limitations.—*Garn v. Lockard* (Mich.) 65 N. W. 764.

§ 187. Who may allege error or assert objections.

[a] (Iowa; 1897.)

Where plaintiff draws out evidence as to a matter not pleaded, and defendant introduces evidence without objection in response thereto, plaintiff cannot complain that the court erred in treating the matter as in issue.—*Bennett State Bank v. Schloesser* (Iowa) 70 N. W. 705.

[b] (Mich.; 1897.)

Plaintiff cannot complain of the submitting to the jury of the terms of a lease, the writing having been excluded on his objection, and the oral testimony not having been objected to.—*Hirschfield v. Franks* (Mich.) 70 N. W. 894.

[c] (Minn.; 1897.)

Erroneous conclusions of law in respect to the rights of one defendant are not ground of

complaint by another defendant who was not prejudiced thereby.—*Borman v. Schneider* (Minn.) 70 N. W. 1075.

(a) (Neb.; 1896.)

When error in permitting the jury to take the account sued on to their room was prejudicial solely because of plaintiff's failure to give evidence explanatory of the peculiar manner in which the account was stated, plaintiff cannot urge the error on appeal.—*Hickman v. Layne* (Neb.) 66 N. W. 298.

47 Neb. 177.

(c) (Neb.; 1896.)

Only those appealing can obtain relief on appeal.—*Rogers v. Central Loan & Trust Co.* (Neb.) 68 N. W. 1048.

§ 188. — Right of appellee.

(a) (Iowa; 1896.)

An appellee cannot complain of a part of a decree from which he has not appealed.—*Carbrier v. Montgomery* (Iowa) 66 N. W. 900.

(b) (Mich.; 1891.)

On an appeal by one party only the other party cannot raise objections.—*Campbell v. Smith* (Mich.) 61 N. W. 654.

103 Mich. 427.

§ 189. Estoppel to allege error.

(a) (Minn.; 1896.)

Where a party objected to the admission of books of account on the ground that they were not properly authenticated under the statute, he cannot urge on appeal that the statute was inapplicable, and that they should have been authenticated according to the common-law rule.—*Leyne v. Lancashire Ins. Co.* (Minn.) 68 N. W. 855.

(b) (Neb.; 1896.)

A party cannot predicate error upon a ruling which he procured to be made.—*Norwegian Plow Co. v. Bollman*, 66 N. W. 292, 47 Neb. 186.

§ 190. Law of the case.

(Iowa; 1896.)

Where instructions in regard to the measure of damages are unobjected to, they become the law of the case, and therefore the exclusion of evidence material in view of the rule of damages so laid down requires a reversal, irrespective of whether such rule was correct or not.—*Eldridge v. Stewart* (Iowa) 66 N. W. 891.

§ 191. — Second appeal.

(a) (Mich.; 1895.)

Where, on a second appeal, the evidence is the same as on the prior appeal, and the record does not differ in any particular from the former record, the decision on the prior appeal is res judicata.—*Apsey v. Detroit, L. & N. R. Co.* (Mich.) 62 N. W. 992.

104 Mich. 646.

(b) (Mich.; 1896.)

Where a declaration, during two trials in the circuit court and one trial in the supreme court, is treated by the parties and the courts as containing a count for false imprisonment, it is too late on a second appeal to claim that the declaration does not contain such count, and that the count is one for malicious prosecution.—*Moore v. Thompson* (Mich.) 66 N. W. 51.

(c) (Mich.; 1896.)

On appeal from an order sustaining a demurrer to the complaint in a proceeding to dissolve a corporation under 3 How. Ann. St. c. 124a, the act was declared constitutional. Held, that the decision became the law of the case, and the question of the constitutionality of the act could not be reconsidered on appeal from a decree on the merits.—*Brown v. Pontiac Min. Co.* (Mich.) 67 N. W. 546; Same v. Mesnard Min. Co., Id.

(d) (Mich.; 1897.)

A ruling on appeal becomes the law of the case on retrial, and is not reviewable on a

second appeal. *Pierce v. Underwood* (Mich.) 70 N. W. 419.

(e) (Minn.; 1896.)

An assignment of error cannot be considered on a second appeal as to matters involved in the first appeal. In re Kittson's Estate (Minn.) 69 N. W. 625; Appeal of St. Paul Trust Co., Id.; Appeal of Kittson, Id.

(f) (Neb.; 1895.)

Where a case on appeal was remanded generally for new trial, and the same questions were presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal.—*City of Hastings v. Foxworthy* (Neb.) 63 N. W. 955.

45 Neb. 676.

(g) (Neb.; 1896.)

Decisions upon points involved in a case on a former appeal become the law of the case, and will not, as a rule, be re-examined.—*Fuller v. Cunningham* (Neb.) 67 N. W. 879.

48 Neb. 857.

(h) (S. D.; 1896.)

On a second appeal the supreme court will not review a question decided on the former appeal.—*Tanderup v. Hausen* (S. D.) 66 N. W. 1073.

2. REVIEW ON APPEAL FROM INTER-MEDIATE COURT.

See, also, ante, § 35.

Necessity of motion for new trial, see ante, § 81.

§ 192. Matters not apparent of record.

(Neb.; 1895.)

The refusal of the district court to strike out pleadings in a case appealed from a justice of the peace, because presenting issues not made before the justice, cannot be reviewed unless the record discloses what issues were presented before the justice.—*First Nat. Bank v. Chilson* (Neb.) 63 N. W. 362.

45 Neb. 257.

3. OBJECTIONS AND ISSUES NOT RAISED BELOW.

Adhering to theory pursued below, see ante, § 184.

Appeals from justices, see ante, §§ 172-174.

Time and manner of bringing objections to attention of lower court, see ante, §§ 74-86.

Waiver of objections to pleading, see "Pleading," §§ 86-100.

§ 193. In general.

[a] Objections not raised below cannot be urged on appeal.

(Neb.; 1896) *Fuller v. Cunningham*, 67 N. W. 879, 48 Neb. 857;

(S. D.; 1896) *Dowdle v. Cornue*, 68 N. W. 194.

(b) (Iowa; 1895.)

In an action by the assignee of a bond to secure a debt, the objection that the bond was not assigned at the time the action was commenced cannot be urged for the first time on appeal.—*Hoffman v. Smith* (Iowa) 63 N. W. 182.

(c) (Iowa; 1895.)

Questions not of a jurisdictional character will not be considered when presented for the first time in the appellate court.—*Ottumwa Sav. Bank v. City of Ottumwa* (Iowa) 63 N. W. 672.

(d) (Iowa; 1896.)

The contention that plaintiff cannot recover because he alleged that his injuries were due to the excessive force used by defendant's conductor in ejecting him from the train, and the jury found specifically that no excessive

force was used, cannot be urged for the first time on appeal.—*Milroy v. Chicago, M. & St. P. Ry. Co. (Iowa)* 67 N. W. 276.

[c] (Iowa; 1896.)

A defendant in an action for specific performance, who asserts that plaintiff has forfeited his rights by neglect to make certain payments, cannot for the first time on appeal raise the objection of failure to demand a conveyance.—*Ganghen v. Kerr (Iowa)* 68 N. W. 694.

[f] (Mich.; 1895.)

Objections not raised in the court below will be wholly disregarded on appeal.—*Mahiat v. Codde (Mich.)* 64 N. W. 194.

[g] (Mich.; 1896.)

Defendant cannot object for the first time on appeal that other persons jointly liable were not made parties.—*Clark v. O'Rourke (Mich.)* 69 N. W. 147.

[h] (Neb.; 1897.)

A ground for setting aside a judicial sale must be first presented in the lower court.—*Creighton University v. Riley (Neb.)* 69 N. W. 943.

[i] (Neb.; 1897.)

Objections to bills of exceptions because not presented for examination and amendment within the statutory time cannot be first raised on appeal.—*Thompson v. Missouri Pac. Ry. Co. (Neb.)* 69 N. W. 1119; *Alexander v. Overton, Id.*; *Hake v. Woolner, Id.*; *Mapes v. Village of Syracuse, Id.*; *Brown v. Hartman, Id.*

[j] (N. D.; 1896.)

It cannot be first urged on appeal that no notice of intention to move for new trial was ever served.—*Fletcher v. Nelson (N. D.)* 69 N. W. 53.

[k] (S. D.; 1896.)

Where oral evidence of the clerk of the court is admitted without objection to contradict the recitals in an execution, it cannot be disregarded on appeal.—*Loeke v. Hubbard (S. D.)* 69 N. W. 588.

[l] (Wis.; 1895.)

A garnishee cannot complain of the action of the trial court in acting on a stipulation for judgment against defendant, where no objection was made or exception taken thereto.—*John R. Davis Lumber Co. v. First Nat. Bank (Wis.)* 63 N. W. 1018.
90 Wis. 464.

[m] (Wis.; 1896.)

The fact that appellants did not understand that the entire equities of the case were being tried at circuit, but, on the contrary, understood that only certain leading questions were to be heard, after a decision of which a reference was to be had, upon which proofs upon the different branches of the case, in detail, were to be produced, cannot be first urged on appeal.—*Gates v. Parmly (Wis.)* 67 N. W. 739.
93 Wis. 294.

[n] (Wis.; 1896.)

An objection that no undertaking was ordered or given when a temporary injunction was granted cannot be raised for the first time on appeal from an order denying a motion to dissolve the injunction.—*Opperman v. Waterman (Wis.)* 69 N. W. 569.

§ 194. Objections going to jurisdiction.

[a] (Iowa; 1895.)

In an equity case, the objection that the court has no jurisdiction, because plaintiff has a remedy at law, cannot be made for the first time on appeal. *Railway Co. v. Donnell* (1889) 42 N. W. 176, 77 Iowa, 225, disapproved.—*Corey v. Sherman*, 64 N. W. 828.

[b] (Neb.; 1895.)

Where a defendant answers to the merits in a suit in equity, and submits to a trial without objection, he cannot object on appeal that plaintiff had an adequate remedy at law.—*Dorsey v. Nichols*, 61 N. W. 584, 43 Neb. 241.

[c] (Wis.; 1895.)

An equitable complaint having been answered on the merits, and the action tried without objection as to its form, it cannot be urged for the first time on appeal that there was a remedy at law.—*Bent v. Barnes (Wis.)* 64 N. W. 428, 90 Wis. 631.

§ 195. Constitutional questions.

[a] (Iowa; 1895.)

Where an action on an insurance policy is tried on the theory that the statutory 30 days' notice of the time when the premium note fell due was given, the constitutionality of the law requiring such notice to be given, before the policy can be avoided for nonpayment of the premium note, cannot be questioned for the first time on appeal.—*Ross v. Hawkeye Ins. Co. (Iowa)* 61 N. W. 852.
93 Iowa, 222.

[b] (Neb.; 1895.)

The objection that the statute under which the action was brought was not enacted in the constitutional mode cannot be raised for the first time on appeal.—*Clearwater Bank v. Kurkowski (Neb.)* 63 N. W. 133.
45 Neb. 1.

§ 196. Objections to remedy.

[a] (Iowa; 1896.)

In a suit to set aside a judgment by confession, an objection to the form of the action, in that plaintiff's remedy was at law, cannot be raised for the first time on appeal.—*Bull v. Keenan (Iowa)* 69 N. W. 433.

[b] (Iowa; 1897.)

The objection that, instead of filing a petition in an assignment proceeding, to have certain money in the hands of the assignee declared a trust fund, and the same established as a preferred claim, plaintiff should have sought such relief in equity, cannot be first raised on appeal. Code, § 2519.—*In re Knapp (Iowa)* 70 N. W. 626.

[c] (Neb.; 1897.)

A defendant, who has answered to the merits and submitted to the jurisdiction of a court of equity, cannot object for the first time on appeal that the plaintiff had an adequate remedy at law.—*Stahlhut v. Bauer (Neb.)* 70 N. W. 496.

§ 197. Defenses not raised below.

[a] (Iowa; 1896.)

An objection that the matters pleaded as a defense were "in violation of the statute of frauds" cannot be urged for the first time on appeal.—*Boos v. Dulin (Iowa)* 68 N. W. 707.

[b] (Iowa; 1897.)

On appeal from a decree against a vendor for specific performance, the vendor cannot first object that the land to be conveyed is his homestead, and that his wife did not sign the contract for conveyance.—*Wilson v. Kiddick (Iowa)* 69 N. W. 1039.

[c] (Mich.; 1896.)

In an action by the receiver of a foreign insurance corporation against a member to recover on a premium note, the objection that the company was not shown to have been authorized to do business in the state cannot be raised for the first time on appeal.—*Warner v. Delbridge & Cameron Co. (Mich.)* 68 N. W. 283.

[d] (Neb.; 1895.)

An indorser cannot for the first time on appeal urge that the indorsement is defective in form.—*Graves v. Norfolk Nat. Bank (Neb.)* 64 N. W. 225, 45 Neb. 840.

[e] (Neb.; 1896.)

One who, in an action for conversion, defends on the sole ground of his alleged superior title, cannot, on appeal, complain that he should have been permitted to recoup the amount of a lien on the property against the damages for

conversion. *Omaha Brewing Ass'n v. Wuethrich* (Neb.) 66 N. W. 990.
47 Neb. 920.

§ 198. — Limitations.

[1d] (Neb.; 1896.)

Where the statute of limitations was not pleaded in the county court, either by demurrer or answer, it could not be raised on the trial on appeal to the district court. *Fuller v. Schroeder* (1887) 31 N. W. 109, 20 Neb. 631, followed. — *Halbert v. Rosenbalm*, 68 N. W. 622.

[1b] (Neb.; 1897.)

The defense of the statute of limitations cannot be first raised on appeal. — *Bell v. Rice* (Neb.) 70 N. W. 25.

§ 199. Invalidity of contract.

(Minn.; 1896.)

The objection that a contract in suit was invalid for having been made on Sunday could not be first urged on appeal. — *Woodbridge v. Sellwood* (Minn.) 67 N. W. 799.

§ 200. Objections to evidence.

[a] An objection to the admissibility of testimony made for the first time on appeal will not be considered.

— (Iowa; 1895) *Sawin v. Union Bldg. & Sav. Ass'n of Des Moines*, 64 N. W. 401;

(Neb.; 1896) *Graham v. Frazier*, 68 N. W. 367.

[b] (Iowa; 1895.)

Where it appears that the parties to an action came before a stenographer, and in compliance with an agreement between them consented to his acting as a commissioner to take the testimony, the witnesses to be cross-examined, and the stenographer to certify a transcript of his report to the court, one of them cannot, on appeal, raise objections to the depositions so taken which he failed to make in the court below. — *Medland v. Walker* (Iowa) 64 N. W. 797.

[c] (Iowa; 1897.)

A ground of objection to a ruling on the admission of evidence, not stated in the objection as made in the trial court, cannot be considered on appeal. — *Kelly v. Incorporated Town of West Bend* (Iowa) 70 N. W. 726.

[d] (Neb.; 1895.)

Where no objection to the admission of evidence is taken, the question of its competency is waived. — *Brown v. Cleveland* (Neb.) 62 N. W. 463.

44 Neb. 239.

[e] (Neb.; 1896.)

The fact that, in answer to a question of the court concerning a section line in dispute, witness took a plat and went to the judge's desk, where he explained the same in tones and manner unintelligible to the court reporter, so that the answer could not be preserved in the record, was not ground for reversal, under an exception to such proceeding, where counsel for the complaining party did not, at the time, insist upon a full report of the evidence. — *Blomgren v. Holmquist* (Neb.) 68 N. W. 382.

[f] (S. D.; 1897.)

The sustaining of a general objection by a defendant to the admission of the record of a court, which is made by statute prima facie evidence of plaintiff's right of action, constitutes reversible error where the defendant's argument on appeal discloses that the real objection relied on is that proper foundation for the introduction of the record had not been laid, — an objection which might have been obviated had it been specifically stated. — *Bright v. Ecker* (S. D.) 69 N. W. 824.

[g] (S. D.; 1897.)

Where depositions were objected to on the ground that no foundation was laid for any such evidence, that there was no proper au-

thentication, and that they were incompetent, immaterial, and irrelevant, the specific objection that no reason was shown why deponents were not called as witnesses is unavailable on appeal. *First Nat. Exch. Bank v. Sherman* (S. D.) 70 N. W. 617.

[1d] (Wis.; 1896.)

Objection that evidence to prove estoppel was improperly received, because estoppel was not pleaded, cannot first be raised on appeal. — *Evans & Howard Fire-Brick Co. v. Hadfield*, 68 N. W. 468, 93 Wis. 665.

[1] (Wis.; 1897.)

Defendant denied any contract with plaintiff, and claimed that, if plaintiff's evidence showed any contract, it showed only one with defendant and his partner jointly. *Held*, that defendant's failure to object to plaintiff's evidence showing a joint contract did not preclude him from objecting that evidence of admissions by his partner of a joint contract could not be introduced by plaintiff because inconsistent with plaintiff's claim of a separate contract only. — *James v. Carson* (Wis.) 69 N. W. 1004.

§ 201. Objections to verdict or judgment.

[a] (Iowa; 1895.)

A reversal of a money judgment on a replevin bond cannot be had because it does not show that defendant elected to take such judgment, and the judgment was slightly in excess of the value of the property, where such errors were not called to the attention of the trial court. — *Crill v. Jeffrey* (Iowa) 64 N. W. 625.

[b] (Iowa.)

Where, in replevin, a money judgment is given defendant, on his election, the objection that such judgment includes the value of property which the return to the writ shows was not seized cannot be urged, where the mistake was not called to the attention of the trial court. — (1895) *Klotz v. James*, 64 N. W. 648; (1896) *Id.*, 66 N. W. 190.

[c] (Iowa; 1895.)

An error in a judgment, arising from a mistake in computation, is not ground for reversal, when questioned for the first time on appeal. — *Reed v. Lane* (Iowa) 65 N. W. 380.

[d] (Iowa; 1896.)

Portions of a decree in which appellants are alone interested, and to which no objection was made by them in the trial court, will not be reviewed. — *Stewart v. Stewart* (Iowa) 65 N. W. 976.

[e] (Iowa; 1897.)

Defendant cannot complain on appeal that the trial court assessed damages on an erroneous theory, on which evidence was admitted without objection. — *Tarpy v. Blume* (Iowa) 70 N. W. 620.

[f] (Mich.; 1896.)

It is too late to raise the question for the first time by supplemental brief on appeal that the verdict in a slander case, pending but not tried when Laws 1895, Act No. 216, was passed, did not comply with section 2, which provides that in awarding damages the jury must specify the amount awarded for damages to feelings separately from the amount awarded for other damages. — *Hewitt v. Morley* (Mich.) 69 N. W. 245.

[g] (Minn.; 1896.)

The fact that the judgment entered by the clerk does not conform to the order for judgment cannot be raised on appeal, in the absence of an application below to have the judgment corrected. — *Levine v. Lancashire Ins. Co.* (Minn.) 68 N. W. 855.

[h] (Minn.; 1896.)

A variance between the judgment entered and that ordered cannot be first objected to on appeal. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[1] (Neb.; 1896.)

Objections to the form and terms of a verdict should be made in the court below at the time of its rendition, in order to be available on error to the supreme court. *Roggenkamp v. Hargreaves* (1894) 58 N. W. 162, 39 Neb. 540, followed.—*Yankton, N. & S. W. Ry. Co. v. State*, 68 N. W. 487.

4. DISCRETION OF TRIAL COURT.

As to remarks of counsel, see "Trial," § 42.
In awarding costs, see "Costs," § 2.

§ 202. Injunction.**[a] (Iowa; 1896.)**

An order refusing an injunction against obstructing a street, being within the discretion of the court, will not be disturbed unless an abuse of discretion is shown.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

[b] (Minn.; 1896.)

The dissolution pendente lite of a temporary injunction against the opening of a highway will not be disturbed unless an abuse of discretion.—*Gorton v. Town of Forest City* (Minn.) 69 N. W. 478.

§ 203. Granting or refusing continuance.

[a] An application for a continuance during the progress of a trial is addressed to the sound discretion of the court.

—(Neb.; 1896) *Burris v. Court*, 66 N. W. 1131, 48 Neb. 179;

(S. D.; 1895) *Billingsley v. Hiles*, 61 N. W. 687, 6 S. D. 445.

[b] (Mich.; 1896.)

The record of the justice showed that on the return day defendant demanded security for costs and a bill of particulars, and the cause was adjourned two weeks on an agreement that it should then be tried; that on the adjournment day defendant's counsel asked for a further adjournment, to which plaintiff objected, as he had several witnesses from a distance; that security for costs was entered on the adjournment day; that defendant was not prevented from preparing his defense from the delay in filing such security; that the bill of particulars was filed and served before the adjournment day, defendant knowing before such service who were his witnesses; and that no affidavit of merit was filed. *Held*, that the refusal of a further adjournment was not an abuse of discretion.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Vanderbilt* (Mich.) 67 N. W. 690.

[c] (Neb.; 1896.)

An order denying a continuance of a cause will not be reversed, except for an abuse of discretion.—*Storz v. Finkelstein* (Neb.) 66 N. W. 1020.

48 Neb. 27.

§ 204. Amendment of pleadings.

[a] The refusal to allow an amendment will not be disturbed in the absence of an abuse of discretion.

—(Iowa; 1895) *Heusinkveld v. St. Paul Fire & Marine Ins. Co.*, 64 N. W. 769;

(Neb.; 1895) *Kleckner v. Turk*, 63 N. W. 469, 45 Neb. 176.

[b] (Iowa; 1896.)

The court, in its discretion, may, during the trial, permit defendant to amend his pleadings so as to enable him to plead an estoppel in pais.—*Clough v. Bennett* (Iowa) 68 N. W. 578.

[c] (Iowa; 1897.)

It was not error to allow plaintiff, in an action for assault and battery, early in the trial, before resting, to amend by praying for exem-

plary damages; the complaint warranting it.—*Kreuger v. Sylvester* (Iowa) 69 N. W. 1059.

[d] (Mich.; 1897.)

The discretion of the court in refusing defendant's motion to amend a plea of the general issue by giving notice of the statute of limitations is not reviewable.—*Shank v. Woodworth* (Mich.) 70 N. W. 140.

[e] (Neb.; 1896.)

The propriety of granting or withholding leave to amend pleadings, as it is claimed to agree with the evidence in a case, is within the discretion of the trial judge.—*Imhoff v. Richards* (Neb.) 67 N. W. 483.

48 Neb. 590.

[f] (Neb.; 1897.)

The allowance of an amendment, after issues have been joined and trial commenced, is subject to review to ascertain whether there has been an abuse of discretion.—*Harrington v. Connor* (Neb.) 70 N. W. 911.

§ 205. Granting or refusing new trial.

[a] The granting of a new trial will not be disturbed on appeal unless it be shown that there was an abuse of discretion.

—(Iowa; 1895) *Johnson v. Chicago & N. W. Ry. Co.*, 63 N. W. 679; (1897) *Iowa Cent. Building & Loan Ass'n v. Phoenix Ins. Co.*, 70 N. W. 618;

(Minn.; 1895) *Murphy v. St. Paul City Ry. Co.*, 65 N. W. 356, 63 Minn. 301.

[b] (Iowa; 1895.)

In an action for injuries caused by defendant's engine leaving the track through alleged defects in the roadbed, track, and switch standard, defendant asked that the jury be allowed to view the locality of the accident, to which plaintiff agreed. At the view defendant's road master operated an engine over the switches, in the presence of the jury, which had not been contemplated by the court or the parties. *Held* that, though the jury had been instructed before the view that it was to enable them to make better application of the testimony heard in court, in view of what defendant's road master did, the granting of a new trial on the ground that the jury should have been cautioned after the view not to consider their own observations as evidence was not an abuse of discretion requiring a reversal.—*Cox v. Chicago & N. W. Ry. Co.* (Iowa) 63 N. W. 450.

[c] (Iowa; 1896.)

The granting of a new trial is within the discretion of the court.—*Lundon v. Waddick* (Iowa) 67 N. W. 388.

[d] (Mich.; 1895.)

Where the order denying a new trial, on the ground of newly-discovered evidence, and that the verdict is against the evidence, while not assigning reasons therefor, recites that defendant's affidavits do not correctly state what occurred on his motion for a continuance, it cannot be said that the court abused its discretion in refusing the motion.—*Aultman, Miller & Co. v. Dodson* (Mich.) 62 N. W. 708.
104 Mich. 507.

[e] (Neb.; 1895.)

The findings of a trial court, on a motion for a new trial, when based on conflicting evidence, will not be disturbed, unless clearly wrong.—*Kent v. Green*, 62 N. W. 71, 43 Neb. 673.

[f] (S. D.; 1896.)

An order granting a new trial will rarely be interfered with on appeal, unless it is shown to have been based on error of law. An abuse of discretion must clearly appear.—*Thompson v. Ulrikson* (S. D.) 67 N. W. 626.

[g] (S. D.; 1896.)

The action of the lower court in granting a motion for new trial on purely legal grounds may be reviewed on appeal, no question of judicial discretion being involved.—*Davis v. Cook* (S. D.) 69 N. W. 18.

§ 206. — Motion based on newly-discovered evidence.**[a] (Mich.: 1897.)**

The overturning of a motion for a new trial, based on newly-discovered evidence, on the ground that proper diligence to discover the evidence before trial had not been shown, will not be disturbed unless a clear abuse of discretion appears.—*Raymond v. Day* (Mich.) 69 N. W. 832.

[b] (N. D.: 1895.)

The granting of a new trial for newly-discovered evidence is within the discretion of the trial court.—*Patch v. Northern Pac. R. Co.* (N. D.) 63 N. W. 207.
5 N. D. 55.

§ 207. — Where insufficiency of evidence is alleged.**[a] (Iowa: 1891.)**

An order granting a new trial on the ground of insufficiency of the evidence will be affirmed unless an abuse of discretion clearly appears.—*Kern v. May* (Iowa) 61 N. W. 390.
92 Iowa, 674.

[b] (Iowa: 1895.)

An order of the trial court, made on its own motion, setting aside a verdict as being contrary to evidence, and ordering a new trial, will not be disturbed unless there has been a clear abuse of discretion.—*Arctic King Refrigerator Co. v. Kelly* (Iowa) 63 N. W. 676.

[c] (Minn.: 1895.)

Where the evidence was not manifestly in favor of the verdict, the order granting a new trial, for want of sufficient evidence, will not be reversed.—*Hicks v. Stone* (1898) 13 Minn. 434 (Gil. 398), followed.—*Maxfield v. Anerbach*, 62 N. W. 284, 60 Minn. 272.

[d] (Minn.)

Unless the evidence is manifestly in favor of the verdict, an order granting a new trial for insufficiency of evidence will not be reversed.—(1895) *Simon v. Christian*, 65 N. W. 455, 63 Minn. 262; (1896) *Shannahan v. Chicago, St. P., M. & O. Ry. Co.*, 66 N. W. 1151, 64 Minn. 300.

[e] (N. D.: 1896.)

An order granting a new trial on the ground that the evidence does not sustain the verdict is in the discretion of the court.—*Gull River Lumber Co. v. Osbrone-McMillan Elevator Co.* (N. D.) 69 N. W. 691.

[f] (Wis.: 1895.)

An order granting a new trial, on the ground that the verdict was in part contrary to the clear preponderance of the evidence, is within the sound discretion of the trial court.—*Farley v. Chicago, M. & St. P. Ry. Co.* (Wis.) 61 N. W. 769, 89 Wis. 206.

§ 208. Matters relating to receivers.**[a] (Iowa: 1895.)**

An allowance to the counsel of a receiver will not be disturbed on appeal as unreasonable, where it does not appear what services were rendered by the counsel or the value of such services.—*St. Paul Title-Insurance & Trust Co. v. Diagonal Coal Co.* (Iowa) 64 N. W. 606.

[b] (Mich.: 1896.)

The granting of leave to sue or garnish a receiver being discretionary, the court may also, in its discretion, set aside an order granting such leave, where, in its judgment, improperly made; and its action will not be disturbed unless an abuse of discretion appears.—*Citizens' Commercial & Savings Bank v. Bay Circuit Judge* (Mich.) 68 N. W. 649.

[c] (Mich.: 1896.)

The appointment of a receiver will not be set aside unless manifestly an abuse of discretion.—*Rolfe v. Burnham* (Mich.) 68 N. W. 980.

5. PRESUMPTIONS.

See, also, "Certiorari," § 8.

As to abstracts of record, see ante, § 125.

— appealability of order, see ante, § 16.

— effect of error, see post, § 259.

From failure to deny averments in appellee's abstract, see ante, § 129.

On appeal from justice, see ante, § 173.

§ 209. When presumption arises.**[a] (Iowa: 1896.)**

Where it was stipulated on appeal, in attachment, that some of the evidence tended to show that the property attached belonged to defendant and to interveners, and the jury's special finding found the property belonged to both parties, but the general verdict found against the claim of the interveners, it will be presumed, in the absence of evidence, and in support of the general verdict, that plaintiff acquired a right to attach the property before the interest of interveners was acquired.—*Moditt v. Albert* (Iowa) 66 N. W. 162.

[b] (Iowa: 1896.)

Where there is but one issue of fact made by the pleadings, and appellant assigns as error that the evidence is insufficient to sustain the decision of the trial court, it will be assumed on appeal that such issue was determined against the appellant.—*Switzer v. Davis* (Iowa) 66 N. W. 174.

[c] (Iowa: 1896.)

Where a witness testified that a table was worth \$12 at the time of its loss, it will be presumed that the market value at that time was meant, where the instructions fixed the measure of recovery at the reasonable market value of the property.—*Huston v. State Ins. Co.* (Iowa) 69 N. W. 674.

[d] (Iowa: 1897.)

It will be presumed that the case pending on appeal was the only one tried, where there was practically no testimony upon a case which was alleged to have been consolidated with it, and the only reference to such other case is in the caption of the record, showing the submission to the jury.—*J. V. Farwell Co. v. Zenor* (Iowa) 69 N. W. 1030.

[e] (Iowa: 1897.)

On a trial for slander, when the jury is charged to estimate the amount of "actual injury" plaintiff would naturally sustain, the supreme court cannot presume, from the amount of the verdict, that exemplary damages were allowed.—*Trimble v. Tantlinger* (Iowa) 69 N. W. 1045.

[f] (Iowa: 1897.)

The supreme court does not, in order to support the judgment, assume facts essential thereto which have no support in the evidence, unless they are such as may be taken judicial notice of.—*In re Knapp* (Iowa) 70 N. W. 626.

[g] (Mich.: 1895.)

Where, in an action to recover for defendant's interference, by the construction of a dam, with plaintiff's right to float logs in a navigable stream, the record is silent as to defendant's right to construct the dam, it will be presumed that proper proceedings therefor were taken by him.—*Pratt v. Brown* (Mich.) 64 N. W. 583.

[h] (Minn.: 1897.)

After judgment every reasonable intendment is in favor of the sufficiency of the proceedings in a justice court.—*Polk v. American Mortgage & Loan Co.* (Minn.) 70 N. W. 1078.

[i] (Neb.: 1895.)

Where the journal entry shows that an exception was noted to the ruling on a motion, it will be presumed that the party was present, or represented by counsel.—*Rose v. Enrr* (Neb.) 61 N. W. 593, 43 Neb. 358.

[l] (Neb.: 1896.)

This court will not presume the adjournment sine die of a term of the district court from the fact that a period of 23 days has intervened since a given day thereof.—Hyde v. Kent (Neb.) 66 N. W. 39.
47 Neb. 26.

[k] (Neb.: 1896.)

Where an order omits the name of the judge by whom it was made, the fact that the sole judge of the district was disqualified to act in such proceeding raises no presumption against the validity of such order, in view of the statute authorizing judges to hold court for each other.—Link v. Connell (Neb.) 67 N. W. 475.
48 Neb. 574.

[l] (S. D.: 1895.)

Where an order for reference was made, in the absence of a showing that an agreement for reference was not filed or entered in the minutes, it is presumed that the same was made.—Jerould County v. Williams (S. D.) 63 N. W. 905.

[m] (Wis.: 1896.)

Where verdict was directed for plaintiff, it will on appeal be assumed that facts were as claimed by plaintiff, there having been competent evidence before the jury tending to prove them.—Buckstaff v. Hicks (Wis.) 68 N. W. 403.

§ 210. As to authority to institute suit.
(S. D.: 1895.)

An action by the state's attorney, in the name of the county, against the county treasurer and his sureties, for the recovery of money alleged to be due, is presumed to have been authorized by the county commissioners.—Jerould County v. Williams (S. D.) 63 N. W. 905.

§ 211. Necessity of affirmatively showing error.

[a] (Iowa: 1896.)

It cannot be presumed, for the purpose of showing error in admitting statements of a person, that at a certain date there was an overbalance in the account of a bank, and on another date a shortage, that witness was testifying from the books; in which case the books would be the best evidence.—Iowa City State Bank v. Novak (Iowa) 66 N. W. 186.

[b] (Wis.: 1895.)

An objection urged for the first time on appeal that the petition for certiorari from the circuit to the justice's court was defectively verified, and that the writ itself did not appear to have been allowed by the judge, must be affirmatively supported by the record.—Milwaukee Harvester Co. v. Teasdale (Wis.) 64 N. W. 422, 91 Wis. 59.

§ 212. As to action of trial court.

[a] (Iowa: 1894.)

Where a deed was excluded on the ground that it was not the original, and no foundation had been made for secondary evidence, though after the ruling was made counsel stated that it was a deed a copy of which was attached to the petition, if the record does not identify it as such, the presumption in favor of the action of the court prevails.—Young v. Omaha & St. L. Ry. Co. (Iowa) 61 N. W. 209, 92 Iowa, 583.

[b] (Iowa: 1895.)

Where, on trial by the court, incompetent evidence was admitted, subject to plaintiff's objection, and judgment was rendered for plaintiff, it is presumed on appeal that the trial court gave the evidence no consideration.—Wright v. Farmers' Mut. Live-Stock Ins. Ass'n (Iowa) 65 N. W. 308.

[c] (Neb.: 1895.)

It is presumed that the court, in excusing a juror on the ground that he was a party in an action then pending in the trial court, acted advisedly as to whether the juror was such

a party.—Gran v. Houston (Neb.) 64 N. W. 245, 45 Neb. 813.

[d] (Neb.: 1896.)

Eleven months after denying a new trial, the court, on motion, entered judgment nunc pro tunc on the verdict. *Held*, on appeal from the granting of the motion, the bill of exceptions having been quashed, it is presumed that the lower court, on the hearing of the motion, had before it evidence that a judgment had in fact been rendered or ordered at the time the new trial was denied.—Van Etten v. Test (Neb.) 68 N. W. 1023.

[e] (S. D.: 1895.)

Where, on appeal to the circuit court from probate court appointing a guardian, questions of fact are submitted to the jury, whose answers, though only advisory, are referred to in the judgment, and the court itself makes no findings, it will be presumed that the judgment was based on the findings of the jury.—Engle v. Yorks (S. D.) 64 N. W. 132.

[f] (Wis.: 1896.)

It will be assumed on appeal that objections made to evidence, rulings on which do not appear, were overruled, the evidence being essential to the finding made.—Reichert v. Nenser (Wis.) 67 N. W. 939.
93 Wis. 513.

§ 213. As to facts found by trial court.
(Iowa: 1895.)

Where there is evidence to support a general finding, it will be presumed on appeal that the court found every specific fact necessary to support it.—Buford v. Devoe (Iowa) 65 N. W. 413.

§ 214. To cure omission of findings.
(S. D.: 1895.)

Since the statute allows parties to waive findings by the court, in the absence of findings a waiver is presumed.—Chandler v. Kennedy (S. D.) 65 N. W. 439.

§ 215. Concerning names of parties.

(Neb.: 1896.)

In the absence of a showing to the contrary, it will not be presumed, for the purpose of invalidating a judgment rendered against a defendant, that he has any other Christian name than the initials by which he was sued.—Scarborough v. Myrick (Neb.) 66 N. W. 867.
47 Neb. 794.

§ 216. In absence of certain matters from the record.

[a] (Iowa: 1897.)

Under Code, § 3508, which limits the jurisdictional amount in a justice's court to \$100, but provides that by consent of the parties it may be extended to \$300, such consent will be presumed on appeal, where the record does not show that any objection was made to the justice's jurisdiction.—Chesmore v. Barker (Iowa) 70 N. W. 701.

[b] (Neb.: 1896.)

Where the transcript of the record of the trial court shows that a reply was filed therein, the defendant will not be heard to insist in this court that the averments in his answer should be taken as true merely because of his failure to have the reply included in such transcript.—Lewis Inv. Co. v. Boyd (Neb.) 67 N. W. 456.
48 Neb. 604.

[c] (S. D.: 1896.)

Where there is an appeal from an order striking out, as irrelevant, certain parts of the answer, and the abstract does not contain the defenses remaining, it will be presumed that the matter stricken out was redundant, and that the other allegations of the answer require no aid therefrom.—Minnesota Thresher Mann'g Co. v. Schaeck (S. D.) 68 N. W. 287.

§ 217. Where evidence is not preserved.

[a] (Iowa; 1897.)

Where the abstract does not purport to set out all of the evidence, it will be presumed, in support of rulings excluding evidence of statements made by defendant, that there was evidence that they were made for the purpose of a compromise only.—*Bowers v. Hanna* (Iowa) 70 N. W. 745.

[b] (Minn.; 1894.)

Where the evidence is not returned the refusal to make additional findings of fact cannot be reviewed.—*Groomes v. Waterman* (Minn.) 61 N. W. 139.

59 Minn. 258.

[c] (Minn.; 1895.)

In the absence of the evidence, it is presumed that all the issues on which the court found were voluntarily litigated, though they are not within the pleadings.—*Yorks v. City of St. Paul* (Minn.) 64 N. W. 565.

62 Minn. 250.

[d] (Neb.; 1895.)

Where the bill of exceptions does not contain the evidence introduced on the trial, but states that such evidence was considered on a motion for a new trial, the ruling on the motion for new trial cannot be considered on review.—*Spottswood v. National Bank of Commerce* (Neb.) 62 N. W. 245.

44 Neb. 1.

[e] (S. D.; 1896.)

On appeal from a judgment of a court of general jurisdiction, where the record does not purport to contain the evidence, such facts will be presumed, if within the issues, as will support the judgment of the trial court.—*McKennett v. Barringer* (S. D.) 67 N. W. 622.

[f] (Wis.; 1895.)

Where there is nothing before the appellate court but the pleadings, verdict, motion for judgment, ruling, exception, and judgment, it will be presumed that every averment of the complaint not negated by the verdict was proven on the trial.—*McDermott v. Chicago, M. & St. P. Ry. Co.*, 64 N. W. 430, 91 Wis. 38.

§ 218. — As to instructions.

[a] (Iowa; 1895.)

An instruction that plaintiff could not recover for prospective loss of time as the result of an injury cannot be reviewed when the abstract contains only a small part of the evidence.—*Moloney v. Chicago & N. W. Ry. Co.* (Iowa) 63 N. W. 690.

[b] (Neb.; 1896.)

In reviewing instructions, in the absence of a bill of exceptions, they are presumed to have been applicable to the evidence, and to have been proper when considered in connection therewith.—*City Nat. Bank v. Thomas*, 65 N. W. 895, 46 Neb. 861.

[c] (Neb.; 1896.)

If the record contains no proper bill of exceptions, and error is assigned, based on instructions, such instructions will be presumed to be free from error.—*Oltmanns v. Pindlay* (Neb.) 66 N. W. 425.

47 Neb. 289.

§ 219. As to waiver of jury trial.

(Neb.; 1895.)

Where the record on appeal shows that an action was tried without a jury, without objection thereto by either party, or application for a jury, it is presumed that a jury was waived.—*Davis v. Snyder* (Neb.) 63 N. W. 789.

45 Neb. 415.

§ 220. As to waiver of defenses.

(Wis.; 1895.)

Where the court, after charging, stated that, as limitations had not been insisted on as a defense, he would say nothing about them to the jury, and defendant made no objection to

such statement, it will be presumed that the defense of the statute was waived.—*Hall v. Stevens*, 62 N. W. 81, 89 Wis. 447.

6. WEIGHT AND SUFFICIENCY OF EVIDENCE.

Essentials to review sufficiency of evidence, see ante, §§ 122, 123.

Necessity of motion for new trial, see ante, § 82.
— of raising objection on motion for new trial, see ante, §§ 83, 84.

§ 221. In general.

[a] (Iowa; 1895.)

Where a new trial is ordered because of errors in law, in a case tried by the court, the weight of the evidence will not be considered.—*Funk v. Carroll County* (Iowa) 64 N. W. 768.

[b] (Iowa; 1896.)

The question whether a certain railroad is a railway proper, or a street railway, is one of fact, which the supreme court cannot determine without an examination of the evidence as to its character and manner of construction, operation, and use.—*Prescott v. Riverside Park Ry. Co.* (Iowa) 68 N. W. 831.

[c] (Mich.; 1896.)

Where the acts of the parties to an action are in any way inconsistent with their testimony, it is for the jury to determine whether such inferences as arise from their acts are overcome by the testimony given, when one of the parties to the transaction is dead.—*Krause v. Equitable Life Assur. Soc. of U. S.* (Mich.) 67 N. W. 333.

§ 222. Verdict.

[a] Where there is evidence to support it, a verdict will not be disturbed on appeal.

—(Iowa; 1896) *Farmers' Co-operative Soc. of Geneva v. German Ins. Co.*, 66 N. W. 878;

(Neb.; 1896) *Whitecomb v. Thomas*, 66 N. W. 818, 47 Neb. 909; (1896) *Smith v. Smith*, 66 N. W. 1016, 48 Neb. 21;

(Wis.; 1895) *Gilmore v. Chicago, M. & St. P. Ry. Co.*, 62 N. W. 621, 90 Wis. 102.

[b] (Iowa; 1894.)

Where there is evidence to support a verdict, it will not be disturbed because the appellate court might have reached a different conclusion.—*Dimmick v. Babcock* (Iowa) 61 N. W. 394.

92 Iowa, 692.

[c] (Iowa; 1895.)

A verdict will be set aside on appeal, when a manifest injustice would be done by permitting it to stand.—*Chicago Cottage Organ Co. v. Caldwell* (Iowa) 63 N. W. 336.

[d] (Iowa; 1895.)

There was evidence to show that plaintiff, after the first trial of his case, said to defendant's attorneys that he did not want to further prosecute the case; that the verdict in his favor was unjust; and that he had misrepresented his injuries. These statements were sworn to, and a new trial was granted. On the second trial, plaintiff testified that he did not remember making those statements or that he signed an affidavit for a new trial, and testified that before the second trial he was offered a certain sum to dismiss the case. *Held*, that the sufficiency of the evidence was for the jury.—*Carbo v. City of Ottumwa* (Iowa) 64 N. W. 413.

[e] (Mich.; 1894.)

A verdict for plaintiff in an action for personal injuries will not be disturbed because it was based on a finding that the accident was due to a cause which plaintiff testified she did not think it resulted from.—*Tunnicliffe v. Bay Cities Consol. Ry. Co.* (Mich.) 61 N. W. 11.

102 Mich. 624.

[i] (Mich.; 1895.)

A verdict rendered on evidence creating a direct issue of fact as to the existence of the contract sued on will not be disturbed on appeal, in the absence of errors of law.—*Hathaway v. Judie* (Mich.) 63 N. W. 68.
105 Mich. 231.

[j] (Minn.; 1895.)

In determining whether the evidence justified the verdict, evidence offered, but excluded, cannot be considered, though its exclusion was erroneous.—*Sauer v. Flynt* (Minn.) 63 N. W. 252.
61 Minn. 109.

[k] (Minn.; 1895.)

Since usury works an absolute forfeiture of the whole debt, the evidence in support of a verdict sustaining a defense of usury should be scrutinized with greater strictness than in ordinary civil actions.—*Yellow Medicine County Bank v. Cook* (Minn.) 63 N. W. 1093.
61 Minn. 452.

[l] (Minn.; 1896.)

The fact that the accident which caused the injury sued for did not occur in the precise manner claimed by plaintiff did not, alone, require a reversal of a verdict for plaintiff.—*Banker v. People's Ice Co.* (Minn.) 65 N. W. 657.
63 Minn. 411.

[j] (Neb.; 1895.)

A judgment will not be set aside because the jury has drawn an inference from the evidence other than that which the court might have drawn.—*Spears v. Chicago, B. & Q. R. Co.*, 62 N. W. 68, 43 Neb. 720.

[k] (Neb.; 1895.)

Where the evidence supports the findings of the jury, the judgment will be affirmed.—*Van Etten v. Edwards* (Neb.) 62 N. W. 235.
44 Neb. 57.

[l] (Neb.; 1896.)

Where there is sufficient evidence to sustain a verdict, it will not be set aside, notwithstanding the court might have found differently from the jury upon the testimony.—*Fairfield v. Kerns* (Neb.) 67 N. W. 166.
48 Neb. 254.

[m] (Neb.; 1896.)

A verdict not clearly against the weight of the evidence will not be disturbed, though there may have been sufficient evidence to support a contrary verdict.—*Fuller v. Cunningham* (Neb.) 67 N. W. 879.
48 Neb. 857.

[n] (S. D.; 1896.)

When sustained by the evidence, a general verdict on all the issues is conclusive as to every averment essential to a recovery.—*Farmers' Bank of Frankfort v. Bank of Canton* (S. D.) 65 N. W. 1070.

[o] (Wis.; 1896.)

A verdict finding on sufficient evidence that plaintiff was a "tenant" will not be disturbed, even if there was evidence from which the jury might have found that he was a "cropper".—*Foley v. Southwestern Land Co.* (Wis.) 68 N. W. 994.

§§ 223, 224.—Conflicting evidence.

[a] Where the evidence is conflicting, the verdict of the jury will not be disturbed.

—(Iowa; 1896) *Farmers' Co-operative Soc. of Geneva v. German Ins. Co.*, 66 N. W. 878;

(Mich.; 1896) *Phippen v. Bay Cities Consolidated Ry. Co.*, 68 N. W. 216;

(Neb.; 1895) *Mawhiney v. Green*, 62 N. W. 1085, 44 Neb. 688; (1895) *Pearsall v. Columbus Creamery Co.*, 62 N. W. 1093, 44 Neb. 833; (1895) *Will v. Elwood*, 62 N. W. 1113, 44 Neb. 847; (1895) *Davis v. Snyder*, 63 N. W. 789, 45 Neb. 415; (1895) *Farmers' & Merchants' Ins. Co. v. Malone*, 63 N. W.

802, 45 Neb. 302; (1895) *B'Nai Israel v. Garneau*, 63 N. W. 828, 45 Neb. 592; (1895) *Carstens v. Eller*, 63 N. W. 839, 45 Neb. 515; (1896) *Hanbrock v. Loeb*, 65 N. W. 1057, 46 Neb. 868; (1896) *Nelson v. Mills*, 66 N. W. 854, 47 Neb. 824; (1896) *Kroehler v. Long*, 67 N. W. 856, 48 Neb. 889; (1896) *City of Omaha v. Coombe*, 67 N. W. 885, 48 Neb. 879.

[b] (Neb.; 1896.)

A verdict based on conflicting evidence will not be disturbed as against the weight of the evidence.—*Johnson v. Wirth*, 68 N. W. 365; *McCormick Harvesting Mach. Co. v. Seeman*, *Id.* 482.

[c] (Iowa; 1895.)

Where the evidence is conflicting the judgment will not be reviewed.—*Schmitz v. Klatt*, 62 N. W. 784.

[d] (Iowa; 1896.)

In an action for conversion the defendant pleaded estoppel, in that plaintiff had consented to the taking and sale of the goods. The evidence as to the consent was conflicting, and the jury were instructed that if they found plaintiff had so consented he could not recover. *Held*, that a finding for plaintiff on the issue thus presented will not be disturbed on appeal.—*Casey v. Ballou Banking Co.* (Iowa) 67 N. W. 98.

[e] (Neb.; 1895.)

Where the only question contested was whether defendant employed plaintiff as a physician to render services for defendant's daughter, who was over 18 years of age, a verdict on conflicting evidence will not be disturbed on appeal.—*Mitchell v. Jones* (Neb.) 63 N. W. 122.
45 Neb. 55.

[f] (S. D.; 1896.)

Where, in an action to recover for stock killed by a railway train, the testimony as to the circumstances of the killing, on which the question of defendant's negligence depended, was conflicting, the verdict of the jury will not be disturbed.—*Bennett v. Chicago, M. & St. P. Ry. Co.* (S. D.) 66 N. W. 934.

[g] (Wis.; 1895.)

Where the evidence was conflicting, and the court refuses a new trial, a verdict for defendants will not be disturbed.—*Bank of Commerce v. Ross*, 64 N. W. 993, 91 Wis. 320.

§ 225. — Number of witnesses.**(Neb.; 1896.)**

A verdict for plaintiff will not be set aside on appeal, as against the preponderance of evidence, merely because defendant produced the greater number of witnesses.—*Fremont, E. & M. V. R. Co. v. French* (Neb.) 67 N. W. 472, 48 Neb. 638.

§ 226. — Against weight of evidence.**[a] (Neb.; 1895.)**

A verdict holding defendants guilty of conspiracy will be reversed where there is absolutely no evidence that either defendants had any knowledge or took any part in the alleged fraudulent proceedings which deprived plaintiff of his property. 58 N. W. 1131 (1894) affirmed.—*Hardin v. Sheuey*, 62 N. W. 230, 43 Neb. 806.

[b] (Neb.; 1896.)

A verdict will not be set aside, on the ground of the want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong.—*Spurek v. Dean* (Neb.) 68 N. W. 375.

[c] (Wis.; 1894.)

In an action on notes, defendant set up a counterclaim for services rendered the payee, who died before the trial. Such services were rendered many years before such trial, when defendant was doing other business for such payee, and he at no time made any charge for them on his books. The testimony as to the

services was mostly given by defendant. There was evidence that he did not then nor for a long time afterwards intend to charge for such services, and that the payee so understood it. *Held*, that a verdict allowing defendant about 10 per cent. of the amount claimed will not be disturbed, though the uncontradicted evidence of defendant and experts as to the value of the services showed that they were worth more than the jury allowed.—*Moore v. Ellis* 61 N. W. 291, 89 Wis. 108.

(d) (Wis.; 1895.)

In an action against a street-railroad company for injuries, plaintiff alone testified that the car had stopped when she started to alight, and that she was thrown by the negligent starting of the car. Several witnesses testified that she attempted to alight before the car stopped. *Held*, that the supreme court would not disturb a verdict for plaintiff, as against the preponderance of evidence, in the absence of circumstances making plaintiff's story intrinsically improbable or incredible.—*Hardy v. Milwaukee St. Ry. Co.*, 61 N. W. 771, 89 Wis. 183.

§ 227. Findings of court.

[a] The findings of the court on questions of fact, based on conflicting evidence, will not be disturbed.

—(Mich.; 1895) *Edwards v. Waghorn*, 65 N. W. 549; (1896) *Hughes v. Jones*, 66 N. W. 337; (1896) *Painter v. Ledyard*, 67 N. W. 901; (1896) *Stone v. Campbell*, Id. 1103; (1896) *Beaufait v. Dolson*, Id. 1110; (1896) *Sowles v. Raymer*, 68 N. W. 121;

(Minn.; 1895) *Weibler v. Ford*, 63 N. W. 1075, 61 Minn. 398;

(Neb.; 1895) *Thompson v. Field*, 63 N. W. 364, 45 Neb. 146; (1895) *Same v. Luke*, 63 N. W. 828, 45 Neb. 561; (1895) *O'Donohoe v. Polk*, 63 N. W. 829, 45 Neb. 510; (1896) *Wakefield v. Connor*, 66 N. W. 286, 47 Neb. 225; (1896) *State v. Spirk*, 66 N. W. 404, 47 Neb. 337; (1896) *Buffalo County Nat. Bank v. Gilerest*, 66 N. W. 850, 47 Neb. 897; (1896) *Ayers v. Tenney*, 67 N. W. 765, 48 Neb. 722; (1896) *Bartram v. Sherman*, 68 N. W. 380.

[b] (Iowa; 1895.)

A judgment will not be disturbed where, after the elimination of the evidence erroneously admitted, the remaining evidence clearly justifies the decision.—*Briley v. Briley* (Iowa) 63 N. W. 335.

[c] (Minn.; 1895.)

The decision of a court, acting as trier, of a challenge to a juror for actual bias, cannot be reviewed on appeal.—*Perry v. Miller* (Minn.) 63 N. W. 1040.

61 Minn. 412.

[d] (Minn.; 1896.)

Where the direct testimony of the only witness who testified on an issue was seriously shaken on cross-examination, a finding of the court in the negative of the issue, the witness having testified in the affirmative, will not be disturbed.—*Basting v. Northern Trust Co.* (Minn.) 67 N. W. 1017.

[e] (Minn.; 1897.)

Findings of fact which are not overwhelmingly against the weight of the evidence will not be disturbed.—*Moran v. Small* (Minn.) 70 N. W. 850.

[f] (Neb.; 1895.)

Where there is evidence, though conflicting, to support the judgment, it will not be disturbed on appeal.—*Ripley v. Larsen*, 62 N. W. 39, 43 Neb. 687; *Shader v. Same*, Id.; *Johnson v. McLennan*, 62 N. W. 40, 43 Neb. 684.

[g] (Neb.; 1895.)

Where plaintiff's right to recover was not affirmatively established by the proofs in the court below, a judgment for defendant will

not be disturbed.—*Windsor v. Thompson* (Neb.) 62 N. W. 460.

41 Neb. 228.

[h] (Neb.; 1895.)

The supreme court will not reverse a judgment on the weight of evidence.—*Tolerton & Stetson Co. v. McClure* (Neb.) 63 N. W. 791, 45 Neb. 368.

[i] (Neb.; 1896.)

When made upon fairly conflicting evidence, the findings of the district court in support of its judgment must be sustained.—*Baylis v. Parmele* (Neb.) 67 N. W. 449.

48 Neb. 649.

[j] (Neb.; 1896.)

A decree declaring an absolute conveyance to be a mortgage will not be disturbed because a greater number of witnesses testified for defendant than for plaintiff, where it is not manifestly wrong under the evidence.—*Names v. Names* (Neb.) 67 N. W. 751.

48 Neb. 701.

[k] (Neb.; 1896.)

Where there are several special findings of facts, and among them one which can but be a conclusion drawn from the others, and is manifestly wrong, it will be disregarded.—*Johnston v. Milwaukee & Wyoming Inv. Co.* (Neb.) 68 N. W. 383.

[l] (Neb.; 1896.)

Where the evidence is fairly conflicting, the judgment will not be reversed merely because the preponderance seems probably to have been in favor of the unsuccessful party.—*Greer v. Winter* (Neb.) 68 N. W. 1021.

[m] (Neb.; 1896.)

A finding of court on conflicting evidence will not be disturbed, as against the weight of evidence.—*Johnson v. Columbus Buggy Co.* (Neb.) 68 N. W. 1025.

[n] (Neb.; 1897.)

A judgment will not be reversed for insufficiency of the evidence, where not manifestly wrong.—*Stewart v. Smith* (Neb.) 70 N. W. 235.

[o] (Neb.; 1897.)

A judgment will not be reversed when determined on conflicting evidence.—*Central Nebraska Nat. Bank v. Cline* (Neb.) 70 N. W. 512.

[p] (Neb.; 1897.)

Where the evidence would justify impartial minds in reaching different conclusions, the finding of fact thereon will, on appeal, be assumed to be correct.—*Wyman v. Connery* (Neb.) 70 N. W. 518.

[q] (Neb.; 1897.)

A judgment on fairly conflicting evidence will be affirmed.—*McGinnis v. Kyd* (Neb.) 70 N. W. 910.

[r] (S. D.; 1894.)

On appeal from a decree modifying an order for the support of minor children after divorce, the evidence will be reviewed.—*Greenleaf v. Greenleaf* (S. D.) 61 N. W. 42.

6 S. D. 348.

[s] (S. D.; 1895.)

Though, under the statute, the lower court's findings of fact are not conclusive on the supreme court, they will not be set aside unless the evidence clearly preponderates against them.—*Feldman v. Trumbower* (S. D.) 64 N. W. 189.

[t] (S. D.; 1897.)

Where the official survey has not been introduced on the issue of the location of a section line, and the evidence is conflicting, the findings will not be disturbed, unless clearly against the weight of the evidence.—*Dowdle v. Cornue* (S. D.) 70 N. W. 633.

[u] (Wis.; 1895.)

The findings of the trial court will be sustained, unless contrary to the clear preponderance of evidence.—*Nicholson v. Coleman* 64 N. W. 297, 90 Wis. 639.

[v] (Wis.; 1896.)

The finding of the trial court on an issue as to whether or not a bill of sale was fraudulent as to creditors will not be disturbed on appeal where the supreme court cannot say that there was a clear preponderance of the evidence against the finding.—*Loeb v. O'Brien* (Wis.) 67 N. W. 415.
93 Wis. 249.

§ 228. — In equity.

(Mich.; 1895.)

Where the evidence was conflicting as to whether complainant agreed to convey a 30 or a 60 foot lot, and it appeared that the deed was for a single lot, which the abstract showed to have been 30 feet wide, and there was further evidence, though conflicting, to the effect that after the conveyance was made defendant stated that she supposed the lot had a 60-foot frontage, but announced that she was satisfied as it was, a finding for complainant will not be disturbed on appeal.—*Raffel v. Epworth* (Mich.) 64 N. W. 1052.

§ 229. — On motion for new trial.

[a] (Iowa; 1895.)

The finding of the trial court that the jury did not agree in advance that the verdict should be the quotient of the sum of their estimates divided by the number of jurors will not be disturbed, where part of them testify that there was, and others that there was not, such agreement.—*Peterman v. Jones* (Iowa) 63 N. W. 338.

[b] (Iowa; 1895.)

Where the evidence as to the alleged misconduct of a juror, on which a motion for a new trial is based, is conflicting, a finding of the trial court thereon will not be disturbed upon appeal.—*Thompson v. Anderson* (Iowa) 63 N. W. 355.

§ 230. Determination of motion.

[a] (Iowa; 1894.)

The determination of the trial court on a motion for new trial for misconduct of jurors will not be disturbed where there is a conflict in the showing, and resistance made by affidavits as to the misconduct.—*Light v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 380.
93 Iowa, 83.

[b] (Neb.; 1896.)

The discharge of an attachment because of the untruth of the ground stated in the affidavit will not be disturbed where the evidence as to the existence of the ground was conflicting.—*Sterling Manuf'g Co. v. Hough* (Neb.) 68 N. W. 1019.

[c] (Neb.; 1897.)

An order dissolving an attachment, made on conflicting evidence, will not be disturbed.—*Smith v. Bowen* (Neb.) 70 N. W. 949.

§ 231. Findings of referee.

[a] (S. D.; 1896.)

The decision of a referee on the issue as to whether there had been a substantial performance of a building contract, based on conflicting evidence, will not be disturbed unless clearly against the preponderance of the evidence.—*Hulst v. Benevolent Hall Ass'n* (S. D.) 68 N. W. 200.

[b] (Wis.; 1896.)

An order refusing to set aside a referee's findings of fact will not be reviewed, unless the findings were clearly against the preponderance of evidence.—*Guetzkow Bros. Co. v. Andrews* (Wis.) 66 N. W. 119.
92 Wis. 214.

[c] (Wis.; 1896.)

An order confirming allowances by referee of certain sums to an assignee for creditors, as fair and reasonable charges for his services and those of his attorneys, will be affirmed, where being evidence to support it.—*In re H. Penner Co.* (Wis.) 68 N. W. 396; *Appeal of Schenck*, Id.

[d] (Wis.; 1897.)

A referee's findings of fact will not be disturbed unless against the clear preponderance of the evidence.—*Hinz v. Van Dusen* (Wis.) 70 N. W. 657.

7. MATTERS NOT APPARENT OF RECORD.

Presumption, see ante, § 216.

Review on appeal from intermediate court, see ante, § 192.

§ 232. What record must show in general.

[a] (Iowa; 1894.)

On appeal from a judgment sustaining a plea of res judicata which involves a decision as to the issues in a former action, the judgment of the supreme court in such former action cannot be considered where it is not a part of the record.—*Garretson v. Ferrall* (Iowa) 61 N. W. 251.
92 Iowa, 728.

[b] (Iowa; 1895.)

Where the answer upon which the case proceeded to trial is not before the court, it cannot be determined whether the trial court abused its discretion in permitting plaintiff to open and close the case.—*Keokuk Stove Works v. Hammond* (Iowa) 63 N. W. 563.

[c] (Mich.; 1897.)

Where the record shows no special findings of facts and law, the supreme court cannot review the conclusions reached by the trial court upon the facts and law.—*Robson v. Dayton* (Mich.) 69 N. W. 834.

[d] (Minn.; 1896.)

In an action to recover damages for the washing away of 1 acre of land, the jury gave damages for the washing away of 1½ acres. *Held*, that, in the absence of a settled case or bill of exceptions, the court could not declare that error existed.—*Bowers v. Mississippi & Rum River Boom Co.* (Minn.) 67 N. W. 362.
64 Minn. 474.

[e] (Neb.; 1895.)

When no errors are assigned except such as depend on the ruling on a demurrer, the absence of such demurrer from the transcript precludes a consideration of the assignments.—*Ball v. Nelson* (Neb.) 63 N. W. 361.
45 Neb. 205.

[f] (Neb.; 1896.)

The record disclosing a stipulation for the continuance of a cause and a peremptory order of the court dismissing it at the same term, the judgment of dismissal cannot be reviewed, in the absence of a bill of exceptions or of matter of record disclosing the grounds of the court's action.—*School Dist. No. 1 of Harlan County v. Bishop*, 65 N. W. 902, 46 Neb. 850.

[g] (Neb.; 1896.)

When the grounds of complaint of a plaintiff in error depend upon the existence of certain facts, in respect to which there is no recitation or evidence in the record, such assignments of error must be disregarded.—*McCall v. State* (Neb.) 66 N. W. 635.
47 Neb. 660.

[h] (Neb.; 1896.)

Allowing the petition to be amended at the trial cannot be reviewed where the substance of the amendment is not in the record.—*Imhoff v. Richards* (Neb.) 67 N. W. 483.

[i] (Wis.; 1896.)

An order reciting that it was made on certain papers, "and after considering other evidence offered by each of the parties," cannot be reviewed, the record not containing such other evidence, or showing of what it consisted.—*Glover v. Wells & Mulrooney Grain Co.* (Wis.) 66 N. W. 799.
93 Wis. 13.

§ 233. Matters relating to jurors.

(Mich.; 1895.)

There being nothing in the record to show how the jury was procured, or to show that the jurors were not qualified, whether the challenge to the array was properly overruled cannot be considered.—*Tunncliffe v. Bay Cities Consol. Ry. Co.* (Mich.) 65 N. W. 226.

§ 234. Review of pleadings.

(Neb.; 1895.)

There can be no review on appeal of the allowance of an amendment unless it affirmatively appears what amendment was allowed.—*German-American Ins. Co. v. Hart* (Neb.) 61 N. W. 582, 43 Neb. 441.

§ 235. Matters necessary to review rulings on evidence.

[a] (Iowa; 1895.)

Where the record does not set out the deeds complained of as having been admitted in evidence, although they were not properly acknowledged, it will be presumed that there was no error in the action of the court below.—*Medland v. Walker* (Iowa) 64 N. W. 797.

[b] (Iowa; 1895.)

Error in refusing to strike out evidence cannot be reviewed on appeal, unless the abstract contains all the evidence.—*Farwell v. Zenor* (Iowa) 65 N. W. 317.

[c] (Iowa; 1896.)

Questions which must be determined by an examination of the evidence will not be considered on appeal, the record in effect admitting that it does not contain all the evidence.—*Clark v. Tracy* (Iowa) 68 N. W. 435.

[d] (Iowa; 1896.)

The supreme court will not review a question of fact where there is no statement whatever of what the abstract contains.—*Watkins v. Powell* (Iowa) 68 N. W. 597.

[e] (Mich.; 1894.)

An assignment of error based on the admission of evidence cannot be reviewed where the record fails to show that the evidence was in fact admitted.—*Totten v. Burhaus* (Mich.) 61 N. W. 58, 103 Mich. 6.

[f] (Mich.; 1895.)

Assignments of error on the admission of evidence will not be reviewed where neither the bill of exceptions nor the appellant's brief refers to the part of the record containing the evidence.—*Zimmerman Manuf'g Co. v. Dolph* (Mich.) 62 N. W. 339, 104 Mich. 281.

[g] (N. D.; 1896.)

The question whether a notice to take depositions should state the name of each witness to be examined cannot be reviewed where the notice is not incorporated in the abstract of the record.—*Ashe v. Beasley* (N. D.) 69 N. W. 188.

§ 236. Matters necessary to review exclusion of evidence.

[a] (Iowa; 1895.)

Error in sustaining objections to cross interrogatories cannot be reviewed, unless the record contains all the evidence.—*Farwell v. Zenor* (Iowa) 65 N. W. 317.

[b] (Iowa; 1896.)

Under McClain's Code, § 3948, providing that no evidence shall go to the supreme court except such as shall be necessary to explain any exception taken in the case, it is sufficient, to enable the court to review the exclusion of evidence, to set out in the abstract what the excluded evidence tended to prove, without setting out in full the questions asked.—*Forcum v. Independent Dist. of Montezuma in Poweshiek County* (Iowa) 68 N. W. 802.

[c] (Neb.; 1895.)

An exclusion of evidence will not be disturbed on appeal unless the question asked was

so clearly pertinent that a favorable answer would obviously tend to establish some fact material to the issues.—*Cutting v. Baker* (Neb.) 61 N. W. 726, 43 Neb. 470.

[d] (Wis.; 1896.)

In an action for the death of a child, caused by defendant's negligence, error, if any, in excluding the record of a coroner's inquest held on the body of the child, is not made to appear, where, in the bill of exceptions, there is no suggestion of the contents of such record, nor any statement as to what material fact was found by it.—*Olwell v. Milwaukee St. Ry. Co.* (Wis.) 66 N. W. 362, 92 Wis. 339.

§ 237. — Tender of evidence.

(Neb.; 1895.)

A ruling sustaining an objection to a question cannot be reviewed where there was no tender of evidence which an answer, if permitted, would disclose.—*Omaha Fire Ins. Co. v. Berg* (Neb.) 62 N. W. 862, 44 Neb. 522.

§ 238. Review of arguments of counsel.

(Iowa; 1896.)

Where appellee, in his abstract, denies the improper remarks imputed to his counsel in appellant's abstracts, unless appellant files a transcript as to such matter, the remarks cannot be reviewed.—*Eldridge v. Stewart* (Iowa) 66 N. W. 891.

§ 239. Review of instructions given or refused.

[a] (Iowa; 1895.)

Where instructions clearly relate to a matter of law, as shown by the pleadings, they will be considered, on appeal, in the absence of the evidence.—*Seever v. Gabel* (Iowa) 62 N. W. 669.

[b] (Iowa; 1897.)

Alleged errors in giving instructions cannot be considered when all the instructions are not in the record.—*Kreuger v. Sylvester* (Iowa) 69 N. W. 1059.

[c] (Neb.; 1895.)

Where the entire instructions of the court are not in the record, an assignment of error that certain instructions were misleading, for lack of proper modifications, will not be considered, as modifications may have been made in other instructions.—*Conger v. Dodd* (Neb.) 63 N. W. 125, 45 Neb. 36.

[d] (Neb.; 1897.)

Where the evidence is not in the record, the refusal of instructions will not be reviewed.—*Union Pac. Ry. Co. v. Thorne* (Neb.) 70 N. W. 1119.

§ 240. Matters necessary to review rulings on motions.

[a] (Neb.; 1895.)

Where papers made a part of and filed with a motion, and necessary to its determination, were omitted from the record on appeal from the ruling on the motion, that ruling cannot be reviewed.—*Fremont Butter & Egg Co. v. Peters* (Neb.) 63 N. W. 791, 45 Neb. 356.

[b] (Neb.; 1895.)

An assignment of error in overruling a motion to strike from the files a certain paper cannot be considered when neither the motion nor the grounds thereof appear in the record.—*Barr v. State* (Neb.) 63 N. W. 856, 45 Neb. 458.

[c] (Neb.; 1895.)

The ruling on a motion in the district court to compel an election whether the case in which the motion was made, or another case involving a prosecution for the same act, should be dismissed, cannot be reviewed in the absence of a showing that there were two like

cases pending in that court when the motion was made.—*Lindsay v. State* (Neb.) 64 N. W. 716, 46 Neb. 177.

[d] (Neb.; 1896.)

When neither a motion nor the evidence given in support thereof appears in the record, the ruling thereon cannot be reviewed.—*Hudson v. Pennock* (Neb.) 67 N. W. 188, 48 Neb. 359.

[e] (Neb.; 1896.)

The action of the district court in overruling a motion cannot be reviewed here where evidence was necessary to support such motion, and such evidence was not preserved by a bill of exceptions.—*First Nat. Bank v. Carson* (Neb.) 67 N. W. 779, 48 Neb. 763.

§ 241. Review of findings.

(Minn.; 1897.)

The rule that where the settled case shows that documentary evidence was introduced which might have a bearing on the findings of fact, but which is not made a part of the case, the findings will not be reviewed, has no application where the "case" negatives any presumption that the missing documents contained anything which could have affected the findings.—*In re Messing* (Minn.) 70 N. W. 1128; *Messing v. Dunham*, Id.

§ 242. Reasons for decision of trial court.

(Iowa; 1896.)

Under Code, § 3164, allowing an appeal from an order affecting a substantial right, an appeal from an order refusing to enter a default cannot be considered unless the record shows the grounds of the refusal.—*Roberts v. Malloy* (Iowa) 69 N. W. 674.

See, also, ante, § 232.

8. HARMLESS ERROR.

Effect of admitting improper evidence on trial by the court, see "Trial," § 120.

Failure to assess nominal damages, see "Damages," § 52.

In argument of counsel, see "Trial," § 47.

In evidence or instructions as to damages, see "Damages," §§ 50, 51.

In will contest, see "Wills," § 30.

§ 243. No cause for reversal.

[a] Error by which a party is not prejudiced is not ground for reversal.

—(Iowa; 1896) *Hamilton v. Thoen*, 66 N. W. 166;

(Neb.; 1896) *Baum Iron Co. v. Berg*, 66 N. W. 8, 47 Neb. 21;

(Wis.; 1895) *Bilgrien v. Dowe*, 64 N. W. 1025, 91 Wis. 393.

[b] (Iowa; 1895.)

The fact that the court submits to the jury a question which was not put in issue by the pleadings, because evidence elicited by appellant left such question slightly uncertain, is not ground for reversal, where it is clear that appellant was not prejudiced thereby.—*White v. Byam* (Iowa) 64 N. W. 765.

[c] (Iowa; 1896.)

A party cannot complain of the exclusion of a juror for cause unless he shows that he was prejudiced thereby.—*Geiger v. Payne* (Iowa) 69 N. W. 554.

[d] (Iowa; 1897.)

That the court permits the jury to take to their room a paper not introduced in evidence is without prejudice, where a copy of it is set out in the pleadings which the jury may properly take.—*State Bank of Tabor v. Brewer* (Iowa) 69 N. W. 1011.

[e] (Iowa; 1897.)

A statement by the court of issues leading the jury to return a verdict on a counterclaim for both defendants, when it should be in favor of one only, is not prejudicial to plaintiff.—*Citizens' State Bank v. Rowley* (Iowa) 69 N. W. 1017.

[f] (Neb.; 1895.)

In the absence of prejudice to the complaining party, a judgment will not be reversed because of misconduct of a juror.—*Vaughn v. Crites* (Neb.) 62 N. W. 1098, 44 Neb. 812.

[g] (Neb.; 1895.)

A judgment will not be reviewed on allegations of error when the successful party is clearly entitled to judgment on the pleadings.—*Orgall v. Burlington & M. R. R. Co.* (Neb.) 64 N. W. 450, 46 Neb. 4.

[h] (Neb.; 1897.)

Failure to give sufficient notice of the hearing of a motion to vacate a judgment is not prejudicial if the hearing is adjourned to a subsequent date, thereby giving ample time to prepare to oppose the motion.—*Fisk v. Thorp* (Neb.) 70 N. W. 498.

[i] (Neb.; 1897.)

Failure of a jury to answer a question for a special finding, which, when answered either way, would be immaterial, is not prejudicial error.—*Doane v. Smith Bros. Loan & Trust Co.* (Neb.) 70 N. W. 909.

[j] (Neb.; 1897.)

The refusal of the district court to require a nonresident plaintiff to give security for costs is not ground for reversal, if, on a final hearing, the costs are rightly taxed to the defendant.—*Hard v. Hard* (Neb.) 70 N. W. 1122.

[k] (S. D.; 1896.)

Where the original affidavit for an attachment is sufficient, permitting an amendment, if erroneous, is without prejudice.—*Ask v. Armstrong* (S. D.) 68 N. W. 743.

[l] (Wis.; 1896.)

The overruling of a challenge to a juror for cause is not prejudicial error unless an objectionable juror was forced on the challenging party after he had exhausted his peremptory challenges, and sat in the trial.—*Pool v. Milwaukee Mechanics' Ins. Co.* (Wis.) 69 N. W. 65; *Same v. Farmers' Fire Ins. Co.*, Id.

§ 244. What constitutes, in general.

[a] (Mich.; 1895.)

There was no error in excluding a conversation, which could have been used only to refresh the recollection of a witness, where she states that she remembers the conversation.—*People v. Smith* (Mich.) 64 N. W. 200.

[b] (Wis.; 1895.)

A corporation cannot complain that, by error in the computation, a decree required payment of too small an amount on assessments, where they were absolutely void.—*Wells v. Green Bay & M. Canal Co.* (Wis.) 64 N. W. 69, 90 Wis. 442.

[c] (Wis.; 1897.)

Error in entering a "judgment" directing application of the proceeds of property sold on execution, instead of an "order," is harmless.—*Marks v. Auerbach* (Wis.) 69 N. W. 1001.

§ 244a. Error with regard to parties.

[a] (Iowa; 1896.)

In an action against a lumber company to enjoin it from keeping freight cars on a public way in front of premises for loading lumber, a refusal to join as defendant a railroad company which owns and operates the cars is not prejudicial where the injunction is finally denied.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

[b] (S. D.; 1896.)

That, in a suit to enjoin township officers from opening a highway, they are not sued in their official capacity, does not require a re-

versal of a decree granting such injunction.—*Webster v. White* (S. D.) 66 N. W. 1115.

§ 245. Rulings on pleadings.

[a] (Iowa: 1896.)

Where a petition laid damages at \$5,000, and asked judgment for \$10,000, errors in instructing that plaintiff could recover not exceeding \$10,000, and in allowing the petition, after verdict for \$8,000, to be amended by laying the damages at \$10,000, were harmless, where the court subsequently reduced the verdict to \$5,000.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co.* (Iowa) 69 N. W. 743.

[b] (Iowa: 1897.)

Refusal to strike out a plea alleging that the contract sued on is not provable by parol evidence is harmless, as such plea was a legal conclusion in no way affecting the issues.—*Graves v. Clark* (Iowa) 69 N. W. 1046.

[c] (Neb.: 1896.)

A judgment will not be reversed for overruling a motion to require plaintiff to separately state his causes of action where the declaration may be construed as based on one contract only, instead of two, as claimed, and the court instructed the jury as to the issues on that theory.—*Stuht v. Sweesy* (Neb.) 67 N. W. 748.

48 Neb. 767.

§ 246. Ruling on demurrer.

(Iowa: 1896.)

It is harmless error to overrule a demurrer to a reply which contains simply a statement of the evidence, and not defensive matter.—*Runkle v. Hartford Ins. Co.* (Iowa) 68 N. W. 712.

§ 247. Rulings on questions to witnesses.

(Neb.: 1896.)

Error in permitting a witness to state his recollection of the evidence of a witness, since deceased, given at a former trial of the case, without sufficient foundation having first been laid therefor, was harmless, where the witness, in giving his evidence, made statements which completed the foundation for its introduction.—*Twohig v. Leamer* (Neb.) 67 N. W. 152.

48 Neb. 247.

§ 248. Improper exclusion of evidence.

[a] (Iowa: 1894.)

The ruling out of an explanatory answer to a question was not prejudicial, where an explanation had been previously given.—*Calkins v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 423.

92 Iowa, 714.

[b] (Iowa: 1895.)

Where, in an action by an administrator for the death of his intestate, after evidence as to the industrious habits of deceased has been admitted without question, it is admitted of record that the expectancy of the deceased was 21 years at the time of his death, and that plaintiff's testimony will show the value of the services of deceased to have been \$1,000 per year, the exclusion of evidence as to the size of deceased's farm, and whether he accumulated his property after his marriage, if error, is without prejudice to plaintiff. 58 N. W. 1068, reversed.—*McKelvy v. Burlington, C. R. & N. Ry. Co.* (Iowa) 63 N. W. 608.

[c] (Iowa: 1895.)

Error in the exclusion of evidence is not ground for reversal, where the evidence, if admitted, would not have changed the case.—*Reeder v. Dupuy* (Iowa) 65 N. W. 338.

[d] (Mich.: 1895.)

In an action on a policy, where plaintiff testifies that he paid \$50 on the contract, it is harmless error to exclude evidence that he stated to the adjuster that he had paid \$150, where, under the instructions, the amount paid

is immaterial.—*Wooliver v. Boylston Ins. Co.* (Mich.) 62 N. W. 149.

104 Mich. 132.

[e] (Neb.: 1897.)

The rejection of competent evidence which, with all the other evidence applicable, would not have established the fact at issue, is harmless.—*Whitney v. Gretna State Bank* (Neb.) 69 N. W. 933.

[f] (Wis.: 1894.)

Where plaintiff's injuries partially destroyed his eyesight, and evidence was admitted as to whether a beneficial operation was practicable, and the jury were instructed that he could not recover if the operation could be successfully performed, defendant was not prejudiced by the rejection of evidence that plaintiff refused to permit such an operation.—*Craven v. Smith*, 61 N. W. 317, 89 Wis. 119.

[g] (Wis.: 1896.)

The owner of land claimed by another on the ground of adverse possession cannot complain because the court confined the claimant to proof specified by the statute as sufficient to constitute such possession, though the statute was not intended to exclude proof deemed sufficient at common law.—*Lampman v. Van Alstyne* (Wis.) 69 N. W. 171.

[h] (Wis.: 1897.)

The rejection of documents offered by plaintiff is not ground for reversal where they are returned with the bill of exceptions, and, when considered, do not authorize the court to disturb the findings of fact.—*Pomeroy v. Heddles* (Wis.) 70 N. W. 557.

[i] (Wis.: 1897.)

It is not reversible error to exclude a question asking a witness what an article was worth, where he testified that he knew of no demand for it, and did not know its market value, but knew the price of it at the place named, which he was not asked to state.—*La Chappelle v. Warehouse & Builders' Supply Co.* (Wis.) 70 N. W. 589.

§ 249. — Effect of subsequent admission.

[a] Error in excluding evidence is harmless where such evidence is subsequently admitted.

—(Iowa: 1895) *Strong v. Iowa Cent. Ry. Co.*, 62 N. W. 739; (1895) *Bailey v. Bailey*, 63 N. W. 341; (1895) *National Horse-Importing Co. v. Novak*, 64 N. W. 616; (Minn.: 1896) *Hale v. Life Indemnity & Investment Co.*, 68 N. W. 182;

(Neb.: 1895) *Farmers' & Merchants' Ins. Co. v. Malone*, 63 N. W. 802, 45 Neb. 302.

[b] (Iowa: 1895.)

Error in the exclusion of testimony is harmless where the witness subsequently testifies to the facts sought to be elicited thereby so far as they are material.—*Kelly v. Stone* (Iowa) 62 N. W. 842.

[c] (Neb.: 1896.)

Error, if any, in sustaining objections to questions as leading, is cured if the evidence sought to be elicited is afterwards adduced from the same witness in response to other questions.—*Houck v. Linn* (Neb.) 66 N. W. 1103.

§ 250. Admission of improper evidence.

[a] A judgment will not be reversed because of the erroneous admission of evidence, where it is not prejudicial to appellant.

—(Neb.: 1896) *Farmers' Loan & Trust Co. v. Memminger*, 66 N. W. 1014, 48 Neb. 17.

(S. D.: 1896) *Bennett v. Chicago, M. & St. P. Ry. Co.*, 66 N. W. 934;

(Wis.: 1896) *Donovan v. Chicago & N. W. Ry. Co.*, 67 N. W. 721, 93 Wis. 373.

[b] (Iowa.)

When one claiming property as a bona fide purchaser before levy of attachment sues a sheriff for its possession, the admission of the return of the writ, which does not show service on the attachment defendant, or any one in possession, to prove defendant's lawful possession under the attachment, cannot prejudice plaintiff.—(1895) *Klotz v. James*, 64 N. W. 648; *Id.* (1896) 66 N. W. 190.

[c] (Iowa: 1896.)

Error in an action against an administrator to recover back money alleged to have been paid in excess of the amount due on a note executed by a husband and wife, plaintiffs in the action, in permitting the wife to testify that on one occasion, when her husband paid money to decedent, she indorsed the payment on the note at decedent's request, was harmless.—*Erusha v. Tomash* (Iowa) 67 N. W. 390.

[d] (Iowa: 1896.)

A witness testified that, a short time after the fire, he examined the smokestack of defendant's engine, and did not find any appliance for arresting sparks. *Held* that, in view of testimony that, between the time of the fire and the time witness examined it, the spark arrester had been taken out, the admission of the testimony complained of was not prejudicial.—*Richardson v. Douglas* (Iowa) 69 N. W. 530.

[e] (Iowa: 1897.)

Error, if any, in admitting evidence of the arrest of a certain person, cannot be held prejudicial on the ground that the jury were thereby led to suppose that the loss of his time was an element of damages recoverable in the case, where no evidence of the value of his time is offered, and no reference is made thereto in the instruction stating what can be allowed as damages.—*Citizens' State Bank v. Rowley* (Iowa) 69 N. W. 1017.

[f] (Mich.: 1895.)

In an action on an insurance policy issued by local agents, whose authority is in writing, it is harmless error to admit parol evidence of their authority, where defendant does not deny under oath, when it files its plea, the execution of the policy.—*Wooliver v. Boylston Ins. Co.* (Mich.) 62 N. W. 149.

104 Mich. 132.

[g] (Mich.: 1895.)

Plaintiff asked defendant if he had not stated that a certain witness of his had stolen a certain article from him, and that he intended to hold the theft over his head until after the action was over. Defendant denied making the statement, and the person to whom plaintiff claimed it was made also denied it. No motion was made to strike out such evidence, nor was there any showing but that plaintiff's counsel acted in good faith in opening the inquiry, and defendant, without objection, testified to other thefts by the witness. *Held*, that the evidence was not prejudicial to defendant.—*Hoffman v. Adams* (Mich.) 64 N. W. 7.

[h] (Mich.: 1895.)

In an action against a street-railroad company for injuries to a passenger, where one of defendant's employes testified that, on the day after the accident, his superiors asked him to find out by whose car the passenger was hurt, and that he thought he asked all the motormen who were working that day, defendant was not prejudiced by allowing him to also state that he did not find out on what car plaintiff was hurt.—*Tunncliffe v. Bay Cities Consol. Ry. Co.* (Mich.) 65 N. W. 226.

[i] (Mich.: 1896.)

A judgment will not be reversed for trivial errors in the admission of testimony which cannot be presumed to have affected the verdict.—*Rivard v. Rivard* (Mich.) 66 N. W. 681.

[j] (Minn.: 1895.)

In an action by the assignee of an insolvent bank to recover notes transferred by the

bank before its assignment, and alleged to constitute a fraudulent preference, it was harmless error to permit the maker of one of the notes to testify that after the assignment the president of the bank told him that defendant would be sued for the notes, and that he did not think it could hold them.—*Hahn v. Penney* (Minn.) 63 N. W. 843.

62 Minn. 116.

[k] (Neb.: 1895.)

Where averments in a cross petition are not denied, proof to establish them is unnecessary, and a decree will not be set aside because the proof offered was incompetent.—*Chadron Banking Co. v. Mahoney* (Neb.) 61 N. W. 594.

43 Neb. 214.

[l] (Neb.: 1895.)

A judgment will not be reversed for error in admitting immaterial testimony, when it is clear that the verdict must have been the same had such been excluded.—*Terry v. Beatrice Starch Co.*, 62 N. W. 255, 43 Neb. 866.

[m] (Wis.: 1896.)

Where competent, uncontroverted evidence on the subject of damages would justify a larger verdict than the one given, the admission of incompetent evidence on that issue is without prejudice.—*Keller v. Town of Gilman* (Wis.) 66 N. W. 800.

93 Wis. 9.

§ 251. — Opinion evidence.

[a] (Iowa.)

In replevin against a sheriff for attached property, the objection that witnesses testifying to the value of the property were not shown to be competent cannot be urged, where an opportunity for cross-examination was given.—(1895) *Klotz v. James*, 64 N. W. 648; *Id.* (1896) 66 N. W. 190.

[b] (Mich.: 1894.)

The admission of the testimony of a physician as to whether it was evidence of delirium that a testatrix should tell those around her that she wanted some one to go out and get some one to make a will for her is not prejudicial, since it is common knowledge that it would be evidence of the absence of delirium.—*McHugh v. Fitzgerald* (Mich.) 61 N. W. 354.

103 Mich. 21.

[c] (Mich.: 1897.)

Where an action for commissions for selling logs was tried on the theory that, if defendant was liable to pay commissions on all the logs specified in the contract, there were about 9,000,000 feet, and there was no real dispute as to the amount, error in permitting one of plaintiffs, who had seen about 7,000,000 feet of them, and was an experienced lumberman, to state his estimate of the quantity, was not cause for reversal.—*Burrell v. Gates* (Mich.) 70 N. W. 574.

§ 252. — Errors cured.

[a] (Iowa: 1896.)

In an action for assault, a recovery for attorney's fees not being claimed in the petition, error in the admittance in evidence of the amount of the fee plaintiff had contracted to give his attorney is ground for reversal, though the court subsequently ordered such evidence to be stricken from the record, it appearing that the jury were not directed to disregard it.—*Lribeck v. Bierl* (Iowa) 67 N. W. 400.

[b] (Mich.: 1894.)

Error of court in refusing to strike certain testimony is cured by subsequently striking it out.—*People v. Keefer* (Mich.) 61 N. W. 338.

[c] (Mich.: 1896.)

Possible error in the introduction of a copy in evidence is cured by the adverse party introducing the original instrument.—*Enlaw v. Travelers' Ins. Co.* (Mich.) 66 N. W. 469.

§ 253. — Errors cured by instructions.

[a] (Iowa; 1895.)

Allowing a witness testifying to the value of an attorney's services to consider the wealth of the client is not cured by instructing the jury not to consider his wealth, as they cannot determine how much that element affected the estimate.—*Stevens v. Ellsworth* (Iowa) 63 N. W. 683.

[b] (Iowa; 1897.)

The erroneous admission of evidence that changes were made in a crossing after an accident thereon, which the court afterwards instructed the jury not to consider, is not prejudicial where the necessity for repairs and alterations was evident.—*Robinson v. City of Cedar Rapids* (Iowa) 69 N. W. 1064.

[c] (Iowa; 1897.)

In a proceeding to condemn a right of way, certain witnesses considered the fact that the proposed right of way would destroy a connection between two tracts of the land by crossings under bridges in a highway. The court charged that the landowner had no right, without the consent of the supervisors, to so connect the two tracts, "and you should not consider that he had any such right, in arriving at your verdict in this case," and that "any evidence upon that subject is withdrawn from your consideration." *Held*, that the evidence was without prejudice to defendant.—*Burns v. Chicago, Ft. M. & D. M. Ry. Co.* (Iowa) 70 N. W. 728.

[d] (Mich.; 1895.)

In an action against a saloon keeper for selling liquor to plaintiff's husband, whereby she was injured in her means of support and in her feelings, error in admitting testimony of the husband's death since the beginning of the action, and of his expectation of life as shown by the mortality tables, was not cured by an instruction that plaintiff could not recover damages in such action for the husband's death.—*Ford v. Cheever* (Mich.) 63 N. W. 975. 105 Mich. 679.

[e] (Mich.; 1895.)

On the trial of an action for damages for selling liquor to plaintiff's minor son, error, if any, in allowing one of defendant's witnesses to testify that he had drunk with the minor at a saloon other than defendant's, was cured by a charge that it was immaterial whether any one else than defendant gave liquor to the minor, and that the damages could not be lessened merely on that ground.—*Sterling v. Callaghan* (Mich.) 63 N. W. 982.

[f] (Mich.; 1896.)

Possible error in the admission of evidence is cured by limiting it to a purpose which could not have prejudiced the adverse party.—*Runnells v. Village of Pentwater* (Mich.) 67 N. W. 558.

[g] (Mich.; 1896.)

In garnishment of a fund held by an insurance company for payment of a policy in favor of the principal defendant, where it appeared that such defendant had assigned the policy, the erroneous admission, as against the assignee, of declarations by such defendant, made after the assignment, that he intended to apply the proceeds of the policy in payment of his debts, was harmless, where the court charged that, if the assignment was made in good faith to secure a bona fide debt, the assignee was entitled to the fund.—*Muncey v. Sun Ins. Office* (Mich.) 67 N. W. 562.

[h] (N. D.; 1895.)

In an action for the killing of stock at a private railroad crossing, where testimony was admitted that, if the train had been provided with air brakes, it could have been stopped before the crossing was reached, but there was no evidence that air brakes were in common use on trains like the one causing the accident, any error involved in admitting the testimony is cured by a charge withdrawing it from the jury.—*Bishop*

v. Chicago, M. & St. P. Ry. Co. (N. D.) 62 N. W. 605. 4 N. D. 536.

§ 254. Admitting or excluding evidence of facts otherwise shown.

[a] (Iowa; 1896.)

A reversal cannot be had for the admission of incompetent evidence where the same facts are proved by competent evidence.—*Ward v. Chicago, B. & Q. R. Co.*, 65 N. W. 999; *Darnall v. Bennett*, 67 N. W. 273.

[b] (Iowa; 1896.)

Possible error in the introduction of evidence is without prejudice where another witness has testified to the same fact without objection.—*Nagle v. Fulmer* (Iowa) 67 N. W. 369.

[c] (Iowa; 1897.)

In an action against an administrator for goods sold to his intestate, it was harmless error to allow a witness to testify that he and the intestate used to talk about nearly all of their business, where he had already testified, without objection, to statements made to him by the intestate, in regard to the contract with and liability to plaintiff for the goods in question.—*Martin v. Shannon* (Iowa) 70 N. W. 720.

[d] (Mich.; 1896.)

A letter from a witness for plaintiff was properly excluded when offered merely to show the animus of the witness, when it already appeared that she was an enemy of defendant.—*Burt v. Long* (Mich.) 64 N. W. 60.

[e] (Mich.; 1895.)

Error in the exclusion of cumulative evidence on an uncontradicted point is not prejudicial.—*Little v. Williams* (Mich.) 65 N. W. 568.

[f] (Mich.; 1896.)

Error in excluding evidence is harmless where the ultimate fact sought to be established thereby is fully proved by other evidence.—*Miller v. Jurezyk* (Mich.) 67 N. W. 898.

[g] (Minn.; 1895.)

When the competent evidence is such as to require the findings made, the admission of other and incompetent evidence is harmless error.—*Fowlds v. Evans* (Minn.) 63 N. W. 102. 60 Minn. 513.

[h] (Minn.; 1895.)

In an action by an assignee for creditors to recover the amount of an alleged fraudulent preference, where the answer admitted that the assignor was insolvent at the time the alleged preference was made, error in admitting incompetent evidence of the assignor's insolvency at that time was not prejudicial.—*Hahn v. Penney* (Minn.) 63 N. W. 843. 62 Minn. 116.

[i] (Minn.; 1896.)

Error in permitting a witness to state in what capacity another represented a party to the suit, when the other's capacity was in issue, was harmless, where it appeared from other evidence that such person was the agent of the party.—*People's Bank of Minneapolis v. Howes* (Minn.) 67 N. W. 355. 64 Minn. 457.

[j] (Neb.; 1895.)

The admission of the testimony of a disqualified witness, over objections and exceptions, in a trial to the court, is not sufficient ground for reversal, if sufficient material and competent evidence was admitted to support the finding and judgment.—*Lihs v. Lihs* (Neb.) 62 N. W. 457. 44 Neb. 143.

[k] (S. D.; 1896.)

Where the issues were whether defendants had sold a stock of goods, and the amount and nature of the consideration, and the court admitted a bill of sale by defendants simply to show the transfer, the error, if any, in excluding the bill as evidence of the consideration, was cured by the subsequent admission of oral evidence showing the amount and nature of

such consideration.—*Jensen v. Bowles* (S. D.) 67 N. W. 627.

(1) (Wis.; 1895.)

It was not reversible error to admit in evidence a slightly inaccurate map of the vicinity where plaintiff was injured, when the jury had viewed the premises.—*Mayer v. Milwaukee St. Ry. Co.* (Wis.) 63 N. W. 1048.
90 Wis. 522.

§ 255. Compulsory dismissal or nonsuit.

[a] (Neb.; 1896.)

Error in granting an involuntary nonsuit was harmless where on the evidence defendant was entitled to have a verdict directed.—*Zittle v. Schlesinger*, 65 N. W. 892, 46 Neb. 844.

[b] (Neb.; 1896.)

Since the dissolution of an attachment issued on a claim not due terminates the action, the fact that a judge at chambers, after dissolving such attachment, erroneously ordered the dismissal of the main action, was not prejudicial.—*Dayton Spice-Mills Co. v. Sloan* (Neb.) 68 N. W. 1040.

§§ 256, 257. Defects in special verdict.

(Wis.; 1896.)

In an action for personal injuries, conflict in the answers of a special verdict relative to the defense of contributory negligence is harmless error on the plaintiff's objection, where the special verdict shows no liability of defendant.—*Deisenrieter v. Kraus-Merkel Malting Co.* (Wis.) 66 N. W. 112.
92 Wis. 164.

§ 258. Errors cured by verdict or judgment.

[a] (Iowa; 1895.)

Error in admitting evidence as to an issue which is found in favor of appellant is not ground for reversal.—*White v. Byam* (Iowa) 64 N. W. 765.

[b] (Iowa; 1897.)

In an action at law, aided by an attachment levied in July, 1894, a refusal to allow plaintiff to file an amendment claiming interest on his account from January 25, 1895, was harmless, where the jury found that plaintiff's claim was liquidated by the damage resulting to defendant from the attachment.—*Union Mill Co. v. Prenzler* (Iowa) 69 N. W. 876.

§ 259. Presumption as to effect of error.

[a] (Iowa; 1894.)

Where instructions given would be erroneous when applied to any state of facts, and the evidence is not before the supreme court, prejudice will be presumed unless the contrary is affirmatively shown.—*Winey v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 218.
92 Iowa, 622.

[b] (Iowa; 1894.)

The presumption is that the admission of improper testimony is prejudicial.—*Swanson v. French* (Iowa) 61 N. W. 407.
92 Iowa, 695.

[c] (Iowa; 1895.)

Error in an instruction is ground for reversal, unless it affirmatively appears that it was not prejudicial.—*Thomas v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 967.
93 Iowa, 248.

[d] (Iowa; 1895.)

In an action on an account, where account books are admitted in evidence without the requisite preliminary proof, the supreme court cannot presume that the error was without prejudice, though all the evidence is not contained in the transcript or bill of exceptions.—*Arney v. Meyer* (Iowa) 65 N. W. 337.

[e] (Neb.; 1895.)

The refusal to give a pertinent instruction on request is reversible error, in the ab-

sence of a showing that the party requesting the same was not prejudiced by the refusal.—*Case v. Case* (Neb.) 63 N. W. 867.
45 Neb. 493.

[f] (Neb.; 1896.)

The erroneous repetition of a proposition of law in the charge is presumed to have been harmless.—*City Nat. Bank v. Thomas* (Neb.) 65 N. W. 895, 46 Neb. 861.

[g] (N. D.; 1895.)

Error in charging that the jury might disregard the entire testimony of a witness who testified falsely, without instructing that the jury must believe that the witness so testified intentionally, is presumed to be prejudicial.—*McPherrin v. Jones* (N. D.) 65 N. W. 685.
5 N. D. 261.

§ 260. Estoppel to claim that error was harmless.

(Minn.; 1895.)

Where plaintiff secured a verdict on the theory that certain evidence introduced by him was necessary, he cannot, on appeal, contend that such evidence was wholly unnecessary, in order to avoid the effect of error by the court in admitting it.—*Earl Fruit Co. v. Thurston Cold-Storage & Warehouse Co.* (Minn.) 62 N. W. 439.
60 Minn. 351.

9. OBJECTIONS WAIVED BY ACTION OR NONACTION ON APPEAL.

On appeal from justice, see ante, § 174.

§ 261. Matters not urged in brief or argument.

[a] An assignment of error, if not argued, is waived.

—(Iowa; 1894) *Young v. Omaha & St. L. Ry. Co.*, 61 N. W. 209, 92 Iowa, 583;

(Neb.; 1895) *Erek v. Omaha Nat. Bank*, 62 N. W. 67, 43 Neb. 613; (1895) *Madsen v. State*, 62 N. W. 1081, 44 Neb. 631.

[b] An assignment of error not supported by argument will not be considered.

—(Iowa; 1895) *Neimeyer v. Weyerhaeuser*, 64 N. W. 416; (1896) *Mathews v. Heron*, 67 N. W. 226;

(Neb.; 1896) *Johnson v. Gulick*, 65 N. W. 883, 46 Neb. 817; (1896) *City of Kearney v. Smith*, 66 N. W. 538, 47 Neb. 408.

[c] (Iowa.)

Where no argument is filed, questions raised by the record will not be considered.—(1895) *State v. Price*, 64 N. W. 596; (1896) *McCandless v. Hazen*, 67 N. W. 256.

[d] (Minn.; 1895.)

An assignment of error not discussed in the points and authorities is waived.—*Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Fireman's Ins. Co.* (Minn.) 64 N. W. 902.
62 Minn. 315.

[e] (Neb.; 1894.)

Assignments of error not called to the attention of the court by brief or argument will be deemed waived, though a party, in his brief, states that he does not waive any assignment.—*Bishop v. Middleton* (Neb.) 61 N. W. 129, 43 Neb. 10.

[f] (Neb.; 1895.)

Where no argument is made and no briefs are filed on appeal, the judgment will be affirmed.—*Betz v. Martin* (Neb.) 63 N. W. 811.
45 Neb. 341.

[g] (Neb.; 1897.)

Assignments of error not presented by the briefs or oral arguments are waived.—*Hamer v. McFeggan* (Neb.) 70 N. W. 937.

161 (S. D.; 1896.)

Assignment of errors not discussed in appellant's brief will not be considered.—*Dowdle v. Cornue* (S. D.) 68 N. W. 394.

XI. REVIEW OF QUESTIONS OF LAW.

§ 262. What questions may be certified.

[a] (Iowa; 1895.)

The question whether the board of supervisors, in continuing for investigation to the next term a claim of \$10 against the county, owing to the absence of a member of the board, without interviewing the claimant in regard thereto, took an unreasonable time for its investigation, so as to entitle the claimant to immediately sue thereon, is a question of fact, which cannot be determined by the supreme court on a certificate by the trial judge.—*Ross v. Hardin County* (Iowa) 62 N. W. 844.

[b] (Wis.; 1895.)

Where the record of prosecution for the illegal sale of intoxicating liquors did not show that the sale was made in any town or city in which the local option law was in force, the question whether the adoption of such law suspends or repeals the general law regulating the sale of intoxicating liquors was not a proper question to be certified to the supreme court, under section 4721, Rev. St., which provides for the determination, when so certified, of such questions only as actually arose in the case below.—*State v. Hickok* (Wis.) 62 N. W. 931.

90 Wis. 161.

§ 263. Certifying questions of law.

[a] (Iowa; 1895.)

On appeal, in an action involving less than \$100, the certificate of the trial court confers no jurisdiction when it fails to state that the questions certified, on which an opinion is desired, are involved in the case, though the fact may be shown by the record.—*Ellis v. Keokuk County* (Iowa) 62 N. W. 660.

[b] (Iowa; 1895.)

An appeal on certificate of the trial judge, when the amount is less than \$100, will be dismissed, unless it is shown that the certificate was signed at the time the judgment was rendered.—*Callanan v. Kossuth County* (Iowa) 62 N. W. 784.

[c] (Iowa; 1895.)

The supreme court will not, on the certificate of a trial judge, examine "an agreed statement of facts," three pages long, where the question is incomplete, and requires a sifting from the agreed statement of the facts on which to base an answer.—*Stern v. Sample* (Iowa) 65 N. W. 304.

[d] (Iowa; 1895.)

Where questions are certified to the supreme court in an action involving less than \$100, the certificate of the trial court, in order to confer jurisdiction, must show that the questions on which an opinion is desired are involved in the case. *Lamb v. Ross* (1892) 51 N. W. 48, 84 Iowa, 578, followed.—*Estey v. Yemier*, 65 N. W. 327.

[e] (Iowa; 1896.)

The certificate of the judge, authorized by Code, § 3173, in case of an appeal, where the amount in controversy is less than \$100, must be made and filed when the case is decided and judgment entered.—*Powers v. Illinois Cent. R. Co.* (Iowa) 66 N. W. 76.

[f] (Iowa; 1896.)

A certificate of a question of law, under Code, § 3173, providing that no appeal shall be taken to the supreme court in a case involving less than \$100, unless the trial judge shall certify that it involves a question of law on which the opinion of the supreme court is desired, must be complete in itself, and when it does not show that the question certified was one on which the rights of the parties depended, and fails to

settle a disputed question of fact necessarily involved in the determination of the question of law, the case will be dismissed.—*Tucker v. Anderson* (Iowa) 66 N. W. 754.

[g] (Iowa; 1896.)

Under McClain's Code, § 4402, authorizing appeals in actions involving less than \$100 only on a certificate of the trial judge that the cause "involves a determination of a question of law upon which it is desirable to have the opinion of the supreme court," the supreme court does not acquire jurisdiction where the certificate does not state that the question of law on which an opinion is desirable is involved in the case, nor when it does not appear that the certificate was made when the judgment was rendered.—*Smith v. Smith* (Iowa) 68 N. W. 721.

[h] (Iowa; 1896.)

A certificate from the trial judge, where the amount involved is less than the jurisdictional amount, stating that questions of law are involved on which it is desirable to have the opinion of the supreme court, but not stating that the questions certified are involved, is insufficient.—*Connor v. Bennke* (Iowa) 69 N. W. 414.

[i] (Iowa; 1896.)

A certificate for an appeal in a case in which less than \$100 was involved, stating that a question of law arose in the trial of the case, without alleging that the question certified was involved, is insufficient.—*Hiatt v. Nelson* (Iowa) 69 N. W. 553.

[j] (Wis.; 1896.)

Under Laws 1895, c. 215, § 1, providing that no appeal shall be taken to the supreme court when the amount involved, exclusive of costs, is less than \$100, unless the judge shall certify that the case involves questions of law of such doubt as to require a decision of the same, and that in such cases the questions so certified "shall be briefly and clearly stated by the judge," etc., the appeal will be dismissed unless the judge's certificate states the ultimate facts on which the particular questions of law are raised, so that the supreme court may determine the same from the statement alone, without reference to the record.—*Independence Creamery Co. v. Lockway* (Wis.) 68 N. W. 656.

[k] (Wis.; 1896.)

An appeal on a certificate of the judge, under Laws 1895, c. 215, requiring that the questions certified "be briefly and clearly stated by the judge," cannot be considered, all the questions turning to the question whether a payment was voluntarily made, and there being nothing in the certificate from which such question can be determined.—*Leppla v. Reed* (Wis.) 68 N. W. 991.

[l] (Wis.; 1897.)

The certificate of questions of law on an appeal involving less than \$100 (Laws 1895, c. 215) must give the ultimate facts on which the questions arise, and an appeal will be dismissed if the questions can be decided only by reference to the record.—*Burkhardt v. Elgee* (Wis.) 70 N. W. 296.

XII. EFFECT OF APPEAL—SUPERSEDEAS.

Allowance of alimony pending appeal, see "Divorce," § 22.

Appointment of receiver after appeal taken, see "Receivers," § 5.

Rights pending appeal in contest of title to office, see "Office and Officer," § 9.

§ 264. Effect in general.

[a] (Mich.; 1897.)

Pending an appeal from a decree fixing the amount which each of two legatees who had received advancements shall pay to a third, the latter may settle with one of the former and proceed with the cause as to the other.—*Car-michael v. Lathrop* (Mich.) 70 N. W. 575.

[b] (Neb.; 1896.)

An appeal does not operate as a supersedeas, except as provided by statute, and upon the terms imposed by statute.—*Home Fire Ins. Co. v. Dutcher* (Neb.) 67 N. W. 766.

48 Neb. 755.

§ 265. Allowance of supersedeas by trial court.

(Neb.; 1896.)

In cases where the statute makes no provision for a supersedeas as a matter of right, the trial court may, in its discretion, allow a supersedeas upon conditions which it may affix for the protection of the parties.—*Home Fire Ins. Co. v. Dutcher* (Neb.) 67 N. W. 766.

48 Neb. 755.

§ 266. Power of trial court to stay proceedings.

(Iowa; 1895.)

In an action to enjoin a sale under an execution, in that the execution is void, it is proper for the court, pending an appeal, to suspend its judgment dismissing the petition and dissolving the injunction, thereby saving appellant from the necessity of applying to the appellate court for such an order.—*Winter v. Coulthard* (Iowa) 62 N. W. 732.

§ 267. Allowance of supersedeas by appellate court.

(Neb.; 1896.)

It is within the power of the supreme court, in its discretion, after obtaining jurisdiction of a case by appeal, to allow a supersedeas in cases not provided for by statute, and upon terms which the court may prescribe.—*Home Fire Ins. Co. v. Dutcher* (Neb.) 67 N. W. 766.

48 Neb. 755.

§ 268. Power of supreme court.

[a] (Wis.; 1895.)

The supreme court has power to stay the proceedings in a case before it during the pendency of the appeal.—*City of Janesville v. Janesville Water Co.*, 61 N. W. 770, 89 Wis. 159.

[b] (Wis.; 1896.)

Where a judgment is rendered against infant defendants, and it appears from the affidavit of the guardian ad litem that the failure to file an undertaking for costs on appeal was due to the fact that appellants had no other property than that in controversy, and that there was no one sufficiently interested in their behalf to give such undertaking, the supreme court may retain the record for a reasonable length of time to enable them to serve the requisite undertaking, file it in the court below, and have the same properly certified by an amended return.—*Tyson v. Tyson* (Wis.) 68 N. W. 1015.

§ 269. Supersedeas bond.

[a] (Neb.; 1895.)

Under Code Civ. Proc. § 677, providing that a supersedeas bond given on appeal from an order modifying or dissolving an injunction shall be conditioned that appellant will prosecute the appeal without delay, and pay all costs found against him on the final determination of the case, a bond given on such appeal, conditioned that appellant shall pay the amount of the decree, interest, damages, and costs against him in case the decree should be affirmed in whole or in part, was insufficient.—*O'Chander v. State*, 64 N. W. 373, 46 Neb. 10.

[b] (Neb.; 1896.)

A supersedeas bond for an appeal from a decree awarding alimony must be in double the amount of such decree, and conditioned as prescribed by Code Civ. Proc. § 677, subd. 1.—*State v. Cornish* (Neb.) 67 N. W. 481.

48 Neb. 614.

[c] (Neb.; 1897.)

The filing of a supersedeas bond is indispensable to a stay of proceedings pending review.—*State v. Ramsey* (Neb.) 69 N. W. 758.

[d] (Neb.; 1897.)

A supersedeas bond, when filed and approved, will not operate as a supersedeas, unless it contains the conditions prescribed by law.—*State v. Ramsey* (Neb.) 69 N. W. 758.

[e] (Neb.; 1897.)

A proper supersedeas bond, executed, filed, and approved in one cause, will not act as a supersedeas of a decree subsequently rendered in another action between the same parties.—*State v. Ramsey* (Neb.) 69 N. W. 758.

[f] (Neb.; 1897.)

While a supersedeas bond is not essential to obtain a review of a decree in an equity cause, it is indispensable to a stay of the enforcement of such decree pending the review.—*Creighton v. Keith* (Neb.) 70 N. W. 406.

[g] (Neb.; 1897.)

The district court has jurisdiction to vacate a supersedeas bond approved by the clerk of such court, if the surety is insufficient, and no transcript of the record has been lodged in the appellate court for the purpose of appeal or error proceedings.—*Bates & Co. v. Stanley* (Neb.) 70 N. W. 972.

§ 270. Stay or release of execution.

[a] (Mich.; 1896.)

How. Ann. St. § 7621c, prohibits the granting of a stay of proceedings on a verdict or judgment in the circuit court for more than 20 days without bond. *Held*, that the filing of a bond and issuing of a writ of error after a 20-days stay authorized has expired will not discharge a levy made on real estate under an execution issued after the said stay had expired.—*Peterson v. Carpenter* (Mich.) 66 N. W. 487.

[b] (Wis.; 1895.)

The taking of an appeal, and perfecting it by giving the undertakings prescribed in Rev. St. §§ 3049, 3053, after levy of execution on personal property, merely stay all further proceedings on the judgment, and do not, ipso facto, recall the execution or release the levy, but the supreme court may recall the execution and release the levy.—*Tilley v. Washburn* (Wis.) 64 N. W. 312, 91 Wis. 105.

§ 271. Appeal from order appointing receiver.

[a] (Minn.; 1895.)

On the giving of the supersedeas bond prescribed by Gen. St. 1894, § 6142, on appeal from an order appointing a receiver, the receiver's power is suspended pending the appeal, and he should restore to appellant possession of property taken under the order of appointment. *Canty, J.*, dissenting.—*Farmers' Nat. Bank v. Backus* (Minn.) 65 N. W. 255.

63 Minn. 115.

[b] (Minn.; 1895.)

On the return being made on the appeal, the supreme court has inherent power to require the receiver to so restore the property.—*Farmers' Nat. Bank v. Backus* (Minn.) 65 N. W. 255.

63 Minn. 115.

[c] (Neb.; 1896.)

An order appointing a receiver of real property in aid of foreclosure proceedings cannot be superseded as a matter of right pending an appeal therefrom, since it is not an order directing the delivery of possession of real property, within Code Civ. Proc. § 677, subd. 3, allowing supersedeas on appeal from such an order.—*Home Fire Ins. Co. v. Dutcher* (Neb.) 67 N. W. 766.

[d] (Neb.; 1896.)

The allowance of a supersedeas on an appeal from an order appointing a receiver pendente lite is a matter of discretion.—*State v. Stull* (Neb.) 69 N. W. 101.

[c] (Wis.; 1895.)

Where an appeal from an order appointing a receiver is taken in good faith, the court will, upon the movant giving reasonable security, grant a stay of proceedings under said order, during the pendency of the appeal, as a matter of right. *City of Janesville v. Janesville Water Co.*, 61 N. W. 770, 89 Wis. 159.

§ 272. Effect of supersedeas.

[a] (Iowa; 1897.)

Code, §§ 3186, 3191, 3192, providing that an appeal shall not stay proceedings unless a bond is given; that no appeal shall affect the judgment appealed from; and that any execution issued prior to filing such bond shall be countermanded,—contemplate a stay of proceedings on the judgment itself, so that an appeal with supersedeas bond from a self-executing order striking out matter from a pleading does not deprive the court of jurisdiction to render final judgment on the sound portions of the pleadings.—*Allen v. Church* (Iowa) 70 N. W. 127.

[b] (Neb.; 1895.)

Execution cannot issue for a deficiency judgment in foreclosure proceedings pending an appeal, in which a supersedeas bond was given, from an order confirming the foreclosure sale.—*Kountze v. Erick* (Neb.) 63 N. W. 804, 45 Neb. 288.

XIII. DECISION.

On appeal from justice, see ante, §§ 175, 176. In condemnation proceedings, see "Eminent Domain," § 24.

1. IN GENERAL

§ 273. Scope.

(Wis.; 1895.)

When the pleadings, the record, and the judgment of the lower court raise only the issue of the general rights of the several parties to the use of water, the appellate court can only determine the general principle in general terms, having no concrete question before it.—*Green Bay & M. C. Co. v. Kaukauna Water Power Co.* (Wis.) 63 N. W. 1019, 90 Wis. 370.

§ 274. Double appeal.

(S. D.; 1894.)

When an appeal is taken from a judgment and an order denying a new trial, and also from another order, it will be presumed that the appeal was intended to be taken from the judgment and order denying the new trial, and the appeal from the independent order will be treated as surplusage. *Hackett v. Gunderson* (1891) 47 N. W. 546, 1 S. D. 479, distinguished.—*Williams v. Williams*, 61 N. W. 38, 6 S. D. 284.

2. AFFIRMANCE.

After remitting excess in judgment, see post, § 295.

For failure to file briefs, see ante, § 102.

§ 275. When necessary or proper.

[a] (Neb.; 1895.)

Where no brief has been filed by either party, and the cause is submitted without oral argument, the judgment, if it conforms to the pleadings and evidence, will be affirmed.—*Moore v. McCollum*, 62 N. W. 41, 43 Neb. 617.

[b] (Neb.; 1895.)

Though the mere failure to file a motion for a new trial in the court below is not alone sufficient ground for dismissing a petition in error, where no such motion was filed, and no bill of exceptions settled, and the petition in error presents no question for review on a motion to dismiss, the cause will be considered as

submitted on the merits, and the judgment affirmed.—*Erick v. Omaha Nat. Bank* (Neb.) 62 N. W. 67, 43 Neb. 613.

[c] (Neb.; 1896.)

Where the evidence submitted upon a motion is imperfect and so confusing in its nature that it cannot be determined affirmatively that there was error in overruling such motion, the ruling must be sustained.—*Haley v. McCarty* (Neb.) 67 N. W. 857, 48 Neb. 583.

[d] (S. D.; 1896.)

To authorize an affirmance of a decree on the ground that appellant is not a party aggrieved thereby, a motion to dismiss is not necessary.—*Schlegel v. Sisson* (S. D.) 66 N. W. 1087.

§ 276. Appeal by plaintiff—Complaint defective.

(Mich.; 1895.)

In an action for injuries caused by a defective bridge, plaintiff averred that she was lawfully driving along such highway, while the proof showed that the horse was being driven by her companion. *Held*, that a judgment for defendant should not be affirmed because of the variance between the pleading and proof, where reversible error was committed on the trial.—*Ross v. Ionia Tp.* (Mich.) 62 N. W. 401, 104 Mich. 320.

§ 277. Damages for frivolous or vexatious appeal.

[a] (Mich.; 1895.)

An appeal involving only the value of a few chickens, and questioning the sufficiency of the declaration, to which no demurrer was filed, is frivolous, and attorney's fees will be allowed.—*Snow v. McCracken* (Mich.) 64 N. W. 866.

[b] (Mich.; 1896.)

Where a decree dismissing a bill to quiet title under a tax deed was reversed on appeal, on the ground that certain evidence introduced by defendant, and showing the invalidity of the tax deed, was improperly admitted under the pleadings, and the judgment on appeal allowed defendant to amend, and allowed such evidence to stand, provided complainants should be given the right to cross-examine defendant's witnesses, and on second trial the same evidence was used under an amended answer, and complainants refused to cross-examine defendant's witnesses, an appeal from a second decree dismissing the bill, on the ground that the tax deed was void, is within How. Ann. St. § 5982, providing that the court may assess damages for a frivolous appeal.—*Wagar v. Bowley* (Mich.) 67 N. W. 512.

[c] (Neb.; 1894.)

Code Civ. Proc. § 596, providing that, on the affirmance of a judgment, the court "shall also render judgment against plaintiff in error for 5 per cent. on the amount due from him to defendant in error, unless the court shall enter on the minutes that there was reasonable ground for the proceedings in error," does not apply where the court has not acquired jurisdiction because of defects in the proceedings; but in such case a dismissal is the only judgment that can be entered.—*Garneau v. Omaha Printing Co.*, 61 N. W. 100, 42 Neb. 847.

[d] (Wis.; 1895.)

When, in a civil action, an appeal is frivolous and taken merely for delay, the supreme court may, under Rev. St. § 2951, adjudge the respondent, on affirmance, damages for his delay, in addition to interest, not exceeding 10 per cent.—*Sweet v. Davis* (Wis.) 63 N. W. 1047, 90 Wis. 409.

3. DISMISSAL OF APPEAL.

See, also, ante, § 176.

Amount in controversy insufficient to give jurisdiction, see ante, § 39.

For defects in bond, see ante, § 65.

For failure to appeal in time, see ante, § 48.

— to file judgment roll, see ante, § 46.

— to join necessary parties, see ante, § 71.

From judgment complying with prior mandate, see ante, § 3.

§ 278. When ordered.

(Wis.; 1895.)

Where an order overruling a demurrer to the complaint has been reversed on appeal, the appeal will not thereafter be dismissed on affidavits showing that appellant, by his own acts, had estopped himself from questioning the validity of the complaint.—*Northwestern Iron Co. v. West Superior Iron & Steel Co.* 64 N. W. 323, 90 Wis. 570.

§ 279. Grounds.

[a] (Iowa; 1895.)

An appeal from a judgment rendered in an action by a partner to recover as liquidated damages an amount deposited by the defendant partner in a bank, to be paid to plaintiff on defendant's breach of the contract of partnership, should not be dismissed because the bank, after judgment in favor of the plaintiff, and before the appeal was taken, paid the amount into court, and plaintiff satisfied the judgment.—*Sanford v. First Nat. Bank (Iowa)* 63 N. W. 459.

[b] (Wis.; 1895.)

Where the order appealed from is discretionary, and no abuse is shown, the appeal will be dismissed.—*McCarville v. Boyle (Wis.)* 62 N. W. 517, 89 Wis. 651.

[c] (Wis.; 1895.)

After plaintiff and other creditors of a partnership had obtained judgments, and levied execution on the firm property, some of the partners brought suit against the others for a dissolution of the firm and an accounting. Subsequently, on the petition of other creditors, who claimed that the judgments were fraudulent, an order, made and entitled in the partnership action, was granted, allowing petitioners to intervene therein, and also in the creditors' suits, whereupon plaintiff gave notice of appeal, entitled in its action against the firm, from such order. *Held*, that the appeal, being taken in an action other than the one in which such order was made, must be dismissed.—*H. B. Claffin Co. v. Weber*, 63 N. W. 80, 60 Wis. 283.

§ 280. — Matters happening pending appeal.

[a] (Neb.; 1895.)

A motion to dismiss an appeal, because of the payment by appellant of the judgment appealed from, will be overruled when such payment was not voluntary, but was made to avoid a sale of appellant's property on execution issued on the judgment.—*Green v. Hall (Neb.)* 61 N. W. 605, 43 Neb. 275.

[b] (Wis.; 1897.)

An appeal from an order, made after judgment, denying a motion to modify a judgment in a habeas corpus case, will be dismissed, where, pending the appeal, the judgment has been reversed.—*Markwell v. Perceles (Wis.)* 69 N. W. 984.

§ 281. — Failure to serve notice of appeal.

(Iowa; 1897.)

An appeal will be dismissed where appellee's additional abstract, which is not denied, states that notice of appeal was never served on the clerk below, and the transcript and certificate of said clerk show that a notice purporting to have been served on him was not in fact served.—*Pratt v. Pratt (Iowa)* 69 N. W. 1128.

§ 282. Time of making motion.

[a] (Neb.; 1895.)

A motion to dismiss for want of prosecution must be presented before submission of

the case on the merits.—*Moore v. McCollum* 62 N. W. 41, 43 Neb. 617.

[b] (S. D.; 1896.)

It was no ground for failing to make the motion to dismiss the appeal on the motion day of the circuit from which the case came, as required by rule of court 23, that the original papers on appeal were not forwarded to the supreme court in time by appellant, and that the same were finally forwarded at the expense of respondent.—*Shickle-Harrison & Howard Iron Co. v. City of Rapid City (S. D.)* 66 N. W. 499.

[c] (S. D.; 1896.)

The supreme court may entertain a motion to dismiss an appeal, though the transcript was not on file in that court when the motion was noticed for hearing, provided it be received and filed on the day the notice is argued.—*Murray v. Whitmore (S. D.)* 68 N. W. 745.

§ 283. Waiver of right to dismissal.

(Mich.; 1896.)

The right of appellee to insist on a dismissal of the appeal because of appellant's neglect to pay to the register, within 30 days after the appeal is perfected, the fee for making the return, which omission is declared by Laws 1871, Act No. 62, to be a waiver of the appeal, may in turn be waived by appellee, where his counsel, after informing appellant's counsel that the statute had not been complied with, and receiving the reply that the return would be made at once, did not assert his intention to rely on the statutory waiver.—*Bennett v. Hickey (Mich.)* 68 N. W. 650.

§ 284. Reinstatement.

(N. D.; 1894.)

Where an appeal from an order dissolving an attachment has been dismissed for failure to file a transcript within 60 days (rule 9), a reinstatement because of the failure of the trial judge to designate the papers on which such order was based will not be granted, unless appellant shows diligence in trying to procure such designation.—*Walter A. Wood Harvester Co. v. Heidel*, 61 N. W. 155, 4 N. D. 427; *Duluth Dry-Goods Co. v. Same, Id.*; *Merchants' State Bank v. Same, Id.*

4. REVERSAL.

Effect of reversal on right to costs, see "Costs," § 6.

§ 285. For variance between pleading and proof.

(Minn.; 1896.)

When it appears that the variance between a pleading and proof has not misled the adverse party to his prejudice, this court, on appeal, will affirm and remand the cause, with directions to permit the party to amend his pleading to conform to the proofs.—*Adams v. Castle (Minn.)* 67 N. W. 637.

64 Minn. 505.

§ 286. Effect of stipulation.

(Neb.; 1895.)

In the absence of facts pleaded and relief prayed entitling parties to other relief, a judgment of the lower court confirming the priority of a mortgage, according to a stipulation made between the parties, will not be reversed.—*Gilmore v. Silver (Neb.)* 63 N. W. 923.

45 Neb. 632.

§ 287. Effect of reversal—New trial.

[a] (Minn.; 1895.)

On appeal from a judgment for defendant, in an action on a promissory note, the findings of the court sustaining the defenses of usury and alteration of the note were held not sustained by the evidence. No other error was found in the record. *Held*, that a reversal did

not in effect grant a new trial.—*Babcock v. Murray* (Minn.) 63 N. W. 1076.
61 Minn. 408.

[b] (Minn.; 1896.)

The reversal of the judgment on appeal therefrom does not necessarily have the effect of granting a new trial.—*Kurtz v. St. Paul & D. Ry. Co.* (Minn.) 67 N. W. 898.

§ 288. Jurisdiction after reversal.

(Neb.; 1897.)

Where the district court reverses a judgment of the county court, it may retain the cause for trial.—*Maryott v. Gardner* (Neb.) 69 N. W. 837.

5. MODIFICATION.

§ 289. Amendment.

(Iowa; 1895.)

Where it is uncertain whether a judgment for defendant disposed of and included a certain item pleaded by way of set-off, but it is inferable therefrom that it did not, and the judgment is excessive if it is not included, but as near as may be just if it is included, the judgment will be amended on appeal so as to be a bar to further recovery for such item.—*Walker v. Walker* (Iowa) 63 N. W. 331.

§ 290. Of judgment of appellate court.

(Wis.; 1896.)

An erroneous decision of the supreme court cannot be corrected after the term at which it was rendered, but must stand as the law of the case.—*Everett v. Gores* (Wis.) 66 N. W. 616.
92 Wis. 527.

6. REVERSAL OR MODIFICATION—DIRECTING PROPER DECREE.

§ 291. Rendering proper decree.

(Mich.; 1896.)

Where, in a suit for the rescission of a contract for the sale of land for nonperformance on the part of the grantor, the grantor claims a reformation of the contract on the ground of mistake, the supreme court, on appeal from a decree of rescission, may, on reversal, reform the contract.—*Johnson v. Wilson* (Mich.) 69 N. W. 149.

§ 292. Directing proper decree.

(S. D.; 1896.)

Where the appeal is only from an order denying a motion for a new trial on finding for appellant, the cause will be reversed, and not be remanded with directions to enter judgment for appellant.—*Bright v. Ecker* (S. D.) 68 N. W. 326.

7. WHEN NEW TRIAL ORDERED.

§ 293. For errors as to amount of damages.

[a] (Mich.; 1897.)

The court on appeal will not remand for new trial because the verdict is excessive, where the items objected to can be stricken out, and a judgment rendered for those regarding which no error is shown.—*Sloman v. Mercantile Credit Guarantee Co.* (Mich.) 70 N. W. 886.

[b] (Minn.; 1896.)

At the close of plaintiff's evidence the court below, on defendant's motion, dismissed the action. *Held*, that the supreme court will not grant a new trial merely because plaintiff may have been entitled to nominal damages.—*United States Exp. Co. v. Koerner* (Minn.) 68 N. W. 181.

8. EXCESSIVE JUDGMENT GIVEN BELOW.

When new trial ordered, see ante, § 293.

§ 294. Setting aside or reducing verdict.

(Minn.; 1896.)

It is the duty of the appellate court to set aside or conditionally reduce the amount of an excessive verdict.—*In re Keogh's Estate*, 65 N. W. 728, 63 Minn. 403; *Becker v. Bohmert*, *Id.*

§ 295. Affirmance on remitting excess.

[a] (Iowa; 1895.)

A judgment on a fire policy will not be reversed where plaintiff offers to remit any excess because the value of a foundation under the insured building, which was not destroyed, was not deducted from the amount of the insurance.—*Bloom v. State Ins. Co.* (Iowa) 62 N. W. 810.

[b] (Iowa; 1897.)

Where error for which judgment is reversed involves a possible excess of \$200 in the amount of plaintiff's recovery, his offer in petition for rehearing to remit that amount, if former opinion is adhered to, will be acted on; and judgment, as so modified, will be affirmed.—*Irlbeck v. Bierl* (Iowa) 70 N. W. 206.

[c] (Neb.; 1896.)

Where the only reversible error is that the amount of the recovery is excessive, the court will affirm the judgment upon the excess being remitted, if the evidence will support the remainder of the finding.—*Regier v. Shreck* (Neb.) 66 N. W. 618.
47 Neb. 667.

9. MANDATE AND PROCEEDINGS BELOW.

§ 296. Duty to obey mandate.

[a] (Minn.; 1896.)

Where the supreme court remanded a case with directions to enter judgment for plaintiff for part of the land in suit, and ordered a new trial as to the other part, though that procedure was irregular, the duty of the lower court was to enter the judgment.—*McRoberts v. McArthur* (Minn.) 68 N. W. 770.

[b] (Wis.; 1896.)

Where a cause is remanded, with direction to enter judgment "in accordance with the opinion," the trial court has nothing to do but obey such mandate, and no amendment to pleadings will be allowed.—*Patten Paper Co. v. Green Bay & M. Canal Co.* (Wis.) 66 N. W. 601.
93 Wis. 283.

§ 297. Computation of interest.

(Wis.; 1896.)

Where the judgment in an action for the wrongful cutting of timber was for a certain sum, "with interest from the time of the cutting," a mandate on appeal, which directs that judgment be entered for a larger sum "with interest," must be understood to mean interest from the same date as allowed by the trial court.—*Everett v. Gores* (Wis.) 66 N. W. 616.
92 Wis. 527.

§ 298. Remand on appeal in divorce proceedings.

(N. D.; 1895.)

Under Laws 1891, c. 120, § 26, providing that in all cases the supreme court shall remit its judgment to the lower court for enforcement or entry, the supreme court will, on rendering final judgment on an appeal in divorce proceedings under Laws 1893, c. 82, remand the record to the lower court for entry.—*Taylor v. Taylor* (N. D.) 63 N. W. 893.
5 N. D. 58.

§ 299. Proceedings below.

[a] (Iowa; 1895.)

The reversal on appeal of a cause in which a motion for change of venue has been overruled will not necessitate a retrial of the motion for change of venue, if the ruling thereon was correct.—*Stevens v. Ellsworth* (Iowa) 64 N. W. 668.

[b] (Iowa; 1897.)

Pleadings may be amended after an appeal where the judgment of the trial court has been reversed, and the cause remanded for a new trial.—*Martin v. Shannon* (Iowa) 70 N. W. 720.

[c] (Wis.; 1896.)

A mandate of the supreme court, on remanding a case, "to render the proper judgment for the plaintiff," only authorizes the proper judgment on the special verdict in the case, no further trial being contemplated.—*Stahl v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 68 N. W. 954.

§ 300. Power of lower court after affirmance.

[a] (Mich.; 1896.)

A remittitur issued upon the affirmance of a judgment upon writ of error restores to the trial court its jurisdiction of the cause, to make such order as may seem proper.—*Reynolds v. Newaygo Circuit Judge* (Mich.) 67 N. W. 529.

[b] (Mich.; 1896.)

Relators obtained a judgment which, on error, was affirmed. Execution was issued, but the judgment was paid before levy. The judgment debtor was granted leave to move for a new trial. *Held* that, the affirmance not being a decision on the merits, it was within the discretion of the trial court to grant the motion for leave.—*Reynolds v. Newaygo Circuit Judge* (Mich.) 67 N. W. 529.

§ 301. Law of the case.

[a] (Iowa; 1894.)

Where defendant appeals from a judgment allowing plaintiff to withdraw certain claims without prejudice, and the judgment is reversed to enable defendant to get a determination of such claims, he cannot, on a second trial, allege that such claims were res judicata.—*McArthur v. Schultz* (Iowa) 61 N. W. 217.

93 Iowa, 32.

[b] (Iowa; 1896.)

The statement in an opinion on appeal that a certain verbal agreement was proven is not conclusive on the new trial for which the cause is remanded.—*Baxter v. Rollins* (Iowa) 68 N. W. 721.

[c] (Minn.; 1896.)

On a second trial, the judgment of the supreme court on the former trial constitutes the law of the case.—*Bradley v. Norris* (Minn.) 69 N. W. 624.

XIV. JURISDICTION OF APPELLATE COURT AFTER REMAND.

§ 302. In general.

[a] (Minn.; 1897.)

The jurisdiction of the appellate court is divested by the filing of the remittitur below, and it cannot recall the remittitur unless it has been erroneously or irregularly issued.—*Rud v. Board of Com'rs of Pope County* (Minn.) 69 N. W. 886.

[b] (S. D.; 1895.)

On the going down of the remittitur after decision of the case the supreme court loses jurisdiction, and will not entertain a subsequent application for rehearing.—*Dempsey v. Billingshurst* (S. D.) 65 N. W. 427.

[c] (Wis.; 1896.)

Under Rev. St. § 3071, requiring the clerk of the supreme court to transmit the rec-

ord to the court below within 60 days after the decision, unless the court direct the same to be retained for the purpose of enabling a party to move for rehearing, the supreme court retains jurisdiction of the case for the purpose of a motion to vacate an order dismissing the appeal, and to reinstate the appeal, in the nature of a motion for rehearing, made more than 30 days after the decision dismissing the appeal, though a motion for rehearing, under rule 20, should be made within 30 days after the decision.—*Patten Paper Co. v. Green Bay & M. Canal Co.* (Wis.) 67 N. W. 432.
93 Wis. 283.

XV. LIABILITIES ON APPEAL BONDS.

§ 303. In general.

[a] (Mich.; 1894.)

3 How. Ann. St. § 7621c, provides that no stay of any verdict or judgment in any circuit court shall be granted for the purpose of moving for a new trial or settling a bill of exceptions for a longer period than 20 days, unless the party applying therefor shall execute a bond to pay the judgment if the same is not set aside or reversed. Section 8679 provides that no writ of error shall operate as a stay, unless plaintiff in error shall give a bond to prosecute his suit to effect, and pay such judgment as shall be awarded against him. *Held*, that it was no defense to an action on an appeal bond that its conditions covered both sections, and were in the alternative.—*Tenhopen v. Taylor* (Mich.) 61 N. W. 265.
103 Mich. 178.

[b] (Mich.; 1894.)

In a suit on an appeal bond, a clerical error whereby the amount of the judgment appealed from is stated as "two" hundred, instead of "two" hundred, dollars, will be disregarded.—*Tenhopen v. Taylor* (Mich.) 61 N. W. 265.
103 Mich. 178.

[c] (Mich.; 1895.)

In an action on an appeal bond conditioned to pay the rental value of premises on affirmance of judgment, a lease of the premises for the previous year is admissible to show the rental value for the time covered in the bond.—*Vincent v. De-field* (Mich.) 63 N. W. 304.
105 Mich. 315.

[d] (Mich.; 1895.)

Where an appeal bond is insufficient in amount, and the appellant, on order of the court, fails to furnish a new bond, the fact that the appeal is dismissed on motion of the appellee does not estop him from bringing an action on the bond.—*Hascall v. Brooks* (Mich.) 63 N. W. 413.
105 Mich. 383.

[e] (Neb.; 1895.)

The liability of the signers of an appeal undertaking, as between them and the judgment creditor, is that of principal debtors, and not that of principal and surety.—*Flannagan v. Cleveland* (Neb.) 62 N. W. 297.
41 Neb. 58.

[f] (Neb.; 1896.)

The issuing of an execution is not a condition precedent to the right of a judgment creditor to maintain an action against the surety on an appeal undertaking given to enable the judgment debtor to appeal.—*Johnson v. Reed* (Neb.) 66 N. W. 405.
47 Neb. 322.

[g] (S. D.; 1895.)

On the refusal of an administrator to bring an action against the widow to have property in her possession adjudged assets of the estate, the heirs brought the action, and obtained judgment, from which the widow appealed, giving an undertaking to stay execution. *Held*, that though, under the statute, the undertaking did not run to any named promisee, the plaintiff heirs could sue thereon in their own names.—*Bem v. Shoemaker* (S. D.) 64 N. W. 544.

§ 304. When liability accrues.

[a] (Neb.; 1895.)

Where an appeal bond is conditioned that the judgment debtor will "prosecute his appeal to effect, and without unnecessary delay," a failure to perfect the appeal by filing a transcript operates as an affirmation of the judgment, and renders the sureties liable.—*Flannagan v. Cleveland* (Neb.) 62 N. W. 297. 44 Neb. 58.

[b] (Neb.; 1896.)

Judgment was recovered before a justice of the peace against two makers of a promissory note, who jointly appealed to the district court. The undertaking of the surety on the appeal bond was to pay any judgment rendered against the appellants. *Held*, that the surety is liable, notwithstanding judgment in the appellate court was against only one of the appellants.—*Johnson v. Reed* (Neb.) 66 N. W. 405. 47 Neb. 322.

[c] (S. D.; 1895.)

On the administrator's refusal to bring an action against the widow to have property in her hands adjudged assets of the estate, the heirs brought the action, and obtained a judgment, which, on appeal, was held correct as to the personal property, but wrong as to the realty, and was reversed as entered, and the case was remanded with directions. *Held*, that there was no such reversal as to discharge the undertaking given by the widow on appeal.—*Bem v. Shoemaker* (S. D.) 64 N. W. 544.

§ 305. Defenses.

[a] (Minn.; 1895.)

When it appears in an action on a stay bond given under Gen. St. 1894, § 7989, that the debtor had property out of which the claim could have been collected when the bond was given, but thereafter disposed of it, so that, on the entry of judgment, he was without property, it was no defense that, when the bond was executed, the debtor was insolvent, and that, if the judgment had been entered at that time, he would have assigned for his creditors, and that, if he had not assigned, a receiver would have been appointed, in consequence of which plaintiff would not have received a greater per cent. of his claim than that stated.—*Estes v. Roberts* (Minn.) 65 N. W. 445. 63 Minn. 265.

[b] (N. D.; 1895.)

It is no defense to an action on a statutory undertaking on appeal that the court has not fixed the amount thereof under the statute.—*Braithwaite v. Jordan* (N. D.) 65 N. W. 701. 5 N. D. 196.

§ 306. Extent of liability.

[a] (Neb.; 1895.)

The bondsmen of a defendant in forcible entry and detainer, against whom a judgment of restitution has been rendered, and who appeals, are liable, if the judgment is affirmed, for costs, and for the reasonable rent of the premises during the time the defendant wrongfully withholds possession. Code Civ. Proc. § 1030.—*Morrison v. Boggs* (Neb.) 62 N. W. 473. 44 Neb. 248.

[b] (Neb.; 1895.)

Code Civ. Proc. § 1014, providing that a surety on appeal to the district court "shall be liable" for the debt and costs, if judgment go against appellant, does not authorize, on the rendition of a judgment against an appellant, the rendition of the same judgment against the surety.—*Selby v. McQuillan* (Neb.) 63 N. W. 855. 45 Neb. 512.

§ 307. Estoppel of sureties.

(Neb.; 1895.)

The signers of an appeal bond are estopped in a suit thereon from making the de-

fense that no appeal was in fact perfected.—*Flannagan v. Cleveland* (Neb.) 62 N. W. 297. 44 Neb. 58.

§ 308. Release of surety.

(Neb.; 1896.)

The mere continuance of a cause on appeal, without the consent of the surety on the appeal bond, will not release such surety.—*Johnson v. Reed* (Neb.) 66 N. W. 405. 47 Neb. 322.

APPEARANCE.

Authority of attorney, see "Attorney and Client," § 2.

Before justice of the peace, see "Justices of the Peace," §§ 16, 17.

In garnishment, see "Garnishment," § 22.

On appeal, see "Appeal," § 7.

§ 1. What constitutes.

(Wis.; 1894.)

A motion by a garnishee to set aside a judgment in garnishment because the garnishee was not indebted to defendant is such an appearance as will waive a failure to serve the summons on the garnishee, and cure any invalidity in the judgment.—*Wickham v. South Shore Lumber Co.*, 61 N. W. 287, 89 Wis. 93.

§ 2. General appearance.

[a] (Neb.; 1895.)

A motion by defendant in a justice court for a retaxation of costs constitutes a general appearance, and waives objections to jurisdiction over him.—*Dreyfus v. Moline, Milburn & Stoddard Co.*, 61 N. W. 599, 43 Neb. 233.

[b] (Neb.; 1895.)

The appearance of a garnishee for the purpose of moving to dismiss the garnishment on the ground that the garnishee did not reside in the county where suit was brought, *held* not to constitute a general appearance.—*South Omaha Nat. Bank v. Farmers' & Merchants' Nat. Bank* (Neb.) 63 N. W. 128. 45 Neb. 29.

§ 3. Effect.

[a] (Minn.; 1896.)

One not originally a party to the action, who voluntarily appeared and opposed a motion for the appointment of a receiver therein on the merits, and submitted to an order making him a party, became a party, though he stated that he appeared only specially.—*Farmers' Nat. Bank v. Backus* (Minn.) 66 N. W. 5. 64 Minn. 43.

[b] (Minn.; 1896.)

Where an assignee, by bringing an action, ostensibly for conversion, against a nonresident creditor, to whom the debtor has transferred stock as a preferential security, and by attaching his property in this state, compels his appearance, it would be a breach of comity, amounting to fraud on defendant, to allow plaintiff, upon his failure to show a conversion, to treat the action as one to set aside the transfer and recover the stock. *Start, C. J.*, and *Mitchell, J.*, dissenting.—*Hay v. Tuttle* (Minn.) 69 N. W. 696.

§ 4. — Appearance entered after judgment.

(Wis.; 1896.)

A judgment, in a proceeding by certiorari to review action of a county board of supervisors, which is void because jurisdiction of the board was not obtained, is not aided by an attempted appearance by the board, after its rendition, and an informal adoption by the board of the judgment, nothing having been decided or changed in consequence or on the strength of that appear-

ance.—State v. Weinfurther (Wis.) 66 N. W. 702.

92 Wis. 546.

§ 5. — As waiver of objections generally.

[a] (Minn.; 1896.)

By appearing and contesting on the merits a motion for a new trial, made on the minutes at a subsequent term, under Gen. St. 1894, § 5399, to set aside the decision, in a trial by the court without a jury, the objections that the motion was not proper in such a case, and that it could not be heard at that term, were waived.—Gribble v. Livermore (Minn.) 67 N. W. 213.

64 Minn. 396.

[b] (Neb.; 1897.)

The objection that a stranger to the action, who filed a motion therein, had no standing to urge the motion, was waived where the parties to the action voluntarily appeared after notice of the motion, and resisted the same solely on its merits.—Neitzel v. Lyons (Neb.) 67 N. W. 867.

48 Neb. 892.

§ 6. — As waiving objections to process or jurisdiction.

[a] (Iowa; 1897.)

A special appearance by a foreign insurance company to object to the service of notice on its nonresident adjusting agent while temporarily in the state is sufficient to confer jurisdiction over it, since Code, § 2626, subsec. 3, provides that, if a special appearance to object to the service of notice is made, no other notice is necessary.—Lesure Lumber Co. v. Mutual Fire Ins. Co. (Iowa) 70 N. W. 761.

[b] (Mich.; 1895.)

Irregularities relating to the sufficiency of the service and return of summons in an action before a justice are cured where the parties appear and adjourn the case by consent, without pleading.—Waldron v. Palmer (Mich.) 62 N. W. 731.

104 Mich. 556.

[c] (Mich.; 1895.)

In attachment before a justice where the service was defective, an appearance and consent to an adjournment, "without prejudice," do not waive the defective service.—Tunningly v. Butcher (Mich.) 63 N. W. 994.

[d] (Mich.; 1896.)

In an action for libel, where defendant, though the affidavit to hold to bail was insufficient, gave special bail and entered a general appearance, a motion to quash and dismiss the proceedings because the affidavit conferred no jurisdiction to issue the writ or to order bail is properly denied.—Graham v. Cass Circuit Judge (Mich.) 66 N. W. 348.

[e] (Mich.; 1896.)

By appearing and pleading, defendant submits himself to the jurisdiction of the court.—Dunlap v. Byers (Mich.) 67 N. W. 1067.

[f] (Mich.; 1896.)

One who contests an application for the appointment of an administrator cannot complain that the publication of the hearing was insufficient.—In re Brooks' Estate (Mich.) 67 N. W. 975.

[g] (Neb.; 1895.)

The question whether or not the court has jurisdiction of the subject of the action, and of his person, cannot be raised by one who has voluntarily appeared, and presented his claim, by answer and cross bill, for adjudication.—Ragan v. Morrill (Neb.) 61 N. W. 590.

43 Neb. 361.

[h] (Neb.; 1895.)

When a defendant appears and files a motion to dismiss the suit because of defects in the service by publication, he thereby waives all irregularities and defects in such service.—Welch v. Ayres 61 N. W. 635, 43 Neb. 326.

[i] (Neb.; 1896.)

Where a decree is rendered upon service had by publication, and defendant subsequently files an answer to the merits, and asks to have the decree opened under Code Civ. Proc. § 82, such appearance is a waiver of all defects and irregularities in the service.—Scarborough v. Myrick, 66 N. W. 867, 47 Neb. 794.

[j] (Neb.; 1896.)

Persons not under guardianship, and not minors, nor under other legal disability, cannot be heard to complain of a judgment rendered in a proceeding to which they were parties, because the notice required by law of such proceeding was not given them, when the record discloses that they voluntarily appeared and participated in such proceeding.—Spencer v. Wolf (Neb.) 67 N. W. 858.

[k] (Neb.; 1897.)

By a general appearance defendant waives all defects in the issuance and service of summons.—Omaha Loan & Trust Co. Sav. Bank v. Knight (Neb.) 69 N. W. 933.

[l] (Neb.; 1897.)

By a general appearance, defendant waives the issuance and service of summons.—Merchants' Sav. Bank of Providence v. Noll (Neb.) 70 N. W. 247.

[m] (S. D.; 1896.)

Where defendant, after his motion to set aside the summons, which had been improperly served, has been overruled, interposes a counterclaim, and demands an affirmative judgment, he waives the question of jurisdiction over his person.—Lower v. Wilson (S. D.) 68 N. W. 545.

[n] (S. D.; 1896.)

By the general appearance of defendant, by answering to the merits, and attending the trial and testifying, the court acquired jurisdiction of defendant's person.—Pollock v. Pollock (S. D.) 68 N. W. 176.

[o] (Wis.; 1895.)

A special appearance to move to set aside a summons for irregularity of service, with costs of the motion, is not a waiver of want of jurisdiction.—Kingsley v. Great Northern Ry. Co. (Wis.) 64 N. W. 1036, 91 Wis. 380.

[p] (Wis.; 1896.)

An appearance, and a motion to set aside a judgment because the costs are excessive, because no affirmative relief was asked against the moving party, and because the action was prosecuted under a champertous agreement, are consistent only with the fact of jurisdiction, and waive any defect in, or want of, service of process.—Gilbert-Arnold Land Co. v. City of Superior, 67 N. W. 38, 93 Wis. 194.

[q] (Wis.; 1896.)

A party, by going to trial on the merits after his objection to a notice of trial as premature was erroneously overruled, waives the error.—Mills v. National Fire Ins. Co. (Wis.) 65 N. W. 730.

92 Wis. 90.

[r] (Wis.; 1897.)

A general appearance and motion by defendants to set aside a default on the ground of excusable neglect waives all defects in the service.—Pfister v. Smith (Wis.) 69 N. W. 984.

APPLICATION.

For change of venue, see "Criminal Law," § 41. For homestead under federal laws, see "Public Lands," § 3.

For insurance, see "Insurance," §§ 27-43.

For judgment by default, see "Judgment," § 12. For license to sell liquors, see "Intoxicating Liquors," § 9.

For new trial, see "Criminal Law," § 192; "New Trial," §§ 7-15.

For security for costs, see "Costs," § 16.

For writ of assistance, see "Assistance, Writ of."

Of payments, see "Payment," §§ 18-20.

APPOINTMENT.

Of city officer, see "Municipal Corporations," §§ 38-52.
 Of county assessor, see "Counties," § 17.
 Of executor, see "Executors and Administrators," § 1.
 Of guardian, see "Guardian and Ward," § 1.
 Of justice, see "Justices of the Peace," §§ 1, 2.
 Of officers in general, see "Office and Officer," §§ 1-5.
 Of receiver, see "Receivers," §§ 1-11.
 Of special prosecuting attorney, see "Criminal Law," § 53.
 Of state officer, see "States and State Officers," § 6.
 Of trustee, see "Trusts," § 16.

APPORTIONMENT.

Of annuities, see "Annuities."
 Of assets between old and new counties, see "Counties," §§ 8, 9.
 — between old and new districts, see "Schools and School Districts," § 6.
 Of award in condemnation proceedings, see "Eminent Domain," § 29.
 Of costs, see "Costs," § 15.
 Of grand jurors, see "Grand Jury," § 2.
 Of lien claims against several separate parcels, see "Mechanics' Liens," § 7.
 Of members of legislature, see "State Legislature."
 Of proceeds of execution sale, see "Execution," §§ 32, 33.
 Of school funds, see "Schools and School Districts," § 30.
 Of taxes among townships, see "Taxation," § 5.

APPRAISEMENT.

See "Judicial Sales," § 3.
 At mortgage foreclosure sale, see "Mortgages," § 69.
 Of loss under policy, see "Insurance," §§ 82, 83.
 Of property sold on execution, see "Execution," § 22.
 Of value of improvements made by defendant in ejectment, see "Ejectment," § 14.

APPROPRIATION.

For payment of claims against city, see "Municipal Corporations," § 176.
 For school expenses, see "Schools and School Districts," § 8.
 For state purposes, see "States and State Officers," § 15.
 Of land for public use, see "Eminent Domain," § 27.
 Of waters on public lands, see "Waters and Water Courses," § 1.

APPROVAL.

Of ordinance by mayor, see "Municipal Corporations," § 23.
 Of statute, see "Statutes," § 3.

ARBITRATION AND AWARD.

I. SUBMISSION, §§ 1, 2.
 II. AWARD AND PROCEDURE, §§ 3-7.

See, also, "Reference."

Adjustment of loss under policy, see "Insurance," §§ 82, 83, 108, 109.

I. SUBMISSION.

§ 1. Agreement to submit—Acknowledgment.

[a] (Neb.; 1897.)

Failure of the parties to an arbitration under Code Civ. Proc. tit. 28, to acknowledge before a justice of the peace the agreement of submission, as required by the statute, will deprive the district court of jurisdiction to confirm the award or render judgment thereon on motion of the successful party.—*Burkland v. Johnson* (Neb.) 70 N. W. 388.

[b] (Neb.; 1897.)

Failure so to acknowledge the agreement of submission is not an irregularity which the parties may waive.—*Burkland v. Johnson* (Neb.) 70 N. W. 388.

§ 2. Revocation.

[a] (Minn.; 1891.)

The mere fact that the controversies agreed to be submitted to arbitration are the subject of a pending action will not make a submission one "by rule of court," instead of at common-law, revocable at any time before award made.—*Minneapolis & St. L. Ry. Co. v. Cooper* (Minn.) 61 N. W. 143.
 59 Minn. 290.

[b] (Neb.; 1896.)

A stipulation for arbitration, which does not provide for submitting the matters in dispute to a particular person or tribunal, but to one or more persons, to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject of the controversy.—*Home Fire Ins. Co. v. Kennedy* (Neb.) 66 N. W. 278.
 47 Neb. 138.

[c] (Neb.; 1896.)

Where the submission provides for a written award, a revocation may be made after the arbitrators have individually communicated to strangers their respective views, but before they have signed any award.—*Butler v. Greene* (Neb.) 68 N. W. 496.

[d] (Neb.; 1896.)

The right to revoke a submission to arbitration at common law must be exercised before the making and publication of the award.—*Connecticut Fire Ins. Co. v. O'Fallon* (Neb.) 69 N. W. 118.

II. AWARD AND PROCEDURE.

§ 3. Competency of arbitrators.

(Mich.; 1895.)

The fact that one of the parties held a mortgage on the furniture of one of the arbitrators does not show such interest in the arbitrator as to affect the validity of the award.—*Mather v. Day* (Mich.) 64 N. W. 198.

§ 4. Validity of award.

[a] (Mich.; 1895.)

An award not conforming to the agreement of submission is invalid.—*Sawtells v. Howard* (Mich.) 62 N. W. 156.
 104 Mich. 54.

[b] (Mich.; 1895.)

Where the award of arbitrators refers to certain books of account, from which the amount awarded shall be fixed, and such accounts are so incomplete that the amount cannot be computed therefrom without other evidence, the award is void for uncertainty.—*Mather v. Day* (Mich.) 64 N. W. 198.

[c] (Neb.; 1896.)

An agreement to submit a matter of difference to two arbitrators, by whom an umpire was to be chosen, to act only upon matters of difference between the arbitrators, did not authorize one arbitrator and such umpire, without showing of difference between the arbitra-

tors, to return an award conclusive upon the parties concerned.—*Manufacturers' & Builders' Fire Ins. Co. v. Mullen* (Neb.) 67 N. W. 445. 48 Neb. 620.

[d] (Neb.: 1897.)

The failure of arbitrators acting under Code Civ. Proc. tit. 28, to make and state the conclusions of fact and law found by them, is an irregularity merely, which does not render their award void, nor oust the district court of jurisdiction to confirm it.—*Burkland v. Johnson* (Neb.) 70 N. W. 388.

[e] (Neb.: 1897.)

An award by arbitrators under Code Civ. Proc. tit. 28, without a statement of conclusions of fact or of law, as required by the statute, the requirement not having been waived by the parties, is erroneous, and the judgment confirming it may be reversed by a direct proceeding for that purpose.—*Burkland v. Johnson* (Neb.) 70 N. W. 388.

§ 5. Effect of award.

(Iowa: 1895.)

A landlord and his tenant agreed orally to settle their differences by arbitration, and each selected an arbitrator, to whom he gave a memorandum of his claims. On the arbitrators' refusal to settle certain claims for damages, each party waived such claims. The arbitrators found a certain amount due the tenant, and that he should surrender the premises, with which each party expressed his satisfaction, and the tenant complied therewith, but no written award was made. *Held*, that the landlord was bound by the award.—*Skrable v. Pryne* (Iowa) 62 N. W. 21. 93 Iowa, 691.

§ 6. Procedure.

(Neb.: 1897.)

The method of arbitration provided by Code Civ. Proc. tit. 28, is not exclusive.—*Burkland v. Johnson* (Neb.) 70 N. W. 388.

§ 7. Modifying or setting aside award.

[a] (Minn.: 1896.)

In an action to set aside an award, it is competent for one of the arbitrators (who refused to join in the award) to testify to acts of partiality and misconduct on part of the other arbitrators.—*Levine v. Lancashire Ins. Co.* (Minn.) 68 N. W. 855.

[b] (Neb.: 1897.)

If an award made in pursuance of Code Civ. Proc. tit. 28, may be set aside or modified on motion for mistake of the arbitrators in computation or allowance of interest, it can be done only when it appears that the mistake was that of all the arbitrators whose concurrence was necessary to a binding award.—*Burkland v. Johnson* (Neb.) 70 N. W. 388.

ARCHITECTS.

Decision as to proper performance of contract, see "Contracts," § 47.
Right to mechanics' liens, see "Mechanics' Liens," § 15.

ARDENT SPIRITS.

See "Intoxicating Liquors."

ARGUMENT OF COUNSEL.

See "Criminal Law," §§ 79-89; "Trial," §§ 36-49.

ARMY AND NAVY.

See, also, "Militia."

[a] (Iowa: 1896.)

Under Acts 21st Gen. Assem. c. 58, providing for establishment of a soldiers' home, and that the board of commissioners "shall determine the eligibility of applicants for admission," and that they "shall have power to * * * make rules and regulations, not inconsistent with the laws and constitution of this state, for the management and government of said home," the commissioners may provide that any person admitted having a pension shall surrender all thereof in excess of six dollars per month, to be paid his wife, minor children, or parents, if he have any; otherwise to be credited to the support fund.—*Ball v. Evans* (Iowa) 68 N. W. 435.

[b] (Iowa: 1896.)

Such rules do not violate Rev. St. U. S. § § 4745, 4747, providing that any pledge, mortgage, sale, transfer, or assignment of any right, claim, or interest to a pension shall be void.—*Ball v. Evans* (Iowa) 68 N. W. 435.

ARRAIGNMENT.

See "Criminal Law," §§ 25-37.

ARREST.

I. IN CIVIL ACTION, §§ 1-3.

II. ON CRIMINAL CHARGE, §§ 4-6.

See, also, "Bail"; "Criminal Law"; "False Imprisonment"; "Malicious Prosecution."

Execution against the person, see "Execution," §§ 45, 46.

Homicide in resisting, see "Homicide," § 14.

Motion in arrest of judgment, see "Judgment," § 93.

Resisting arrest, see "Obstructing Justice."

Taking witnesses into custody, see "Witness," § 75.

Without warrant under city ordinance, see "Municipal Corporations," § 32.

I. IN CIVIL ACTION.

§ 1. Liability to arrest.

(Mich.: 1896.)

The voluntary discharge by plaintiff of defendant from arrest on *capias ad respondendum* does not exempt defendant from a second arrest in another action for the same cause, where the second arrest is not made maliciously, or with a view to harass the defendant.—*Breckon v. Ottawa Circuit Judge* (Mich.) 67 N. W. 906.

§ 2. Affidavit for arrest.

[a] (Mich.: 1895.)

How. Ann. St. § 7305, provides that the order to hold to bail shall be made only on affidavit of plaintiff, or some person in his behalf, showing the nature of his claim, and that it shall be annexed to, and returned and filed with, the writ. *Held*, that such affidavit need not have attached to it documentary evidence of the facts stated in it, which are within affiant's knowledge.—*Paulus v. Grobben* (Mich.) 62 N. W. 160.

104 Mich. 42.

[b] (Mich.: 1895.)

How. Ann. St. § 8753, subd. 2, provides that an affidavit for the arrest of a fraudulent debtor must state that the debtor has property or rights in action which he fraudulently con-

cents, or that he has rights in action, or some interest in corporate stock, money, or evidence of debt, which he unjustly refuses to apply to the payment of "any judgment or decree which shall have been rendered against him," belonging to the creditor. *Held* that, where such affidavit does not state that affiant's claim is in judgment or decree, the arrest of the debtor is not authorized, and that an affidavit attached to a *capias* in an action for malicious prosecution on account of such arrest need not negative the statement, in the affidavit for arrest, of the debtor's fraudulent acts.—*Paulus v. Groben* (Mich.) 62 N. W. 160.

101 Mich. 42.

[c] (Mich.; 1895.)

An affidavit for a warrant for a debtor's arrest on the ground that he has assigned, or disposed of, or is about to dispose of, his property with intent to defraud his creditors, which alleges that he cannot be arrested according to "chapter 141 of the Revised Statutes," sufficiently shows that the Revised Statutes of 1846 are referred to, as all other revisions of the statutes are known as "Compiled Laws" and "Howell's Annotated Statutes."—*Dummer v. Nungesser* (Mich.) 65 N. W. 564.

[d] (Mich.; 1895.)

It is no objection to the affidavit that it was made by plaintiff's attorney, and that there is no showing that he had personal knowledge of the transactions between the parties, where the allegations of the affidavit are not on information and belief, but are positive statements of fact.—*Dummer v. Nungesser* (Mich.) 65 N. W. 564.

[e] (Mich.; 1895.)

Under 2 How. Ann. St. c. 304, § 4, providing that a warrant for the arrest of a debtor shall issue only on an affidavit showing that there is a debt due plaintiff from defendant, and specifying the nature and amount thereof, an affidavit which alleges that defendant is justly indebted to plaintiff in a certain sum on two promissory notes, which sum is due from defendant to plaintiff, is sufficient.—*Dummer v. Nungesser* (Mich.) 65 N. W. 564.

[f] (Mich.; 1896.)

An affidavit to hold to bail in an action of slander, charging the defendant with repeating the slander, without averring personal knowledge of the utterances by plaintiff, is insufficient.—*Graham v. Cass* Circuit Judge (Mich.) 66 N. W. 348.

[g] (Mich.; 1896.)

To authorize an arrest upon a *ca. resp.* for the unlawful cutting of trees, the affidavit must show that the trespass complained of was without the leave and consent of the owner of the lands; and, where it does not appear that the facts stated were within the personal knowledge of the deponent, the affidavit must set forth the facts and circumstances in detail which were the basis of his conclusions.—*Shaw v. Ashford* (Mich.) 68 N. W. 281.

[h] (S. D.; 1896.)

An affidavit which asserts that the facts are stated upon the personal knowledge of the affiant, but which, from the facts detailed, must necessarily have been stated upon information and belief, is, unless the grounds of such information and belief are given, as required by Comp. Laws, § 4947, insufficient to support an order of arrest.—*Hart v. Grant* (S. D.) 66 N. W. 322.

[i] (S. D.; 1896.)

The cause of action and the cause for arrest being identical, an affidavit alleging that defendant, by fraudulently representing to a debtor or plaintiff that he was authorized by plaintiff to receive payment of the debt, obtained the amount thereof from the debtor, did not authorize the issuance of an order of arrest, since no cause of action accrued to the creditor by reason of the fraud.—*Hart v. Grant* (S. D.) 66 N. W. 322.

§ 3. Discharge.

(Mich.; 1896.)

The right to discharge from arrest on *capias ad respondendum* on the ground of another action pending must be set up by plea in abatement.—*Breckon v. Ottawa* Circuit Judge (Mich.) 67 N. W. 906.

II. ON CRIMINAL CHARGE.

§ 4. In another county.

(Iowa; 1895.)

Under Code, § 4160, providing that when a public offense is committed on the boundary of two counties, or within 500 yards thereof, the jurisdiction is within either county, an officer deputized by a justice of the peace has the same authority to make the arrest in the contiguous county within 500 yards of the boundary as he has in his own county.—*State v. Seery* (Iowa) 64 N. W. 631.

§ 5. Arrest of one already in custody.

(Mich.; 1896.)

The validity of an arrest under proper proceedings is not affected by the fact that the person is already in custody for the offense under invalid proceedings for arrest.—*People v. Payment* (Mich.) 67 N. W. 689.

§ 6. Necessity for warrant.

(Neb.; 1896.)

A marshal was justified in arresting defendant without a warrant for selling liquor without a license, where, a few hours before the arrest, he had seen defendant selling the liquor, and at the time of making the arrest defendant was behind the bar, though at the time of the arrest no liquor was being sold.—*Fry v. Kaessner* (Neb.) 66 N. W. 1126.

48 Neb. 133.

ARSON.

§ 1. Warrant.

(Mich.; 1897.)

A warrant alleging that defendant, "with force and arms," did set fire to and burn a certain mill, "contrary to the form of the statute," etc., and referring to the act as a "felony," is sufficient, though it does not charge a "willful and malicious" burning, in the terms of How. Ann. St. § 9125, under which the warrant was drawn.—*People v. Pichette* (Mich.) 69 N. W. 739.

§ 2. Indictment.

(Iowa; 1894.)

An indictment drawn under Code, § 3885, providing for the punishment of any one setting fire to material with intent to cause the burning of a building, and making no reference to the time of day at which the crime is committed, need not contain an averment of the time of day.—*State v. Tennebom* (Iowa) 61 N. W. 193.

92 Iowa, 551.

§ 3. — Description of premises and ownership.

(Iowa; 1894.)

An indictment charging that defendant "set fire to a great amount of rags, * * * in the cellar under a * * * building situated on the north half * * * of lot 4, * * * owned by G.," avers that G. was the owner of the building, and not of the rags.—*State v. Tennebom* (Iowa) 61 N. W. 193.

92 Iowa, 551.

§ 4. Evidence.

(Iowa; 1894.)

On trial of D. and S. for setting fire in a building with intent to burn it, it appeared

that D.'s daughter had a stock of goods in the building; that D. conducted a store for her; that D. lived with S.; that the fire started about 6 o'clock a. m. in a shed addition to the building, in which D. kept a gasoline stove; and that the evidence of defendants' guilt was only circumstantial. *Held*, that evidence that such stove leaked gasoline, and had once caught fire, was admissible.—*State v. Delaney* (Iowa) 61 N. W. 189.

92 Iowa, 467.

§ 5. — Sufficiency.

[a] (Iowa; 1894.)

On the trial of one indicted for setting fire to a store building, it appeared that the fire started at night, among some refuse in the cellar under defendant's store, arranged with kerosene barrels during the day so that it would burn readily; that a barrel of kerosene had been left in the room above during the day before, and the floor had become saturated with oil, some of which seemed to have been spread with a broom. The evidence was conflicting as to whether defendant was at the store on the night of the fire, six witnesses, relatives and friends, testifying that he was with his sick wife all the time, and one, occupying rooms in the burned building, that she had seen and heard him in the store on the night in question. It was moonlight, but, by her own evidence, she must have seen him in the shadow. *Held*, that a verdict of guilty was not so against the evidence as to require reversal.—*State v. Tennehom* (Iowa) 61 N. W. 153.

92 Iowa, 551.

[b] (Iowa; 1895.)

On a trial for setting fire to a dwelling, it appeared that defendant, who was interested in insurance on the building, was the only person in it when the fire originated, and that she was met, by persons attracted to the house by smoke issuing from the cupola, coming out of a room on the second floor with a bunch of burning feathers or mattress filling in her hands, the hall and stairs being strewn with the same substance. A burning feather bed was found in the room from which she came, resting on chairs, with the end torn open. There was no evidence that the fire had come from the rooms above. Defendant was not excited, and directed the persons present to leave the burning rooms, in order to save things in other parts of the house. *Held*, that the evidence justified a verdict of conviction.—*State v. Burgor* (Iowa) 62 N. W. 696.

ASSAULT AND BATTERY.

I. CIVIL ACTION, §§ 1-3.

II. CRIMINAL PROSECUTION, §§ 4-10.

I. CIVIL ACTION.

§ 1. Right of action.

[a] (Neb.; 1897.)

One who has commanded an intruder to leave his premises may use reasonably necessary means to enforce his command; but if, in so doing, he exceed the bounds of reasonable force, he will be guilty of an assault.—*Harshman v. Rose* (Neb.) 69 N. W. 755.

[b] (Wis.; 1896.)

The cause of action alleged in a complaint (an unlawful and malicious assault with a revolver) is not supported by a special verdict that the revolver was not aimed or presented at plaintiff when discharged, or immediately thereafter, and that defendant discharged the same with the intention of frightening plaintiff, but without intending to do him bodily harm.—*Degenhardt v. Heller* (Wis.) 68 N. W. 411.

93 Wis. 662.

§ 2. Justification.

[a] (Iowa; 1896.)

Abusive language is not justification for an assault, so as to prevent the assailant from being liable to the assaulted party for the actual damages.—*Irlbeck v. Bierl* (Iowa) 67 N. W. 400.

[b] (Neb.; 1896.)

An owner of premises, who, aided by another, seized a tenant and forcibly took him to the street, and dropped him upon the pavement in such a brutal manner as to cause injuries, was liable in damages to the tenant, though he was entitled to possession of the premises.—*Mengedoth v. Von Dorn* (Neb.) 67 N. W. 858.

48 Neb. 880.

§ 3. Pleading, evidence, and damages.

[a] (Iowa; 1897.)

Where a complaint for assault and battery charged that defendant willfully and wantonly threw plaintiff to the ground, the burden was on plaintiff to show, not only the battery, but the willfulness and wantonness of it.—*Cottrell v. Platt* (Iowa) 70 N. W. 177.

[b] (Neb.; 1897.)

In a civil action for assault and battery, such damages as are the necessary and usual consequence of the act complained of need not be alleged.—*Harshman v. Rose* (Neb.) 69 N. W. 755.

[c] (Wis.; 1897.)

In an action for assault and battery in making a false arrest, where there was evidence that some violence was used, it was proper to charge that punitive damages could be allowed if the battery was inflicted "under circumstances of aggravation or cruelty, with vindictiveness or malice."—*Lamb v. Stone* (Wis.) 70 N. W. 72.

II. CRIMINAL PROSECUTION.

See, also, "Indecent Assault."

Assault with intent to kill, see "Homicide," § 19.

—to rape, see "Rape," §§ 1, 2, 14.

§ 4. What constitutes assault.

[a] (Iowa; 1895.)

Instructions defining an assault as "an unlawful attempt to commit violence upon the person of another, with the present ability to do so," and defining a battery as "an unlawful beating of another," is not rendered erroneous by the use of the words "unlawful attempt," and the omission of the words "with full force or violence."—*State v. Cody* (Iowa) 62 N. W. 702.

[b] (Mich.; 1895.)

Where an abutting owner threatens one in the employ of the commissioner of highways engaged in taking up a drain built by defendant across a road, and not for the purpose of preventing the illegal destruction of the drain, he is guilty of assault.—*People v. Sayers* (Mich.) 63 N. W. 1002.

105 Mich. 708.

§ 5. Assault with intent to do great bodily injury.

[a] (Mich.; 1895.)

Evidence of the use of a deadly weapon on a vital part of the body with sufficient force to produce unconsciousness sufficiently establishes intent to do great bodily harm.—*People v. Smith* (Mich.) 64 N. W. 200.

[b] (Mich.; 1895.)

On a trial for assault with intent to do great bodily harm there was evidence that bitter feeling had long existed between defendant and B., who owned adjoining land, and that defendant had assaulted B. once before; that on the day of the assault complained of, B., with her daughter and F., were on defendant's land, trying to quench a fire, which threat-

ened the division fence; that defendant came up with a stick, and ordered them away, and, on the refusal of F. to go, a fight ensued between the latter and defendant; that defendant struck F. with his stick, and then turned and struck B. on the head; that defendant said, "I will kill you before you leave here," and struck B. again over the head with the stick, felling her to the ground. Defendant claimed that B. struck him while he was fighting with F., and that she was hit by a blow intended for the latter. *Held*, that the question of intent to do great bodily harm was properly left to the jury.—*People v. Conley* (Mich.) 61 N. W. 325.

[c] (Neb.; 1894.)

A "great bodily injury," within Cr. Code, § 17b, does not necessarily mean a permanent injury.—*Murphy v. State* (Neb.) 61 N. W. 491, 43 Neb. 31.

[d] (Neb.; 1894.)

Defendant, without provocation, struck complainant with his fist, knocking him down, and kicked him twice. Complainant, on attempting to arise, discovered that his right leg was broken. With assistance, he retreated across the street, where a few minutes later he was followed by defendant, who again struck him. *Held* to sustain the conviction for assault with intent to inflict great bodily injury.—*Murphy v. State* (Neb.) 61 N. W. 491, 43 Neb. 34.

[e] (Neb.; 1895.)

Where, on the trial of an indictment for assault with intent to do bodily injury, it appears that defendant slapped a child with her hand, in the face, causing a swelling which remained for several days, it was proper to submit to the jury the question of defendant's guilt as charged.—*Whitener v. State* (Neb.) 61 N. W. 704, 46 Neb. 144.

§ 6. Assault with deadly weapon.

(Neb.; 1895.)

Where a weapon, and the manner of its use, in the commission of an assault, are such as to admit of but one conclusion in that respect, the question whether or not it is "deadly" is one of law, for the court to determine.—*Krebnay v. State*, 61 N. W. 628, 43 Neb. 337.

§ 7. Information.

(Neb.; 1894.)

An information under Cr. Code, § 17b, for an assault with intent to inflict great bodily injury, is sufficient if it charges the offense in the language of the statute, without stating the means with which the assault was committed.—*Murphy v. State*, 61 N. W. 491, 43 Neb. 34.

§ 8. Evidence.

[a] (Mich.; 1895.)

On a prosecution for assault with intent to do great bodily harm, testimony of the person assaulted as to the nature and extent of his wounds is competent to show the intent.—*People v. Sutherland* (Mich.) 62 N. W. 566, 104 Mich. 468.

[b] (Mich.; 1895.)

It is proper to permit the witness to exhibit his injuries to the jury.—*People v. Sutherland* (Mich.) 62 N. W. 566, 104 Mich. 468.

§ 9. Instructions.

[a] (Mich.; 1895.)

In a prosecution for assault with intent to do great bodily harm, evidence that the assault was without provocation; that defendant immediately ran after striking the blow, which broke the nose of the person assaulted, and rendered him insensible,—an instruction that one is presumed to intend the natural consequences of his act is proper.—*People v. Resh* (Mich.) 65 N. W. 99.

[b] (Neb.; 1896.)

Where the evidence on a prosecution for assault and battery showed that defendant struck prosecutor with a hammer at least twice, there was no error in failing to define the word "assault" in the instructions.—*Wells v. State* (Neb.) 66 N. W. 29.

47 Neb. 74.

§ 10. Punishment.

(Iowa; 1895.)

Where the evidence showed that defendant, because of some alleged previous provocation, attacked a person at night, inflicting severe bodily injuries, notwithstanding no resistance was made, a fine of \$200 imposed by the court was not excessive.—*State v. Akin* (Iowa) 62 N. W. 667.

ASSESSMENT.

For drains, see "Drainage," §§ 7-9.

For highways, see "Highways," §§ 22-24.

Of benefits from public improvements, see "Municipal Corporations," §§ 127-155.

Of taxes, see "Taxation," §§ 25-37.

On corporate stock, see "Corporations," § 50.

On mutual fire policy, see "Insurance," § 145.

On policies in mutual benefit companies, see "Insurance," § 172.

ASSETS.

Of decedents' estates, see "Executors and Administrators," § 6.

Of firm, see "Partnership," §§ 40, 41.

ASSIGNEE.

See "Assignment," § 11; "Assignment for Benefit of Creditors," §§ 26-32.

In bankruptcy, see "Bankruptcy."

In insolvency, see "Insolvency," §§ 7-9.

ASSIGNMENT.

I. WHAT IS ASSIGNABLE, §§ 1-5.

II. VALIDITY AND EFFECT, §§ 6-10.

III. RIGHTS OF PARTIES, §§ 11, 12.

IV. ACTIONS, § 13.

See, also, "Assignment for Benefit of Creditors."

Admissibility of declarations by assignor as against assignee, see "Evidence," § 37.

Effect of assignment before garnishment, see "Garnishment," § 10.

Estoppel to acquire mechanic's lien by, see "Mechanics' Liens," § 17.

Of bills and notes, see "Negotiable Instruments," §§ 24-41.

Of corporate stock, see "Corporations," §§ 58-62.

Of dower, see "Dower," § 7.

Of error, see "Appeal," §§ 87-101; "Criminal Law," § 204.

Of judgment, see "Judgment," §§ 113, 114.

Of lease, see "Landlord and Tenant," §§ 31-34.

Of license to cut timber, see "License," § 1.

Of mortgage, see "Chattel Mortgages," §§ 31, 32; "Mortgages," §§ 29-33.

Of mortgaged property, see "Chattel Mortgages," §§ 58-60.

Of mutual benefit insurance certificate, see "Insurance," § 164.

Of plaintiff's interest pending suit, see "Abatement and Revival," § 1.

Of policy, see "Insurance," §§ 21-23.

Of right to dower in land, see "Dower," § 8.

Of subject-matter of action, effect on lien of attorney, see "Attorney and Client," § 21.
Of trade-name, see "Trade-Marks and Trade-Names," § 1.
Set-off of assigned claims, see "Set-Off and Counterclaim," § 6.

I. WHAT IS ASSIGNABLE.

§ 1. In general.

[a] (Mich.; 1896.)

A contract for the planting and care of an orchard is a personal one, and cannot be assigned where the landowner relies on the benefit he will derive from the personal knowledge, skill, and honesty of the fruit-tree man.—*Edison v. Babka* (Mich.) 69 N. W. 499.

[b] (Minn.; 1896.)

The right of re-entry for a breach of a condition subsequent is not assignable before the breach.—*Ohio Iron Co. v. Auburn Iron Co.* (Minn.) 67 N. W. 221.

64 Minn. 404.

[c] (Minn.; 1897.)

Since Gen. St. 1894, § 5171, provides that an action for a wrong shall not abate by the death of a party after verdict of a jury or report of a referee, a verdict for a personal injury is assignable.—*Kent v. Chapel* (Minn.) 70 N. W. 2.

[d] (Neb.; 1895.)

Dividends declared by a corporation on corporate stock are capable of assignment.—*Cook v. Monroe* (Neb.) 63 N. W. 800.

45 Neb. 349.

[e] (S. D.; 1895.)

A contract with the state to do the class of printing specified in Laws 1891, c. 99, which contains no stipulation prohibiting its assignment, may be assigned.—*Carter v. State* (S. D.) 65 N. W. 422.

§ 2. Guaranty.

(Minn.; 1894.)

A written guaranty, executed by defendants, that C. will pay B. "any indebtedness that may now or hereafter be owing" to B. by C., not exceeding a certain sum, is assignable by B. to a third person on a sale and transfer of overdue notes against C.—*Anchor Inv. Co. v. Kirkpatrick* (Minn.) 61 N. W. 29.

59 Minn. 378.

§ 3. Liens.

(Wis.; 1895.)

Rev. St. c. 143 (entitled "Of Liens"), section 3316, provides that "all claims for liens * * * under this chapter" shall be assignable. Section 3328 provides that any subcontractor who has furnished materials to a principal contractor for any building for any school district, etc., may maintain an action therefor against such principal contractor and such school district jointly, etc. *Held*, that the remedy given by section 3328 is assignable.—*Bank of Iron River v. Board of School Directors of Town of Iron River*, 65 N. W. 363, 91 Wis. 596.

§ 4. Choses in action.

[a] (Iowa; 1896.)

A claim for the recovery of money paid for intoxicating liquors, under Code, § 1550, providing that all such payments shall be deemed to have been received upon a valid promise and agreement to repay the same on demand, is assignable.—*Sellers v. Arie* (Iowa) 68 N. W. 814.

[b] (Mich.; 1895.)

An action for trespass to land in cutting timber therefrom is assignable.—*Gates v. Comstock* (Mich.) 65 N. W. 544.

[c] (Mich.; 1897.)

The right to recover money due under a contract partly performed is assignable.—*Rodgers v. Torrent* (Mich.) 70 N. W. 335.

[d] (Wis.; 1897.)

A cause of action which survives is assignable before judgment.—*Lehmann v. Deuster* (Wis.) 70 N. W. 170.

[e] (Wis.; 1897.)

A claim for damages alleged to have been sustained by reason of a conspiracy to defraud is not assignable as a claim for injury to personal property.—*John V. Farwell Co. v. Wolf* (Wis.) 70 N. W. 289.

§ 5. Future earnings.

[a] (Mich.; 1896.)

An assignment by an executor—who has been appointed by the probate court, and has secured the probate of the will—of compensation to be earned in defending against an appeal is void as against public policy.—*In re King's Estate* (Mich.) 68 N. W. 154; *Doty v. Bates*, *Id.*

[b] (Neb.; 1895.)

An assignment of moneys not yet earned, but expected to be earned in the future, under an existing contract, is valid and enforceable in equity.—*Perkins v. Butler County* (Neb.) 62 N. W. 308.

44 Neb. 110.

II. VALIDITY AND EFFECT.

§ 6. Validity.

[a] (Mich.; 1896.)

A contract of sale of standing timber reserved title in the vendor till payment of the price, and required the vendees, before removing the timber, to make specified payments, and that their default should, at the option of the vendor, avoid the contract. The vendees contracted, with the consent of the vendor, indorsed on the contract, to sell the same timber. The indorsement restricted the contract to the parties making it, and provided that it should not be a waiver by the vendor of any terms of the original contract, and contained a further agreement with the second vendees that, if the original vendees defaulted in their contract, they could cut and remove the timber on terms provided in the original contract. The second vendees, without the written consent of the original vendor, or any consideration passing to him, assigned the contract so indorsed, without having paid any money on it. *Held* that, as between the assignee and the original vendor, the assignment was void for want of mutuality.—*Jackson v. Sessions* (Mich.) 67 N. W. 315.

[b] (Mich.; 1897.)

When made bona fide, an assignment of accounts is valid, though not recorded.—*McDonald v. Preston Nat. Bank* (Mich.) 70 N. W. 143.

§ 7. — Parol or written assignment.

[a] (Iowa; 1895.)

Where the bond to secure the payment of a debt was assigned by parol before an action was commenced thereon, it is immaterial that no formal written assignment thereof had been executed.—*Hoffman v. Smith* (Iowa) 63 N. W. 182.

[b] (Minn.; 1896.)

Where the owner of an account turned the same over to plaintiff with the agreement that he should have and collect it from the debtor, and the debtor was notified thereof by the owner and by plaintiff, the assignment was complete, as against the debtor, though not formal and not in writing.—*Hurley v. Bendel* (Minn.) 69 N. W. 477.

§ 8. Equitable assignment.

[a] (Minn.; 1896.)

Defendant, relying on representations by the mortgagor's wife that her husband, who had deserted her, was dead, purchased from her the equity of redemption, taking her deed, and afterwards redeemed from the foreclosure sale.

Held, that the redemption amounted to an equitable assignment of the interest acquired by the purchaser at the foreclosure sale.—*Knight v. Schwandt* (Minn.) 69 N. W. 626.

[b] (Wis.; 1897.)

A mortgagee agreed to discontinue foreclosure, in consideration of the application of the rents on the debt; and the mortgagor instructed his agent to pay over the rents, as collected, to the mortgagee. *Held* an equitable assignment of the rents, so that, when collected and in the hands of the agent, they were not subject to garnishment by a judgment creditor of the mortgagor.—*Baillie v. Currie* (Wis.) 70 N. W. 660.

§ 9. What passes by assignment.

[a] (Mich.; 1895.)

Where the vendee in a contract for the sale of land, which provides for its forfeiture in case of default in payments, assigns his interest thereunder as collateral security, and the contract is subsequently declared forfeited by the vendor, any rights which the vendee has in the payments already made pass to his assignee.—*Hooper v. Van Husen* (Mich.) 63 N. W. 522.

105 Mich. 592.

[b] (Neb.; 1896.)

An assignment by contractors engaged in constructing a public building of all their "interest in warrants or vouchers due" them under the contract, with authority to the assignee to receipt for the same, did not include money subsequently earned by them in performance of their contract.—*Ryan v. Douglas County* (Neb.) 66 N. W. 30.

47 Neb. 9.

[c] (Wis.; 1895.)

A contractor, after assigning part of a contract to subcontractors, assigned the entire contract to a bank, authorizing it to collect all payments due or to become due under the contract, and to give a full release therefor. The subcontractors, after the assignment to the bank, assigned to plaintiff their contract, and gave him an order on the original contractor for all money due or to become due under their contract, which order the contractor accepted by agreeing to pay the moneys when received by himself. *Held* an assignment of all rights under the contract, but not an assignment of moneys paid to the bank under the contract.—*Dimple v. State Bank*, 65 N. W. 501, 91 Wis. 601.

[d] (Wis.; 1896.)

An assignment of "all right, title and interest in and to all property, real and personal, legal and equitable, which I now own or claim to own or in which I have any interest" is sufficient to transfer the assignor's interest in his own behalf and as attorney in shares of stock to recover which he has sued.—*Ellis v. Southwestern Land Co.* (Wis.) 69 N. W. 363.

[e] (Wis.; 1896.)

But such assignment did not operate to transfer the assignor's interest as attorney for services rendered in such suit subsequent to the assignment.—*Ellis v. Southwestern Land Co.* (Wis.) 69 N. W. 363.

§ 10. Effect of check, draft, or order, as assignment.

[a] (Iowa; 1896.)

The issuance of a check or draft on a bank operates as an equitable assignment of so much of the drawer's deposit in the bank as is necessary to pay such check or draft, but gives the drawee no greater rights in such fund than the drawer himself had.—*Thomas v. Exchange Bank of Angus* (Iowa) 68 N. W. 780.

[b] (Minn.; 1896.)

An order attached to an account, directing its payment to the party named in the order, and delivered to him, operates as an assignment of the debt or account, although the order is not accepted by the debtor, and is valid

as against a subsequent garnishment.—*Union Iron Works v. Kilgore* (Minn.) 67 N. W. 1017.

[c] (Minn.; 1897.)

A draft for the whole of a specified debt amounts to an assignment of such debt to the payee, even without acceptance.—*Brady v. Chadbourne* (Minn.) 70 N. W. 981.

III. RIGHTS OF PARTIES.

§ 11. Rights of assignee.

[a] (Mich.; 1895.)

An agreement by the assignor of a debt, should he be called upon to protect its payment, to show good cause for its payment, means that the assignor would show that the debt was a valid and subsisting legal obligation against the debtor named.—*Prudden v. Nester* (Mich.) 61 N. W. 777.

103 Mich. 540.

[b] (Mich.; 1896.)

A debtor cannot defend an action by an assignee of the claim against him on the ground that the assignment was gratuitous.—*Coe v. Hinkley* (Mich.) 67 N. W. 915.

§ 12. Equities enforceable against assignee.

(Mich.; 1894.)

An assignment without consideration of a decree for foreclosure of a mortgage is subject to the equities between the owner of the mortgaged land and the assignor.—*Moore v. Smith* (Mich.) 61 N. W. 538.

103 Mich. 387.

IV. ACTIONS.

§ 13. By assignee.

(Minn.; 1896.)

Where notes and collateral chattel mortgages were assigned for the purpose of enabling the assignee to collect the same by suit, and turn the proceeds over to the assignor, the assignee could sue in his own name.—*Struckmeyer v. Lamb* (Minn.) 65 N. W. 930.

64 Minn. 57.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

I. WHAT CONSTITUTES, §§ 1-4.

II. REQUISITES AND VALIDITY, §§ 5-11.

III. PREFERENCES AND RESERVATIONS, §§ 12-17.

IV. CONSTRUCTION AND EFFECT, §§ 18-25.

V. THE ASSIGNEE, §§ 26-32.

VI. RIGHTS OF CREDITORS, §§ 33-39.

VII. ACTIONS, §§ 40, 41.

See, also, "Composition with Creditors"; "Insolvency."

Acts validating assignees' bonds, retrospective legislation, see "Constitutional Law," § 27. Conflict of laws regulating, see "Conflict of Laws," § 4.

Effect as change of interest or title, see "Insurance," § 53.

Power of partner to make, see "Partnership," § 18.

I. WHAT CONSTITUTES.

§ 1. What constitutes.

[a] (Iowa; 1896.)

Code, § 2115, providing that no general assignment by an insolvent for the benefit of creditors shall be valid unless made for the ben-

ent of all, in proportion to the amount of their respective claims, uses the word "assignment" in its technical sense, and does not affect general transfers of the debtor's property.—*Roberts v. Press* (Iowa) 66 N. W. 756.

[b] (Mich.; 1897.)

A transfer of all one's property to a creditor in payment of his claim, and in further consideration of his paying the claims of certain other creditors, they not knowing or agreeing thereto, is an assignment for benefit of creditors.—*Hill v. Mallory* (Mich.) 70 N. W. 1016.

[c] (Wis.; 1894.)

Where plaintiffs, who held an unrecorded bill of sale of a part of their debtor's property as security for his notes, surrendered it to defendant, and the debtor at the same time transferred all of his property to defendant, and in consideration thereof defendant promised to pay all the debtor's indebtedness, including said notes, the transaction did not amount to an assignment for the benefit of the debtor's creditors.—*Green v. Hadfield* (Wis.) 61 N. W. 310, 89 Wis. 138.

[d] (Wis.; 1895.)

Where an insolvent, by consent of some of his creditors, agrees that a third person shall collect the proceeds of sales from his factory, of which the debtor is to retain control, the proceeds, after paying running expenses, to be applied on the debts of such creditors, the agreement to continue in force six months, subject to renewal, it is an assignment for creditors, which, not being made in accordance with the statutes, is void.—*Jameson v. Maxcy* (Wis.) 65 N. W. 492, 91 Wis. 563.

§ 2. Intent of parties.

(Iowa; 1896.)

Whether certain acts constitute a general assignment for the benefit of creditors is to be determined by the intent of the parties.—*Roberts v. Press* (Iowa) 66 N. W. 756.

§ 3. Insolvency of debtor.

(Iowa; 1896.)

One who is unable to meet his just obligations in due course of trade, and who is unable to proceed in business without making some arrangement with his creditors, is insolvent, within Code, § 2115, providing for assignments by insolvents for the benefit of creditors.—*McCandless v. Hazen* (Iowa) 67 N. W. 256.

§ 4. Constructive assignment—Instruments purporting to be mortgages.

[a] (Iowa; 1896.)

A mortgage to secure particular creditors, thereby defeating other creditors in the collection of their debts, is not a general assignment for the benefit of creditors, within Code, § 2115, forbidding preferences in such assignments.—*Roberts v. Press* (Iowa) 66 N. W. 756.

[b] (Iowa; 1896.)

Defendants, who were dealers in hardware and machinery, executed a chattel mortgage on their stock and assigned accounts, in all valued at \$3,300, securing all their creditors but three, and covering \$3,300 out of a total indebtedness of \$3,700. They were not insolvent, but had property of the value of \$1,150 remaining. They did not intend going out of business, but expected to continue until the mortgage was paid. The creditors had no knowledge of the mortgage when executed, but most of them ratified it afterwards. *Held*, that the transaction did not constitute a general assignment.—*David Bradley & Co. v. Hopkins* (Iowa) 67 N. W. 261; *Rector & Wilhelm Co. v. Same*, *Id.*

[c] (Neb.; 1895.)

Instruments in the form of chattel mortgages, providing that the mortgagees should divide the proceeds of the mortgaged property pro

rata with another, and that the mortgagees should take immediate possession, *held* to constitute chattel mortgages, rather than an assignment for the benefit of creditors.—*Kilpatrick-Koch Dry-Goods Co. v. Bremers* (Neb.) 62 N. W. 1105.

44 Neb. 863.

[d] (Wis.; 1895.)

An insolvent debtor gave to certain creditors, who were his relatives and friends, a chattel mortgage covering all his property, with an agreement that one of such creditors should immediately take possession of the property, as agent and trustee for all, sell the same, and distribute the proceeds among the mortgagees, pro rata. Subsequently two other creditors took chattel mortgages on the same property, with knowledge of the first mortgage, and consented to the arrangement made at that time. *Held*, that all the chattel mortgages were void, as to the other creditors; the entire transaction being, in effect, a general assignment, with preferences. *Winner v. Hoyt* (1886) 28 N. W. 380, 66 Wis. 227, followed.—*Strong v. Imig*, 64 N. W. 295, 91 Wis. 29.

II. REQUISITES AND VALIDITY.

Necessity of bond by assignee, see post, §§ 26, 27.

§ 5. Requisites.

[a] (Minn.; 1896.)

A deed of assignment in insolvency, which in terms assigns all of the unexempt property of the insolvent for the equal benefit of all his creditors who shall file releases of their demands against the debtor, is sufficient, although the phrase "bona fide" is not contained therein.—*Yanish v. Pioneer Fuel Co.* (Minn.) 66 N. W. 198.

64 Minn. 175.

[b] (Neb.; 1896.)

In an action to hold liable as garnishee the assignee of an insolvent firm with respect to property which has come into his hands by virtue of the assignment, it is immaterial whether or not the deed of assignment was witnessed, and any ambiguity in such deed will not be so construed as to render it void.—*Deere, Wells & Co. v. Losey* (Neb.) 67 N. W. 462.

48 Neb. 622.

[c] (Wis.; 1895.)

Under Rev. St. 1878, § 1694, making assignments for the benefit of creditors void unless the assignee delivers a bond to the county judge or court commissioner, "not being a creditor of the assignor," an assignment is not void because the court commissioner to whom it was delivered did not certify thereon, or on the assignee's bond, that he was not a creditor of the assignor. His qualification to act will be presumed in the absence of proof to the contrary.—*Standard Paper Co. v. Krauthoefer*, 61 N. W. 764, 89 Wis. 168.

§ 6. Acknowledgment and attestation.

[a] (Minn.; 1896.)

Every assignment for the benefit of creditors, whether made under the assignment or insolvency laws of the state, is void, unless duly acknowledged.—*Bennett v. Knowles* (Minn.) 68 N. W. 111.

[b] (Neb.; 1896.)

Since the comma after the word "acknowledgment," in Comp. St. c. 6, § 6, providing that assignments for the benefit of creditors "shall be in writing, and shall be executed and acknowledged in the manner in which a conveyance of real estate is or shall be required to be executed and acknowledged, in order to entitle the same to be recorded," is an interpolation, that section requires a deed of assignment to be witnessed. *Bank v. Horn* (1892) 52 N. W. 562, 34 Neb. 742; *Deere, Wells & Co. v. Losey* (1896) 67 N. W. 462, 48 Neb. 622, overruled.—*Sager v. Summers*, 68 N. W. 614.

[c] (Neb.: 1896.)

Since Comp. St. c. 6, § 1, provides that no assignment for the benefit of creditors shall be valid unless made in conformity with the act, and section 6 requires a deed of assignment to be witnessed, an unattested deed is invalid, even as between the parties.—*Sager v. Summers* (Neb.) 68 N. W. 614.

§ 7. Requiring creditors to file releases.

(N. D.: 1895.)

An assignment for the benefit of creditors, avowedly made under the statute, was not rendered void, under Comp. Laws, § 4663, declaring an assignment void which tends to coerce a creditor to release his claim, by the provision for distribution of the proceeds of the estate among the creditors "who shall file releases of their claims * * * as provided by law."—*Bangs v. Padden* (N. D.) 64 N. W. 78.

5 N. D. 92.

§ 8. By firm.

[a] (Minn.: 1896.)

An assignment executed as follows: "Brooks & Co., by W. M. Brooks. All Brooks," did not pass the separate property of W. M. Brooks.—*Farwell, Ozmun, Kirk & Co. v. Brooks* (Minn.) 68 N. W. 5.

[b] (Minn.: 1896.)

A deed of assignment by partners for the benefit of creditors, in order to be valid, must on its face be sufficient to assign, not only the partnership property, but also all of the non-exempt separate property of each of the partners.—*Farwell, Ozmun, Kirk & Co. v. Brooks* (Minn.) 68 N. W. 5.

§ 9. Parol trust in land.

(Wis.: 1897.)

Under Rev. St. § 2302, providing that a trust in land can be created or proved only by an instrument in writing, a parol trust in land for the benefit of creditors is void at the election of the trustee, and can be enforced by neither debtor nor creditors.—*Kronskop v. Kronskop* (Wis.) 70 N. W. 475.

§ 10. Fraud.

[a] (Neb.: 1896.)

The fraudulent disposition of a part of his property by one about to make an assignment for the benefit of his creditors will not operate to impair the title of the assignee to the remainder, when such assignment is afterwards made to and acted upon by the assignee in good faith.—*Deere, Wells & Co. v. Losey* (Neb.) 67 N. W. 462.

48 Neb. 622.

[b] (Wis.: 1895.)

The fact that an assignment is made with the secret purpose, on the part of the assignor, to force his creditors to compromise, does not render it void, as a conveyance made with intent to hinder or delay creditors.—*Killman v. Gregory*, 65 N. W. 53, 91 Wis. 478.

§ 11. Estoppel to assert invalidity.

(Iowa: 1895.)

The fact that the agents of an insolvent insurance company filed claims for unearned premiums with the assignee, after giving proper credit for the balance due the company by them, does not estop them from contesting the validity of the assignment, as affecting their right of set-off.—*Franzen v. Hutchinson* (Iowa) 62 N. W. 698.

III. PREFERENCES AND RESERVATIONS.

See, also, "Fraudulent Conveyances," § 2.

Recovery by assignee of value of property transferred as preference, see post, § 30.

Time of filing claim for preference, see post, § 36.

§ 12. When preference exists.

[a] (Iowa: 1897.)

The fact that a mortgage previously executed by a corporation was filed for record on the day previous to the making of a general assignment by the mortgagor, in the absence of evidence connecting the two together in the intention of the parties, does not justify their construction together as one instrument, intended to give an illegal preference to the secured creditors.—*In re Bloomfield Woolen Mills* (Iowa) 70 N. W. 115; *Allender v. State Bank of Bloomfield*, Id.

[b] (Wis.: 1895.)

An assignment in terms preferred rent due on the land of the assignor, who owned no land, except his homestead, which was not assigned, and who owed no rent, except the rent for one month of the store building in which he did business, and for which he had a lease for a term of years. *Held*, that the assignment did not, in fact, prefer the rent due for the store building, and it was not void because of such preference, under *Sanb. & B. Ann. St.* § 1693a.—*Killman v. Gregory* (Wis.) 65 N. W. 53, 91 Wis. 478.

§ 13. Validity of preferences.

(Iowa: 1896.)

A transfer by an insolvent debtor to his brother, a few days before making a general assignment, will not be declared fraudulent, as against creditors, where it appears that it was made pursuant to a prior promise to indemnify such brother against liability as a surety, and where there was no evidence that at the time of the transfer the debtor intended to assign.—*McCandless v. Hazen* (Iowa) 67 N. W. 256.

§ 14. — Mortgages.

[a] (Iowa: 1896.)

A mortgage of an insolvent debtor's entire stock to secure particular creditors, without any intent to make a general assignment, is valid, though a short time thereafter the debtor does in fact execute such assignment.—*Roberts v. Press* (Iowa) 66 N. W. 756.

[b] (Mich.: 1895.)

The facts that a mortgagor was insolvent at the time a mortgage was given, that the mortgagor and mortgagee were related, and that the mortgagor made a general assignment the day after the mortgage was executed, will not render the mortgage fraudulent as to creditors, when the claim of the mortgagee was bona fide, and the assignment was not contemplated when the mortgage was given, though the mortgagee knew that the mortgagor was in failing circumstances, and an assignment seemed probable.—*Kalamazoo Spring & Axle Co. v. Winans, Pratt & Co.* (Mich.) 64 N. W. 23.

§ 15. Delivery of mortgaged property to mortgagee.

(Wis.: 1895.)

Where the assignee, having taken possession of the assigned property under bond, delivered to different mortgagees parts of the property covered by their several mortgages, such delivery did not render the assignment void, as giving an unlawful preference to such creditors.—*Case v. James* (Wis.) 63 N. W. 237.

90 Wis. 320.

§ 16. Effect of preference on assignment.

[a] (Iowa: 1895.)

Where defendant, when insolvent, and shortly before making an assignment, executed several mortgages and conveyances to secure alleged indebtedness, with intent to give preference to certain creditors, the transactions invalidate the assignment, under Code, § 2115, providing that no general assignment of property by an insolvent shall be valid unless it be made for the benefit of all his creditors propor-

tionately.—*Bradley v. Bailey* (Iowa) 64 N. W. 758.

[b] (Iowa; 1896.)

A banking partnership, being insolvent, executed a number of deeds and mortgages to secure certain creditors, and a trust deed to plaintiff to secure depositors who were named therein as beneficiaries, plaintiff being a depositor for a nominal amount. A corporation of which the partners were controlling members, and to which the firm was largely indebted, also executed a general assignment. The trust deed, at the time of its execution, included practically all the property owned by the firm. *Held*, that the conveyances must be regarded as one transaction, constituting a general assignment, and therefore void, under Code, § 2115, declaring that no general assignment shall be valid unless made for the benefit of all the creditors.—*Elwell v. Kimball* (Iowa) 69 N. W. 286.

[c] (Iowa; 1896.)

Evidence that a father sold to his two sons their partnership stock in trade, taking their notes for the price; that they had no other property subject to execution, and the father knew it; that, after conducting business at a loss, the sons, knowing themselves bankrupt, through false statements to a commercial agency, obtained goods on credit, for the purpose of stocking up and then failing; that the sons then executed a chattel mortgage on their entire stock to their father for their entire debt to him, and, about an hour afterwards, on advice of the father's attorney, made an assignment for the benefit of creditors to their brother-in-law, warrants a finding that the mortgage and assignment constitute one transaction, in effect a general assignment for the benefit of creditors with a preference, which, under Code, § 2115, is void.—*Creglow v. Creglow* (Iowa) 69 N. W. 446.

[d] (Mich.; 1897.)

A transfer of all one's property to a creditor in payment of his claim, and in further consideration of his paying the claims of certain other creditors, they not knowing or agreeing thereto, is void for preferences.—*Hill v. Mallory* (Mich.) 70 N. W. 1016.

§ 17. Reservation.

(N. D.; 1895.)

The reservation of exempt property in an assignment for the benefit of creditors does not render the assignment void, though such property is not specified therein.—*Bangs v. Fadden* (N. D.) 64 N. W. 78.

5 N. D. 92.

IV. CONSTRUCTION AND EFFECT.

§ 18. Construction.

[a] (Minn.; 1896.)

An assignment for the benefit of creditors, under the insolvency laws, by a debtor, after garnishment proceedings have been commenced against him, is not an involuntary, but a voluntary, assignment.—*Hawkins v. Ireland* (Minn.) 67 N. W. 73.

64 Minn. 339.

[b] (Wis.; 1896.)

A provision in a deed of general assignment by the members of a firm that the assignee should pay "all other debts, of every kind and description," of the firm, includes debts owed by the firm as a member of another insolvent partnership; and a creditor of the latter partnership cannot obtain a preference by a levy on assigned property, on the assumption that on payment of the direct obligations of the assigning firm the remainder of the property reverts to the assignors.—*In re Gilbert* (Wis.) 68 N. W. 863; *Appeal of Cleasby*, *Id.*

§ 19. Title of assignee.

(Neb.; 1894.)

The assignee of an insolvent corporation, under an assignment for the benefit of credit-

ors, takes the property subject to whatever equities existed against the assignor.—*Salladin v. Mitchell*, 61 N. W. 127, 42 Neb. 859.

§ 20. Asserting remedy in derogation of assignment.

(Iowa; 1895.)

After a chattel mortgage has been foreclosed in an action against an insolvent and his assignee, one who has filed his claim with the assignee cannot, under Code, §§ 3150-3153, providing for equitable proceedings in favor of judgment creditors against any person indebted to the judgment debtor, maintain a suit to set aside said chattel mortgage on the goods in possession of the assignee.—*Mehlhop v. Ellsworth* (Iowa) 64 N. W. 638.

§ 21. Whether property in custodia legis.

(Iowa; 1895.)

In an action of attachment, wherein an assignee intervened, claiming the property under a deed of assignment from defendant, it may be shown that certain creditors were preferred, and that the assignment was void, and therefore the property subject to attachment.—*Bradley v. Bailey* (Iowa) 64 N. W. 758.

§ 22. Collateral attack on assignment.

(Iowa; 1896.)

An assignment regular on its face cannot be collaterally attacked.—*McCandless v. Hazen* (Iowa) 67 N. W. 256.

§ 23. Priority over attachment.

(Minn.; 1895.)

A deed of assignment for the benefit of creditors, purporting to have been made and delivered under the insolvency law, regular in form and complete on its face, cannot be attacked in garnishment proceedings instituted by a creditor of the assignor against the assignee.—*Staples v. Schulenberg & Boeckeler Lumber Co.* (Minn.) 64 N. W. 148.

62 Minn. 158.

§ 24. Effect.

(S. D.; 1897.)

A tenant in common of personalty may sue his co-tenant for conversion of the common property, though the latter has made an assignment for creditors.—*Grigsby v. Day* (S. D.) 70 N. W. 881.

§ 25. Discharge—Liability for taxes.

(Wis.; 1896.)

A claim for taxes against an estate assigned for the benefit of creditors is not a debt, within the meaning of I Sanb. & B. Ann. St. §§ 1702a-1702u, providing for the discharge of debts of an insolvent by a voluntary assignment.—*In re Assignment of Riddell* (Wis.) 67 N. W. 1135.

93 Wis. 564.

V. THE ASSIGNEE.

Conditions precedent to right to sue, see post, § 40.

Objections by creditors to sale by assignee, see post, § 33.

§ 26. Bond.

(Wis.; 1896.)

Under Rev. St. §§ 1694-1696, providing that all voluntary assignments shall be void unless the assignee delivers to the proper officer a bond, duly executed, with two or more sureties, the failure of the assignee to sign the bond renders the assignment void.—*John V. Farwell Co. v. Arthur* (Wis.) 67 N. W. 20.

93 Wis. 56.

§ 27. — Justification by sureties.

(Wis.: 1895.)

Rev. St. § 1694, providing that the sureties on the bond of an assignee "shall each testify to his responsibility, and by their affidavits satisfy the officer taking such bond," does not require that such sureties shall testify orally, but is sufficiently complied with by affidavits of their responsibility accepted by the officer.—*Case v. James* (Wis.) 63 N. W. 237.
90 Wis. 320.

§ 28. Removal.

(S. D.: 1895.)

An order removing, for cause, under Comp. Laws, § 4675, an assignee for the benefit of creditors, will not be reversed because the order was made without formal notice to the assignee, where such assignee and his counsel were present in court, in pursuance of a notice to render an account, and the account shows gross irregularities in the management of the estate, and neither he nor his counsel objected to the making of the order.—*King v. McClurg* (S. D.) 63 N. W. 219.

§ 29. Allowance for expenses.

(Minn.: 1894.)

Where the assignee of an insolvent debtor, having been removed on the petition of the creditors, prosecuted an unsuccessful appeal from the order removing him, the appeal was in the interest of himself personally, and not of the estate, and he is not entitled to be reimbursed for his expenditures.—*In re Nicolin* (Minn.) 61 N. W. 330; *Weiland v. Hilgers*, Id. 59 Minn. 323.

§ 30. Right to attack transfers by debtor.

[a] (Iowa: 1895.)

An assignee for the benefit of creditors may maintain an action to set aside a fraudulent conveyance made by his grantor before the execution of the deed of assignment.—*Mehlhop v. Ellsworth* (Iowa) 64 N. W. 638.

[b] (Mich.: 1896.)

The assignee of an insolvent firm under a voluntary assignment represents only his assignors and their creditors, and cannot maintain a bill to reach individual assets of a former member of the partnership, alleged to have been fraudulently conveyed by such member after his colorable withdrawal from the firm, for the purpose of hindering and delaying creditors of the former partnership and of the grantor; such creditors not being parties to the suit, and there being nothing to show that the assignee is authorized to act for them.—*Michigan Trust Co. v. Webber* (Mich.) 67 N. W. 811.

[c] (Minn.: 1896.)

In the absence of a prior wrongful conversion, the assignee for creditors cannot sue for the value of property transferred for the purpose of giving a preference.—*Hay v. Tuttle* (Minn.) 69 N. W. 696.

[d] (Neb.: 1896.)

Since an assignee under a voluntary assignment for creditors may not, except as authorized by Comp. St. c. 6, §§ 30, 42, 43, assert rights beyond those which the assignor himself might assert had no assignment been made, and since an unrecorded chattel mortgage is invalid by statute only as against creditors, and not as between the parties, the holder of an unrecorded chattel mortgage, executed by a debtor who subsequently assigns for the benefit of his creditors, has a right to the mortgaged property superior to that of the assignee, unless the case is one in which said sections expressly confer upon the assignee the power of a creditor.—*Laurel County Bank v. Gillilan* (Neb.) 68 N. W. 352.

§ 31. Misadministration.

(Iowa: 1895.)

The fact that the assets of an insolvent's estate, which paid a dividend of but 32 per cent., were nominally largely in excess of the liabilities, was no evidence of misadministration.—*Skinner v. Browne* (Iowa) 64 N. W. 787.

§ 32. Vacating order settling account.

[a] (Wis.: 1896.)

Under Rev. St. § 2832, giving the court power to vacate a final order settling the account of an assignee for creditors, if the failure of a creditor to appear on the hearing arose through inadvertence, it is proper to vacate such order where a creditor failed to appear because he received no notice of such hearing.—*Commercial Bank v. McAuliffe* (Wis.) 66 N. W. 110.
92 Wis. 242.

[b] (Wis.: 1896.)

Where a court vacates an order settling the account of an assignee for the benefit of creditors, and allows a creditor to file objections to the account, it may refer the hearing of such objections, regardless of whether Rev. St. § 2861, allowing references, applies to actions, only, or also to special proceedings.—*Commercial Bank v. McAuliffe* (Wis.) 66 N. W. 110.
92 Wis. 242.

[c] (Wis.: 1896.)

The court is not prevented from vacating such order, for good cause shown, by Rev. St. § 1701, providing that such final order shall be "conclusive upon all parties."—*Commercial Bank v. McAuliffe* (Wis.) 66 N. W. 110.
92 Wis. 242.

VI. RIGHTS OF CREDITORS.

Asserting remedy in derogation of assignment, see ante, § 20.

§ 33. In general.

[a] (Iowa: 1897.)

In a proceeding against an assignee for creditors to have a deposit made with the assignor before the assignment declared a trust fund and established as a preferred claim, it need not appear that the assignee has any of the assets transferred to him by the assignment.—*In re Kuapp* (Iowa) 70 N. W. 626.

[b] (Mich.: 1897.)

In an action, under 3 How. Ann. St. § 8749, relating to voluntary assignments, and authorizing holders of preferred claims to bring an action in case of fraud, and apply for a receiver, an order, made pendente lite, appointing a receiver, and requiring defendants to deliver to the receiver all property constituting a stock of goods owned by persons named, which is in possession of other defendants as mortgagees, is erroneous, if not a nullity.—*Hall v. Donovan* (Mich.) 69 N. W. 643.

[c] (Wis.: 1894.)

The creditors alone can question the sale by an assignee of his insolvent's property on other terms than for cash.—*Becker v. Holm* 61 N. W. 307, 89 Wis. 86.

[d] (Wis.: 1895.)

Plaintiff, having sold timber to one for whom defendant has become assignee for the benefit of creditors, retaining the title thereto until the purchase price should be paid, is entitled, on tracing the property sold, through its transformation into lumber, into the mass of property in defendant's hands, to recover the money obtained by defendant on its sale by him.—*Bent v. Barnes*, 64 N. W. 428, 90 Wis. 631.

[e] (Wis.: 1896.)

Where the assigning firm, as to its own business, is solvent and has a surplus of property, creditors of the insolvent firm of which it was a member, after exhausting the assets of such firm, may prove their claims with the assignee of the

solvent firm, and participate in the surplus assets; but such right is an individual one, with which an assignee of the insolvent firm has no connection, and in which he cannot act.—*In re Gilbert* (Wis.) 68 N. W. 863; *Appeal of Cleashy, Id.*

§ 34. Presentation and proof of claims. (Iowa: 1895.)

Where an assignee for creditors failed to file with the clerk of court, as required by Code, § 2120, all the claims presented to him, and the order of distribution did not include the claims not filed, the assignee's report and the order should be set aside, and the excluded claimants be granted a hearing.—*Lacey v. Newcomb* (Iowa) 63 N. W. 704.

§ 35. Necessity of filing claim. (Iowa: 1896.)

Under Code, § 2122, making it the duty of the court to "order the assignee to make fair and equal dividend among the creditors of the assets in his hands, in proportion to their claims," the distribution should be made in accordance with the legal rights of the creditors; and the fact that one does not petition specially for a separate dividend from the estates of a firm and of its members, to which he is entitled, or files his claim against the partnership only, where all are covered by the same assignment, does not relieve the court of the duty of ordering such dividends paid him as his proof entitles him to receive.—*In re Carter* (Iowa) 67 N. W. 239; *State Bank of Keokuk v. Irwin, Id.*

§ 36. Time for filing claims.

[a] (Iowa: 1895.)
The assignee, 18 days after the first newspaper publication of the notice of assignment, mailed a notice to certain creditors, stating that claims should be filed "within three months of the first publication of this notice." *Held*, that such creditors were justified in believing that no publication had been previously made, and that the assignee and the other creditors were estopped to object that claims of the creditors so notified, filed within three months from receipt of the notice, were not filed in time.—*Scott v. Thomas* (Iowa) 62 N. W. 790.

[b] (Iowa: 1895.)
The three months allowed by Code, §§ 2119, 2126, in which creditors may file claims against an insolvent debtor, begin to run from the first publication of the notice of assignment as required by Code, § 2119, and not from the time of mailing notice to the creditor.—*Scott v. Thomas* (Iowa) 62 N. W. 790.

[c] (Iowa: 1897.)
Code, § 2126, requiring claims against an assigned estate to be filed within three months, does not apply to an application to have a claim, already properly filed, made a preferred one.—*In re Knapp* (Iowa) 70 N. W. 626.

[d] (Neb.: 1896.)
One who, through his own fault, fails to present his claim against an assigned estate within the time prescribed by law in conformity with the order of the county court, is forever barred from participating in the distribution.—*Commercial Nat. Bank v. Lipp* (Neb.) 65 N. W. 777, 46 Neb. 595.

§ 37. Avoiding conveyance by debtor. (Wis.: 1896.)

Saub. & B. Ann. St. § 1693h, providing that in certain cases a creditor may sue in the name of the assignee to set aside a fraudulent conveyance of the assignor made prior to the assignment, does not authorize such action where the conveyance was made after the assignment by the assignee himself.—*Kyes v. Merrill Furniture Co.* (Wis.) 65 N. W. 735. 92 Wis. 32.

§ 38. Payment of taxes.

[a] (Wis.: 1895.)
Saub. & B. Ann. St. § 1700, requiring an assignee for the benefit of creditors to "pay all taxes assessed on the property assigned, which remain unpaid," before paying a dividend, does not require him to pay the taxes on stock pledged by his assignor for more than its value.—*City of Milwaukee v. Momsen* (Wis.) 61 N. W. 1126, 89 Wis. 351.

[b] (Wis.: 1896.)
On a claim for taxes by a city against an estate assigned for the benefit of creditors, the court should order the assignee to pay such claim before making any dividends, under 1 *Saub. & B. Ann. St.* § 1700, providing that the assignee shall pay all unpaid taxes assessed on the assigned property before making dividends.—*In re Assignment of Riddell* (Wis.) 67 N. W. 1135. 93 Wis. 564.

§ 39. Effect of discharge of assignor. (Wis.: 1895.)

The discharge of an assignor in insolvency proceedings is not a bar to the foreclosure of a mortgage debt previously proved against his estate.—*Trustees of Wisconsin State Grange of Order of Patrons of Husbandry v. Kniffen* (Wis.) 62 N. W. 943. 90 Wis. 14.

VII. ACTIONS.

By assignee to set aside transfers by debtor, see ante, § 30.

By creditor to avoid conveyance by debtor, see ante, § 37.

§ 40. Action by assignee.

[a] (Mich.: 1896.)
The filing by the assignee of a bond signed by a corporation of another state which has not been authorized to become surety on undertakings does not qualify the assignee to sue for assets of his assignor.—*McCuaig v. City Sav. Bank* (Mich.) 69 N. W. 500.

[b] (Mich.: 1896.)
Under *How. Ann. St.* §§ 8739, 8740, requiring the instrument of assignment (or a duplicate thereof), an inventory of the assigned property, a list of creditors, and the bond of the assignee to be filed within 10 days after the assignment is made, an assignee cannot sue as such, where a copy only of the deed of assignment is filed, or where the other instruments named are not filed within the 10 days.—*McCuaig v. City Sav. Bank* (Mich.) 69 N. W. 500.

[c] (Wis.: 1895.)
An allegation that a certain person "was duly appointed assignee" of a certain firm, "and thereafter duly qualified as such assignee, and entered into the discharge of his trust," cannot be considered as an allegation that the firm made an assignment to him for the benefit of its creditors.—*Sellers v. First Presbyterian Church of West Superior*, 64 N. W. 1031, 91 Wis. 328.

§ 41. Right of set-off in action by assignee.

(Neb.: 1894.)
The defendant in an action by the assignee to recover money due to an insolvent banking corporation may set off against the amount owing by him to the bank an indebtedness of the latter to him.—*Salladiu v. Mitchell* 61 N. W. 127, 42 Neb. 859.

ASSIGNMENTS OF ERROR.

See "Appeal," §§ 87-101; "Criminal Law," § 204.

ASSISTANCE. WRIT OF.

[a] (Mich.; 1897.)

On application for a writ of assistance in behalf of a purchaser at foreclosure sale, objections by one actually in possession, or claiming possession by his tenants, must be made in some more formal way than by verbal statement of the claim.—*Aldrich v. Donovan* (Mich.) 69 N. W. 1108.

[b] (Wis.; 1895.)

A writ of assistance will not be issued on the application of a mortgagee to put him in possession of the mortgaged premises until after confirmation of the foreclosure sale.—*Meehan v. Blodgett*, 64 N. W. 429, 91 Wis. 63.

ASSOCIATIONS.

See, also, "Agricultural Societies"; "Benevolent Societies"; "Building and Loan Associations"; "Cemeteries"; "Corporations"; "Religious Societies."

Railroad employes' relief fund associations, see "Benevolent Societies," § 1; "Release and Discharge," § 3.

Service of process on foreign associations, see "Writs and Notice of Suits," § 17.

Venue of action against, see "Venue in Civil Cases," § 6.

§ 1. Nature and status.

[a] (Mich.; 1896.)

Where the purposes of an incorporated driving club are to promote social intercourse among its members, provide the conveniences of a clubhouse, pleasure grounds, and proper facilities for improving, training, and exhibiting horses at meetings to be held at stated times, such purposes are lawful.—*Detroit Driving Club v. Fitzgerald* (Mich.) 67 N. W. 899.

[b] (Mich.; 1896.)

A partnership association, limited, organized under How. Ann. St. c. 79, is governed by the laws of corporations, and not the laws applicable to limited partnerships.—*Rouse, Hazard & Co. v. Detroit Cycle Co.* (Mich.) 69 N. W. 511.

[c] (Mich.; 1897.)

It is no objection to the enforcement of a trust in favor of a religious society or denomination that it is only a voluntary association, and not incorporated.—*White v. Rice* (Mich.) 70 N. W. 1024.

§ 2. Stock.

[a] (Mich.; 1896.)

A subscriber to stock of an incorporated driving club cannot avoid paying assessments according to the terms of his subscription because he did not know that all the stock had not been subscribed or paid in, where, after he knew such facts, and knew the assessments were made, the purposes of the club, the provisions of its by-laws, what it was doing, and what it had done by way of acquiring property and expending money, he participated in its purposes, accepted membership tickets and badges without paying a membership fee, but paid annual dues only, and availed himself of the benefit of being a stockholder.—*Detroit Driving Club v. Fitzgerald* (Mich.) 67 N. W. 899.

[b] (Mich.; 1896.)

The subscription to the capital stock of a partnership association, limited, organized under How. Ann. St. c. 79, may be paid by promissory notes, relieving the stockholder from further liability, where such notes are converted into money, and the proceeds applied for the benefit of the association.—*Rouse, Hazard & Co. v. Detroit Cycle Co.* (Mich.) 69 N. W. 511.

§ 3. Rights of members.

(Mich.; 1894.)

Where a voluntary society dissolves before the expiration of a lease of a hall, the lease becomes the property of the members, who may exercise it jointly.—*Sommers v. Reynolds* (Mich.) 61 N. W. 501.

103 Mich. 307.

§ 4. Liability of members.

[a] (Mich.; 1899.)

One who has dealt with an association organized under How. Ann. St. c. 79, relating to partnership associations limited, as a legal entity, is, in the absence of fraud, estopped to question the validity of the organization, so as to render the stockholders liable as partners.—*Staver & Abbott Manufg Co. v. Blake* (Mich.) 69 N. W. 508.

[b] (Mich.; 1896.)

Under How. Ann. St. c. 79, § 3, providing that the omission of the word "limited" in the use of the name of the association shall render each member liable for "any indebtedness, damage, or liability arising therefrom," such omission on one occasion in dealing with plaintiff will not render the members liable to plaintiff in the absence of evidence that any indebtedness, damage, or liability resulted from such omission.—*Staver & Abbott Manufg Co. v. Blake* (Mich.) 69 N. W. 508.

[c] (Mich.; 1896.)

An action by a creditor to enforce the liability of the stockholders of an insolvent association will not lie where the association has been placed in the hands of a receiver.—*Rouse, Hazard & Co. v. Detroit Cycle Co.* (Mich.) 69 N. W. 511.

[d] (S. D.; 1895.)

Where persons unite in a voluntary unincorporated association, and, for convenience, contract under an associate name, the acts of the association (it not being a legally responsible body) are the acts of its members who instigate and sanction the same.—*Winona Lumber Co. v. Church* (S. D.) 62 N. W. 107.

6 S. D. 498.

§ 5. Suspension or expulsion of members.

[a] (Neb.; 1896.)

Where articles of incorporation of a voluntary association provided that its affairs should be managed by a board of directors and by its by-laws, and clothed the board with power to inquire into and punish infractions of its by-laws, the board was authorized to punish infractions by suspension or expulsion of offending members.—*Jackson v. South Omaha Live-Stock Exchange* (Neb.) 68 N. W. 1051.

[b] (Neb.; 1896.)

The mere fact that a director had a special interest in the infliction of punishment upon a member of a voluntary association for the violation of its regulations did not, in the absence of objection on the ground of disqualification of such director to act as a trier of the accused, so far invalidate the findings and order of the board of directors, acting within the scope of its powers, as to render them subject to collateral attack.—*Jackson v. South Omaha Live-Stock Exchange* (Neb.) 68 N. W. 1051.

§ 6. Actions.

(S. D.; 1895.)

A complaint alleging that certain persons "met together, and organized a voluntary unincorporated association under the name of * * * Association"; that defendants were the general officers thereof, and its active managers; that, with the knowledge and sanction of defendants, plaintiff, relying on defendants' responsibility therefor, sold lumber and building materials to said association, which were used in the construction of buildings for the use of such association, for which payment was past

due,—states a cause of action against defendants.—*Winona Lumber Co. v. Church* (S. D.) 62 N. W. 107.
6 S. D. 498.

ASSUMPSIT.

I. WHEN LIES, §§ 1-5.

II. PLEADING, EVIDENCE, AND PRACTICE, §§ 6-10.

See, also, "Contracts"; "Use and Occupation." Remedy by, see "Mandamus," § 7.

I. WHEN LIES.

§ 1. Right of action and defenses.

[a] (Mich.; 1895.)

Recovery may be had under a common count for money due on a contract fully performed.—*Flint & P. M. R. Co. v. Donovan* (Mich.) 65 N. W. 583.

[b] (Neb.; 1895.)

One who received property in consideration of an agreement to pay the grantor's debts could not defend a suit by a creditor of the grantor on the ground that the creditor previously sued the grantor, and attached the property in question as the grantor's property.—*Davis v. National Bank* (Neb.) 63 N. W. 852.
45 Neb. 589.

§ 2. Implied promise.

(Wis.; 1895.)

Plaintiff took defendant's minor son under a written contract to provide for and educate him, and to receive his services until he reached the age of 21 years, and to pay at that time a small sum for such services. Held that, upon breach of the contract by the defendant, an action would not lie to recover, upon an implied contract, the reasonable value of board, lodging, etc., furnished the son while in plaintiff's custody.—*Tietz v. Tietz* (Wis.) 62 N. W. 939.

90 Wis. 66.

§ 3. Money had and received.

[a] (Mich.; 1895.)

An action for money had and received will lie against one with whom accounts were left for collection, he to pay creditors from the proceeds, on his refusal to account for the balance.—*Tanner v. Page* (Mich.) 63 N. W. 993.

[b] (Mich.; 1895.)

Where an agent authorized to loan his principal's money retains possession of the note given by the borrower, under an agreement with the principal that he shall receive as commissions a certain percentage of the interest collected, the principal may recover his proportion of the interest paid the agent by the borrower, as money had and received.—*Liesemer v. Burg* (Mich.) 63 N. W. 999.

[c] (Mich.; 1895.)

Where an insurance company pays a policy on the life of a married man, to the beneficiaries named, his widow cannot maintain an action against such beneficiaries, to recover the money so paid, on the ground that they were not proper beneficiaries, and that as to them the policy was void.—*Hosmer v. Welch* (Mich.) 65 N. W. 280.

[d] (Minn.; 1895.)

Where an excessive attorney's fee is charged on the foreclosure of a mortgage, the owner, at the expiration of the year of redemption, may recover it from the mortgagee or his representative, in an action for money had and received.—*Eliason v. Sidle* (Minn.) 63 N. W. 730.
61 Minn. 285.

[e] (S. D.; 1895.)

An action for money had and received lies against a mortgagee who, having purchased at a sale under his mortgage, collected, without the mortgagor's consent, rents from the tenants of the mortgaged premises, where such rents were paid to him in the belief that he was entitled to the same.—*Siems v. Pierre Sav. Bank* (S. D.) 64 N. W. 167.

§ 4. Work and labor.

[a] (Iowa; 1896.)

Where a person rendering services is a member of the family of the person served, and is receiving support therein, before recovery can be had an expectation that compensation should be made must be shown.—*Tank v. Rohweder* (Iowa) 67 N. W. 106.

[b] (Mich.; 1897.)

Where a woman rendered services in defendant's farmhouse upon his stating to her "that he would have to have men there, and there would have to be some one there to do the work and take care of them," she could recover for doing washing and mending for the hired men.—*Fowler v. Fowler* (Mich.) 70 N. W. 336.

[c] (Wis.; 1896.)

Where a son-in-law furnished board, lodging, and services to his father-in-law, on his periodical visits with him during a period of several years, without demanding any compensation, but kept a record of the visits and services, and after his father-in-law's death, being dissatisfied with the share that was left to his wife by his father-in-law, he charged up these items, he could not enforce his claim against the estate.—*In re Schmidt's Estate* (Wis.) 67 N. W. 37.
93 Wis. 120.

§ 5. Recovery on quantum meruit in case of specific contract.

(Mich.; 1896.)

In an action for work done under a building contract, where it was claimed by the defendant that plaintiff, without cause, had abandoned and refused to complete the contract, upon proof of such fact the plaintiff was entitled to recover upon a quantum meruit only a sum not exceeding the contract price, less the cost of completing the work, and less any damage and added expense incurred by defendant by reason of the breach of contract by plaintiff.—*Sheldon v. Leahy* (Mich.) 69 N. W. 76.

II. PLEADING, EVIDENCE, AND PRACTICE.

§ 6. Pleading and proof.

[a] (Minn.; 1895.)

In an action for money loaned to defendant, evidence that the transaction was illegal, because a wager on the price of wheat for future delivery, is admissible under a general denial.—*Dodge v. McMahan* (Minn.) 63 N. W. 487.
61 Minn. 175.

[b] (Minn.; 1895.)

Where the complaint was for "money loaned to the defendant, and paid for his use and benefit," and there was no motion to make the complaint more definite, or to compel plaintiff to elect on which claim he would proceed, it was proper to admit evidence that the money was loaned for the purchase of wheat for future delivery.—*Dodge v. McMahan* (Minn.) 63 N. W. 487.
61 Minn. 175.

§ 7. Admissibility of evidence.

[a] (Iowa; 1895.)

In an action by a daughter to recover of her father's estate for services rendered to him, on a promise by him that she should be paid upon his decease, the exclusion of questions asked plaintiff as to how much money she had when

she went home to begin the services sued for, how much money she had spent from that time until her father's death, how much she had immediately after his death, and whether she had more property then than at the time of beginning the service, was not prejudicial error.—*Ridler v. Ridler* (Iowa) 61 N. W. 991.

93 Iowa, 347.

[b] (Mich.; 1895.)

In an action on a quantum meruit to recover the price of logs sold, where in the original contract a method of scaling and measurement had been agreed upon as conclusive, although the vendee has put it out of the vendor's power to fulfill the contract, the vendor is, nevertheless, bound by the method agreed upon as to measurement of the logs actually delivered.—*Eakright v. Torrent* (Mich.) 63 N. W. 293.

105 Mich. 294.

[c] (Mich.; 1896.)

A parol promise by an employer to give his employé \$15 a month and the cottage where he then lived for her services, though void under the statute of frauds, may be used, in an action by the employé for the services after they are performed, as a basis for establishing their value. In re Williams' Estate (1895) 64 N. W. 490, followed.—*Rhea v. Meyers' Estate*, 69 N. W. 239.

§ 8. Sufficiency of evidence.

(Iowa; 1895.)

In an action by a daughter against her father's estate to establish a claim for services rendered him, there was evidence that she had, when 23 years of age, reluctantly declined a position, and returned to her father's house at his request; that he was aged, and her mother a cripple; that a day or two after her return she told her father that she could not stay at home without compensation, whereupon he promised to pay her for what she did; that the same year he told one of plaintiff's friends that she should be paid for her work; and that about a year before his death, upon her expressing her dissatisfaction at not having been paid, her father said that there would be plenty to pay her with when he was gone, and that she should be paid at that time. *Held*, that it was error to direct a verdict for defendant.—*Ridler v. Ridler* (Iowa) 61 N. W. 994.

93 Iowa, 347.

§ 9. Question for jury.

(Iowa; 1896.)

Of four minor heirs, defendant was guardian of two. Certain land was sold by referees in partition, and the portions of two heirs were paid to said guardian. The portions of the other two were paid into court, and the clerk executed to said referees receipts therefor, reciting that said money was the distributive shares of defendant's wards. The clerk paid the money to defendant, as guardian, who settled with his wards, giving them twice the amount to which they were entitled. *Held*, in an action by an heir who did not receive his portion, that the issue as to whether defendant had notice that the money did not belong to his wards should have been submitted to the jury, after plaintiff introduced evidence in support of the affirmative thereof.—*House v. Bowman* (Iowa) 66 N. W. 165.

§ 10. Instructions.

[a] (Mich.; 1896.)

Plaintiff advanced to C. money with which to purchase live stock for plaintiff's market. C. bought cattle of defendant on Sunday, and paid him part of the price, the balance to be paid in a day or two. Plaintiff caused a tender of the balance and a demand for the cattle to be made the next day. Defendant refused the demand, and refused to return the money received, claiming that it was paid by C. on an old indebtedness, and that he had no notice that the money belonged to plaintiff. *Held* that, in a suit to recover the money, plain-

tiff was entitled to an instruction that he should recover if the money was paid by C. to defendant with notice that it belonged to plaintiff, or as part of the price for the cattle, and defendant refused to deliver the cattle, though defendant had no notice that the money belonged to plaintiff.—*Bearce v. Fahrnow* (Mich.) 67 N. W. 318.

[b] (Neb.; 1896.)

An issue, in an action for services, of the length of time devoted to the employment, was sufficiently presented in the absence of a request, by instructions that the burden of proof to establish the services rendered was on plaintiff, and that the jury were to ascertain from the evidence what services were performed.—*O'Brien v. Parsons* (Neb.) 68 N. W. 1020.

ASSUMPTION.

By new firm of debts of old firm, see "Partnership," § 47.

Of mortgage debt on transfer of property mortgaged, see "Mortgages," § 35.

Of risks by servant, see "Master and Servant," §§ 67-79.

ASYLUMS.

Commitment of insane person, see "Insanity," § 3.

Compensation for taking insane person to hospital, see "Sheriffs and Constables," § 4.

[a] (Minn.; 1896.)

The commission appointed under Gen. Laws 1895, c. 157, to locate a fourth hospital for the insane, received an offer of a particular site from a person whose land was near the city of H., an offer from that city of a particular site near it, and an offer from the city of A., designating no particular site. One of the commission having moved for an informal ballot on the "location of a site," the ballot was taken, and the record of the commission shows that formal ballots were taken, on the last of which a majority voted for H., and a minority for A., and that H. was declared selected. *Held*, that the location was of the city, and not of the particular site; hence there was no acceptance of the offer of H.—*State v. Bondy* (Minn.) 68 N. W. 1075.

[b] (Neb.; 1895.)

It was ground for removing the superintendent of the hospital for the insane that attendants maltreated patients, and that the medical treatment of patients was not modern, and included a course of unnecessarily harmful drugs.—*State v. Hay* (Neb.) 63 N. W. 821.

45 Neb. 321.

ATTACHMENT.

I. WHEN AUTHORIZED, §§ 1-8.

II. PROPERTY SUBJECT TO, §§ 9, 10.

III. AFFIDAVIT, §§ 11-17.

IV. BONDS, §§ 18-23.

V. LEVY AND LIEN, §§ 24-31.

VI. RETURN OF WRIT, § 32.

VII. PROCEDURE, §§ 33-43.

VIII. CLAIMS BY THIRD PERSONS, §§ 44-48.

IX. ABANDONMENT AND DISSOLUTION, §§ 49-58.

X. WRONGFUL ATTACHMENT, §§ 59-66.

See, also, "Execution"; "Exemptions"; "Garnishment."

Appealable orders, see "Appeal," § 23.

For contempt, see "Contempt," § 13.

Levy by mortgagor's creditors, see "Chattel Mortgages," §§ 56, 57.
 Liability for wrongful levy, see "Sheriffs and Constables," §§ 8-10.
 Practice before justice of the peace, see "Justices of the Peace," § 28.
 Priority of assignment over, see "Assignment for Benefit of Creditors," § 23.
 Service of process by publication, see "Writs and Notice of Suits," § 4.
 Substitution of parties on death of plaintiff, see "Abatement and Revival," § 12.
 To enforce logger's lien, see "Logs and Logging," § 9.

I. WHEN AUTHORIZED.

§ 1. Action on contract.

(S. D.; 1895.)

An action on a money judgment, whether recovered for a tort or on a contract, is an "action arising on contract," within Comp. Laws, § 4993, specifying the kind of actions in which attachments may issue.—*First Nat. Bank v. Van Vooris* (S. D.) 62 N. W. 378.
 6 S. D. 548.

§ 2. Before maturity of debt.

[a] (Neb.; 1896.)

Code Civ. Proc. § 237, does not authorize an attachment on a claim not due on the ground that the claim was fraudulently contracted.—*Dayton Spice-Mills Co. v. Sloan* (Neb.) 68 N. W. 1040.

[b] (Wis.; 1894.)

A creditor suing on a demand note had an attachment issued and levied on the same day he received the note. By mistake, the note and attachment papers were postdated as of the day after the attachment. *Held*, that such error would not invalidate the attachment proceedings as against subsequently attaching creditors.—*Shakman v. Sommermeyer* (Wis.) 61 N. W. 309, 89 Wis. 72.

Immaturity as ground for dissolution, see post, § 58.

§ 3. Grounds.

[a] (Neb.; 1895.)

To sustain an attachment, as against defendant therein, it is sufficient to establish the existence of one or more of the statutory grounds therefor, as against him, without regard to the rights of other parties.—*Landauer v. Mack*, 61 N. W. 597, 43 Neb. 430.

[b] (Neb.; 1896.)

A great disproportion between the value of chattels mortgaged and the amount secured thereby affords no ground for attachment.—*Dayton Spice-Mills Co. v. Sloan* (Neb.) 68 N. W. 1040.

[c] (S. D.; 1896.)

Comp. Laws, § 4995, subd. 3, authorizing the issuance of an attachment where the "debt" was incurred for property obtained under false pretenses, and section 5014, subd. 2, providing that a creditor may bring an action on a claim, and have an attachment against the property of the debtor, when the debt was incurred for property obtained under false pretenses, authorize the issuance of an attachment in an action on a matured or immatured debt incurred for property obtained under false pretenses.—*Finch v. Armstrong* (S. D.) 68 N. W. 740.

[d] (Wis.; 1894.)

The ground of an attachment being that defendant had a chattel mortgage on his store, which had not been filed, it is not material whether plaintiff knew, before the debt was contracted, of the existence of the mortgage.—*Ryan Drug-Store Co. v. Hvambzahl* (Wis.) 61 N. W. 299, 89 Wis. 61.

§ 4. — Nonresidence.

[a] (Iowa; 1895.)

A finding that defendant was a nonresident within Code, § 2580, providing that an action aid-

ed by attachment may be brought in any county where property may be found, when defendant is a nonresident of the state, is supported by evidence that he and his family had been absent from the state for three months, so that a personal action could not be maintained against him within the state, that he had opened a real-estate office in the city to which he had gone, and that the directory of that city showed that he had an office and house there, though he had left the furniture in his house in this state, and he and the members of his family stated that it was his intention to be absent from the state only a short time.—*Stevens v. Ellsworth* (Iowa) 63 N. W. 683.

[b] (Neb.; 1896.)

One who left the state to visit relatives in New York, intending to return in a few weeks, but who was delayed in returning for nearly four months by reason of the sickness of relatives, and on account of business, did not lose his domicile in Nebraska, or acquire a residence in New York, and hence was not a nonresident, within the attachment law.—*Johnson v. May* (Neb.) 68 N. W. 1032.

§ 5. — Fraud.

(Neb.; 1896.)

The fact that a debtor, at the time of procuring a loan and extensions of previous loans, promised the lender to apply the proceeds of certain property which he contemplated selling to the payment of the amounts borrowed, but that, on selling the property, he applied the proceeds in liquidation of a debt due another person, did not constitute fraud justifying the issuance of an attachment at the instance of the lender.—*Geneva Nat. Bank v. Bailor* (Neb.) 67 N. W. 865.
 48 Neb. 866.

§ 6. — Fraudulent disposition of property.

[a] (Neb.; 1895.)

Where a debtor made statements disclosing an intention to defeat the claim of a creditor, and for several months disposed of his stock as rapidly as possible, without giving a satisfactory account of the proceeds of the sales, an attachment of the balance of the stock, on the ground of a fraudulent disposal or concealment of property, was warranted.—*Reed Bros. Co. v. First Nat. Bank* (Neb.) 64 N. W. 701, 46 Neb. 168.

[b] (Neb.; 1896.)

The evidence plainly showing an intention of the debtor to delay his creditors in the collection of their claims by placing his property beyond their reach, in proceedings by the ordinary processes of the law it was error to discharge an attachment based on that ground.—*Kingman v. Weiser* (Neb.) 67 N. W. 941.
 48 Neb. 834.

[c] (S. D.; 1896.)

Though a mortgage by an insolvent corporation to its president, of substantially all its property, may be ineffectual to give him a preference, as against its creditors, it does not authorize an attachment on the ground that the corporation has disposed of its property with intent to defraud its creditors (Comp. Laws, § 4995, subd. 5); the evidence of the corporation that it was executed in good faith and for money advanced, and without any intent to defraud, not being overcome.—*Trebilcock v. Big Missouri Min. Co.* (S. D.) 68 N. W. 330.

[d] (S. D.; 1896.)

One cannot attach on the ground that a mortgage given and recorded before he became a creditor was with intent to defraud, though he had no actual notice of it before he gave credit.—*Trebilcock v. Big Missouri Min. Co.* (S. D.) 68 N. W. 330.

[e] (S. D.; 1896.)

Under Comp. Laws, § 4993, authorizing the issuance of an attachment where a debtor has

disposed of his property with intent to defraud his creditors, to authorize the issuance of the attachment, the sale must have been made with actual fraudulent intent. The mere fact that the sale is fraudulent in law, the debtor acting in good faith, is insufficient.—*First Nat. Bank v. McMillan* (S. D.) 68 N. W. 537.

[f] (S. D.; 1896.)

On motion to discharge an attachment issued on the ground that defendant has disposed of and is about to dispose of his property to defraud creditors, evidence merely that a chattel mortgage was given by defendant before the purchase of the goods, which was not recorded until afterwards, is insufficient.—*Park v. Armstrong* (S. D.) 68 N. W. 739.

[g] (S. D.; 1896.)

A general assignment for the benefit of creditors, whether valid or not, is not ground for attachment against the assignor, unless it is executed with a specific intent to defraud.—*German Bank v. Folds* (S. D.) 68 N. W. 747.

§ 7. — Intention of debtor to remove property.

(S. D.; 1895.)

Under Comp. Laws, § 5014, it is only when the action is brought on a claim not due that plaintiff is entitled to an attachment on the ground that defendant is about to remove his property with intent of hindering and delaying plaintiff in the collection of his debt.—*Foley-Wadsworth Implement Co. v. Porteous* (S. D.) 65 N. W. 429.

§ 8. Joint defendants.

(Mich.; 1896.)

To sustain an attachment against several joint debtors on an affidavit stating that defendants have or are about to dispose of "their" property with intent to defraud their creditors, plaintiff must show joint action or intended action on the part of defendants to dispose of their joint property.—*Cottrell v. Hathaway* (Mich.) 66 N. W. 596.

II. PROPERTY SUBJECT TO.

§ 9. Equitable interest in land.

(Neb.; 1894.)

An equitable interest in land cannot be reached by attachment.—*Shoemaker v. Harvey*, 61 N. W. 109, 43 Neb. 75.

§ 10. Property in custodia legis.

(Neb.; 1896.)

An attachment of personalty in possession of a sheriff for safe-keeping pending an application for a receiver is not void because levied without leave of court, where neither the sheriff nor the receiver subsequently appointed objected on that ground.—*Ackerman v. Ackerman* (Neb.) 69 N. W. 388.

III. AFFIDAVIT.

Allowing time to procure other affidavits, see post, § 36.

On motion to discharge or vacate, see post, § 52.

Variance between declaration and affidavit, see post, § 39.

§ 11. Sufficiency.

[a] (Mich.; 1896.)

An affidavit for an attachment against partners and M. on partnership notes not due stated that defendants were indebted; that M. was payee and indorser of the notes; and that M. himself stated that the notes were made and negotiated upon a joint venture; and it appeared that M. negotiated the notes fraudulently. *Held*, that the affidavit was sufficient to authorize an

attachment against all the defendants.—*Mosher v. Bay Circuit Judge* (Mich.) 66 N. W. 384.

[b] (Neb.; 1896.)

An affidavit for an attachment, setting forth the grounds therefor in the language of the statute, is sufficient.—*Burnham v. Range* (Neb.) 66 N. W. 277.

47 Neb. 175.

[c] (S. D.; 1895.)

An attachment in an action for breach of contract to convey real estate, issued on an affidavit failing to enumerate any of the acts or omissions constituting actionable detriment under Comp. Laws, § 4586, or to allege that plaintiff prepared to enter on the land, or paid any part of the price, and not alleging facts showing that plaintiff sustained damages ascertainable by reference to the contract, or from which the court could determine the amount which plaintiff was entitled to recover, was properly vacated. *Kellam, J.*, dissenting.—*Narregang v. Muscatine Mortgage & Trust Co.* (S. D.) 64 N. W. 1129.

§ 12. Verification.

(Wis.; 1896.)

Under Rev. St. § 3702, prohibiting the issuance of a warrant of attachment by a justice until "the plaintiff or some person in his behalf" shall make and file an affidavit as therein required, the filing of an affidavit reciting that the affiant, "for and on behalf of * * * [plaintiff], being duly sworn, on oath doth say," etc., is insufficient, the recital not being sworn to; and an attachment issued thereon is void.—*Maguire v. Bolen* (Wis.) 68 N. W. 408.

§ 13. Averments on information and belief.

(Mich.; 1896.)

Pub. Acts 1889, No. 149, authorizing an attachment on a claim not due, does not forbid the issue of the writ on the same kind of affidavit as was previously sufficient, viz. where the requisite facts, except the fact of indebtedness, are stated on information and belief; hence an affidavit, which alleges positively the existence of the debt, and when it is due, may be sufficient, though some of the facts are stated on hearsay.—*Mosher v. Bay Circuit Judge* (Mich.) 66 N. W. 384.

§ 14. Averments as to nature and amount of claim.

[a] (Neb.; 1897.)

When the nature of the plaintiff's claim is not fully set forth in the affidavit, reference may be had to the petition.—*Grotte v. Nagle* (Neb.) 69 N. W. 973.

[b] (Neb.; 1897.)

A statement, in an affidavit for attachment, that the action is "upon an account for goods sold and delivered by plaintiff to defendant at his request," is sufficient, under Comp. St. 1895, § 199, to show that the action was one in which an attachment might issue, and to give the court jurisdiction.—*Grotte v. Nagle* (Neb.) 69 N. W. 973.

[c] (Neb.; 1897.)

Code Civ. Proc. § 199, provided that an attachment affidavit should set forth "the amount which the affiant believes the plaintiff ought to recover." *Held*, that a slight variance between the amount stated and that due is immaterial.—*Grotte v. Nagle* (Neb.) 69 N. W. 973.

§ 15. By agent.

(S. D.; 1895.)

The authority of an agent to make affidavit for an attachment sufficiently appears when affiant states "that he is the agent for plaintiffs for the purpose of making this affidavit, and he makes the same on behalf of said plaintiffs in the above-entitled action."—*Hardenberg v. Roberts* (S. D.) 61 N. W. 1128.

§ 16. Time of filing.

(Mich.; 1895.)

Under Laws 1891, Act 8, providing that in a suit by attachment, where notice is given by publication, an affidavit shall be filed within 10 days after commencement of publication, and, if it is not filed as required, the attachment shall be dismissed, provided that the affidavit may be filed in the discretion of the court at any time before the order of dismissal shall actually be made, there is no abuse of discretion in refusing to allow the affidavit to be filed after the property has been sold under execution on judgment in the suit.—*Savidge v. Ottawa Circuit Judge* (Mich.) 63 N. W. 295.

105 Mich. 257.

§ 17. Effect of amendment.

(Wis.; 1896.)

The amendment of an affidavit for attachment by increasing the amount of the plaintiff's claim, after the warrant has been levied, does not affect the rights of another creditor making a subsequent levy on the same property before the amendment was filed.—*Maguire v. Bolen* (Wis.) 68 N. W. 408.

IV. BONDS.

Given by intervener, see post, § 44.

Liability in case of wrongful attachment, see post, § 63.

§ 18. Attachment bond.

[a] (Iowa; 1894.)

It is not within the discretion of the court to permit the filing of an attachment bond in an amount less than that required by statute.—*Griffith v. Milwaukee Harvester Co.* (Iowa) 61 N. W. 243.

92 Iowa, 634.

[b] (Iowa; 1894.)

Under Code, § 2959, providing that plaintiff in attachment must file a bond for an amount at least double the value of the property sought to be attached, and section 2954, requiring the sheriff to levy on property 50 per cent. greater in value than the amount stated in the petition to be due, the bond must be given in a sum three times the amount so stated.—*Griffith v. Milwaukee Harvester Co.* (Iowa) 61 N. W. 243.

92 Iowa, 634.

[c] (Neb.; 1897.)

The obligation of a surety in an undertaking in attachment is to pay the obligees thereof the damages sustained by reason of the attachment "if the order be wrongfully obtained."—*Hopewell v. McGrew* (Neb.) 70 N. W. 397.

§ 19. — Signing by plaintiff.

[a] (Neb.; 1897.)

Under Code, § 200, an attachment bond is valid without the signature of the attaching plaintiff.—*Storz v. Finkelstein* (Neb.) 69 N. W. 856.

[b] (Neb.; 1897.)

An attachment plaintiff who does not sign the bond is not liable thereon.—*Storz v. Finkelstein* (Neb.) 69 N. W. 856.

[c] (Wis.; 1896.)

Rev. St. § 2732, providing that before a writ of attachment shall issue "a written undertaking on the part of the plaintiff, with sufficient surety, shall be delivered to the officer," etc., does not require plaintiff himself to sign the instrument.—*Shakman v. Koch* (Wis.) 67 N. W. 925.

93 Wis. 595.

§ 20. — Curing defects by new bond.

(Iowa; 1891.)

Under Code, § 3021, providing that plaintiff in attachment may amend any defect in the bond, defects in a bond may be remedied by

a new bond which takes effect as of the date of the original.—*Griffith v. Milwaukee Harvester Co.*, 61 N. W. 243, 92 Iowa, 634.

§ 21. Bond for release of property.

[a] (Neb.; 1895.)

The delivery bond in attachment proceedings, provided for by Code Civ. Proc. § 206, can be approved only by the officer holding the writ of attachment.—*Dewey v. Kavanagh* (Neb.) 63 N. W. 396.

45 Neb. 233.

[b] (Neb.; 1895.)

The execution of a delivery bond in attachment proceedings, as provided for by Code Civ. Proc. § 206, does not discharge the attachment.—*Dewey v. Kavanagh* (Neb.) 63 N. W. 396.

45 Neb. 233.

§ 22. — Estoppel by signing.

(Neb.; 1896.)

Code Civ. Proc. § 206, provides that an officer who has levied a writ of attachment shall deliver the attached property to the person in whose possession it was found, upon his execution, with sureties, of an undertaking that the parties to the same are bound in double the appraised value thereof, and that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action. *Held*, that a stranger to the attachment suit, in whose possession the attached property is found, and who has given such an undertaking, cannot, after judgment and order of sale in the attachment case, be heard to assert, in an action upon the undertaking, that he himself, and not the attachment defendant, was the owner of the property.—*Cooper v. Davis Mill Co.* (Neb.) 67 N. W. 178.

48 Neb. 420.

§ 23. Actions.

[a] (Neb.; 1897.)

In an action on an attachment bond, where the answer is a general denial of the averments of the petition, the burden is upon plaintiff to show that the attachment was wrongfully issued.—*Storz v. Finkelstein* (Neb.) 69 N. W. 856.

[b] (Neb.; 1897.)

Where a general denial is filed to a petition on an attachment bond, a charge permitting the jury to return a verdict for plaintiff if they find that the judgment was merely dissolved, without requiring them to find that it was wrongfully sued out, is error.—*Storz v. Finkelstein* (Neb.) 69 N. W. 856.

[c] (Neb.; 1897.)

A petition by an assignee of one of the parties to the attachment suit, a stranger to the attachment bond, for damages which he claims to have sustained by reason of the attachment of property held by him as assignee, does not state a cause of action on the attachment bond.—*Hopewell v. McGrew* (Neb.) 70 N. W. 397.

V. LEVY AND LIEN.**§ 24. Levy.**

[a] (Iowa; 1895.)

Where the sheriff, in attaching a stock of farming implements, makes a full inventory thereof, but leaves them in the building where they were found, in charge of a bailee, from whom he takes a receipt, and expressly directs such bailee to hold the property until further order of court, there is a sufficient compliance with Code, § 2967, subd. 2, providing that, if the property is capable of manual delivery, "the sheriff must take it into his custody."—*Hamilton v. Hartinger* (Iowa) 64 N. W. 592.

[b] (Mich.; 1895.)

Under How. Ann. St. §§ 6840, 6841, providing that the constable shall execute a writ of attachment at least six days before the re-

turn thereof, by seizing the goods, and serving, either personally or by substitution, a copy on defendant, a seizure made on the 19th, and service on the 24th, under a writ returnable on the 28th, are void.—*Punningly v. Butcher* (Mich.) 63 N. W. 994.

§ 25. — On land.

(Neb.; 1894.)

A levy of an attachment on land by posting a copy thereof is not effective, as against third parties, when there is an occupant of such land, since Code Civ. Proc. § 205, provides that in attaching land "the officer shall leave with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the order."—*Shoemaker v. Harvey* (Neb.) 61 N. W. 109, 43 Neb. 75.

§ 26. Notice of levy.

[a] (Iowa; 1895.)

The notice of attachment required by Code, § 2967, subd. 1, to be served on defendant, must be in writing.—*Hamilton v. Hartinger* (Iowa) 64 N. W. 592.

[b] (Iowa; 1895.)

The notice of attachment required by Code, § 2967, subd. 1, to be served on defendant, means notice of levy, and not merely notice of the issuance of the writ.—*Hamilton v. Hartinger* (Iowa) 64 N. W. 592.

[c] (Iowa; 1896.)

The time for serving notice of a levy, required by Code, § 2967, to be given to defendant "if found within the county," is when the levy is made; and the fact that defendant came into the county 11 days after an attachment sued out on the ground of nonresidence had been levied did not invalidate the levy, because the return on the attachment showed nothing as to notice to defendant.—*Hicks v. Swan* (Iowa) 66 N. W. 762.

[d] (Iowa; 1897.)

Under Code 1873, § 2967, providing that in levying attachments notice must be given to the person in occupation, and section 3010, providing that the sheriff shall return on every attachment what he has done under it, a return on an attachment against a nonresident defendant, which fails to show that notice was served on the person occupying the land, is insufficient to give a lien.—*Anderson v. Moline Plow Co.* (Iowa) 69 N. W. 1028.

[e] (Iowa; 1897.)

Notice of attachment, required by Code, § 2967, to be served on defendant, may be served within a reasonable time after the actual seizure of or levy on the property.—*Citizens' Nat. Bank v. Converse* (Iowa) 70 N. W. 200.

[f] (Iowa; 1897.)

Where notice of attachment of goods is served on defendant within four hours of the seizure, and after diligent effort to find him, it is served within a reasonable time.—*Citizens' Nat. Bank v. Converse* (Iowa) 70 N. W. 200.

§ 27. Service of inventory on defendant.

(Mich.; 1895.)

How. Ann. St. § 6840 et seq., provide, in regard to attachments, that the officer levying the attachment shall serve a copy of the inventory of the property seized on defendant, if he can be found within the county, and, if not, that a copy of the inventory shall be left at the place of residence of defendant, if there be such place within the county. *Held*, that the officer levying the attachment must also serve the copy of the inventory on defendant. Service of such copy by any other officer does not give the court jurisdiction.—*Cary v. Everett* (Mich.) 65 N. W. 566.

§ 28. Lien.

[a] (Iowa; 1895.)

The levy of an attachment on property conveyed by the attachment defendant to an-

other will not, of itself, create a lien. *Boggs v. Douglass* (1893) 56 N. W. 412, followed.—*Ware v. Delahaye*, 61 N. W. 640.

[b] (Iowa; 1897.)

An attachment is served, within Code, § 2969 (providing that property attached is bound from the service of the attachment), at the time of the seizure, and not when the notice thereof required by section 2967 is given defendant.—*Citizens' Nat. Bank v. Converse* (Iowa) 70 N. W. 200.

[c] (Minn.; 1896.)

Immediately upon the delivery of the deeds whereby, through a third party, the title to real property was transferred from a husband to his wife, the latter took, and thereafter retained, possession of the land, the deeds being simultaneously filed for record. The deed to the third party was recorded, but the deed from him to the wife was temporarily withdrawn from the register's office for the purpose of making a slight correction. Pending this correction, a creditor of the third party attached the land as his property, with full knowledge of all of the facts. *Held*, that such creditor acquired no rights or interest in the land by virtue of such attachment, or through a purchase of the same at a sale upon execution to satisfy its judgment against the third party.—*Jorgenson v. Minneapolis Threshing Co.* (Minn.) 67 N. W. 364.

64 Minn. 489.

§ 29. — Priority over unrecorded deed by debtor.

(S. D.; 1896.)

Title acquired by an unrecorded deed is superior to that obtained by a purchaser at an execution sale under an attachment levied after the deed was made. *Bateman v. Backus* (1887) 34 N. W. 66, 4 Dak. 433, followed.—*Roblin v. Palmer*, 67 N. W. 949.

§ 30. Priority between attachments.

(Iowa; 1896.)

Under Code, § 2965 (providing that, where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff), a writ given him on Saturday, but which could not be served on that day, should, on the petition being amended to authorize service on Sunday, be served before a writ issued on Sunday, under a petition authorizing service on that day, and placed in his hands on Sunday before the amendment.—*Richards v. Schreiber, Conchar & Westphal Co.* (Iowa) 67 N. W. 569.

§ 31. Release.

(Minn.; 1896.)

Where, on execution, money enough is garnished to pay part of the judgment, such money is not released by a subsequent levy of the execution on property more than sufficient to pay the whole judgment.—*Pierce v. Wagner* (Minn.) 67 N. W. 537.

64 Minn. 265.

VI. RETURN OF WRIT.

§ 32. Effect.

(Mich.; 1895.)

A return on a writ of attachment filed on the return day (February 5th), reciting that the property was attached January 12th, and that after diligent search the officer has been unable to find the attachment defendant, and dated January 15th, precludes any presumption that the officer continued to look for the attachment defendant from the date of the writ to the date of filing, so as to render it sufficient to confer jurisdiction.—*Millard v. Hayward* (Mich.) 65 N. W. 104.

VII. PROCEDURE.

Judgment against claimant, see post, § 48.
 Notice to claimant, see post, § 45.
 Service of citation in proceeding to dissolve,
 see post, §§ 57, 58.

§ 33. Amendable defects.

(Wis.; 1894.)

An error in the date of a writ of attachment may be cured by amendment.—Shakman v. Sommermeyer, 61 N. W. 309, 89 Wis. 72.

§ 34. Claims not due.

(Neb.; 1897.)

Where attachment is brought on a claim before it is due, as provided by Code Civ. Proc. § 237, the action may be prosecuted to judgment on seizure of the property under the attachment.—Mosher v. Farmers' & Merchants' Nat. Bank (Neb.) 70 N. W. 540.

§ 35. Service of process on defendant.

[a] (Neb.; 1896.)

Jurisdiction over attached property is not lost, so as to render the custody of the officer unlawful, so long as the action remains pending, by failure to serve process on defendant in the main action.—Darnell v. Mack (Neb.) 65 N. W. 805, 46 Neb. 740.

[b] (Neb.; 1897.)

Jurisdiction over attached property is not lost by failure to serve process in the main case, so long as the action remains pending.—Rachman v. Clapp (Neb.) 70 N. W. 259.

§ 36. Allowing time to procure other affidavits.

(S. D.; 1895.)

It was not error to deny plaintiff time in which to procure affidavits in support of his attachment, where it appeared that one of the persons whose affidavit was to be taken was an employé of plaintiff, and it did not appear that any effort had been made to get his affidavit, or that, if he were present, he would be able to do more than state the source of the information on which he had in positive terms made the affidavit for attachment, or that other persons whose affidavits were to be taken had knowledge of material facts, and plaintiff stated that a postponement for less than 15 days would be without avail.—Pirie v. Berg (S. D.) 64 N. W. 1130.

§ 37. Defenses—Estoppel to deny interest of defendant.

[a] (Neb.; 1896.)

A plaintiff who has attached property as the property of defendant, and obtained writs of garnishment to issue on allegations that the garnishee has in his possession property belonging to defendant, will not be heard to assert that defendant has not sufficient interest to be allowed to defend against the attachments.—Dayton Spice-Mills Co. v. Sloan (Neb.) 68 N. W. 1040.

[b] (Neb.; 1897.)

An attaching plaintiff is estopped to assert that the defendant has not sufficient interest to defend against the attachment.—McCord-Brady Co. v. Bowen (Neb.) 70 N. W. 950.

§ 38. Answer—Pending motion to dissolve.

(Neb.; 1895.)

In an action aided by attachment, the filing by defendant of a motion to dissolve the attachment does not excuse him from pleading to the petition; and if he fail to do so within the time provided by law his default may be entered, and plaintiff proceed to judgment, though such motion is yet pending.—Stutzner v. Printz, 61 N. W. 620, 43 Neb. 306.

§ 39. Variance between declarations and affidavit.

(Mich.; 1896.)

In an action commenced by attachment, that the attachment affidavit alleges a cause of action as for a trespass to land by cutting timber, whereas the complaint is for a conversion of the timber, is not ground for demurrer, but for a summary application to set the declaration aside.—Longyear v. Minnesota Lumber Co. (Mich.) 66 N. W. 567.

§ 40. Evidence.

[a] (Mich.; 1897.)

Evidence of the amount paid plaintiff during defendant's dealings with it is not admissible on the question of defendant's concealment of his property.—Finlay Brewing Co. v. Prost (Mich.) 70 N. W. 137.

[b] (Mich.; 1897.)

An attachment was based on fraud in contracting the debt, and on concealment of property. Plaintiff put in evidence executions against defendant, and defendant's statements to officers that he had no property subject to execution, and showed that the statement was false. Held, that evidence that such judgments were against him as an accommodation indorser was inadmissible.—Finlay Brewing Co. v. Prost (Mich.) 70 N. W. 137.

§ 41. Judgment.

(Neb.; 1895.)

A finding by a justice of the peace, in an attachment suit, of the sum due plaintiff, an assessment of his recovery, and an order of sale of the attached property, is a judgment in form against defendant, and, where the only relief sought is to subject the attached property to the payment of the debt, is sufficient as an entry.—Smith v. Johnson, 62 N. W. 217, 43 Neb. 754.

§ 42. Sale.

[a] (Mich.; 1896.)

Lumber is not perishable property, within How. Ann. St. § 8011, authorizing the sale of attached property where it consists of perishable goods.—Mosher v. Bay Circuit Judge (Mich.) 66 N. W. 478.

[b] (Wis.; 1896.)

Under Rev. St. § 2740, authorizing the court to sell the attached property when likely to perish or depreciate in value during the pendency of the action, an order of sale, based on affidavits showing the requisite facts, will not be set aside on motion made after the proceedings thereunder are practically concluded, whether the affidavits were true or false.—Shakman v. Koch (Wis.) 67 N. W. 925, 93 Wis. 595.

§ 43. — Directions in judgment.

(S. D.; 1896.)

A judgment in a suit aided by attachment need not direct a sale of the property in satisfaction thereof, as the law explicitly imposes that duty upon the attaching officer.—Iowa State Sav. Bank v. Jacobson (S. D.) 66 N. W. 453.

VIII. CLAIMS BY THIRD PERSONS.

Right of intervener to move to dissolve, see post, § 53.

§ 44. Intervention in general.

[a] (Iowa; 1897.)

Formal defects in a delivery bond given by an intervener in attachment are waived if no objection thereto was made in the pleadings, and the sheriff had accepted the bond as valid, and all parties had treated it as such for 14 years.—Valley Bank of Clarinda v. Wolf (Iowa) 69 N. W. 1131.

[b] (Neb.; 1896.)

Writs of attachment having been levied in different actions on the same property, plain-

tiff in the later case may intervene in the earlier case to have the relative priority of the levies adjudicated.—*Deere, Wells & Co. v. Eagle Manuf'g Co. (Neb.)* 68 N. W. 504.

[*Neb.*; 1896.]

Defendant in an attachment case cannot, as against junior attaching creditors, waive a substantial departure from the mode prescribed by law for giving effect to the attachment, nor can he waive defects which prejudice the substantive rights of such creditors.—*Deere, Wells & Co. v. Eagle Manuf'g Co. (Neb.)* 68 N. W. 504.

§ 45. Notice to claimants.

(*Iowa*; 1897.)

Laws 1881, c. 45, § 1, relating to notice to be given by claimants of property taken under attachment, does not apply where the defendant in attachment executes a delivery bond for the release of the property.—*Ayres, Wentherswax & Reed Co. v. Dorsey Produce Co. (Iowa)* 70 N. W. 111.

§ 46. Necessary parties to determine claim.

(*Iowa*; 1895.)

Where, in attachment, the assignee under a general assignment for creditors by defendant intervenes, claiming the property attached, the joinder of creditors preferred by mortgage on other property is not necessary to the determination of the validity of the assignment as between plaintiff and the assignee.—*Bradley v. Bailey (Iowa)* 64 N. W. 758.

§ 47. Order to protect interest of interveners.

(*Iowa*; 1896.)

Where, in attachment, interveners claimed the property, and the entire case was submitted to the jury at one time, and the jury specially found that the property was owned by defendant and interveners, there was no error in failing to make such an order, under Code, § 3016, as would protect the interest of interveners; the summary proceedings for which that section provides not having been adopted, and no request for such order having been made after said finding was returned.—*Moffitt v. Albert (Iowa)* 66 N. W. 162.

§ 48. Judgment.

(*Iowa*; 1897.)

Under Code, § 3016, providing that on intervention in attachment "the petitioner's claim shall be in a summary manner investigated." * * * If it is found that the petitioner has title to, a lien on or any interest in such property, the court shall make such order as may be necessary to protect its rights.—"the court can only pass on an intervenor's claim to the property, and cannot render a money judgment against him.—*Valley Bank of Clarinda v. Wolf (Iowa)* 69 N. W. 1131.

IX. ABANDONMENT AND DISSOLUTION.

§ 49. In general.

(*Neb.*; 1896.)

A debtor, who had transferred all his interest in property subsequently attached to one who is not a party to the attachment suit, cannot, in his own name and right, on motion to dissolve the attachment, establish the validity of his transfer.—*Kountze v. Scott (Neb.)* 68 N. W. 479.

§ 50. Motion or petition to vacate.

[*Mich.*; 1896.]

A petition by one defendant for dissolution of an attachment issued against her and her codefendant, on an affidavit alleging that defendants have disposed and are about to dispose of "their" property with intent to defraud their

creditors, stating that petitioner had not disposed of or attempted to dispose of "her" property, or any portion thereof, with intent to defraud her creditors, sufficiently alleges that petitioner has not disposed of nor attempted to dispose of either her individual property or property jointly owned with her codefendant.—*Cottrell v. Hathaway (Mich.)* 66 N. W. 596.

[*Neb.*; 1895.]

A motion to discharge an attachment must be filed before judgment in the action, though a ruling thereon may be given after judgment.—*Stutzner v. Printz (Neb.)* 61 N. W. 620, 43 Neb. 306.

[*Neb.*; 1895.]

Where an attachment has been dissolved on the merits, additional findings need not be made on request and affidavits filed.—*Standard Stamping Co. v. Hetzel (Neb.)* 62 N. W. 247.

44 Neb. 105.

[*Neb.*; 1897.]

The applicability of Code Civ. Proc. § 235, authorizing defendant at any time before judgment, upon reasonable notice to plaintiffs, to move to dissolve an attachment, is not affected by the fact that the attached property does not belong to the defendant, or is incumbered for its full value.—*McGord-Brady Co. v. Bowen, 70 N. W. 950; South Park Imp. Co. v. Baker, Id. 952.*

§ 51. — Notice.

(*Neb.*; 1896.)

A notice given plaintiff on March 20th of a hearing, on March 22d, of a motion to discharge an attachment, was "reasonable" (Code Civ. Proc. § 223), where, on the previous December 4th, plaintiff had been served with notice of the motion, which was to be heard the following day, but no hearing was ever had under that notice, and all the affidavits desired to be presented on the hearing were filed long before the hearing.—*Sterling Manuf'g Co. v. Hough (Neb.)* 68 N. W. 1019.

§ 52. — Affidavits and evidence.

[a] An order dissolving an attachment, made on conflicting affidavits, will not be reversed unless opposed to a clear preponderance of the evidence.

—(*Minn.*; 1895) *Finance Co. of Pennsylvania v. Hursey*, 61 N. W. 672, 60 Minn. 17;

(*S. D.*; 1895) *Loranger v. Big Missouri Min. Co.*, 61 N. W. 686, 6 S. D. 478.

[*Neb.*; 1895.]

Evidence that property attached as the partnership property of defendants belongs to one of them, and that he is not a partner with the other, and does not owe the debt, is admissible to show that he is not responsible for the fraudulent act of the other defendant, which was one of the grounds of attachment.—*Rosenberg v. Burnstein (Minn.)* 61 N. W. 684.

60 Minn. 18.

[*Neb.*; 1896.]

Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard on conflicting evidence, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence.—*Whipple v. Hill (1893)* 55 N. W. 227, 36 Neb. 720, followed.—*Nebraska Moline Plow Co. v. Klingman (Neb.)* 66 N. W. 1101.

48 Neb. 204.

[*Neb.*; 1896.]

An order discharging an attachment, made upon conflicting evidence, will not be disturbed by a reviewing court unless the decision is clearly and manifestly wrong.—*Geneva Nat. Bank v. Bailor (Neb.)* 67 N. W. 865.

48 Neb. 866.

[*Neb.*; 1896.]

Statements, in an affidavit on a motion to discharge an attachment, of matters tran

spirings since the attachment was issued, cannot be considered in determining the existence of the specified grounds for the attachment.—*Geneva Nat. Bank v. Bailor* (Neb.) 67 N. W. 865.

48 Neb. 866.

[f] (S. D.: 1895.)

An order denying a dissolution of an attachment on the ground that defendant is a nonresident will not be disturbed, where defendant has for months been employed in another state, and has no dwelling place within the state, and it does not appear whether he intends to return.—*Pech Manuf'g Co. v. Groves* (S. D.) 62 N. W. 109.

6 S. D. 504.

[g] (S. D.: 1895.)

When the averments of an affidavit for an attachment are disputed the attaching creditor must show that some ground specified in the affidavit existed when the attachment issued.—*Jones v. Meyer* (S. D.) 63 N. W. 773.

[h] (S. D.: 1895.)

When the attachment affidavit shows plaintiff's claim to be past due, and alleges that defendant has sold and disposed of his property with the intent to defraud his creditors, which is denied by defendant, and, on hearing of the motion to discharge, is not supported by plaintiff's evidence, the attachment will not be sustained because defendant failed to deny that he disposed of his property to defraud plaintiff.—*Foley-Wadsworth Implement Co. v. Porteous* (S. D.) 65 N. W. 429.

[i] (S. D.: 1896.)

An affidavit for discharge of an attachment issued on an affidavit stating that defendant "is" about to dispose of his property to defraud creditors, denying that defendant "is" about to so dispose of his property, is sufficient, as the affidavit relates retrospectively to the time when the suit was instituted or the affidavit for attachment made.—*Finch v. Armstrong* (S. D.) 68 N. W. 740.

[j] (S. D.: 1897.)

On a motion to discharge an attachment issued on the ground of a disposition of property by the debtor with intent to defraud creditors, an assignment previously made is admissible only as bearing on the question of actual intent, and the validity of the assignment is not in issue.—*German Bank v. Folds* (S. D.) 69 N. W. 823.

§ 53. — Who may make.

[a] (S. D.: 1895.)

An assignor for the benefit of creditors, whose property was attached before his assignment, may move to vacate the attachment.—*Tolerton & Stetson Co. v. Casperson* (S. D.) 63 N. W. 908.

[b] (S. D.: 1897.)

Where intervener in attachment moves to discharge the attachment on papers showing that he is a subsequent lienor, the court may entertain the motion as made in that capacity (Comp. Laws, § 5011), irrespective of the right to move as intervener.—*Citizens' Bank v. Corkings* (S. D.) 70 N. W. 1059.

[c] (S. D.: 1897.)

Comp. Laws, § 5011, providing that "in all cases" defendant or a subsequent lienor may move to discharge an attachment, authorizes a motion by a subsequent lienor for insufficiency or fatal irregularity of the affidavit on which the attachment was granted.—*Citizens' Bank v. Corkings* (S. D.) 70 N. W. 1059.

§ 54. — Issues determined.

[a] (Neb.: 1895.)

On the hearing of a motion to discharge an attachment allowed on the ground that defendant had disposed of his property with intent to defraud creditors, the alleged fraudulent transaction being the conveyance by mortgage of certain property, the validity of such mort-

gages cannot be determined.—*Landauer v. Mack* 61 N. W. 597, 43 Neb. 430.

[b] (Neb.: 1895.)

Where it was alleged in the petition in attachment that defendants acted conjunctively, one buying on credit, and turning over goods to the other, to be disposed of for the joint benefit of both, it was proper, on a motion to dissolve such attachment, to consider whether or not there existed the alleged privity between defendants.—*Standard Stamping Co. v. Hetzel* (Neb.) 62 N. W. 247.

44 Neb. 105.

§ 55. — Burden of proof.

(Neb.: 1896.)

Where the facts stated in an affidavit for an attachment are denied on a motion to dissolve, the burden is cast upon the plaintiff to sustain, by proof, his charges.—*Geneva Nat. Bank v. Bailor* (Neb.) 67 N. W. 865.

48 Neb. 866.

§ 56. — Bill of exceptions.

[a] (Neb.: 1896.)

Prior to Laws 1895, c. 72, a county judge had no authority to allow a bill of exceptions embodying the evidence on a motion to discharge an attachment; that authority not being conferred by Code Civ. Proc. § 236e, providing a method whereby an order discharging an attachment may be superseded pending a review on error.—*Altschuler v. Snyder* (Neb.) 67 N. W. 869.

§ 57. Dissolution.

[a] (Mich.: 1896.)

In interlocutory proceedings to dissolve an attachment, service of citation upon the attorney of the plaintiff is sufficient, although both the plaintiff and the attorney are nonresidents, and are within the county only for the purposes of the attachment suit.—*Cleland v. Clark* (Mich.) 69 N. W. 652.

[b] (Mich.: 1896.)

Under How. Ann. St. § 8028, providing that, in proceedings to dissolve an attachment, the citation shall be served, three days before the return day, by reading it to the plaintiff in the attachment if found within the county, and, if not, then the same may be served upon his agent or attorney, the citation in the latter case must be read to the attorney.—*Cleland v. Clark* (Mich.) 69 N. W. 652.

§ 58. — Grounds.

[a] (Minn.: 1895.)

It is no ground for dissolving an attachment, issued in an action against two defendants as partners, on the motion of one of them, that the property levied on is individual property, and that he is not a partner with the other, and does not owe the debt.—*Rosenberg v. Burnstein* (Minn.) 61 N. W. 684.

60 Minn. 18.

[b] (Minn.: 1895.)

An attachment is discharged, as to an assignee in a general assignment for the benefit of creditors, by an amendment to the complaint and affidavit for attachment, made after the execution of the assignment, substituting a different cause of action for the one set up in the original pleadings.—*Heidel v. Benedict* (Minn.) 63 N. W. 490.

61 Minn. 170.

[c] (Neb.: 1896.)

The institution of an action before the claim is due, and the issuing and levying of an attachment without obtaining an order therefor, is a substantial defect, of which junior attaching creditors may take advantage.—*Deere, Wells & Co. v. Eagle Manuf'g Co.* (Neb.) 68 N. W. 504.

[d] (Neb.: 1897.)

Where an attachment affidavit varies from an amended petition in the statement of the

kind of an account in suit, and defendant, by answering the amended petition, has waived the right to further object that it sets up an account different from that pleaded in the original, it is proper to overrule a motion to discharge the attachment on the ground that the affidavit does not state the nature of plaintiff's claim as contained in the amended petition.—*Grotte v. Nagle* (Neb.) 69 N. W. 973.

[e] (Neb.; 1897.)

It is no ground for discharging the attachment that part of the sum stated in the affidavit is not due.—*Grotte v. Nagle* (Neb.) 69 N. W. 973.

[f] (S. D.; 1895.)

That a portion of the property seized under an attachment is exempt under the homestead laws, affords no ground for vacating the attachment.—*Pech Manuf'g Co. v. Groves* (S. D.) 62 N. W. 109.

6 S. D. 501.

[g] (S. D.; 1895.)

That the land of a nonresident has been attached concurrently with proceedings to foreclose a chattel mortgage securing the debt is no ground for dissolution.—*Pech Manuf'g Co. v. Groves* (S. D.) 62 N. W. 109.

6 S. D. 504.

X. WRONGFUL ATTACHMENT.

§ 59. Notice of claim or levy.

[a] (Iowa; 1895.)

Where plaintiff seized defendant's property under an attachment in which written notice of the levy was not made on defendant, as required by Code, § 2967, subd. 1, and insisted on holding the property under the writ, he is estopped to assert, as a defense to a counterclaim setting up wrongful attachment, that the levy was invalid for want of such written notice.—*Hamilton v. Hartinger* (Iowa) 64 N. W. 592.

[b] (Iowa; 1896.)

Where an attachment is wrongfully levied under the direction of plaintiff, the notice of claim required to be given the levying officer by McClain's Code, § 4195, need not be given plaintiff in order to render him liable to claimant for damages in trespass or trover.—*Bradley v. Miller* (Iowa) 69 N. W. 426.

§ 60. What constitutes.

[a] (Neb.; 1896.)

In order to maintain an action for wrongful attachment, independent of the statute, and not on the bond, malice in suing out the writ, and want of probable cause, must be averred.—*Storz v. Finkelstein*, 66 N. W. 1020.

48 Neb. 27.

[b] (Neb.; 1896.)

The fact that an attachment was dissolved does not show that the writ was wrongfully sued out, so as to render the plaintiff in attachment liable in an action for wrongful attachment.—*Storz v. Finkelstein* (Neb.) 66 N. W. 1020.

48 Neb. 27.

§ 61. Evidence.

(Iowa; 1895.)

Portions of a city directory showing defendant's business connections are admissible, in connection with other evidence, to show the facts on which plaintiff acted in suing out his attachment.—*Bowman v. Western Fur Manuf'g Co.* (Iowa) 64 N. W. 775.

§ 62. Instructions.

(Iowa; 1896.)

Instructions as to wrongful attachment need not state that, if plaintiff knew, when suing out the attachment, that the grounds alleged therefor were false, he would be chargeable with malice in suing out the writ; there be-

ing no evidence that he had such knowledge.—*Hamilton v. Thoen* (Iowa) 66 N. W. 105.

§ 63. Recovery in action on bond.

(Iowa; 1895.)

Code, § 2961, relating to actions on attachment bonds, provides that the plaintiff therein may recover reasonable attorney's fees if the attachment was wrongfully sued out, and there was no reasonable cause to believe the ground upon which the same was issued to be true. *Held*, that said fees cannot be recovered unless both of such conditions are shown to exist, and therefore, where the ground of attachment was that defendant was a nonresident, and he was in fact a nonresident, he cannot recover such fees, though the attachment was served by fraudulently inducing him to come into the state.—*Dickinson v. Athey* (Iowa) 65 N. W. 326.

§ 64. Damages and costs.

[a] (Iowa; 1896.)

A finding of arbitrators, refusing to allow damages for wrongful attachment, will not be set aside where the attachment was levied on land, and there was no evidence that any damage was caused by such levy, and the attaching plaintiff was advised by counsel to bring attachment.—*Tank v. Rohweder*, 67 N. W. 106.

[b] (Iowa; 1897.)

Where defendant, in an action aided by attachment, admits plaintiff's claim and recovers on a counterclaim against plaintiff and his sureties for wrongful attachment, the court may allow him attorney's fees as part of the costs.—*Union Mill Co. v. Prenzler* (Iowa) 69 N. W. 876.

[c] (Iowa; 1897.)

It appeared that, while plaintiff, who had dealt with defendants for years, was seriously ill, the latter, fearing that he might die, and that they would have to wait a year for their claim if the property went into the hands of an administrator, endeavored, by intimidation and threats of legal process, to induce plaintiff's wife and daughter to turn over some of the property, and, failing in this, they sued out a writ of attachment for the alleged reason that plaintiff was about to convert the property into cash for the purpose of placing it beyond the reach of creditors. *Held*, that \$5,000 exemplary damages for wrongful attachment was not excessive.—*Union Mill Co. v. Prenzler* (Iowa) 69 N. W. 876.

[d] (Iowa; 1897.)

As an element of damages for the wrongful detention of property under an attachment, it may be shown that the owner had to sell the property at a reduced price because of a decline in the market.—*Chesmore v. Barker* (Iowa) 70 N. W. 701.

[e] (Neb.; 1897.)

In an action for wrongful attachment, where it appeared that defendant had levied on and sold a horse of plaintiff valued at \$100, an allowance of \$500 for loss of reputation and humiliation from the levy of the attachment was excessive.—*Jensen v. Hallam* (Neb.) 70 N. W. 1121.

[f] (Wis.; 1895.)

Where a sheriff seizes goods under an attachment valid on its face and regularly issued, and it is adjudged that no cause for attachment existed, no liability rests on the sheriff if the goods are destroyed while in his possession, but the attaching creditor is in such case liable for the full value, under Rev. St. §§ 2746, 2747, providing that, if the finding is for defendant, the court shall order the property attached to be delivered to defendant, and allowing defendant damages for any injury thereto.—*Stanley v. Carey*, 62 N. W. 188, 89 Wis. 410.

§ 65. Action for malicious prosecution.

[a] (Iowa; 1897.)

Advice of counsel is not a complete defense to a claim for exemplary damages for wrongful

attachment, where a full statement of all the facts was not made.—*Union Mill Co. v. Prenzler* (Iowa) 69 N. W. 876.

[b] (Iowa; 1897.)

In a suit for wrongful attachment, the fact that plaintiff made a fair statement of all the facts to his attorney is not a complete defense.—*Union Mill Co. v. Prenzler* (Iowa) 69 N. W. 876.

[c] (Mich.; 1895.)

In an action for maliciously suing out a writ of attachment it was error to direct a verdict for defendant where it appeared that defendant sued out the writ on several notes, one of which he knew was not due, and did not consult his counsel as to whether the writ could be issued on such unmatured note.—*Wiesinger v. First Nat. Bank* (Mich.) 64 N. W. 59.

§ 66. — Pleading and evidence.

[a] (Iowa; 1895.)

Where defendants allege in their answer that plaintiff's attachment was wrongfully and maliciously levied, which allegation is met by a general denial, plaintiff may show that he had stated the facts within his knowledge to his attorney before suing out the writ, and had been by him advised that it was authorized.—*Bowman v. Western Fur Manuf'g Co.* (Iowa) 64 N. W. 775.

[b] (Mich.; 1894.)

In an action for the malicious prosecution of a writ of attachment, evidence that defendant was informed by a clerk of plaintiff of his business and financial affairs, and of his efforts to borrow money and dispose of his property, is admissible, as tending to rebut malice and show probable cause.—*Le Clear v. Perkins* (Mich.) 61 N. W. 357.

103 Mich. 131.

[c] (Mich.; 1894.)

In an action for the malicious prosecution of a writ of attachment, the burden is on plaintiff to establish both want of probable cause, and malice in suing out the writ.—*Le Clear v. Perkins* (Mich.) 61 N. W. 357.

103 Mich. 131.

[d] (Mich.; 1895.)

In an action for maliciously suing out a writ of attachment, proof that defendant placed all the facts before his counsel, and acted upon his opinion, establishes probable cause.—*Wiesinger v. First Nat. Bank* (Mich.) 64 N. W. 59.

[e] (Minn.; 1895.)

In an action for malicious prosecution of an attachment on the ground that the debtor had disposed of his property with intent to defraud creditors, plaintiff may show that when the writ was issued he owed no one but defendant.—*Tykeson v. Bowman* (Minn.) 61 N. W. 909.

60 Minn. 108.

ATTENDANCE.

Of witness, see "Witness," §§ 75-77.

ATTESTATION.

Of assignment, see "Assignment for Benefit of Creditors," § 6.

Of deed, see "Deed," § 5.

Of mortgage, see "Mortgages," § 10.

Of will, see "Wills," §§ 12, 13.

ATTORNEY AND CLIENT.

I. RETAINER AND AUTHORITY, §§ 1-5.

II. DUTIES AND LIABILITIES OF ATTORNEY, §§ 6-9.

III. DISBARMENT, §§ 10-12.

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IV. COMPENSATION OF ATTORNEY, §§ 13-23.

1. In General, §§ 13-17.

2. Lien, §§ 18-23.

See, also, "ChamPERTY and Maintenance"; "District and Prosecuting Attorneys."

Absence of counsel as ground for continuance, see "Continuance," § 5.

Advice of counsel, see "Malicious Prosecution," §§ 9, 10.

Appointment of attorney to assist prosecuting attorney, see "Criminal Law," §§ 54-56.

Argument and remarks of counsel, see "Criminal Law," §§ 79-89; "Trial," §§ 36-49.

Champerous contracts with attorney, see "ChamPERTY and Maintenance," § 1.

Communications between juror and counsel, ground for new trial, see "New Trial," § 23.

Death of counsel as ground for continuance, see "Continuance," § 5.

Exemption of law books from forced sale, see "Exemptions," § 3.

Extinguishment of dower rights by power of attorney, see "Dower," § 3.

Misconduct of counsel as ground for new trial, see "New Trial," § 25.

Powers of attorney, see "Powers," § 1.

Privileged communications between attorney and client, see "Witness," § 10.

—to attorney, see "Witness," § 9.

Ratification of employment of counsel for city, see "Municipal Corporations," § 41.

Right to open and close, see "Trial," § 38.

I. RETAINER AND AUTHORITY.

Justice acting as attorney, see "Justices of the Peace," § 4.

Service of process by plaintiff's attorney, see "Writs and Notice of Suits," § 12.

Warrant of attorney authorizing judgment by confession, see "Judgment," § 11.

§ 1. Retainer.

(Mich.; 1896.)

Where it appears from the record that certain attorneys appeared for all defendants, and pleaded the general issue, and that subsequently two of defendants appeared by other attorneys, and pleaded the general issue, and there was no order of substitution, service of notice of trial on the attorneys first appearing was sufficient as to all defendants.—*Landyskowski v. Lark* (Mich.) 66 N. W. 371.

§ 2. Authority of attorney.

[a] (Minn.; 1895.)

Where an order to show cause why a judgment for plaintiff should not be set aside is procured on affidavits of an attorney who had appeared in the action and answered for defendants, and of another attorney who states that he is one of defendants' attorneys, and, on the hearing, the last-named attorney produces written authority to appear for defendants, though such authority is executed five days after the order is procured, it is error to dismiss the proceedings on the ground that no authorized attorney has appeared in defendants' behalf.—*Olmstead v. Firth* (Minn.) 61 N. W. 1017.

60 Minn. 126.

[b] (Minn.; 1895.)

Where defendant is sued as an individual, it will not be presumed that his attorney had authority to consent to an amendment of the complaint seeking to recover against him as a receiver.—*Erskine v. McIlrath* (Minn.) 62 N. W. 1130.

60 Minn. 485.

[c] (Neb.; 1896.)

An attorney employed to collect a debt has not, by virtue of his general employment, authority to release a debtor except upon pay-

ment of the full amount of the debt in money.—*Smith v. Jones*, 66 N. W. 19, 47 Neb. 108.

[d] (S. D.; 1894.)

A client is bound by the direction of his attorney, indorsed on an affidavit in claim and delivery, requiring the officer to take the property described in the affidavit from defendant, and deliver the same to plaintiff, though the property, in fact, belonged to a third person.—*Peury v. McCormick Harvesting Mach. Co.* (S. D.) 61 N. W. 162.

6 S. D. 396.

[e] (S. D.; 1895.)

An attorney authorized to institute and prosecute replevin may bind his client to pay the expense of removing the property taken from defendant to a place of safety.—*Fox v. William Deering & Co.* (S. D.) 64 N. W. 520.

§ 3. Conduct of litigation.

[a] (Iowa; 1896.)

The general employment of an attorney to prosecute an action does not confer on him the power to dismiss it.—*Rhtasel v. Rule* (Iowa) 65 N. W. 1013.

[b] (Minn.; 1895.)

Where an admission of service of summons and complaint was made by defendants' attorneys, and was followed by an answer interposed by the same attorneys, and a trial wherein the defense was conducted by them, it is presumed that they had special authority to admit service, or that defendant ratified their act in so doing.—*Backus v. Burke* (Minn.) 65 N. W. 459.

63 Minn. 272.

§ 4. Contract of employment—Rescission.

(Wis.; 1894.)

In an action by a client against her attorneys for money collected it appeared that there was a written contract between them whereby the client agreed to supply the disbursements for the suit, and the attorneys agreed to prosecute it for a fixed sum. Plaintiff advanced some money for disbursements, and three years later, while the suit was pending, defendants wrote for advances made by them, which she was unable to furnish, and so wrote defendants. Defendants wrote again, asking for money, and were answered that plaintiff could not send it, but, in the event of success, would allow a stated amount in addition to the sum fixed by the contract. Some correspondence then followed, in which defendants claimed they were not working under the contract, and in which plaintiff insisted it was still in force. Plaintiff also wrote that, as defendants were disposed to continue with the case, the question regarding the contract might rest for future settlement. Nothing further was said about the contract till judgment was rendered for plaintiff, though several letters passed regarding the suit. *Held*, that the contract was not rescinded.—*Sheehy v. Duffy* (Wis.) 61 N. W. 295, 89 Wis. 6.

§ 5. Notice to attorney.

(Wis.; 1896.)

A client is not chargeable with notice of facts which came to the knowledge of the attorney while acting for another, and which he has no right to communicate, or which, from their nature, he would conceal.—*Melms v. Pabst Brewing Co.*, 66 N. W. 518, 93 Wis. 153.

II. DUTIES AND LIABILITIES OF ATTORNEY.

Contempt, see "Contempt," § 3.

§ 6. Acting for adverse party.

[a] (Iowa; 1895.)

An attorney whose employment by accused was not complete, but merely condition-

al, and who had not held with him any confidential consultations, or made any investigation of his defense, may be allowed to assist in the prosecution.—*State v. Lewis* (Iowa) 65 N. W. 295.

[b] (Iowa; 1895.)

That an attorney retained by a husband to sue for a divorce wrote the wife, in answer to a letter seeking to also retain him, that he had been retained by the husband for the purpose of shelving him, and advising her to employ a lawyer and fight the case, is sufficient to warrant the jury in finding that the contract of employment between the attorney and the husband was rescinded by the attorney, or that he was acting in bad faith.—*Bullis v. Easton* (Iowa) 65 N. W. 395.

[c] (Neb.; 1895.)

The members of a firm of attorneys cannot represent opposite sides of the same cause without the knowledge and consent of the clients.—*Cox v. Barnes* (Neb.) 63 N. W. 394.

45 Neb. 172.

§ 7. Proceedings by client for accounting.

[a] (Iowa; 1895.)

A contract by an attorney who has charge of the interest of heirs in an estate, with such heirs, for the purchase of a portion of the estate which they have received in a compromise negotiated by him with their consent, is valid, if the consideration is adequate, and the transaction is without concealment or fraud on his part.—*Mitchell v. Colby* (Iowa) 63 N. W. 769.

[b] (Neb.; 1896.)

In an action for money collected by defendants as attorneys at law, a recovery could not be had for damages resulting from an unauthorized appearance by defendants for plaintiff in an action entirely independent of the collection, whereby the court acquired jurisdiction to and did render judgment against plaintiff as defendant in said action, in application of which judgment the amount collected was ordered to be paid over by the attorneys in a garnishment proceeding against them by the judgment creditor.—*Scott v. Kirschbaum* (Neb.) 66 N. W. 443.

47 Neb. 331.

§ 8. Liability on agreement to pay costs.

(Minn.; 1896.)

An attorney who induced his client to take an assignment of usurious notes and chattel mortgages securing the same, by representing that they were valid, and that, if the client would bring suit thereon, and was thereby put to expense, he would reimburse him therefor, was liable to the client for the costs and expenses of a suit on the notes and mortgages wherein the mortgagor obtained a judgment.—*Struckmeyer v. Lamb* (Minn.) 65 N. W. 930.

64 Minn. 57.

§ 9. Fraud and collusion.

(Iowa; 1897.)

The original petition, in an action, under Code, § 212, for collusion on the part of an attorney with intent to deceive a court or a party, alleged that defendant colluded with his client to interpose a fictitious counterclaim in an action before a justice, so as to enable the client to appeal, and that the case was appealed and expenses incurred by plaintiff on the appeal, but did not allege that defendant appeared for his client on the appeal. A demurrer was sustained, on the ground that it did not show that the expenses incurred by plaintiff were caused by defendant's conduct. The amended petition alleged that defendant appeared for his client in the trial on appeal. *Held*, that it was error to strike out the amended complaint as a mere repetition of the original.—*Kranse v. Lloyd* (Iowa) 69 N. W. 1062.

III. DISBARMENT.

Distinction between contempt and disbarment proceedings, see "Contempt," § 8.
Right to jury trial, see "Jury," § 26.

§ 10. Right to file charges.

(S. D.: 1897.)

An application by one attorney for leave to file charges against others for unprofessional conduct is barred where a previous trial of the same charges resulted in a judgment for the accused, who then filed counter charges against the applicant for circulating false and malicious charges, in which proceeding the latter was found guilty, and his license revoked; no appeal being taken from either judgment.—*In re Houghton* (S. D.) 70 N. W. 634.

§ 11. Grounds.

[a] (Mich.: 1896.)

In disbarment proceedings, charges that respondent was present at the bedside of a girl on whom an abortion had been committed, for the purpose of preventing her from making an ante mortem statement; that he directed who should care for her, forbade that any person should see her alone, and directed her attendant not to permit her to make any statement concerning herself, her condition, or the cause thereof; and, as a conclusion of law, that respondent was guilty of unlawful and unprofessional conduct, in that he attempted to stifle evidence of the commission of a crime, by preventing the ante mortem statement,—are sufficiently specific, and constitute legal ground for disbarment.—*In re Shepard* (Mich.) 67 N. W. 971.

[b] (N. D.: 1895.)

Where the statute enumerates grounds for the disbarment of an attorney, he can be disbarred on no other grounds.—*In re Eaton* (N. D.) 62 N. W. 597.
4 N. D. 514.

§ 12. Procedure.

[a] (Mich.: 1895.)

In disbarment proceedings defendant is entitled to have the evidence examined by the court, so as to receive an authoritative determination of the falsity of the charges.—*In re Chandler* (Mich.) 63 N. W. 69.
105 Mich. 235.

[b] (Mich.: 1896.)

An order to show cause why an attorney should not be disbarred may issue, in the discretion of the court, on charges filed by the prosecuting attorney, and verified by him on information and belief.—*In re Shepard* (Mich.) 67 N. W. 971.

[c] (Mich.: 1896.)

The failure of the clerk to enter a judgment of disbarment does not render the proceedings void.—*In re Shepard* (Mich.) 67 N. W. 971.

IV. COMPENSATION OF ATTORNEY.

Attorney's fees, allowance to receiver, see "Receivers," § 22.

—in action for divorce, see "Divorce," § 40.

—in action on injunction bond, see "Injunction," § 35.

—in action on policy, see "Insurance," § 131.

—in will contest, see "Wills," § 31.

—on foreclosure under power, see "Mortgages," § 91.

—on mortgage foreclosure, see "Mortgages," § 67.

Costs of attorney's services in criminal cases, see "Costs," § 39.

Expert testimony as to value of legal services, see "Evidence," § 61.

Promise in note to pay attorney's fees, effect on negotiability, see "Negotiable Instruments," §§ 10, 11.

1. IN GENERAL.

§ 13. Right to compensation.

(Minn.: 1896.)

Attorneys for some of the creditors of an insolvent debtor, who procured an order allowing all creditors to share in the distribution of the assigned estate without filing releases (Gen. St. 1894, § 4249), are not entitled to compensation for their services out of the trust fund, in the absence of a showing that the estate was benefited thereby.—*In re Vetter* (Minn.) 68 N. W. 850; *Merrick v. Bonness*, Id.

§ 14. Amount.

[a] (Iowa: 1895.)

In estimating the value of attorney's services it is proper to consider the success of the litigation without regard to the ultimate benefit to the client.—*Stevens v. Ellsworth* (Iowa) 63 N. W. 683.

[b] (Iowa: 1895.)

The wealth of a client cannot be considered in determining the fees of the attorney.—*Stevens v. Ellsworth* (Iowa) 63 N. W. 683.

[c] (Iowa: 1895.)

The fact that the woman for whom an attorney undertakes to have set aside a divorce obtained by her husband had no means, and that the attorney relied on obtaining compensation from the husband, does not affect the question of how much should be recovered of the husband therefor.—*Stevens v. Ellsworth* (Iowa) 63 N. W. 683.

[d] (Iowa: 1895.)

Facts going to show the difficulties to be met and overcome by an attorney in a case are properly included in a question as to the value of his services.—*Stevens v. Ellsworth* (Iowa) 63 N. W. 683.

§ 15. — Services under assignment by court.

[a] (Mich.: 1895.)

Under Laws 1893 (Act No. 96), providing that attorneys appointed in criminal cases for defendants unable to procure counsel shall be entitled to receive from the county treasurer, "on the certificate of the presiding judge," such an amount as the judge shall in his discretion deem reasonable compensation, not in any case exceeding \$50, it is the duty of the presiding judge to fix the amount of compensation in such cases.—*Withey v. Osceola Circuit Judge* (Mich.) 65 N. W. 668.

[b] (Mich.: 1897.)

An attorney appointed to defend an indigent prisoner in the trial court cannot, without an order of the court, appeal, and enforce a claim against a county for fees and expenses therefor, under How. Ann. St. § 9046, as amended by Laws 1893, No. 96, providing for appointments by the court of an attorney for an indicted person, and section 9047, providing that such attorney shall not be compelled to follow the case in the supreme court, and, if he does so, may recover an enlarged compensation.—*De Long v. Board of Sup'rs of Muskegon County* (Mich.) 69 N. W. 1115.

§ 16. Contract for compensation.

(Wis.: 1896.)

In the making of a contract between an attorney and one who is not at the time his client, by which the relation of attorney and client is created between them, and the services to be rendered and the compensation therefor are stipulated, the parties deal with each other at arm's length; and no presumption of undue influence arises, requiring the attorney to affirmatively prove good faith and adequacy

of consideration.—*Dockery v. McLellan* (Wis.) 67 N. W. 733.

93 Wis. 381.

§ 17. Action for compensation.

[a] (Mich.; 1894.)

In an action to recover for professional services, evidence of plaintiff's ability as an attorney is admissible to show the value of the services.—*Lungerhausen v. Crittenden* (Mich.) 61 N. W. 270.

103 Mich. 173.

[b] (Mich.; 1896.)

In an action for services rendered as attorneys in the province of Ontario, and claiming compensation in accordance with the rates established by the statutes of Ontario, where defendant contended that there was a special agreement as to the charges to be made, an instruction that, if the jury found no such agreement was made, the plaintiff's compensation would be regulated by the statute of Ontario, was properly given.—*Dawson v. Peterson* (Mich.) 68 N. W. 246.

[c] (S. D.; 1891.)

In the absence of an express contract, an attorney at law is entitled to reasonable compensation, and when such attorney has testified in his own behalf, in an action to recover for his services, that the same are reasonably worth a specified amount, he may be cross-examined to show that by his carelessness or unskillfulness the suit was lost, and that his services were worth less than the amount claimed.—*Cranmer v. Building & Loan Ass'n of Dakota* (S. D.) 61 N. W. 35.

6 S. D. 341.

2. LIEN.

§ 18. Lien of attorney.

[a] (Iowa; 1895.)

An attorney has no equitable lien for services independent of statute.—*Ward v. Sherbondy* (Iowa) 65 N. W. 413.

[b] (Mich.; 1896.)

Where an attorney has a lien for fees on a judgment against an officer, and brings an action on the debtor's official bond in the name of the judgment creditors, plaintiffs cannot discontinue the action, to the injury of the attorney, without his consent.—*Heavenrich v. Alpena Circuit Judge* (Mich.) 69 N. W. 226.

§ 19. Notice.

(Neb.; 1897.)

Comp. St. c. 43, § 45, provides that upon rendering judgment against the insurer in an action for a total loss the court "shall allow plaintiff a reasonable attorney's fee, to be taxed as part of the costs." *Held*, that an indorsement by the clerk on the summons in such an action, that upon defendant's failure to appear plaintiff would take judgment for a specified amount, with "attorneys' fees and costs," was not notice to the insurer of plaintiff's attorney's claim of a lien for fees.—*Cobbey v. Dorland* (Neb.) 69 N. W. 951.

§ 20. Priority.

[a] (Iowa; 1895.)

Code, § 215, subd. 3, gives an attorney a lien for a general balance of compensation on money due his client in the hands of the adverse party in an action in which he is employed, from the time written notice, stating the amount and services, is given such adverse party; subdivision 4 provides that, after judgment, the notice may be given and made effective against the judgment debtor by entering it in the docket judgment, opposite the entry of judgment. *Held* that, where a judgment requires the claim of an intervening creditor of the plaintiff to be first paid out of the amount

for which plaintiff has judgment, the right of the creditor is superior to the lien of an attorney.—*Ward v. Sherbondy* (Iowa) 65 N. W. 413.

[b] (Neb.; 1895.)

An attorney's lien for services is subordinate to the right of the adverse party to any proper set-off, or other available defense.—*Field v. Maxwell* (Neb.) 63 N. W. 62.

44 Neb. 900.

§ 21. Effect of assignment of subject-matter.

(S. D.; 1896.)

After judgment for plaintiff in justice court, his attorney perfected a lien for fees, as against the judgment debtor, as provided in Comp. Laws, § 470, subd. 4; and, after affirmance of the judgment on appeal to the circuit court, an action was brought by plaintiff against defendant and the sureties on his appeal bond. *Held* that, by filing his lien, the attorney obtained an interest both in the judgment and in the cause of action on the appeal bond, which was not affected by a subsequent assignment of plaintiff's interest in the judgment to one of the defendant sureties on the bond.—*Leighton v. Serveson* (S. D.) 66 N. W. 938.

§ 22. Compromise and settlement by parties.

[a] (Mich.; 1894.)

A discontinuance of an action for personal injuries will not be set aside because the stipulation is filed without the knowledge or consent of plaintiff's attorney.—*Voigt Brewery Co. v. Donovan* (Mich.) 61 N. W. 343.

103 Mich. 190.

[b] (Neb.; 1895.)

An action for specific performance of a contract was compromised after trial and appeal, a third party purchasing the interest of plaintiff. Defendant, for a valuable consideration, became entitled to be released from all obligations by virtue of such contract. After a dismissal filed by the party who succeeded to the interest of plaintiff, the attorney for plaintiff filed a lien for fees in conducting the suit; also a petition asking to be allowed to intervene and prosecute the appeal, unless such fees were paid. *Held* that, as plaintiff's right against defendant had been extinguished before the lien was filed, there was nothing to which it could attach remaining in the hands of defendant, and defendant was entitled to have the cause dismissed.—*Sheedy v. McMurtry* (Neb.) 63 N. W. 21.

44 Neb. 499.

§ 23. Protection against set-off.

[a] (Minn.; 1896.)

Pending an appeal in the district court from a taxation of costs against plaintiff, defendant applied, on motion, to set off the judgment for costs against a judgment against him in plaintiff's favor. *Held* that, as against plaintiff's attorneys, who had previously given notice of their lien on the judgment, it was a proper exercise of discretion for the court to deny the motion.—*Lindholm v. Itasca Lumber Co.* (Minn.) 65 N. W. 931.

64 Minn. 46.

[b] (S. D.; 1896.)

A judgment on appeal for costs against the plaintiff may be set off pro tanto against a similar judgment in the same action in plaintiff's favor, without regard to the lien of the attorney.—*Lindsay v. Pettigrew* (S. D.) 66 N. W. 321.

AUDIT.

Of claims against city, see "Municipal Corporations," § 175.

— against county, see "Counties," § 47.

AUDITOR.

See "Reference."

AUSTRALIAN BALLOT LAW.

See "Elections and Voters," § 10.

AUTHENTICATION.

Of record on appeal, see "Appeal," §§ 112-115;
"Criminal Law," § 207.

AUTREFOIS ACQUIT AND CONVICT.

See "Criminal Law," §§ 30-37.

AVOIDANCE.

Of contract by infants, see "Infancy," § 3.
— by insane person, see "Insanity," § 6.

AWARD.

See "Arbitration and Award."

In condemnation proceedings, see "Eminent Domain," §§ 28-32.

B.**BAGGAGE.**

See "Carriers," § 71.

BAIL.

Affidavit to hold to bail, see "Arrest," § 2.
Power of court commissioners, see "Court Commissioners."

§ 1. Right to bail.

[a] (Iowa; 1894.)

Where a conviction of murder in the second degree has been reversed on appeal, the defendant is not precluded from admission to bail, under McClain's Code, § 5489, providing that "no person convicted of murder shall be admitted to bail."—State v. Helm (Iowa) 61 N. W. 246.

92 Iowa, 540.

[b] (Mich.; 1895.)

Const. art. 6, § 29, provides that all persons shall before conviction be bailable except for murder and treason. 2 How. Ann. St. § 9479, authorizes justices of the peace to let to bail in all cases where the punishment for the offenses charged shall be less than imprisonment for life. *Held*, that a justice may admit to bail a person charged with rape, the punishment for which is imprisonment for life or any number of years.—People v. Burwell (Mich.) 63 N. W. 986.

§ 2. Recognizance on appeal.

[a] (Neb.; 1894.)

A recognizance for an appeal from a conviction before a justice of the peace is invalid if the court before which the prisoner is to appear is not stated.—Pill v. State (Neb.) 61 N. W. 96, 43 Neb. 23.

[b] (N. D.; 1895.)

An order, after sentence, that the bail should remain valid as a recognizance given after conviction and after a writ of error, was void.—In re Markuson (N. D.) 64 N. W. 939.
5 N. D. 180.

§ 3. Liability on bond.

[a] (Mich.; 1895.)

The sureties on the recognizance of a person charged with crime are not discharged by a continuance of the case at the term at which the principal was required to appear.—People v. Hanaw (Mich.) 64 N. W. 328.

[b] (Mich.; 1895.)

An information, in one count, charged G. with feloniously breaking and entering, in

the nighttime, a shop not adjoining to or occupied with a dwelling house, with intent to commit larceny; and, in the second count, with larceny. He gave in the same court a bond "to answer to an information on file against him for burglary." *Held*, that the bond was not void for misnomer of the offense charged, under 2 How. Ann. St. § 9485, providing that no action on any recognizance shall be defeated by any defect in the form of the bond.—People v. Hanaw (Mich.) 64 N. W. 328.

[c] (S. D.; 1895.)

Where one released on bail procures a continuance, and then fails to appear at the term to which the case is continued, his recognizance may be forfeited, and his sureties held liable thereon.—State v. Breen (S. D.) 62 N. W. 135.

6 S. D. 537.

§ 4. — Surrender of accused.

(Iowa; 1895.)

Code, § 4587, provides that on appeal defendant must be admitted to bail, conditioned: (1) If the appeal be from a fine, that he will pay the same if required to do so; (2) if from imprisonment, that he will surrender himself in execution. *Held*, that a bond on appeal from a fine, and imprisonment until paid, conditioned for the payment of the fine and the surrender of defendant, was not discharged by the surrender and imprisonment of defendant.—State v. Meier (Iowa) 65 N. W. 316.

§ 5. Forfeiture—Judgment.

(Mich.; 1895.)

Under How. Ann. St. § 8457, providing that in case of forfeiture of bail the judgment shall be for the amount of the penalty of the recognizance, it is error to give judgment for interest from the date of forfeiture.—People v. Hanaw (Mich.) 64 N. W. 328.

§ 6. Action on recognizance.

[a] (Iowa; 1895.)

Where a bond on appeal from a judgment imposing a fine and imprisonment until the fine was paid was conditioned for payment of the fine and surrender of defendant, the fact that after defendant surrendered himself the governor suspended that part of the sentence imposing imprisonment did not preclude the state from suing on the bond to recover the fine.—State v. Meier (Iowa) 65 N. W. 316.

[b] (S. D.; 1896.)

Since Comp. Laws, § 4872, provides that a trustee of an express trust shall be construed to include a person with whom, or in whose

name, the contract is made for the benefit of another, the state is a proper party to sue on a defaulted bail bond executed to the state under section 7608, though the money, when collected on the bond, belongs to the county.—*State v. Newson* (S. D.) 66 N. W. 468.

BAILMENT.

See, also, "Agistment"; "Carriers"; "Depositaries"; "Innkeepers"; "Livery Stable Keepers"; "Pledge"; "Warehousemen."

Deposit of grain in warehouse, see "Warehousemen," § 3.

Estoppel of bailee to deny bailor's title, see "Estoppel," § 30.

Liability of carrier as gratuitous bailee, see "Carriers," § 11.

— of innkeepers for deposits, see "Innkeepers."

§ 1. In general.

[a] (Iowa; 1896.)

A portion of certain goods destroyed by fire negligently set was held by the plaintiff on commission under contracts with the manufacturers. *Held*, that plaintiff had such an interest therein as bailee as entitled him to recover for their loss.—*Allen v. Barrett* (Iowa) 69 N. W. 272.

[b] (Minn.; 1895.)

A lienholder cannot defeat an action of replevin by the owner of the property, without proving the amount of his lien.—*Shearer v. Gunderson* (Minn.) 63 N. W. 103.

60 Minn. 525.

§ 2. The contract—Bailment or sale.

(Iowa; 1897.)

A contract between manufacturer and dealer provided that goods shipped to the latter should remain the property of the former till sold, the money and notes received on sales to be held by the consignee as collateral security to his debt to the consignor, to whom the sales notes were to be made payable; that the consignee should sell the goods at a reasonable profit, within a specified time, advance at time of shipment one-third the price in cash, and give his notes for the balance, or, at his option, execute his notes for full price; that the proceeds of sales should be applied to the consignee's account, but that he might take up any of his notes, either by cash or by sale notes, on such terms as might be agreed on, the sale notes to be guaranteed by him; that goods remaining at end of season, and accepted by the consignor, should be credited on the consignee's account; that the latter could appropriate proceeds after the consignor was fully paid; that no goods should be returned without the consignor's order; that said consignor carried no goods in hands of customers; and that the consignee must look to carrier for all loss or damage. Subsequent correspondence showed that the consignor recognized the consignee as his debtor. *Held* not a contract of bailment, but of sale.—*Norwegian Plow Co. v. Clark* (Iowa) 70 N. W. 808.

See, also, "Sale," § 6.

§ 3. Liability of bailee.

(Neb.; 1896.)

A bailee who contracts to keep the property in a particular place is not discharged from damages resulting from his failure to do so because he was compelled to remove it by the owner of the place designated.—*Butler v. Greene* (Neb.) 68 N. W. 496.

§ 4. — Negligence.

[a] (Iowa; 1895.)

The maker of a note, and plaintiff, who was surety thereon, delivered money to defend-

ant, who had originally taken the note as agent of one S., with which to take it up, and in consideration of which plaintiff, to defendant's knowledge, released a mortgage given by the maker of the note to secure him as surety. *Held*, that where defendant turned the money over to his principal without inquiry as to whether he still had the note, and the principal, on account of having negotiated the same, returns the money to the maker, defendant is liable to plaintiff for the sum he is required to pay as surety.—*Jones v. Foreman* (Iowa) 61 N. W. 846.

93 Iowa, 198.

[b] (Iowa; 1895.)

A clause, in a lease of personal property, providing that at its termination the lessee should "return said property in as good condition as it now is, usual wear excepted," does not make the lessee liable in damages, where the property has been destroyed by fire without fault on his part.—*Seever v. Gabel* (Iowa) 62 N. W. 669.

[c] (Iowa; 1897.)

By an agreement between S. and M., two notes owned by S. were deposited with a bank as security for a debt of \$49, due by S. to M., to be returned to S. on the payment of such sum to M. The cashier gave M. a receipt for the notes, "to be released on payment of \$49 by S." Such cashier knew the condition on which the notes had been deposited. *Held* that, where the cashier and bank delivered such notes to M. on his returning such receipt, they were liable to S. therefor, though they acted gratuitously in the matter.—*Serry v. Knepper* (Iowa) 70 N. W. 601.

[d] (Mich.; 1896.)

Defendant wrote to plaintiffs: "I have a customer for a diamond. Send me some. * * * I may have to keep them for ten days or two weeks." Plaintiffs forwarded a number of stones, with a memorandum thereof which recited, "These goods belong to us till paid for." Soon after defendant received the stones, they were stolen from him; and, in his letter to plaintiffs informing them of the theft, he asked them to send duplicate bills, telling them not to be alarmed, as he would pay every cent he owed them. *Held*, that the transaction was a bailment for the mutual advantage of both parties, and hence defendant was not liable for the loss unless he failed to use ordinary care.—*Knights v. Piella* (Mich.) 69 N. W. 92.

[e] (Neb.; 1896.)

The hirer of a team is liable to the owner for want of ordinary care in the use of the team.—*Purnell v. Miner* (Neb.) 68 N. W. 942.

§ 5. Action by bailor against bailee.

[a] (Mich.; 1896.)

In an action by a bailor against a bailee to recover the value of goods which the latter refused to redeliver, defendant may show, under the general issue, that the property was stolen from him without negligence on his part.—*Knights v. Piella* (Mich.) 69 N. W. 92.

[b] (Mich.; 1896.)

When defendant, in an action against a bailee to recover the value of goods which he refused to deliver, shows that his refusal was due to the loss of the goods by theft, the burden is on plaintiff to prove negligence on defendant's part.—*Knights v. Piella* (Mich.) 69 N. W. 92.

§ 6. Action for possession by bailee against owner.

(Minn.; 1895.)

A bailee entitled to the possession of the property for a specific time and purpose may recover the value of his special interest, against the owner, who took possession before the expiration of such time.—*Engel v. Scott & Hollister Lumber Co.* (Minn.) 61 N. W. 825.

60 Minn. 39.

BALLOTS.

See "Elections and Voters," §§ 10-14.

BANKRUPTCY.

See, also, "Assignment for Benefit of Creditors"; "Composition with Creditors"; "Insolvency."

(Mich.; 1894.)

A deed of land by a bankrupt's assignee, purporting to convey only the bankrupt's interest, conveys subject to all equities which existed against the bankrupt.—*De Mey v. Defer* (Mich.) 61 N. W. 524.
103 Mich. 239.

BANKS AND BANKING.

- I. IN GENERAL, §§ 1-7.
- II. DEPOSITS, §§ 8-17.
- III. COLLECTIONS, §§ 18-23.
- IV. OFFICERS, §§ 24-27.
- V. INSOLVENCY, §§ 28-39.
- VI. NATIONAL BANKS, §§ 40, 41.

Assessment of stock in name of owner, see "Taxation," § 31.

Banks as depositories of public funds, see "Depositories," § 2.

Checks, see "Negotiable Instruments," §§ 60-62.
Corporation succeeding to business of bank, assumption of bank's debts, see "Corporations," § 24.

Effect of check or draft of assignment, see "Assignment," § 10.

Embezzlement by bank officer, see "Embezzlement," § 4.

Taxation, see "Taxation," § 12.

I. IN GENERAL.

§ 1. Capital stock.

[a] (Mich.; 1896.)

A purchaser of registered bank stock cannot compel a transfer of the stock on the books of the bank, where the former owners are members of a firm which is indebted to the bank, as 3 How. Ann. St. § 320Sa8, provides that no transfer of stock shall be valid against a bank so long as the registered holder thereof is indebted to the bank.—*Citizens' State Bank of Monroeville, Ind., v. Kalamazoo County Bank* (Mich.) 69 N. W. 663.

[b] (Mich.; 1896.)

The lien in favor of a bank on the stock of registered holders to the extent of any debt due from such holders (3 How. Ann. St. § 320Sa8) is not waived by the by-law of a bank which provides that holders of stock desiring to sell shall give the bank an option to purchase; that if it fails to do so "at the expiration of ten days' time, the stockholders may sell at pleasure."—*Citizens' State Bank of Monroeville, Ind., v. Kalamazoo County Bank* (Mich.) 69 N. W. 663.

[c] (Mich.; 1896.)

Where no demand has been made on a bank for a transfer of stock till the stockholder's indebtedness to the bank has matured, the bank may refuse to transfer on its books the certificate of stock, which had theretofore been pledged to a third person, and for the stockholder's unpaid indebtedness may claim a superior lien, under 3 How. Ann. St. § 320Sa8, which provides, among other things, that "no transfer of stock shall be valid against a bank so long as the registered holder thereof shall be liable as to the bank for any debt due and unpaid."—*Michigan Trust Co. v. State Bank of Michigan* (Mich.) 69 N. W. 645.

[d] (Minn.; 1894.)

Where a part of an increase of capital stock of a bank was purchased by the president, and paid for with city funds deposited in other banks in his name as city treasurer, such stock is not absolutely void, though Gen. St. 1878, c. 33, § 18, as amended by Gen. Laws 1881, c. 77, § 3, provides that "no increase of capital stock shall be valid until the whole amount of the increase proposed is paid in cash."—*Dann v. State Bank* (Minn.) 61 N. W. 27.
59 Minn. 221.

§ 2. National bank reorganized as state bank.

(Mich.; 1895.)

Under 3 How. Ann. St. § 3208b6, authorizing the reorganization of a national bank as a state bank, and providing that "all assets of said dissolved national bank shall, by act of law, be vested in and become the property of such state bank," etc., where a national bank is reorganized into a state bank, which takes all its paper, assumes all its liabilities, and continues the same board of directors, the state bank retains the identity of the national bank so that it may enforce a written authority held by such bank for the indorsement of commercial paper.—*First Commercial Bank v. Talbert* (Mich.) 61 N. W. 888.
103 Mich. 625.

§ 3. Power of legislature—Submitting questions to people.

[a] (Iowa; 1897.)

Const. art. 8, § 5, requiring all acts and amendments thereto, authorizing and creating corporations with banking powers, to be first submitted to a vote of the people, relates only to banks of issue, and not to those organized under the general incorporation act (Code, c. 1, tit. 9), of which Acts 18th Gen. Assem. c. 208, fixing the liability of stockholders, is an amendment.—*State v. Union Stock Yards State Bank* (Iowa) 70 N. W. 752.

[b] (Wis.; 1895.)

Rev. St. 1878, § 4541, providing that any officer or agent of any bank or institution, or of any person, company, or corporation engaged in whole or in part in banking, or any person engaged in such business in whole or in part, who shall accept on deposit, or for safe-keeping, or to loan, any money, or any paper for collection, when he knows, or has good reason to know, that such bank, company, corporation, or person is unsafe or insolvent, shall be punished, etc., does not impair any banking right, and is therefore within the enacting power of the legislature, and does not require the vote of the people provided by Const. art. 11, § 5.—*In re Koetting* (Wis.) 62 N. W. 622.
90 Wis. 166.

§ 4. Powers.

(Mich.; 1895.)

Under 1 How. Ann. St. § 3142, 3 How. Ann. St. § 3208b, providing that it shall be lawful for banks to purchase, hold, and convey real estate mortgaged to them in good faith, and such as it shall purchase at sale under decrees or mortgage foreclosures under securities held by them, a bank can foreclose a mortgage by advertisement.—*Gage v. Sanborn* (Mich.) 64 N. W. 32.

§ 5. Liability in general.

(Iowa; 1895.)

R., who was engaged in shipping stock, drew on a firm through a bank, and the latter forwarded the drafts for collection with a letter to the firm, stating that "R. has drawn on you to-day for \$2,230. Will ship you next Monday night one carload of hogs and cattle." The draft was collected, but sufficient stock was not forwarded to balance it. The firm knew that the bank was engaged in banking business exclusively, and also the nature of R.'s business. *Held,*

that the bank was not liable for the balance of the draft.—*Littleton v. People's Bank (Iowa)* 63 N. W. 666.

§ 6. Discounts.

(Mich.; 1895.)

Defendant bank, in reply to the request of plaintiff bank for good paper indorsed by defendant, sent it "for discount and returns" a 90 days' note of ordinary discount paper form, indorsed by itself. The cashier testified on the first trial that the original note was rediscounted paper, and that this was the bank's usual method of having paper rediscounted. On the second trial he and one of the bookkeepers testified that the books of the bank do not show that defendant discounted it before transferring it to plaintiff. Defendant had the renewal notes executed every 90 days, and forwarded the discount to plaintiff. *Held*, that the note was rediscounted paper.—*First Nat. Bank v. Stone (Mich.)* 64 N. W. 487.

§ 7. Trust companies.

[a] (Minn.; 1895.)

An annuity, safe-deposit, and trust company organized under Gen. St. 1894, § 2841 et seq., is not a corporation "embracing banking privileges," within Const. art. 10, § 1, which refers only to banks of issue or circulation, provided for in article 9, § 13, and hence its stockholders are liable under article 10, § 3, for corporate debts to the amount of stock owned by them.—*International Trust Co. v. American Loan & Trust Co. (Minn.)* 65 N. W. 78, 62 Minn. 501.

[b] (Minn.; 1895.)

Where a trust company, having charge of several trust funds belonging to separate estates and parties, used in its private business part thereof, and its cash balance on hand was made up of money belonging to all the funds commingled, for the purpose of ascertaining how much money belonging to any particular fund it so used, only that fund's proportionate part of the cash on hand could be deducted from the cash balance due it.—*St. Paul Trust Co. v. Kittson (Minn.)* 65 N. W. 74, 62 Minn. 408; *Kittson v. St. Paul Trust Co., Id.*

II. DEPOSITS.

Receiving deposits after insolvency, see post, §§ 33-36.

Set-off of deposit against claim by assignee in insolvency, see post, § 29.

Presentment and payment of checks, see "Negotiable Instruments," § 62.

§ 8. Creating agency.

(Mich.; 1894.)

Plaintiff left with a bank certain mortgages, with instructions that the money received thereon was not to be credited to his account, but that the bank should immediately notify him, so that he could withdraw the same. Checks were given in payment, and the money, when received, was credited to a fictitious account. *Held*, that the bank received the money as plaintiff's agent, and not in such a way as to create the relation of debtor and creditor between them.—*In re Johnson (Mich.)* 61 N. W. 352, 103 Mich. 109; *Sherwood v. Central Michigan Savings Bank, Id.*

§ 9. In savings bank.

(Mich.; 1896.)

A by-law of a savings bank, which is organized under the general banking laws, and which is required by statute to have capital stock and stockholders, providing that the bank shall not be liable to a depositor for payments of the moneys deposited to the holder of his pass book, though it should be stolen from the depositor, is not binding on the depositor, unless he has notice thereof; Pub. Laws 1887, p. 233,

providing that deposits shall be paid to the depositor or his personal representatives.—*Ackenhansen v. People's Sav. Bank (Mich.)* 68 N. W. 118.

§ 10. Trust funds.

[a] (Iowa; 1896.)

A mortgagor of cattle sold them with the consent of the first mortgagee, and deposited the proceeds of the sale to his own credit in a bank, which was a second mortgagee, and applied the money to the payment of the debt due to the bank. Prior to the sale the mortgagor agreed with the first mortgagee that the proceeds of the sale should be sent to the bank to be applied on the first mortgage. *Held*, that the fact that the bank officers knew of the first mortgage, and of its priority, and that such mortgage was to be paid when the cattle were sold, was not such notice to the bank of the agreement between the mortgagor and the first mortgagee as would charge it with a knowledge of the trust character of the fund.—*Smith v. Crawford County State Bank (Iowa)* 68 N. W. 690.

[b] (Neb.; 1896.)

When a commission merchant deposits in bank money realized from the sale of live stock consigned to him, at a time when his account at the bank is overdrawn, the bank is accountable to the consignor, regardless of the question of notice and cannot apply the deposit in satisfaction of the consignee's indebtedness.—*Cady v. South Omaha Nat. Bank (Neb.)* 65 N. W. 906, 46 Neb. 756.

Rights after insolvency, see post, § 28.

§ 11. Repayment and right of recovery.

(S. D.; 1895.)

Pending a motion to set aside a default judgment, the sheriff levied on funds in the defendant bank under the judgment, satisfied the judgment, and deposited the funds in his own name in the bank, taking the usual negotiable certificate of deposit therefor, which he immediately transferred by indorsement to plaintiff. Plaintiff deposited the fund in his own name, subject to check, and drew a check thereon, which the bank paid, and afterwards the judgment was set aside. *Held*, that the bank could not withhold the money from plaintiff, nor assert that it was deposited in plaintiff's name on behalf of the judgment creditor.—*Martin v. Minnekahta State Bank (S. D.)* 64 N. W. 127.

§ 12. Application of deposits to debts due bank.

[a] (Neb.; 1896.)

When a customer of a bank who has overdrawn his account makes a deposit, the presumption is, in the absence of evidence, that the deposit was general, and was made and received towards the payment of the overdraft.—*Nichols v. State, 65 N. W. 774, 46 Neb. 715.*

[b] (Neb.; 1896.)

When a commission merchant deposits in a bank money realized from the sale of live stock consigned to him, at a time when his account at the bank is overdrawn, the bank is accountable to the consignor, regardless of the question of notice, and accordingly cannot apply the deposit in satisfaction of the merchant's indebtedness.—*Cady v. South Omaha Nat. Bank (Neb.)* 68 N. W. 358.

§ 13. — Set-offs.

[a] (Iowa; 1896.)

A bank has the right to set off a note owing to it by an insolvent depositor, though not due, against the depositor's account.—*Thomas v. Exchange Bank of Angus (Iowa)* 68 N. W. 780.

[b] (Iowa; 1896.)

Under Code 1873, §§ 2087, 2546, an action by the assignee of an open account is subject to all defenses, counterclaims, or causes of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against

the assignor before notice of the assignment; and a bank may set off a note of a depositor in its favor in an action against it on a check or draft drawn by such depositor, of which it had no notice until after it learned of the drawer's insolvency.—*Thomas v. Exchange Bank of Angus* (Iowa) 68 N. W. 780.

[c] (Minn.; 1897.)

Where a bank made a loan secured by indorsed notes, on insolvency of the borrower it could set off the loan against a deposit, though the loan was not due when the borrower made an assignment.—*Stolze v. Bank of Minnesota* (Minn.) 69 N. W. 813.

§ 14. Certificates of deposit.

[a] (Wis.; 1895.)

Where plaintiff, an illiterate man, accepted a certificate of deposit of \$200, and \$100 in cash, in lieu of a certificate of \$400 on which had been indorsed a payment of \$100, he is not estopped from recovering the \$100 payment indorsed on the original certificate, as having been made to an unauthorized person, by a delay of 14 months in discovering the fact of the indorsement.—*Devine v. Bank of Baldwin* (Wis.) 64 N. W. 589, 91 Wis. 68.

[b] (Wis.; 1895.)

When plaintiff, after accepting a certificate of deposit of \$200, and \$100 in cash, in lieu of a certificate of \$400 on which was indorsed a payment of \$100, sued to recover such \$100, as having been paid to an unauthorized person, 14 months after it was made, it was proper to allow the jury to consider the illiteracy of plaintiff and his wife in explanation of such delay.—*Devine v. Bank of Baldwin* (Wis.) 64 N. W. 589, 91 Wis. 68.

§ 15. Special deposit.

(S. D.; 1896.)

In an action by a county against a bank, to compel defendant to surrender to the county clerk, for cancellation, a county warrant, and satisfy a judgment obtained thereon by defendant, and to enjoin defendant from assigning or disposing of such judgment, the petition alleged, in substance, that defendant refused to satisfy such judgment out of moneys deposited in the bank pending the litigation for the purpose of paying any judgment it might obtain on such warrant, pursuant to an agreement between it and plaintiff's treasurer; that such treasurer and the clerk of the circuit court had, in behalf of the county, demanded of the bank that it apply such deposit to the payment of such judgment, and satisfy the same, and tendered a check for the amount; that the bank and the county treasurer and his bondsmen were each and all insolvent; and that defendant had assigned such warrant, and was about to assign and transfer such judgment, etc. *Held*, that the petition stated a cause of action.—*Fall River County v. Minnekahta State Bank* (S. D.) 67 N. W. 617.

§ 16. Duty as to customers' checks.

[a] (Minn.; 1896.)

When a bank refuses to pay a check drawn by a depositor against a fund sufficient to pay it, the depositor is not, in an action for the slander, restricted to nominal damages.—*Svensen v. State Bank* (Minn.) 65 N. W. 1086, 64 Minn. 40.

[b] (Neb.; 1897.)

A customer's bank check should be presented for payment with all dispatch consistent with the circumstances of the case and the transaction of other commercial business.—*Western Wheeled Scraper Co. v. Sadilek* (Neb.) 69 N. W. 765.

§ 17. Cashing forged checks—Rights of bank and depositor.

[a] (Iowa; 1897.)

When a fund on deposit is reduced by the wrongful payment of a forged check, the de-

positor is entitled to interest on the amount so paid out from the time of its payment.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[b] (Iowa; 1897.)

A drawer of a check owes no duty to the drawee or to an indorsee to investigate as to the genuineness of an indorsement, or for that purpose to examine with diligence the check upon its return.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[c] (Iowa; 1897.)

A bank which delivered to the supposed agent of a borrower its check on another bank for the amount of the loan, payable to the borrower, is not bound by such agent's act in procuring the money from a third bank on a forged indorsement of the borrower's name, though he was at the time acting as the drawer's agent.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[d] (Iowa; 1897.)

Where a check drawn by plaintiff bank on defendant bank was presented to intervener with a forged indorsement of the name of the payee, and, before cashing it, intervener telephoned plaintiff regarding the check, and there is a dispute as to whether plaintiff's officer, who replied, stated merely that the check was "all right," or stated that it would be "all right to cash it," the burden, as between plaintiff and defendant, is on the latter to show that intervener was authorized to pay it in the form in which it was presented.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[e] (Iowa; 1897.)

A bank which has drawn a check on another bank is justified in considering a general inquiry by telephone by a third bank to which the check has been presented as relating merely to the genuineness of its signature and the existence of funds with which to meet it.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[f] (Iowa; 1897.)

It is the duty of a bank to which a check drawn by a depositor, and payable to order, is presented by one claiming under an ostensible indorsement by the payee, to ascertain at its peril that the indorsement is genuine.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[g] (Minn.; 1895.)

Where the banker, on whom a check has been drawn, pays it, he cannot recover the amount, though the drawer's signature was forged, if the party to whom he paid it was a bona fide holder. *Canty, J., dissenting.*—*Germania Bank v. Boutell* (Minn.) 62 N. W. 327.

60 Minn. 189.

III. COLLECTIONS.

§ 18. Negligence of collecting bank.

[a] (Neb.; 1897.)

A bank receiving for collection a customer's check must pay it upon the receipt thereof during business hours, or promptly give notice of its dishonor, in order to charge the drawer and indorsers.—*Western Wheeled Scraper Co. v. Sadilek* (Neb.) 69 N. W. 765.

[b] (Neb.; 1897.)

A bank undertaking to collect a customer's check is negligent if it sends it for payment direct to the drawee bank, when there is in the same town another bank in good standing.—*Western Wheeled Scraper Co. v. Sadilek* (Neb.) 69 N. W. 765.

[c] (Wis.; 1896.)

Plaintiff, as indorsee of notes due August 4th, sent them to defendant bank for collection. Prior to their receipt by defendant, the bank building was burned, but on August 1st the bank resumed business, and notified the maker of the notes. *Held*, that the defendant, having

undertaken the collection of the notes, was not excused from liability for its negligence in not protesting the notes by reason of the confusion consequent upon the fire. *Merchants' State Bank v. State Bank of Phillips* (Wis.) 69 N. W. 170.

§ 19. Employing subagent.

(S. D.; 1894.)

A bank at which a note is payable, and to which it is sent for collection, has no implied authority to employ a bank in another city as its subagent to collect the note, so as to make a payment to such subagent a payment to the owner of the note.—*Sherman v. Port Huron Engine & Thresher Co.* (S. D.) 66 N. W. 1077.

§ 20. Rights and liabilities as to proceeds.

[a] (Mich.; 1895.)

Where a mortgage is sent to a bank for collection, with direction to remit, the relation of creditor and debtor is not established between the sender and the bank, where the latter fails to remit, and therefore, on the insolvency of the bank, a trust will be imposed on its assets in favor of the sender, as against general creditors of the bank.—*Wallace v. Stone* (Mich.) 65 N. W. 113.

[b] (N. D.; 1896.)

Intervenor, holding a certificate of deposit in L. bank, indorsed it for collection to A. bank, which forwarded it for collection to N. bank. N. surrendered the certificate on receipt of L.'s draft, and credited the amount thereof to A., which issued its certificate of deposit to intervenor at his request. The draft not being paid, N. charged back the amount thereof to A., and intervenor, though after A.'s suspension, surrendered his certificate of deposit in A., and A. credited N. with the amount thereof. At no time since has N. claimed to own the draft, or to have any interest therein save as collateral to its claim against A. for overdraft. *Held*, that intervenor owns the draft, so that N. cannot recover dividends thereon for the purpose of applying them to A.'s indebtedness to it for overdraft.—*National Bank of Commerce v. Johnson* (N. D.) 69 N. W. 49.

[c] (Wis.; 1895.)

Where a draft was sent to defendant bank for collection, and defendant, at the request of the drawee, advanced the funds for payment thereof, and mailed a draft to the payee, stating that it was "in payment of the draft" sent to it for collection, defendant, on discovering the insolvency of said drawee, could not intercept the letter, and destroy the draft so mailed.—*Canterbury v. Bank of Sparta* 64 N. W. 311, 91 Wis. 53.

§ 21. — On insolvency of collecting or remitting bank.

[a] (Neb.; 1897.)

That the correspondent has credited the account of the remitting bank with the proceeds of the collection does not preclude the owner from recovering such proceeds of the correspondent upon the insolvency of the remitting bank.—*Branch v. United States Nat. Bank* (Neb.) 70 N. W. 34.

[b] (Wis.; 1895.)

Where a bank converted the proceeds of a draft received by it for collection, by sending same to its correspondent bank for collection and credit on its overdraft on the latter bank, the owner of the draft cannot recover such proceeds, as a trust fund, from the receiver, subsequently appointed, of the bank to which he delivered it for collection, though the correspondent bank has collateral security for the overdraft, as such proceeds never came to the possession of the receiver.—*Thummiller v. Barth* (Wis.) 62 N. W. 94, 89 Wis. 381.

§ 22. Medium of payment.

(Mich.; 1895.)

Testimony of one witness that a payment on a mortgage was made to a bank in money, and not by a certificate of deposit held by the person making it against the bank, and the testimony of the other witness to the payment that he thinks the payment was so made, though contradicted by the testimony of a clerk in the bank that if the money had been first procured on the certificate, and then paid over, it would have been marked on the certificate register, and that the cash account would not have balanced as it did, is sufficient to prove that the payment was made in money. *Hooker and Montgomery, JJs.*, dissenting.—*Wallace v. Stone* (Mich.) 65 N. W. 113.

§ 23. Lien of bank on collections.

(Mich.; 1895.)

A bank has a lien on a note deposited for collection by a debtor before maturity of his own debt, remaining uncollected and unassigned in its hands after his debt matures, for its payment.—*Gibbons v. Hecox* (Mich.) 63 N. W. 519.
105 Mich. 509.

IV. OFFICERS.

Receiving deposits after insolvency, see post, §§ 33-36.

§ 24. Representation of bank by officers.

[a] (Iowa; 1896.)

The president of a bank has authority by virtue of his office to make a valid assignment of a judgment in favor of the bank.—*Guernsey v. Black Diamond Coal & Mining Co.* (Iowa) 68 N. W. 777.

[b] (Iowa; 1897.)

The interest of B. as chattel mortgagee being as cashier of a bank, the word "us," in an agreement signed in his name and given the mortgagor, reciting, "It is hereby agreed that B., cashier, shall not take possession * * * until default therein, unless such action shall be necessary to protect us against other creditors," does not refer to the mortgagor and B., but to the bank.—*Gilmore v. Kilpatrick-Koch Dry-Goods Co.* (Iowa) 70 N. W. 175.

[c] (Neb.; 1896.)

Where one purchased negotiable paper from the president of a bank with a guaranty of payment executed by him apparently in behalf of the bank, on his representation that the paper belonged to the bank, and the transaction occurred in the banking house where the president was apparently engaged in performing his duties as such, the bank was liable on the guaranty.—*City Nat. Bank v. Thomas* 65 N. W. 895, 46 Neb. 861.

[d] (S. D.; 1896.)

A bank to which land was conveyed by one of its officers individually for its full value, subject to a mortgage executed by him individually, to which the bank was in no manner a party, was not liable to the mortgagee for a loss sustained by the latter because of worthless securities received in exchange for a discharge of the mortgage, given at the time of the transfer to the bank, where the securities were the individual property of officers of the bank, and the discharge was obtained by such officers individually.—*Staples v. Huron Nat. Bank* (S. D.) 66 N. W. 314.

[e] (Wis.; 1897.)

Where the directors of a bank authorized the president, cashier, and two of the directors as a committee to purchase certain land at a fixed price, the president and cashier had no authority to authorize a third person to buy the land at an increased price, so as to bind the bank to pay such person a commission therefor.—*Bryant v. Bank of Commerce* (Wis.) 70 N. W. 480.

§ 25. — Notice to officers.**[a] (Iowa; 1897.)**

Evidence by a cashier of a bank that in the purchase of a note neither he nor the other officers of the bank had notice of matters pleaded by defendant as a defense to the note, was not conclusive evidence that the other officers had no notice thereof.—*Bennett State Bank v. Schloesser* (Iowa) 70 N. W. 705.

[b] (S. D.; 1897.)

Where a partner sells to a bank of which he is cashier a note due the firm, and the bank acts wholly through its discount committee, of which he is not a member, it is not affected with knowledge possessed by him of infirmities in the note.—*National Bank of Commerce v. Feeney* (S. D.) 70 N. W. 874.

[c] (Wis.; 1896.)

On an issue whether the plaintiff bank had knowledge of the preference of a creditor of its debtor, it was proper to charge that the bank was not chargeable with knowledge of its directors acting individually, but that the jury might consider the knowledge of the directors as tending to prove knowledge on the part of the bank.—*Continental Nat. Bank v. McGeoch* (Wis.) 66 N. W. 606.

92 Wis. 286.

§ 26. Authority of cashier.**[a] (Mich.; 1895.)**

A cashier of a bank, to whom its entire management is intrusted by the directors, has authority to have its paper rediscounted in the usual course of business; and his authority is not limited to extraordinary occasions, not admitting of delay.—*Davenport v. Stone* (Mich.) 62 N. W. 722.

104 Mich. 521.

[b] (Minn.; 1895.)

The power of a bank cashier to transfer notes and securities held by the bank can be questioned only by the bank or its representative.—*Haugan v. Sunwal* (Minn.) 62 N. W. 398.

60 Minn. 367.

[c] (Wis.; 1897.)

A tax against a bank, based on the amount of taxable property shown by return of its cashier, cannot be questioned by its receiver, any more than by it, though it had no taxable property; it not appearing that it was insolvent when return was made and tax levied, or that the cashier acted in bad faith.—*Hamacker v. Commercial Bank* (Wis.) 70 N. W. 295.

§ 27. — Estoppel to deny authority.**[a] (Mich.; 1895.)**

A cashier loaned the bank's money, without knowledge of the directors, to members of a land company, including plaintiff, and took their notes therefor, but, in consideration of a transfer of his interest to the bank, released plaintiff from liability as indorser on notes of the other members. Later, to prevent failure of the company and loss to the bank, a new company was formed, which paid to such cashier, for the bank, money sufficient to pay all debts of the old company to the bank, including plaintiff's note. The cashier converted most of the money to his own use, and the rest was used by the bank, but none of the notes were surrendered. The directors disclaimed all knowledge of any of such transactions except the receipt by the cashier of the money, which they claimed he received in his former capacity of treasurer of the first land company. Complete control of the bank's affairs was left to the cashier, and the directors, who rarely met, allowed him to do as he chose. *Held*, that plaintiff's note was paid, and the directors were estopped to repudiate the release by the cashier.—*Wing v. Commercial & Sav. Bank* (Mich.) 61 N. W. 1009.

103 Mich. 565.

[b] (Mich.; 1895.)

A bank which intrusts its entire management to the cashier, and its assignee, are es-

topped to deny his authority to guaranty the payment of its paper upon his having it rediscounted for the bank.—*Davenport v. Stone* (Mich.) 62 N. W. 722.

104 Mich. 521.

[c] (Mich.; 1895.)

Where the cashier, intrusted by its directors with its entire management, has been accustomed, in having paper rediscounted, to guaranty its payment, the bank will be estopped from denying his authority to so guaranty it.—*First Nat. Bank v. Stone* (Mich.) 64 N. W. 487.

[d] (Mich.; 1897.)

Under an agreement with the cashier of defendant bank, complainant company mortgaged its property to secure bonds, which were left in the mortgagee's possession, to be delivered to the cashier for sale, on his demand, the proceeds to be credited on complainant's debt to the bank. In the cashier's absence, complainant was notified that certain notes given to the bank were due, and the assistant cashier, under instructions from the directors, agreed to extend credit till the cashier should return, on condition that the unsold bonds should be held by the bank as collateral, and complainant thereupon gave a note reciting that it was secured by said bonds. The cashier, on his return, surrendered this note to complainant, taking renewal notes, with the agreement that the bonds should be security for all complainant's indebtedness to the bank; and, after obtaining the bonds from the mortgagee, the cashier pledged them to the bank as collateral security for his own debt. *Held*, that the bank could not apply the bonds on the cashier's indebtedness, but should hold them as collateral security for complainant's debt.—*Detroit Motor Co. v. Third Nat. Bank* (Mich.) 69 N. W. 726.

V. INSOLVENCY.

Rights as to collections, see ante, § 21.

Liability of public officer for moneys lost by

failure of bank, see "Office and Officer," § 21.

Receiving deposits after insolvency, effect of repeal of statute, see "Statutes," § 33.

§ 28. Special deposits and trusts.**[a] (Iowa; 1896.)**

A banking partnership, being insolvent, executed a number of deeds and mortgages to secure different creditors, and a trust deed to secure depositors. *Held*, construing the deeds as an assignment for the benefit of creditors, that the claims of the depositors were not trust obligations, entitling them to priority over the general creditors.—*Elwell v. Kimball* (Iowa) 69 N. W. 286.

[b] (Mich.; 1894.)

The fact that a bank, which receives money as the agent of another, mingles it with its own funds, does not prevent the imposition of a trust thereon on the insolvency of the bank, if the money on hand at no time prior to the bank's failure is reduced below the amount so received in trust by the bank.—*In re Johnson* (Mich.) 61 N. W. 352, 103 Mich. 109; *Sherwood v. Central Michigan Savings Bank*, *Id.*

[c] (Mich.; 1894.)

The fact that a special depositor, on being falsely told that there were not sufficient funds in bank to pay the amount held in trust by the bank for him, receives in part payment a draft, which is never paid, is not a waiver of his right to impress on the assets of the bank a trust in his favor.—*In re Johnson* (Mich.) 61 N. W. 352, 103 Mich. 109; *Sherwood v. Central Michigan Savings Bank*, *Id.*

[d] (Neb.; 1894.)

Where one makes a loan to a purchaser of land of the amount necessary to pay therefor, receiving a mortgage to secure it, and deposits the money in a bank, to be paid over to the vendor, and the cashier of the bank falsely

states to the vendor that he has the right to hold the money until a defect in the title can be cured, and sends the vendor a certificate of deposit payable when the title is straightened, and in a few days the bank becomes insolvent, the vendor is not a voluntary creditor of the bank, and the money is held in trust for him, and the title thereto does not pass to the receiver.—*State v. State Bank (Neb.)* 61 N. W. 252, 42 Neb. 896.

[c] (*Neb.*; 1896.)

A fund which comes into the possession of a bank, with respect to which the bank has but a single duty to perform, which is to deliver it to the person entitled thereto, is a trust fund incapable of being commingled with general assets of the bank subsequently transferred to a receiver.—*Capital Nat. Bank v. Coldwater Nat. Bank (Neb.)* 69 N. W. 115.

[f] (*Wis.*; 1895.)

That a banker, who has since assigned for the benefit of creditors, knew that moneys deposited with him by plaintiff were county moneys, and that the assignee came into possession of moneys in the bank at the time of the failure, does not sufficiently identify the moneys in the hands of the assignee, so as to entitle plaintiff to a preference.—*Stevens v. Williams*, 64 N. W. 422, 91 Wis. 58.

[g] (*Wis.*; 1895.)

When a bank, in which trust funds have been deposited, assigns for the benefit of its creditors, the cestui que trust can recover any portion of such funds that he can trace and identify in the hands of the assignee.—*Dowie v. Humphrey*, 64 N. W. 315, 91 Wis. 98.

[h] (*Wis.*; 1895.)

Where, on failure of a bank, it appears that money deposited in trust has been dispersed, the cestui que trust must prove his claim as a general creditor.—*Dowie v. Humphrey* 64 N. W. 315, 91 Wis. 98.

§ 29. Set-off of deposit against claim by assignee.

(*Neb.*; 1896.)

In an action by the assignee of an insolvent banking corporation to recover money due it, defendant may set off deposits due him from the bank at the time of its failure.—*Bernstein v. Coburn (Neb.)* 68 N. W. 1021.

§ 30. Remedies and proceedings on insolvency.

[a] (*Minn.*; 1896.)

Under Gen. St. 1894, §§ 5900-5903, a creditor of a corporation having banking powers may, without having obtained a judgment at law against it, maintain an action, in behalf of himself and all other creditors who may choose to become parties thereto, against the corporation, to obtain the relief provided by said sections.—*American Savings & Loan Ass'n v. Farmers' & Merchants' State Bank (Minn.)* 67 N. W. 800.

[b] (*Minn.*; 1896.)

Where creditors of an insolvent banking corporation, in accordance with the terms of, and in response to, an order of the court, made and published under the provisions of section 5911, have filed their claims in the shape of an intervenor's complaint, made under oath, they become parties to the proceeding or action, and no formal order of court making them parties is required.—*Palmer v. Bank of Zumbrot* (Minn.) 67 N. W. 893; *Same v. George*, 1d.; *Thacher v. Woodbury*, 1d.

[c] (*Neb.*; 1897.)

An insolvent bank, in a proceeding under Comp. St. c. 8, to wind up its business, remains an interested party even after the appointment of a receiver, and may resist an application for an order conferring on the receiver authority not granted by the order appointing him.—*State v. German Sav. Bank (Neb.)* 70 N. W. 221.

§ 31. — Enforcing stockholders' liabilities through receiver or by petition in intervention.

[a] (*Iowa*; 1897.)

Acts 18th Gen. Assm. c. 208, § 1, makes each stockholder of a banking corporation individually liable to the creditors over and above the stock held by him, to an amount equal to his shares, and provides that, should the bank become insolvent, and its assets prove insufficient, the stockholders may be compelled to pay such deficiency in proportion to the amount of stock held by each, not to exceed the extent of the additional liability. *Held*, that it is not necessary for the receiver to first exhaust all the assets before enforcing the stockholders' liability.—*State v. Union Stock Yards State Bank (Iowa)* 70 N. W. 752.

[b] (*Iowa*; 1897.)

In a proceeding under Code, § 1572, to wind up an insolvent bank, the court may, on the application of the receiver, make an ex parte order for an assessment against the stockholders, to discharge their liability, under Acts 18th Gen. Assm. c. 208, § 1, subject to the right of each stockholder to contest such liability when sued for payment of the assessment.—*State v. Union Stock Yards State Bank (Iowa)* 70 N. W. 752.

[c] (*Iowa*; 1897.)

In a suit by the state, under Code, § 1572, to wind up an insolvent bank, the liability of the stockholders under Acts 18th Gen. Assm. c. 208, is not directly to the creditors, but constitutes a fund for the debts of the bank, which the receiver is authorized to collect and distribute.—*State v. Union Stock Yards State Bank (Iowa)* 70 N. W. 752.

[d] (*Minn.*; 1896.)

Where a creditor of an insolvent banking corporation institutes an action against it under the provisions of Gen. St. 1894, c. 76, §§ 5900, 5901, and secures the appointment of a receiver, but fails to take any steps towards bringing the stockholders of the insolvent into the action, any other creditor may, upon an ex parte application to the court, showing the necessity of enforcing the statutory liability of such stockholders, obtain an order allowing him, in his own behalf, and in behalf of all other creditors, to intervene and file a complaint making the stockholders parties defendant, and to bring them into the action for the purpose of ascertaining and determining their statutory liability in the same proceeding.—*Palmer v. Bank of Zumbrot* (Minn.) 67 N. W. 893; *Same v. George*, 1d.; *Thacher v. Woodbury*, 1d.

[e] (*Minn.*; 1896.)

In the interlocutory decree made upon default in a proceeding instituted by a creditor of an insolvent banking corporation under Gen. St. 1894, c. 76, §§ 5900, 5901, the receiver appointed therein was directed to proceed by suit against the stockholders of the bank to ascertain and determine their statutory liability. Thereafter, by a cross bill, the stockholders of the company were made parties to the action. *Held*, that the error in the interlocutory decree was thereby rendered harmless.—*Palmer v. Bank of Zumbrot* (Minn.) 67 N. W. 893; *Same v. George*, 1d.; *Thacher v. Woodbury*, 1d.

[f] (*Minn.*; 1896.)

When a creditor has been allowed, upon application, and by order of the court, to intervene and file a complaint, and to bring stockholders into an action instituted under the provisions of sections 5900, 5901, relating to insolvent banking corporations, and they have been brought in, there is but one action or proceeding pending; and as the insolvent corporation is already a defendant therein, it need not be named as a defendant in said complaint, nor again be served with a summons.—*Palmer v. Bank of Zumbrot* (Minn.) 67 N. W. 893;

Same v. George, Id.; Thacher v. Woodbury, Id.

[g] (Minn.; 1896.)

Where a creditor of an insolvent banking corporation institutes an action against it under Gen. St. 1894, c. 76, §§ 5900, 5901, and secures the appointment of a receiver, but fails to take steps towards bringing the stockholders into the action, and another creditor is permitted to file a complaint which brings the stockholders in, the original plaintiff cannot then be allowed to amend his complaint to the same end.—Palmer v. Bank of Zumbrota (Minn.) 67 N. W. 893; Same v. George, Id.; Thacher v. Woodbury, Id.

[h] (Minn.; 1897.)

The attorney general sued to forfeit the charter of a bank organized under state laws, for failure to reduce an indebtedness of the president of the bank to the statutory limits, as required by Gen. St. 1894, §§ 2525, 2628. Thereafter, before judgment, a creditor, with the consent of the attorney general, and with leave of court, intervened in the action, filed a complaint, and brought in stockholders as defendants to enforce their double liability. *Held*, that the action was fully authorized by Gen. St. 1894, §§ 5900-5902, and creditors might, during the pendency of such action, enforce such liability against the stockholders under section 5905, or proceed as in the case at bar.—State v. Merchants' Bank (Minn.) 70 N. W. 803.

§ 32. Payments made after insolvency with intent to create preferences.

[a] (Mich.; 1897.)

To bring a case within 3 How. Ann. St. § 3208e6, providing that payments by a bank, "either after the commission of an act of insolvency or in contemplation thereof, * * * with a view to the preference of one creditor over another," are void, there must be, not only an act or a contemplation of insolvency, and a payment resulting in a preference, but the payment must be made with a view to create the preference.—Stone v. Jenison (Mich.) 70 N. W. 149.

[b] (Mich.; 1897.)

For three days there was a slight run on a bank, which suspended on the third day at 3 p. m. The cashier believed the bank had sufficient assets to pay all depositors could it avoid suspension, and in the forenoon of the third day paid defendant his deposit. He testified that in making payments he acted to protect the bank, and not with a view to making preferences. During the run, and before the payment to defendant, he had persuaded some depositors not to withdraw, in one instance giving as a reason for the request the closeness of the money market. *Held*, that a receiver of the bank could not recover the amount so paid defendant, on the ground that it was a payment after an act of insolvency, or in contemplation thereof, with a view to giving a preference (3 How. Ann. St. § 3208e6).—Grant, J., holding that there was no act of insolvency; Moore and Hooker, JJ., holding (Long, C. J., and Montgomery, J., dissenting) that there was no evidence that the payment was made with a view to create a preference.—Stone v. Jenison (Mich.) 70 N. W. 149.

§ 33. Criminal prosecution for receiving deposits after insolvency.

[a] (Iowa; 1895.)

On trial of an indictment of a banker for receiving deposits when insolvent, it was proper to charge that, though the deposit was received by defendant's son after defendant had instructed him to refuse deposits, if defendant, on learning that the deposit was so received, placed it among the funds of the bank, he "knowingly accepted and received" it, within the statute.—State v. Eifert (Iowa) 65 N. W. 309.

[b] (Iowa; 1896.)

McClain's Code, §§ 1824, 1825, provide that if any bank shall receive or accept any deposit when insolvent, any officer or managing party thereof, knowing of such insolvency, who shall knowingly permit the receiving of any such deposit as aforesaid, shall be guilty, etc. *Held*, that an officer of an insolvent bank, who, knowing of its insolvency, permits or connives at the receiving of deposits, is guilty of the offense described, whether he is a managing party or not.—State v. Yetzer (Iowa) 66 N. W. 737.

[c] (Iowa; 1896.)

It is not necessary, to constitute a violation of such statute, that the deposit must be received in the bank building or rooms, but the receipt of money on deposit for the bank outside of its rooms is sufficient.—State v. Yetzer (Iowa) 66 N. W. 737.

[d] (Iowa; 1896.)

Where an officer of a bank, knowing the bank to be insolvent, assists, advises, etc., the keeping of the bank open for the receipt of deposits, and while it is so kept open a particular deposit is received, such officer is guilty of a violation of such statute, though the money is actually received by another.—State v. Yetzer (Iowa) 66 N. W. 737.

[e] (Minn.; 1895.)

Two or more persons, partners as bankers, may jointly commit the crime of receiving deposits with knowledge that they and the bank are insolvent.—State v. Smith (Minn.) 64 N. W. 1022.

62 Minn. 540.

[f] (Wis.; 1897.)

To receive money, giving a certificate of deposit therefor payable at a certain time, with interest, is receiving it "on deposit," within Rev. St. § 4541, declaring it an offense for an officer of a bank, when knowing it is insolvent, to receive money "on deposit" or "for safe-keeping" or "to loan" or "for collection."—State v. Shove (Wis.) 70 N. W. 312.

§ 34. — Officers of national bank.

[a] (Iowa; 1895.)

Acts 18th Gen. Assem. c. 153, §§ 1, 2, making it a felony for "any officer" of a bank to receive deposits with knowledge that the bank is insolvent, apply to officers of national as well as other banks.—State v. Fields (Iowa) 62 N. W. 653.

[b] (Iowa; 1895.)

Acts 18th Gen. Assem. c. 153, §§ 1, 2, making it a felony for "any officer" of a bank to receive deposits with knowledge that the bank is insolvent, are not void, in so far as they apply to national bank officers, as an attempt to control and regulate the operations of national banks.—State v. Fields (Iowa) 62 N. W. 653.

§ 35. — Indictment.

(Iowa; 1895.)

Under Code, § 4305, providing that an indictment shall be sufficient if it states the act complained of in such manner as to enable a person of common understanding to know what is intended to be charged, an indictment under Acts 18th Gen. Assem. c. 153, § 2, making it a penal offense for a banker, knowing himself to be insolvent, to receive a deposit, which alleges that defendant did accept and receive a deposit of money from M., sufficiently shows that the money belonged to M.—State v. Eifert (Iowa) 65 N. W. 309.

§ 36. — Evidence.

[a] (Neb.; 1896.)

On trial on an indictment under Comp. St. 1895, §§ 637, 638, for receiving a deposit in an insolvent bank, defendant offered to show that the deposit was made by a customer whose account was at the time overdrawn in an amount larger than the deposit. *Held*, that the evidence was admissible as tending to show that

the deposit was made and accepted as an application on the depositor's indebtedness to the bank. *Nichols v. State*, 65 N. W. 774, 46 Neb. 715.

[b] (Neb.; 1897.)

On the question whether an officer of a bank received on deposit, knowing the insolvency of the bank, \$300, for which a certificate of deposit was given, it is immaterial that part of the amount was a certificate of deposit given by the bank, and then due, with accrued interest thereon, which was then surrendered. — *State v. Shove* (Wis.) 70 N. W. 312.

[c] (Wis.; 1897.)

To show insolvency of a bank at the time an officer was charged with receiving a deposit, knowing its insolvency, evidence of the amount of deposits with it at the time, and the amount of paper held by the bank, and the worthlessness of such paper, is admissible. — *State v. Shove* (Wis.) 70 N. W. 312.

§ 37. Receivers.

[a] (Iowa; 1895.)

The right of a stockholder to obtain the appointment of a receiver of a state banking corporation is not prohibited by Code, § 1572, providing that the auditor, when satisfied from its report that such corporation is insolvent, shall direct the attorney general to commence proper proceedings to have a receiver appointed; or by Code, tit. 20, c. 6, providing for ousting corporations from their franchises and winding up their affairs. — *Dickerson v. Cass County Bank* (Iowa) 64 N. W. 395.

[b] (Iowa; 1895.)

Code, § 2903, provides that, on petition of either party to a civil proceeding, wherein he shows that he has a probable right or interest in the property which is the subject of the controversy, and that such property or its use is in danger of being injured, the court, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly injured, may appoint a receiver. *Held*, that a court of equity has jurisdiction to appoint a receiver of a state banking corporation on the petition of a stockholder. — *Dickerson v. Cass County Bank* (Iowa) 64 N. W. 395.

See, also, ante, § 31.

§ 38. Presentation and payment of claims.

[a] (Mich.; 1895.)

The receipt by a person of a dividend from the assignee of an insolvent bank does not estop him from demanding payment in full of his claim against the bank, on the ground that a trust was imposed on the assets in his favor as against the general creditors. — *Wallace v. Stone* (Mich.) 65 N. W. 113.

[b] (Minn.; 1896.)

In an action under Gen. St. 1894, c. 76, to wind up an insolvent banking corporation, the state of Minnesota is a preferred creditor. — *State v. Bell* (Minn.) 67 N. W. 212.

64 Minn. 400.

§ 39. Liability of stockholders.

[a] (Minn.; 1895.)

Under Gen. St. 1894, § 2501, providing that stockholders of banks of deposit and discount shall be individually liable, in an amount equal to double the amount of stock owned by them, for all debts of the bank, and that such liability shall continue for one year after a transfer of their stock, the individual liability of a stockholder who transferred his shares in good faith is limited to such debts as were incurred prior to the transfer. — *Harper v. Carroll* (Minn.) 64 N. W. 145.

62 Minn. 152.

[b] (Minn.; 1896.)

A pledgee of stock, by registering it on the books of the bank as transferred to him absolutely, voluntarily makes himself a stockholder,

and is liable as such upon the subsequent insolvency of the bank. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[c] (Minn.; 1896.)

Where the amount of a judgment in an action under Gen. St. 1894, c. 76, to enforce the double liability of stockholders, exceeds the amount of debts to be satisfied thereby, it should provide for issuing successive executions, on order of the court, first for each stockholder's pro rata share of the indebtedness and expenses, and afterwards for subsequent successive executions for such additional pro rata amounts as may be made necessary by failure to collect from insolvent stockholders. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[d] (Minn.; 1896.)

A transfer of stock was not registered on the books of the bank until after the assignment, and it was then registered as a transfer from the stockholder to the bank. *Held*, that it was error to hold the assignor liable only as a transferor on the indebtedness existing at the time of the transfer. He should have been held liable as a stockholder. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[e] (Minn.; 1896.)

The creditors are entitled to judgment against each stockholder for the full amount of his statutory liability, though this exceeds the aggregate of all the indebtedness and the costs and expenses of the action. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[f] (Minn.; 1896.)

A transferee of stock, upon the insolvency of the bank within a year after the transfer, is liable only for his share of the existing indebtedness which also existed at the time of the transfer; but he is not released because this amount has been collected from others reached before him, in the order of liability adopted by the court. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[g] (Minn.; 1896.)

The court may, in its discretion, on application and notice, stay the docketing of the judgment against a particular stockholder on the giving of bond to pay assessments on the judgment whenever ordered by the court. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[h] (Minn.; 1896.)

Since, under Gen. St. 1894, § 2501, a stockholder who has transferred his stock within a year before the insolvency is only secondarily liable, execution should not issue against him until his transferee fails to respond to execution. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[i] (Minn.; 1896.)

The liability, under Gen. St. 1894, § 2501, of one who has transferred his stock within a year prior to the insolvency, is secondary only to the liability of the succeeding holders of the same stock, and not to the liability of all subsequent transferees of other stock. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[j] (Minn.; 1896.)

A transferee of stock, upon the insolvency of the bank within a year after the transfer, is entitled to the benefit of any dividend realized from the corporate assets. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[k] (Minn.; 1896.)

Creditors are entitled to recover receiver's fees, in addition to their debts and statutory costs and disbursements, not exceeding the amount of the stockholders' statutory liability. — *Harper v. Carroll* (Minn.) 69 N. W. 610.

[l] (Neb.; 1896.)

The double liability of a stockholder of a banking corporation or institution, as fixed by Const. art. 11, § 7, can be enforced by one creditor of the corporation or institution only for the benefit of all the creditors, or by the receiver of the corporation or institution when there is a

receiver.—*Farmers' Loan & Trust Co. v. Funk* (Neb.) 68 N. W. 520.

[m] (Neb.: 1896.)

Const. art. 11, § 4, relating to miscellaneous corporations, and providing that before the enforcement of individual liability of stockholders there must be judicially ascertained the indebtedness proposed to be enforced, and that the assets of the corporation must be first extinguished, applies to the liability of stockholders of banking corporations or institutions as fixed by section 7.—*Farmers' Loan & Trust Co. v. Funk* (Neb.) 68 N. W. 520.

[n] (Neb.: 1896.)

Const. art. 11, § 7, making every stockholder in a banking corporation or institution individually liable to its creditors over and above the amount of stock held by him, to an amount equal to his stock, for all liabilities accruing while he remained a stockholder, is enforceable without special statutory enactments.—*Farmers' Loan & Trust Co. v. Funk* (Neb.) 68 N. W. 520.

See, also, ante, § 31.

In trust company, see ante, § 7.

VI. NATIONAL BANKS.

Prosecution of officer for receiving deposits after insolvency, see ante, § 34.

Reorganization as state banks, see ante, § 2.
Liability for exacting usury, see "Usury," §§ 15, 16.

§ 40. Transactions with state banks.

(Iowa: 1897.)

A note payable to a national bank was indorsed by a state bank which was in process of dissolution, and to whose business the national bank succeeded. The name of the national bank had been substituted for that of the state bank in its note blanks, and the note was written on a blank so changed. There was an agreement between the banks that notes held by the state bank, and guaranteed by it, should be received by the national bank. Several purchases of notes had been made by the national bank under the agreement, and some notes had been selected by a committee, but the note in question did not appear in the list of those so purchased or selected. The note was made by a depositor in the state bank to satisfy an overdraft. The overdraft was satisfied on its books, and the note was credited to the state bank on the books of the national bank. *Held*, that a judgment in favor of the national bank against the state bank, as guarantor of the note, on the ground that the note was originally given to the state bank, and transferred to the national bank pursuant to the agreement, would not be disturbed.—*Deselle v. Iowa City Bank* (Iowa) 70 N. W. 702.

§ 41. Acts ultra vires.

[a] (Iowa: 1897.)

Where a bill of lading is issued to a national bank as security for money advanced on a draft for the price of the goods, a creditor of the shipper, who subsequently attached the goods, cannot object that the bank had no authority to take goods as security for a loan.—*Ayres, Weatherwax & Reed Co. v. Dorsey Produce Co.* (Iowa) 70 N. W. 111.

[b] (N. D.: 1896.)

A national bank which assumed to sell for another certain notes owned by him, but which, instead of selling them to a third person, without his knowledge sold them to itself, violated its duty to the owner, the same as if it had full power under the law to act as such agent; and was, therefore, guilty of a conversion of such notes, notwithstanding its agency was ultra vires.—*Anderson v. First Nat. Bank* (N. D.) 67 N. W. 821.

5 N. D. 451.

[c] (S. D.: 1895.)

Want of authority in plaintiff national bank to purchase a negotiable note cannot be pleaded by the maker of the note in defense.—*First Nat. Bank v. Smith* (S. D.) 65 N. W. 437.

BASTARDY.

Changing method of enforcing liability of father, ex post facto law, see "Constitutional Law," § 28.

§ 1. Nature of proceedings.

(Neb.: 1895.)

A bastardy proceeding under Comp. St. c. 37, is a civil proceeding.—*Stoppert v. Nierle* (Neb.) 63 N. W. 382.
45 Neb. 105.

§ 2. Who may maintain proceedings.

(S. D.: 1895.)

Bastardy proceedings are properly instituted and carried on in the name of the state.—*State v. Bunker* (S. D.) 65 N. W. 33.

§ 3. Jurisdiction.

[a] (Neb.: 1895.)

Proceedings under Comp. St. c. 37, entitled "Illegitimate Children," are within the jurisdiction of a county judge.—*Stoppert v. Nierle* (Neb.) 63 N. W. 382.
45 Neb. 105.

[b] (S. D.: 1895.)

Laws 1893, c. 24, conferring jurisdiction in bastardy proceedings on the county court, is not in conflict with Const. art. 5, §§ 20, 21, limiting the jurisdiction of the county court to cases wherein the demand or value of the property does not exceed \$1,000, since that provision applies only to the civil jurisdiction of that court.—*State v. Scott*, 65 N. W. 31; *Same v. Bunker*, *id.* 33.

[c] (S. D.: 1896.)

Laws 1893, c. 24, conferring on the county courts jurisdiction in bastardy proceedings, is constitutional. *State v. Scott* (1895) 65 N. W. 31, followed.—*State v. Hughes*, 66 N. W. 1076.

§ 4. Effect of intercourse with others than defendant.

(Minn.: 1895.)

Where the evidence on a prosecution for bastardy tended to prove that complainant had intercourse with another at about the time the child was begotten, and about the time she testified to having had intercourse with defendant, defendant was entitled to an instruction that even if he had intercourse with complainant, unless the jury found that such intercourse resulted in pregnancy, they must find defendant not guilty.—*State v. Allrick* (Minn.) 63 N. W. 1085.

61 Minn. 415.

§ 5. Pleading.

(S. D.: 1895.)

Defendant's failure to enter a plea does not constitute reversible error where he was deprived of no rights which he would have been entitled to had a formal plea been entered.—*State v. Bunker* (S. D.) 65 N. W. 33.

§ 6. Evidence.

[a] (Mich.: 1894.)

Previous acts of sexual intercourse are competent in evidence.—*People v. Keefer* (Mich.) 61 N. W. 338.
103 Mich. 83.

[b] (Mich.: 1896.)

In a prosecution for bastardy defendant can only be convicted on proof of the particular act of intercourse charged in the complaint, but evidence of other acts, occurring at other times and places, is competent to show the probability

of the particular net having occurred.—*People v. Schilling* (Mich.) 68 N. W. 233.

[c] (Neb.; 1895.)

In bastardy proceedings the examination before a justice of the peace is expressly made admissible in evidence by Comp. St. c. 37, § 5.—*Stoppert v. Nierle* (Neb.) 63 N. W. 382.

45 Neb. 105.

[d] (Neb.; 1895.)

In bastardy proceedings defendant cannot introduce evidence of his reputation for chastity.—*Stoppert v. Nierle* (Neb.) 63 N. W. 382.

45 Neb. 105.

[e] (Neb.; 1895.)

In an action of bastardy the defendant is entitled to ask the complainant, on cross-examination, whether she had sexual connection with other men at or near the time the child was begotten, and it is error to restrict the range of such cross-examination to a number of days less than the period of gestation.—*Stoppert v. Nierle* (Neb.) 63 N. W. 382.

45 Neb. 105.

[f] (Neb.; 1896.)

Evidence of the unchastity of the complainant in a bastardy proceeding, outside the period of gestation, whether in the nature of proof of her improper conduct or of her general reputation for chastity, is irrelevant.—*Davison v. Cruse* (Neb.) 66 N. W. 823.

47 Neb. 829.

[g] (Neb.; 1896.)

The probable duration of the period of gestation is a question of fact, to be shown by proper evidence in each particular case wherein that question is material.—*Davison v. Cruse* (Neb.) 66 N. W. 823.

47 Neb. 829.

[h] (S. D.; 1896.)

In bastardy proceedings, it is harmless error to strike out testimony of the complaining witness, admitted without objection, that she was a cousin of defendant.—*State v. Hughes* (S. D.) 66 N. W. 1076.

§ 7. — Offer of marriage.

(Neb.; 1897.)

An offer of marriage by the putative father to the mother of the bastard child, made with a view to the settlement of the proceedings about to be commenced, is not admissible.—*Lisy v. State* (Neb.) 69 N. W. 768.

§ 8. — Declarations of complainant.

(Neb.; 1895.)

Evidence of declarations of the complainant in a bastardy suit, in which she claimed the defendant was the father of her child, made out of court, and not during her testimony before the justice or county judge or the district court, is incompetent.—*Stoppert v. Nierle* (Neb.) 63 N. W. 382.

45 Neb. 105.

§ 9. — Sufficiency.

[a] (Mich.; 1894.)

Where the weight of evidence clearly shows the act of intercourse at the time assigned by the complaining witness, a mistake as to the place is immaterial.—*People v. Keefer* (Mich.) 61 N. W. 338.

103 Mich. 83.

[b] (Mich.; 1895.)

The fact that a brother of one charged with bastardy attempted to settle the matter without the latter's knowledge is not evidence of the latter's guilt.—*People v. Hawks* (Mich.) 65 N. W. 100.

[c] (Neb.; 1896.)

In bastardy proceedings, a mere preponderance of the evidence is sufficient to sustain a verdict of guilty.—*Davison v. Cruse* (Neb.) 66 N. W. 823.

47 Neb. 829.

[d] (S. D.; 1895.)

It is sufficient for the state, in a bastardy proceeding, to prove its case by a preponderance of evidence.—*State v. Bunker* (S. D.) 65 N. W. 33.

§ 10. Instructions.

(Minn.; 1895.)

In a prosecution for bastardy, where the evidence was that the child was fully developed at its birth, defendant was entitled to an instruction that the child must have been begotten more than 225 days before its birth.—*State v. Allrick* (Minn.) 63 N. W. 1085.

61 Minn. 415.

§ 11. Appeal.

[a] (Minn.; 1895.)

A supersedeas bond on appeal from a judgment in bastardy proceedings should be conditioned on the payment of all costs and charges awarded against defendant on appeal, and in case of dismissal of the appeal, or of affirmance of the judgment, on defendant's abiding by and performing the judgment, or surrendering himself a prisoner, in execution thereof.—*State v. Allrick* (Minn.) 65 N. W. 639.

63 Minn. 328.

[b] (Minn.; 1895.)

Neither Gen. St. 1894, § 6143, relating to the bond on appeal from "a judgment directing the payment of money," nor any other statute regarding supersedeas bonds on appeals in civil actions, applies to an appeal from a judgment in bastardy proceedings.—*State v. Allrick* (Minn.) 65 N. W. 639.

63 Minn. 328.

BATTERY.

See "Assault and Battery."

BAWDYHOUSE.

See "Disorderly House."

BENEFICIARIES.

See "Trusts," §§ 25-31.

Designation in charitable bequest or devise, see "Charities," §§ 5, 6.

In mutual benefit policy, see "Insurance," § 160.

BENEFITS.

From public improvements, see "Municipal Corporations," §§ 127-155.

BENEVOLENT SOCIETIES.

Exemption of funds, see "Exemptions," § 8. Mutual benefit insurance, see "Insurance," §§ 149-184.

Venue of action against, see "Venue in Civil Cases," § 6.

§ 1. What constitute.

(Iowa.)

An association organized by a railroad company for the benefit of the members, in case of injury to them, or of the beneficiaries named in the membership certificate, in case of their death, the relief fund of which is raised from monthly payments by the members, who are employes of the road only, any deficiency being made up by the company, is not an "insurance company," but a beneficial society.—(1895) *Donald v. Chicago, B. & Q. Ry. Co.* (Iowa) 61 N.

W. 971. 93 Iowa, 284; (1897) Maine v. Chicago, B. & Q. R. Co. (Iowa) 70 N. W. 630.

§ 2. Members.

[a] (Iowa; 1897.)

A certificate of membership in a mutual benefit society may limit an express promise to pay a fixed amount at the end of the endowment period by providing that, if there shall not be a certain number of members at that time, a payment of the amount that a full assessment will bring, based on the ages at which the members joined the society, shall be payment in full of the certificate.—Theunen v. Iowa Mut. Ben. Ass'n (Iowa) 70 N. W. 712.

[b] (Minn.; 1896.)

Where a fraternal or benevolent association issues a certificate of membership which, by its terms, is to continue in force so long as the member complies with the rules of the association, the presumption is that it continues until the contrary is made to appear; and, if the membership has ceased, the burden is on the association to prove it.—Cornfield v. Order of Brith Abraham (Minn.) 66 N. W. 970. 64 Minn. 261.

§ 3. — Suspension.

[a] (Iowa; 1897.)

The suspension for nonpayment of assessments of a member of a beneficial association who had made a continuing agreement with its officers that his assessment should be paid out of printing and supplies to be furnished by him is not validated by the fact that the person making the suspension had come into the office after the agreement was made, and did not know of it.—Bixby v. Grand Lodge A. O. U. W. (Iowa) 70 N. W. 737.

[b] (Iowa; 1897.)

Such an agreement is not a violation of a requirement of the certificate and by-laws that the member should pay all assessments on or before the 28th of the month; the printing and supplies, for which the association had power to contract, being equivalent to advance payments.—Bixby v. Grand Lodge A. O. U. W. (Iowa) 70 N. W. 737.

BEQUEST.

See "Wills."

BEST AND SECONDARY EVIDENCE.

See "Evidence," §§ 9-15.

BIAS.

Of juror, see "Jury," §§ 2, 5, 6.
Showing bias to affect credibility, see "Witness," § 64.

BIDDING.

For city contract, see "Municipal Corporations," § 66.
For school district contract, see "Schools and School Districts," § 19.

BILL.

Of discovery, see "Discovery," § 2.
Of lading, see "Carriers," § 3.
Of particulars, see "Pleading," §§ 74, 75.
Of review, see "Equity," § 63.
Of sale, see "Sale," § 15.

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BILLS AND NOTES.

See "Negotiable Instruments."

Alteration of notes, see "Alteration of Instruments," § 3.

Rights of indorsee of note secured by mortgage, see "Chattel Mortgages," § 32.

BLACKMAIL.

See "Threats and Threatening Letters."

BLANKS.

Filling out blank, see "Alteration of Instruments," § 4.

Signature in blank by guarantor, right to fill in, see "Guaranty," § 6.

BLASTING.

See "Negligence," § 5.

BOARDS.

County boards, see "Counties," §§ 26-32.

Of city estimates, see "Municipal Corporations," § 6.

Of equalization, see "Taxation," §§ 38-44.

Of fire underwriters, see "Insurance," § 2.

Of health, see "Health," §§ 1, 2.

Of pardon, see "Pardon."

Of public lands, see "States and State Officers," § 5.

Proceedings by, see "Office and Officer," §§ 10, 11.

BODY STEALING.

(Iowa; 1895.)

Upon the trial of an indictment under McClain's Code, § 5328, which declares that "if any person without lawful authority, dig up, disinter, remove or carry away any human body," he shall be punished, etc., it is incumbent on defendant to show that he had lawful authority.—State v. Schaeffer (Iowa) 64 N. W. 276.

BOILER INSPECTION.

Class legislation, see "Constitutional Law," § 24.

BONA FIDE PURCHASERS.

See "Sale," §§ 89-92; "Vendor and Purchaser," §§ 37-40.

Of bills and notes, see "Negotiable Instruments," §§ 42-57.

Of city bonds, see "Municipal Corporations," §§ 182, 183.

Of corporate stock, see "Corporations," § 62.

Of mortgaged property, see "Chattel Mortgages," § 30.

Of mortgage note, see "Mortgages," § 30.

BONDS.

As to questions of suretyship, see "Principal and Surety."

Estoppel of obligor, see "Estoppel," § 3.

For release of property attached, see "Attachment," § 21.

In attachment, see "Attachment," §§ 18-23.

Injunction bonds, see "Injunction," §§ 32-34.

In replevin, see "Replevin," §§ 33-35.

Liabilities on appeal bonds, see "Appeal," §§ 303-308.

— on bail bonds, see "Bail," §§ 3, 4.

— on official bonds, see "Office and Officer," § 21.

Of assignee for creditors, see "Assignment for Benefit of Creditors," §§ 22, 27.

Of clerk of court, see "Clerk of Court."

Of contractor, see "Mechanics' Liens," § 48.

Of county, see "Counties," §§ 38, 39.

Of county treasurer, see "Counties," § 19.

Of depository of county funds, see "Depositories," § 1.

— of state funds, see "Depositories," § 2.

Of guardian, see "Guardian and Ward," §§ 16, 17.

Of insurance agent, see "Insurance," § 102.

Of liquor dealer, see "Intoxicating Liquors," § 21.

Of public officer, see "Office and Officer," § 7.

Of reinsurer, see "Insurance," § 15.

Of school district, see "Schools and School Districts," § 20.

Of sheriffs and constables, see "Sheriffs and Constables," §§ 13, 14.

Of state, see "States and State Officers," § 13.

Of town, see "Towns," § 4.

On appeal, see "Appeal," §§ 61, 70.

— from justice, see "Appeal," § 163.

— in admiralty, see "Admiralty," § 2.

Supersedeas bonds, see "Appeal," § 269.

Taken from public contractor, see "Municipal Corporations," § 64.

To discharge garnishee, see "Garnishment," § 29.

To procure injunction, see "Injunction," § 22.

§ 1. Execution and delivery.

1a1 (Minn.: 1896.)

The fact that the name of a surety who signs and seals a bond is not mentioned therein does not affect its validity, if it is apparent from the face of the bond that he intended to be bound by its conditions. *Campbell v. Rotering* (1889) 43 N. W. 795, 42 Minn. 115, followed.—*Wheeler v. Paterson*, 66 N. W. 964, 64 Minn. 231.

1b1 (Neb.: 1895.)

Where a bond is delivered without the signature of all persons named in the body thereof as obligors, there was no presumption that the bond was not to be considered as binding on those signing it until executed by all of the persons so named.—*Mullen v. Morris* (Neb.) 62 N. W. 74, 43 Neb. 596.

1c1 (Neb.: 1895.)

Where a bond which is a joint obligation in form is delivered to the obligee without being executed by all the persons named in the body thereof as obligors, the bond itself is sufficient to put the obligee on inquiry as to whether those who signed consented to its being delivered without the signatures of the others.—*Mullen v. Morris*, 62 N. W. 74, 43 Neb. 596.

§ 2. Instrument defective as statutory bond.

(Mich.: 1894.)

A bond reciting that the surety will pay the judgment against defendant at the end of six months, intended by the surety, magistrate, and plaintiff in the suit to operate as a statutory stay bond, but defective as such, will be considered a common-law obligation to pay the judgment.—*Lustfield v. Ball* (Mich.) 61 N. W. 339.

103 Mich. 17.

§ 3. Scope of liability.

(S. D.: 1896.)

On a bond conditioned on the repayment by a bank of county funds deposited by the county treasurer, the obligors are liable for the repayment of the amount of a certificate of deposit given the obligee for money deposited with the bank before the execution of the bond, and

subsequently redelivered to the bank, and the amount of the certificate credited to the obligee.—*Allibone v. Ames* (S. D.) 68 N. W. 165.

§ 4. Performance.

(Iowa: 1896.)

A bond conditioned for the payment by an agent of all money he should receive on account of his agency is discharged by the employer's taking the agent's note in satisfaction of all claims, and agreeing to return the bond.—*Smith v. Jackson* (Iowa) 66 N. W. 80.

§ 5. Actions.

1a1 (Mich.: 1897.)

In an action on a bond made pending a suit in chancery, conditioned that the principal defendant would "well and truly pay all such sums of money, and perform and satisfy any final decree made against him in this cause," the declaration alleged that the decree provided that defendant should pay the receiver the sum of \$1,460.11, and should pay costs to complainants, and that the receiver, out of the sum decreed to be paid to him, should pay to complainants the sum of \$574.81. The decree set out in the declaration recited that H. had been appointed receiver in the cause. *Held*, that the receiver's relation to the chancery suit was sufficiently shown.—*Robson v. Dayton* (Mich.) 69 N. W. 834.

1b1 (Mich.: 1897.)

Plaintiff's interest in the money directed to be paid by defendant was sufficiently shown, at least as to the sum directed to be paid by the receiver.—*Robson v. Dayton* (Mich.) 69 N. W. 834.

1c1 (N. D.: 1895.)

In an action by an assignee of nonnegotiable school bonds, defendant could show want of consideration for the bonds, in that it received for them neither cash nor audited and canceled warrants.—*Flagg v. School Dist. No. 70, Barnes County* (N. D.) 65 N. W. 674, 5 N. D. 191.

1d1 (Wis.: 1895.)

In an action on the bond of an insurance agent, a claim that the agent received in the aggregate a certain sum of money collected from persons named therein, and a claim that he received another sum from another person, do not constitute separate causes.—*Northern Assur. Co. of England v. Hotchkiss* (Wis.) 63 N. W. 1020, 90 Wis. 415.

§ 6. — Parties.

1a1 (Mich.: 1895.)

How. St. § 841a, provides that contractors shall execute to the state a bond for the payment of all indebtedness which may accrue to any person for labor performed in the erection of a public building. *Held*, that persons to whom an indebtedness had accrued for labor performed on a school building may recover on a bond executed as required by statute, except that it was payable to a board of education, instead of to the state, and though there was an additional condition to save said board harmless from all claims for such labor.—*Board of Education of City of Detroit v. Grant* (Mich.) 64 N. W. 1050.

1b1 (Minn.: 1896.)

Gen. St. 1894, § 193, provides that in case of an election contest three persons shall be appointed to whom the inspection and examination of the ballots shall be referred, and that the contestant shall file a bond conditioned that he will pay the expenses of the examination and inspection, if he fail to maintain the contest. *Held* that, though the bond names the contestee as obligee, any one of the persons to whom the examination and inspection was referred may sue thereon in his own name, but they cannot sue jointly.—*Moede v. Haines* (Minn.) 69 N. W. 216.

§ 7. — Pleading.

[a] (Mich.: 1896.)

In a suit on a bond, a declaration which is sufficient to show a good common-law bond is not demurrable.—*Boyer v. Sowles* (Mich.) 67 N. W. 530.

[b] (Mich.: 1896.)

In declaring on a bond, where profert is made, delivery need not be averred.—*Boyer v. Sowles* (Mich.) 67 N. W. 530.

[c] (Wis.: 1895.)

In an action on a specialty, it is unnecessary to allege consideration.—*Northern Assur. Co. of England v. Hotchkiss* (Wis.) 63 N. W. 1020.

90 Wis. 415.

[d] (Wis.: 1895.)

In an action against sureties on the bond of an insurance agent, whereby they were held and firmly bound unto the plaintiff in a certain sum, and for which payment they bound themselves jointly and severally, a complaint alleging a breach of the bond by the principal obligor by receiving \$321 as such agent, and a refusal to pay it over, states a cause of action.—*Northern Assur. Co. of England v. Hotchkiss* (Wis.) 63 N. W. 1020.

90 Wis. 415.

[e] (Wis.: 1896.)

An allegation, in an action on a bond of an attorney, that he was appointed the attorney of plaintiff corporation by its board of directors, "and held under said appointment for the term of two years," sufficiently alleges that his term of office was for two years.—*Germania Spar & Bau Verein v. Flynn* (Wis.) 66 N. W. 109.

92 Wis. 201.

[f] (Wis.: 1896.)

A complaint which alleges that plaintiff corporation was authorized to loan money to members on real-estate security; that arrangements were made to loan a certain sum to a member, that R., the duly-appointed attorney of plaintiff, "by virtue of his office," was given a check payable to his order, to be delivered to the borrower as soon as the latter should execute a satisfactory mortgage; and that R. converted the check, during his term of office,—states a good cause of action against the sureties on R.'s bond.—*Germania Spar & Bau Verein v. Flynn*, 66 N. W. 109, 92 Wis. 201.

§ 8. — Evidence.

[a] (Mich.: 1896.)

A debtor made a bill of sale to secure notes. Thereafter the creditor delivered the goods to the debtor, who gave a bond conditioned to sell the goods, and account for the proceeds to a certain sum. *Held*, that admission of the notes in evidence in an action on the bond, for the purpose of showing consideration and the history of the transaction, was proper.—*Wheeler v. Meyer* (Mich.) 66 N. W. 46.

[b] (Mich.: 1896.)

A finding that an inventory was attached to a bond at the time it was signed by the surety is warranted by testimony of the person who drew it that he pinned the inventory to the bond, that it was pinned to it when the principal signed it, that the principal took it to the surety, and when it came back with the surety's signature the inventory was still pinned thereon; it being recited in the bond that "an inventory is hereunto attached and made a part hereof."—*Wheeler v. Meyer* (Mich.) 66 N. W. 46.

[c] (Neb.: 1895.)

The burden is on those who executed a bond without the signatures of others named therein to show that they were not to be bound unless it was executed by such others.—*Mullen v. Morris*, 62 N. W. 74, 43 Neb. 596.

§ 9. — Judgment.

(S. D.: 1895.)

It was proper, under Comp. Laws, § 4901, in an action on the bond of a county treasurer, to enter judgment against each of the sureties for the amount for which he was severally liable.—*Custer County v. Albien* (S. D.) 64 N. W. 533.

§ 10. Limit of recovery—Penalty.

[a] (Minn.: 1895.)

Where a bond contains a contract for the performance of certain things, and the obligor binds himself in a penalty to such performance, the penalty is not the limit of recovery on the instrument; but the obligee may recover damages as often as the breach arises, even beyond the penalty.—*Meinert v. Botcher* (Minn.) 62 N. W. 276.

60 Minn. 204.

[b] (Neb.: 1895.)

The object of a penalty in a bond is to fix the limit of the liability of the signers.—*Morrison v. Boggs* (Neb.) 62 N. W. 473.

44 Neb. 248.

[c] (Neb.: 1895.)

In an action on a penal bond, judgment may be recovered for the actual damages sustained, not exceeding the penalty of the bond and interest from the date of the breach of the conditions, less all the payments made by the obligors.—*Mullen v. Morris* (Neb.) 62 N. W. 74, 43 Neb. 596.

BONUS.

From borrower to lender, see "Usury," § 5.

BOOKS.

Of account as evidence, see "Evidence," § 78.
Right to inspect corporate books and papers, see "Corporations," § 67.

BOROUGHES.

See "Municipal Corporations."

BOUNDARIES.

- I. NATURAL, §§ 1, 2.
- II. ARTIFICIAL, §§ 3-6.
- III. RECOGNITION AND ADVERSE POSSESSION, §§ 7, 8.
- IV. EVIDENCE, §§ 9, 10.
- V. ESTABLISHMENT — STATUTORY PROCEEDINGS, § 11.

Judicial notice of boundary of judicial district, see "Evidence," § 3.

Of city, see "Municipal Corporations," §§ 18-21.

Of county, see "Counties," § 3.

Of school district, see "Schools and School Districts," § 4.

I. NATURAL.

§ 1. Streams and waters.

[a] (Wis.: 1896.)

A definite boundary, like a nonnavigable river, called for in a deed, controls distances and quantity in the description, and conveys the land to the thread of the stream.—*Lampman v. Van Alstyne* (Wis.) 69 N. W. 171.

[b] (Wis.: 1897.)

Low-water mark on the shore of a lake, as a boundary, is ordinary low-water mark, or the level at which the water stands when free from

disturbing causes.—*Slauson v. Goodrich Transp. Co.* (Wis.) 69 N. W. 990.

[c] (Wis., 1897.)

Where one of the boundaries in a deed is substantially coincident with the shore of a lake at low-water mark, the intent to convey to such mark will be presumed, in the absence of language indicating a contrary intent, though the lake is not named as a boundary.—*Slauson v. Goodrich Transp. Co.* (Wis.) 69 N. W. 990.

§ 2. — Meander lines.

[a] (Iowa; 1895.)

A meander line merely determines the sinuosities of the stream or body of water, and is not a boundary.—*Schlusser v. Crookshank* (Iowa) 65 N. W. 344; *Caldwell v. Jackson, Id.*; *McNary v. Same, Id.*

[b] (Iowa; 1895.)

The owners of land adjoining the meander line of a navigable lake, as established by government surveyors, are riparian owners, and entitled to all land lying between such line and the high-water line of the lake, though most of such land is high, and not subject to overflow.—*Schlusser v. Crookshank* (Iowa) 65 N. W. 344; *Caldwell v. Jackson, Id.*; *McNary v. Same, Id.*

[c] (Iowa; 1895.)

In the absence of evidence of a reservation in the patent or an assertion of title by the government to land lying between the meander line of a lake, as established by its surveyors, and the shore line of the lake, evidence aliunde is inadmissible to show that the meander line was intended as the boundary of the adjoining patent.—*Schlusser v. Crookshank* (Iowa) 65 N. W. 344; *Caldwell v. Jackson, Id.*; *McNary v. Same, Id.*

[d] (Iowa; 1895.)

The fact that the meander line of a navigable lake, as established by government surveyors, did not coincide with the shore line of the lake, will not overcome the presumption that the government, in patenting land adjoining the meander line, intended to convey the land lying between such line and the lake.—*Schlusser v. Crookshank* (Iowa) 65 N. W. 344; *Caldwell v. Jackson, Id.*; *McNary v. Same, Id.*

[e] (Iowa; 1895.)

The fact that the number of acres recited in a government patent corresponds with the quantity within the meander line along a navigable lake will not prevent the patentee from claiming the land between the meander line and the shore line.—*Schlusser v. Crookshank* (Iowa) 65 N. W. 344; *Caldwell v. Jackson, Id.*; *McNary v. Same, Id.*

II. ARTIFICIAL.

§ 3. Highways—Center or side of road.

(Minn.; 1895.)

Where one plats submerged land, extending a distance of several blocks, streets, and alleys beyond the shore line, but not to the point of navigability, and then conveys one of these blocks, in the rear of which are drawn the platted lines of an alley 12 feet wide between the block so conveyed and the outermost line of the alley, and beyond which, in the direction of the line of navigable water, there is an unplatted space of submerged land, no title or appurtenant right to the unplatted space passed to the grantee, and his title was limited to the center of the alley.—*Gilbert v. Emerson* (Minn.) 61 N. W. 820.

60 Minn. 62.

§ 4. Courses and distances—Control by monuments.

(Neb.; 1895.)

The original monuments established during a government survey control course and distance.—*Peterson v. Skjelver* (Neb.) 62 N. W. 43. 43 Neb. 663.

§ 5. Location of corner.

(Neb.; 1895.)

Where it is shown by uncontradicted evidence that a section corner was located by the government surveyors at a certain point, such location must control, though it is a place different from that given in the field notes and plat.—*Peterson v. Skjelver* (Neb.) 62 N. W. 43. 43 Neb. 663.

§ 6. Official surveys.

[a] (S. D.; 1896.)

The location by the county surveyor of the section lines under Act 1890, c. 35, which makes the survey presumptively correct, only makes such location prima facie evidence against the landowners.—*Webster v. White* (S. D.) 66 N. W. 1145.

[b] (S. D.; 1896.)

Where a section line is in controversy, the line as indicated by the government mounds established by the government surveyor must prevail, when the points at which the mounds were placed have been ascertained.—*Dowdle v. Cornue* (S. D.) 68 N. W. 194.

[c] (S. D.; 1896.)

The question as to where the mounds made by the government surveyor at the time of the original survey were in fact placed is one of fact, and a finding thereon will not be disturbed unless there is a clear preponderance of the evidence against it.—*Dowdle v. Cornue* (S. D.) 68 N. W. 194.

[d] (S. D.; 1897.)

On resurvey of land originally belonging to the United States, and which had been surveyed under its authority, the resurvey must follow the boundaries and monuments as run by the original survey, if the monuments can be found, or the places where they were originally placed identified.—*Randall v. Burk Tp. of Minnehaha County* (S. D.) 70 N. W. 837.

III. RECOGNITION AND ADVERSE POSSESSION.

Extending possession to boundaries, see "Adverse Possession," § 10.

§ 7. Agreement between parties.

[a] (Mich.; 1895.)

Where parties by mutual agreement fix a boundary line, and thereafter acquiesce in the line so established, such line will be considered the true line, though the period of acquiescence be less than that fixed by statute for gaining title by adverse possession.—*White v. Peabody* (Mich.) 64 N. W. 41.

[b] (Mich.; 1896.)

In ejectment between adjoining landowners, there was a dispute as to the boundary, and defendant claimed that plaintiff had acquiesced in a certain line as a boundary; but it appeared from defendant's evidence that plaintiff took no part in the selection of the surveyor who made such line, and plaintiff testified that she did not agree to such boundary, and informed defendant that she would require a new survey, and defendant thereafter attempted to prevent such resurvey. *Held*, that the evidence failed to show that plaintiff had agreed on a boundary line.—*Dauer v. Hildebrandt* (Mich.) 68 N. W. 145.

[c] (Mich.; 1897.)

Where a conveyance is made, by description in no way uncertain, of the west 65 feet of a lot, the fact that, during the negotiations, the parties thereto had made some measurements, and the purchaser was told that his east boundary would be the side of a cistern, which was 68 feet east of the west boundary, followed by his erecting steps which extended 20 inches over a line 65 feet east of the west boundary, to which there was no objection so long as the grantor continued to own the east part of the

lot, amounts to no more than an agreement within the statute of frauds, and does not bring the case within the rule that a mutual adjustment of a disputed boundary, followed by the establishment of plain landmarks, and occupancy and acquiescence under such arrangement, fixes the boundary.—*De Long v. Baldwin* (Mich.) 69 N. W. 831.

§ 8. Estoppel.

[a] (Iowa; 1895.)

Plaintiffs bought one of several lots which defendant had platted, and erected thereon a building which encroached on an adjacent lot owned by defendant. Plaintiffs could not have relied with safety on the plat alone, but they relied solely on defendant's representations as to the boundaries of the lot; and defendant, knowing that fact, in good faith, but erroneously, indicated a point as plaintiffs' corner, in consequence of which mistake plaintiffs encroached on defendant's lot. Defendant did not claim that there was an encroachment until plaintiffs' building was erected. *Held*, that defendant was estopped to deny that the point indicated by him was the corner of plaintiffs' lot.—*Ross v. Ferree* (Iowa) 64 N. W. 683.

[b] (Iowa; 1897.)

Plaintiff is not estopped to claim the true boundary between her lot and that of defendants, though they respectively occupied for more than 10 years to a line on plaintiff's lot, any claim of title thereto by defendants being on the erroneous belief that it was the true line; and though, when defendants, while grading their lot, called plaintiff's attention to a line on the ground, which they had made, and stated they understood it to be on the boundary line, plaintiff answered that she was satisfied that the line was the proper one, and told them to go on with their work; and though she, after they had graded their lot, constructed a temporary retaining wall on the line, there having been at the time no question between them in regard to the location of the boundary, and she not having known till thereafter but that such line was the true boundary.—*Jordan v. Ferree* (Iowa) 70 N. W. 611.

[c] (Mich.; 1895.)

In ejectment it appeared that, while defendant was erecting his building, plaintiff asked him if he was on his own line, and defendant said he was going to have a survey made. Defendant continued with the building without objection from plaintiff, who saw the work going on every day. Five years afterwards plaintiff had the land surveyed, and discovered that defendant's building was on his line, and immediately called defendant's attention to it, and there was then some talk of defendant paying for the part occupied by his building. *Held*, that it was a question for the jury whether a boundary line was established with defendant's acquiescence.—*Manistee Manuf'g Co. v. Cogswell*, 61 N. W. 884, 103 Mich. 602.

IV. EVIDENCE.

§ 9. Competency and materiality.

[a] (S. D.; 1895.)

On the question as to the location of a boundary line, it is immaterial that a resurvey, locating the line as claimed by one of the parties, was made under an unauthorized contract.—*Hanson v. Township of Red Rock in Minnehaha County* (S. D.) 63 N. W. 156.

[b] (Wis.; 1895.)

That a fence is on the true boundary line between two farms cannot be shown by evidence that it is in line with fences on adjoining farms.—*Fuller v. Worth*, 64 N. W. 995, 91 Wis. 406.

§ 10. Surveys.

[a] (Mich.; 1895.)

Testimony of a civil engineer that he had taken pains to establish the correctness of a

stake designating a section corner; that he knew it to be approximately the location of the original section corner; that he had used the stake so frequently with reference to other surveys that he was perfectly sure of its correctness; and that, if it were not correct, the streets would all be thrown out of line,—is sufficient to warrant the admission of a survey the starting point of which was the stake alluded to, as against an objection that such point had not been located.—*Manistee Manuf'g Co. v. Cogswell* (Mich.) 61 N. W. 884.

103 Mich. 602.

[b] (Mich.; 1895.)

The record of a survey by a county surveyor in subdividing a section, which neither shows for whom the survey was made, nor the variation of the magnetic needle from the true meridian, as required by How. Ann. St. § 619, and which does not purport to fix definitely the center of the section, was not admissible.—*Van Der Groef v. Jones* (Mich.) 65 N. W. 602.

[c] (Mich.; 1895.)

Though How. Ann. St. § 616, provides that the certificate of the county surveyor of any survey made by him shall be presumptive evidence of the facts stated therein, when other surveys made by competent surveyors are introduced in evidence the survey of the county surveyor is of no more binding force than the others.—*Van Der Groef v. Jones* (Mich.) 65 N. W. 602.

V. ESTABLISHMENT—STATUTORY PROCEEDINGS.

§ 11. Statutory proceedings.

(Iowa; 1896.)

Where boundary commissioners base their report on the evidence introduced, an order denying a motion to set it aside for erroneous findings will not be disturbed, in the absence of the evidence on which the commissioners acted.—*Maher v. Shenhall* (Iowa) 65 N. W. 978.

BOUNTIES.

(Neb.; 1896.)

Laws 1895, c. 1, declaring that a specified bounty shall be paid for each pound of sugar manufactured in the state, and providing a manner of ascertaining the amount so manufactured, and directing the state auditor, on proof of the amount, to draw his warrant on the treasurer therefor, but in no way limiting the total sum to be so expended, makes no "specific appropriation" out of which the bounties may be paid, within Const. art. 3, § 22, declaring that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."—*State v. Moore* (Neb.) 69 N. W. 373.

BREACH OF MARRIAGE PROMISE.

§ 1. Pleading.

(Iowa; 1894.)

An allegation in the complaint that "defendant entered into a verbal contract by which the said defendant promised and agreed to marry this plaintiff" is sufficient to show the mutuality of the contract, on motion in arrest of judgment.—*Edwards v. Edwards* (Iowa) 61 N. W. 413.

93 Iowa, 127.

§ 2. Evidence.

[a] (Iowa; 1894.)

In a trial for breach of promise, it is proper to exclude evidence of the feeling of plaintiff towards defendant after he had refused to marry her.—*Edwards v. Edwards* (Iowa) 61 N. W. 413.

93 Iowa, 127.

[61 (Iowa; 1896.)

Allegations of seduction by means of the promise may be pleaded merely in aggravation of damages, and do not cause the complaint to embrace two causes of action.—*Geiger v. Payne* (Iowa) 69 N. W. 551.

[61 (Iowa; 1896.)

Letters from defendant to plaintiff, containing references to defendant's business, and the amount of money he was making, and explaining his relations with another woman, were admissible.—*Geiger v. Payne* (Iowa) 69 N. W. 551.

[61 (Iowa; 1896.)

Defendant's statement to a third person that he was between two fires, and did not know whether to marry plaintiff or another woman, was admissible to show that he had a marriage with plaintiff under consideration.—*Geiger v. Payne* (Iowa) 69 N. W. 554.

[61 (Iowa; 1896.)

Declarations of defendant to third persons as to his intentions towards plaintiff were admissible, though made after the alleged breach of promise.—*Geiger v. Payne* (Iowa) 69 N. W. 554.

[61 (Neb.; 1895.)

In an action for breach of marriage promise, it was proper to permit defendant to prove specific acts of incontinence on the part of plaintiff.—*Stratton v. Dole* (Neb.) 63 N. W. 875, 45 Neb. 472.

[61 (Wis.; 1895.)

In an action for breach of promise of marriage, it is immaterial whether defendant was married before the action was brought.—*McCarville v. Boyle*, 62 N. W. 517, 89 Wis. 651.

§ 3. Instructions.

[a] (Mich.; 1894.)

In an action for breach of promise of marriage, where defendant averred that there was no acceptance of his offer, it was not error to charge that "the contract under which his suit was brought was one for life, involving associations and emotions which," etc., when such language was immediately followed by the words, "I do not mean to state that a contract was made, but simply to say what the rule of damages in this kind of a case would be."—*Rutter v. Collins* (Mich.) 61 N. W. 267, 103 Mich. 143.

[b] (Mich.; 1894.)

A charge that, if the contract was made and broken by defendant, the damages would involve injured pride and humiliation and loss of peace of mind, entitling plaintiff to "such damages as will compensate her for such injury," does not imply the existence of wounded pride, humiliation, etc., but directs that she is to receive compensation for what the jury find that she actually suffered.—*Rutter v. Collins* (Mich.) 61 N. W. 267, 103 Mich. 143.

§ 4. Damages.

[a] (Iowa; 1896.)

A verdict for \$16,000 for breach of a marriage promise by a man worth between \$50,000 and \$75,000, who had seduced plaintiff by means of such promise, is not excessive.—*Geiger v. Payne* (Iowa) 69 N. W. 554.

[b] (Iowa; 1896.)

Where the evidence shows that defendant is wealthy, and has a good home, it is not error to instruct that, in estimating plaintiff's damages, the jury may consider the worldly advantage of "a permanent home" and a "domestic establishment."—*Geiger v. Payne* (Iowa) 69 N. W. 554.

[c] (Mich.; 1894.)

Where defendant had considerable property, and plaintiff was engaged in general housework, it was not error to charge that the jury should consider the social standing of de-

fendant and the pecuniary circumstances of plaintiff, and compensate her for the loss of the station and of the home to which defendant invited her.—*Rutter v. Collins* (Mich.) 61 N. W. 267, 103 Mich. 143.

[d] (Neb.; 1895.)

In an action for breach of promise to marry, evidence of defendant's reputation for wealth is admissible to show the condition in life which plaintiff would have secured, had defendant not broken the promise.—*Stratton v. Dole* (Neb.) 63 N. W. 875, 45 Neb. 472.

BREACH OF THE PEACE.

See "Disorderly Conduct."

Ordinances for prevention of disturbances, see "Municipal Corporations," § 32.

Surety to keep the peace, see "Costs," § 33.

BREAKING.

See "Burglary," § 2.

BRIBERY.

Entrapment into crime, see "Criminal Law," § 4.

(Minn.; 1896.)

An indictment for offering a bribe to a juror (Gen. St. 1894, § 6348), though following the language of the statute, is insufficient unless it directly alleges that defendant knew that the person to whom the bribe was offered was a juror, and also what particular thing was offered, and that it was of a certain value.—*State v. Howard* (Minn.) 68 N. W. 1096.

BRIDGES.

I. CONSTRUCTION AND MAINTENANCE, §§ 1, 2.

II. LIABILITY FOR DEFECTS, §§ 3-6.

I. CONSTRUCTION AND MAINTENANCE.

Over highways, see "Highways," § 30.

Over navigable waters, see "Navigable Waters," § 1.

§ 1. Construction and repair.

[a] (Iowa; 1896.)

Under Code, § 303, cl. 18, making it the duty of the board of county supervisors to provide for the erection and repair of necessary bridges required for public convenience, it is within the discretion of the board to provide for supplying the necessary plank for the repair of small bridges and culverts throughout the county.—*Denison v. Watts* (Iowa) 66 N. W. 886.

[b] (Minn.; 1895.)

Sp. Laws 1885, c. 175, gives the county commissioners of Mower county authority to construct a public bridge in the city of Austin when the cost of such construction shall exceed \$100, and to pay for the same out of county funds.—*Greenman v. Board of Com'rs of Mower County* (Minn.) 64 N. W. 1142, 62 Minn. 397.

§ 2. Public aid.

[a] (Iowa; 1896.)

Taxpayers may sue to recover from a bridge company taxes paid by them pursuant to a vote to the company of aid in the construction

of a bridge (Laws 21st Gen. Assem. c. 13) and received by the company, where the company has failed to comply with the conditions entitling it to such aid.—*Smith v. Omaha & C. B. Railway & Bridge Co. (Iowa) 66 N. W. 1041.*

[b] (Iowa: 1896.)

Laws 21st Gen. Assem. c. 13, § 1, provides for aid by cities to any corporation formed under the laws of Iowa for the construction of bridges. Section 3 provides for payment of such aid to the treasurer of the company to whom it is voted. Section 2 provides that the terms and conditions expressed in the notice of the election shall be binding on such corporation, its "successors and assigns." *Held*, that such aid cannot be given to a foreign corporation.—*Smith v. Omaha & C. B. Railway & Bridge Co. (Iowa) 66 N. W. 1041.*

[c] (Iowa: 1896.)

The Omaha & Council Bluffs Railway & Bridge Company was organized in Iowa to maintain a bridge over the Missouri river between the two cities. The act of congress authorizing the bridge designated the company as the Omaha & Council Bluffs Railway & Bridge Company, "organized under the laws of Iowa and Nebraska," whereupon a Nebraska company was formed under the same name, to which the Iowa company conveyed all its franchises, together with the right to the aid voted it by the city of Council Bluffs for the construction of the bridge. The Nebraska company did not bind itself to build for the Iowa company the bridge which it subsequently constructed. *Held*, that the bridge was constructed by the Iowa company, and neither it nor the Nebraska company was entitled to receive the aid voted the Iowa company for the construction of the bridge. Laws 21st Gen. Assem. c. 13.—*Smith v. Omaha & C. B. Railway & Bridge Co. (Iowa) 66 N. W. 1041.*

II. LIABILITY FOR DEFECTS.

§ 3. In general.

[a] (Iowa: 1897.)

Since Code, § 1001, expressly provides that public bridges must be not less than 16 feet wide, a road supervisor is not justified, by a resolution of the town trustees, in erecting a bridge only 14 feet wide.—*Gould v. Schermer (Iowa) 70 N. W. 697.*

[b] (Iowa: 1897.)

Where plaintiff was injured by a fall from a bridge due to the frightening of her horse by a horse passing under the bridge on a cattle passageway constructed by defendant for his own convenience and without authority, the question whether defendant, as road supervisor, was negligent in not placing guards or rails on the bridge was for the jury, though guards or rails were not required by law.—*Gould v. Schermer (Iowa) 70 N. W. 697.*

[c] (Iowa: 1897.)

While plaintiff was driving over a bridge erected by defendant as road supervisor, her horse became frightened by a horse which was passing under the bridge, over a passageway constructed by defendant without authority, for his own convenience, and plaintiff was injured by falling from the bridge. The first count alleged negligence in erecting the bridge without guard rails, and the second count set up the wrongful construction of the passageway, without referring to the bridge, and the reference to the bridge in the first count related only to defendant's duty in connection with the construction of such passageway. *Held*, that the two counts were substantially the same.—*Gould v. Schermer (Iowa) 70 N. W. 697.*

§ 4. Liability of counties and villages.

[a] (Iowa: 1894.)

In an action against a county for injuries caused by a defective bridge, an instruc-

tion that it was the duty of the board, in case its members did not possess the requisite skill to discharge the duty of inspection, to appoint a competent person to inspect the county bridges at proper intervals, is proper.—*Morgan v. Fremont County (Iowa) 61 N. W. 231.*
92 Iowa, 644.

[b] (Iowa: 1895.)

In the case of a horse backing off an approach to a bridge where there was no railing or barrier, it is proper to instruct that, if ordinary care required the approach to be guarded by a railing, and an ordinary and suitable railing would have prevented the injury, the county was liable.—*Miller v. Boone County (Iowa) 63 N. W. 352.*

[c] (Mich.: 1896.)

Where a bridge was built by private persons, and the village adopted an ordinance purporting to open and dedicate, as approaches to the bridge, certain land purchased for water-work purposes, the land so dedicated is a highway, in fact, for the maintenance of which the village is liable.—*Williams v. Village of Petoskey (Mich.) 66 N. W. 55.*

[d] (Mich.: 1896.)

Though Pub. Acts 1879, No. 280, under which the village of Petoskey was incorporated, in section 4 provides that all bridges built across Bear river within the village limits shall be maintained by the township of Bear Creek at large, yet where a bridge, which was erected by private persons, but recognized by the village and the township, crossed said Bear creek, and also an artificial channel running parallel therewith constructed by the village for its own use, the village is liable for the safe maintenance of that portion which crossed its said channel.—*Williams v. Village of Petoskey (Mich.) 66 N. W. 55.*

§ 5. Notice of defect.

[a] (Iowa: 1894.)

In an action against a county for injuries caused by a defect in a county bridge, evidence that a member of the board of county supervisors was informed of the defect prior to a regular meeting of the board held before the time of the accident is competent, as it is the duty of each member of the board to report defects in bridges.—*Morgan v. Fremont County (Iowa) 61 N. W. 231.*
92 Iowa, 644.

[b] (Neb.: 1895.)

A county is liable for injuries caused by a defective county bridge, though no notice of the defects had been given to any officer of the county.—*Ransch v. Dodge County (Neb.) 61 N. W. 725, 43 Neb. 508.*

§ 6. Contributory negligence of traveler.

[a] (Iowa: 1896.)

In an action for personal injuries caused by a defective highway bridge, a complaint alleging that the bridge "became decayed, shaky, out of repair, timbers rotten and displaced, so that it was obviously defective and dangerous continuously for more than a year prior to the accident; that defendant could have readily discovered the defective and dangerous condition in ample time to have made repairs and prevented said accident,"—does not show that plaintiff was negligent in using the bridge.—*Homan v. Franklin County (Iowa) 68 N. W. 559.*

[b] (Wis.: 1894.)

In an action for personal injuries through the negligent construction of a bridge, it appeared that the hayrack of plaintiff's sled, on which she was hauling hay, caught on a forked post negligently placed on the bridge. The hay was loaded very insecurely, and had already tipped over once. Plaintiff attempted to start the sled while on the hay, and was thrown into the ravine by reason of the load upsetting. *Held*, that plaintiff was, as a matter of law, guilty of contributory negligence.

—Fisher v. Town of Franklin (Wis.) 61 N. W. 80, 89 Wis. 42.

BRIEFS.

See "Appeal," §§ 102, 103.

BROKERS.

See "Factors and Brokers."

BUILDING AND LOAN ASSOCIATIONS.

Act authorizing formation, class legislation, see "Constitutional Law," § 24.
Exemptions from operation of interest laws, act granting special privilege, see "Constitutional Law," § 26.

§ 1. Violation of franchise—Injunction.

(Minn.: 1896.)

A building and loan association doing business under Laws 1891, c. 131 (Gen. St. 1894, §§ 2855-2894), is a corporation having power to make loans on pledges, within Gen. St. 1894, § 5900, and hence may, in an action by the attorney general on behalf of the state under that section, be restrained from exercising any of its corporate rights whenever it violates the provisions of its acts of incorporation or any other law binding on it.—*State v. American Savings & Loan Ass'n* (Minn.) 67 N. W. 1, 64 Minn. 349.

§ 2. By-laws.

(Minn.: 1895.)

Where a building and loan association and its members had given ambiguous by-laws of the association a uniform and practical construction, that construction, as applied to contracts between the association and said members, will be applied by the court.—*McDonough v. Hennepin County Catholic Building & Loan Ass'n* (Minn.) 64 N. W. 106, 62 Minn. 122; *Hughes v. Same*, *Id.*

§ 3. Loans to members.

[a] (Mich.: 1894.)

A loan association may be compelled to accept such a sum in satisfaction of a mortgage given by one of its members, and held by it, as accords with the representations in reference to its by-laws, made by its secretary in his dealings with plaintiff at the time of making the loan. Grant and Hooker, JJ., dissenting.—*Sawyer v. Menominee Loan & Bldg. Ass'n* (Mich.) 61 N. W. 521.

103 Mich. 228.

[b] (Mich.: 1895.)

Laws 1887, Act No. 50, § 10, providing that, on repayment of a loan before the end of the eighth year after the issue of the stock on which the loan is made, one-eighth of the premium bid shall be returned for each unexpired year of the eight, applies only in case of voluntary payment.—*People's Bldg. & Loan Ass'n of Saginaw County v. Billing* (Mich.) 62 N. W. 373.

104 Mich. 186.

[c] (Neb.: 1896.)

By-laws of building and loan associations, fixing a mode of ascertaining a credit due a borrowing member on account of unearned premium, in determining the amount due on the loan, will be enforced, if not unconscionable.—*Livingston Loan & Building Ass'n v. Drummond* (Neb.) 68 N. W. 375.

[d] (Neb.: 1896.)

In ascertaining the amount due on a loan made by a building and loan association to a member, the borrower is entitled to a credit of the present value of the stock at the time of

foreclosure, as well as to a fair credit on account of unearned premium.—*Livingston Loan & Building Ass'n v. Drummond* (Neb.) 68 N. W. 375.

§ 4. — Unconscionable contract.

(Neb.: 1895.)

An agreement whereby the stock of a borrowing member of a foreign building and loan association, pledged as security for his loan, is to be forfeited on default of interest, without allowing credit on account of payments previously made on such stock, is unconscionable, and will not be enforced by the courts of Nebraska, though recognized as valid in the association's own state.—*Randall v. National Building, Loan & Protective Union of Minneapolis* (Neb.) 62 N. W. 252, 43 Neb. 876.

§ 5. — Premium.

(Mich.: 1895.)

Laws 1887, Act No. 50, § 8, providing that the member bidding the highest premium for the priority of loan shall be entitled to receive the amount fixed by the by-laws in relation to the amount of his stock, "less the premium bid," authorizes the association to deduct the premium bid from the face of the loan.—*People's Bldg. & Loan Ass'n of Saginaw County v. Billing* (Mich.) 62 N. W. 373.

104 Mich. 186.

§ 6. — Ultra vires.

[a] (Mich.: 1895.)

Though the by-laws of a building and loan association provide that no loan shall be made except to members, the fact that, on a loan being made to a member, the joint bond of the member and one not a member is taken, does not open to them the defense of ultra vires.—*People's Bldg. & Loan Ass'n of Saginaw County v. Billing* (Mich.) 62 N. W. 373.

104 Mich. 186.

[b] (Minn.: 1895.)

One who received the benefit of a loan from a loan association cannot defeat a recovery therefor on the ground that the loan contract was ultra vires.—*Central Building & Loan Ass'n v. Lampson* (Minn.) 62 N. W. 544.

60 Minn. 422.

§ 7. — Usury.

[a] (Minn.: 1895.)

A building and loan association organized under Gen. St. 1878, c. 34, § 169 (Gen. St. 1894, § 2794), and doing a local business only, is not subject to the usury laws where it loans its funds to members at a rate of interest not in itself usurious, and, in addition thereto, receives a premium for such loans, though the premium and interest together exceed the legal rate.—*Central Building & Loan Ass'n v. Lampson* (Minn.) 62 N. W. 544.

60 Minn. 422.

[b] (Minn.: 1895.)

Where it appeared that the borrower from an alleged corporation was required to buy corporate stock of the lender; that the note given included the price of the stock in addition to the amount borrowed; that such stock had no market value, and no dividends were paid thereon,—*held*, that the sale of stock was a mere cover for usury.—*City Loan Co. v. Cheney* (Minn.) 63 N. W. 250.

61 Minn. 83.

[c] (Neb.: 1896.)

Under Act 1873 (Gen. St. p. 207), authorizing building and loan associations created thereunder to collect money by stated dues, fines, interest, and by premiums bid by members for the right of precedence in taking loans, and providing that the dues, fines, and premiums, though in excess of legal interest, shall not make the loan usurious, interest may be reserved at the highest legal rate on the face of the loan, though the premium be deducted from that amount,

and the difference only paid the borrower.—Livingston Loan & Building Ass'n v. Drummond (Neb.) 68 N. W. 375.

§ 8. — Application of payments on stock.

[a] (Neb.; 1895.)

A borrowing member of a building and loan association may elect to have payments on account of stock applied on his indebtedness to the association. 60 N. W. 1019 (1894), affirmed.—Randall v. National Building, Loan & Protective Union of Minneapolis, 62 N. W. 352, 43 Neb. 876.

[b] (Neb.; 1895.)

Stock payments, by a borrowing member of a building and loan association, are not ipso facto credits on his indebtedness, so as to reduce pro tanto the amount due on his mortgage.—Randall v. National Building, Loan & Protective Union of Minneapolis, 62 N. W. 252, 43 Neb. 876.

§ 9. Forfeiture of stock.

(Mich.; 1895.)

Where the bond given by a member in consideration of a loan provides that, on default in payment of dues on his stock transferred as security, the association may, at its option, declare the stock forfeited, and apply its withdrawal value on the bond, a formal foreclosure is not necessary to such application.—People's Bldg. & Loan Ass'n of Saginaw County v. Billing (Mich.) 62 N. W. 373.

104 Mich. 186.

§ 10. Mortgages.

(Minn.; 1896.)

A national building and loan association advanced money to a member, who bid a certain premium therefor, and took a mortgage to secure the advance and the monthly dues on the member's stock, which it was estimated would mature in nine years, until it matured, stipulating that a default of an installment of interest or stock dues for six months should render dues for the whole nine years payable, and that the same might be enforced at once as liquidated damages. *Held*, that on default the amount due on the mortgage for stock dues was the amount of their present value in gross.—Mandlin v. American Savings & Loan Ass'n (Minn.) 65 N. W. 645.

63 Minn. 358.

§ 11. Insolvency—Rights of members.

[a] (Minn.; 1897.)

In adjudging matters between an insolvent association and its members, the court should, as far as is equitable, proceed on the principle of rescission; and each member should, to that extent, receive what he was paid, and pay back what he has received.—Knutson v. Northwestern Loan & Building Ass'n (Minn.) 69 N. W. 889.

[b] (Minn.; 1897.)

A borrowing member of an insolvent association is entitled to set off against his debt only the excess of what he had paid against the loan, over his share of the losses and expenses of the association and the expenses of receiver.—Knutson v. Northwestern Loan & Building Ass'n (Minn.) 69 N. W. 889.

[c] (Minn.; 1897.)

Where, because of losses, the association becomes unable to mature its stock or to carry out the purpose for which it was organized, and the court proceeds to wind up its business, the contract between the members, at least so far as concerns future performance, is terminated.—Knutson v. Northwestern Loan & Building Ass'n (Minn.) 69 N. W. 889.

BUILDING CONTRACTS.

See "Contracts," § 33.

BURDEN OF PROOF.

See "Evidence," § 8.

BURGLARY.

I. WHAT CONSTITUTES, §§ 1-3.

II. INDICTMENT AND INFORMATION, §§ 4, 5.

III. EVIDENCE, §§ 6-8.

IV. INSTRUCTIONS, § 9.

I. WHAT CONSTITUTES.

§ 1. Elements of offense.

(Neb.; 1897.)

That the act be committed in the nighttime is an essential element of the crime, as defined by Cr. Code, § 48.—In re McVey (Neb.) 70 N. W. 51.

§ 2. The breaking.

[a] (Iowa; 1895.)

Opening a screen door, not fastened, but hung on spring hinges, which serve to keep it closed, is a breaking.—State v. Conners (Iowa) 64 N. W. 295.

[b] (Neb.; 1895.)

A breaking necessary to constitute burglary may be any act of physical force, however slight, by which the obstruction to entrance is removed.—Metz v. State, 65 N. W. 190, 46 Neb. 547.

§ 3. Character and location of building.

[a] (Iowa; 1896.)

A corn crib 150 feet by 12 feet, having a roof, the only opening for entrance to which was a place where a board had been left off near the roof, and constructed upon heavy posts sunk into the ground, on which joists were nailed to support the floor, the sides being constructed by nailing fencing boards to the posts, the boards near the bottom being close together, and the other about 1½ inches apart, is a building (Code, § 3894) in which valuable things are kept, so as to authorize a conviction under such section for breaking into the crib with intent to commit a public offense.—State v. Gibson (Iowa) 66 N. W. 742.

[b] (Mich.; 1895.)

Where two stores have a stairway between them, leading up from the street to the second story, and descending at the rear, and the second story of each is occupied as a dwelling, and is accessible only from the stairway, having no entrance from the stores, the stores are within 2 How. Ann. St. § 9134, providing that any person who breaks and enters, in the night, a store "not adjoining to or occupied with a dwelling house," with intent to commit larceny, shall be imprisoned in the state prison for not more than 15 years.—People v. Van Dam (Mich.) 65 N. W. 277.

[c] (Neb.; 1895.)

A building erected on a farm, within which to store husked corn, is a storehouse and warehouse, within Cr. Code, § 48, defining burglary.—Metz v. State, 65 N. W. 190, 46 Neb. 547.

II. INDICTMENT AND INFORMATION.

Duplicity, see "Indictment and Information," § 23.

§ 4. Sufficiency in general.

[a] (Iowa; 1895.)

An indictment charging the burglarious entry of a dwelling with intent "to commit a public offense, to wit, adultery," need not allege the facts necessary in an indictment for

adultery.—*State v. Mecum* (Iowa) 61 N. W. 286.

[b] (Mich.; 1895.)

An indictment for burglary may be laid as at common law, without referring to the special facts so as to bring it within one of the different degrees of punishment provided by statute for burglary.—*People v. Shaver* (Mich.) 65 N. W. 538.

[c] (S. D.; 1896.)

Laws 1895, c. 64, § 3, requires an offense charged in an information to be stated with the same precision as is required in an indictment. Comp. Laws, § 7249, provides that an indictment is sufficient if the act charged is clearly set forth in ordinary language, so that a person of common understanding could know what is intended, and with such certainty as that the court can pronounce judgment according to the right of the case. Section 6741 provides that every person who breaks and enters in the nighttime any building, etc., in which any property is kept, with intent to steal or commit any felony, is guilty of burglary in the third degree. *Held*, that an information was sufficient which charged that defendant, in the nighttime, burglariously broke and entered with intent, etc., burglariously to steal, though it did not state the degree of the offense charged.—*State v. La Croix* (S. D.) 66 N. W. 941.

[d] (Wis.; 1895.)

Under Laws 1893, c. 63, making the possession of burglars' tools adapted to break open places of deposit, in order to take therefrom any money or property, with intent to use them for such purpose, an offense, an information alleging possession with the intent to break open places of deposit in general, and take property therefrom, without specifying any particular place or property, is sufficient.—*Scott v. State*, 65 N. W. 61, 91 Wis. 552.

§ 5. Variance.

[a] (Iowa; 1895.)

Under Code, § 4302, providing that, where an offense involving injury to property is described in other respects with sufficient certainty, an erroneous allegation of the name of the injured person is immaterial, an indictment alleging the breaking into a store of certain named persons, "known as the 'Grange Store,'" in a certain town, is sufficient on proof that the store was known as the "Grange Store," in such town, though owned by the persons named, not as individuals, but as a corporation.—*State v. Jelinek* (Iowa) 64 N. W. 259.

[b] (Iowa; 1895.)

Where an indictment for burglary alleged the title to the building to be in one whom the evidence showed to be only a tenant thereof, there was no fatal variance.—*State v. Lee* (Iowa) 64 N. W. 284.

[c] (Iowa; 1896.)

Where, on a prosecution for burglary, the evidence showed that the building entered was a three instead of a two story building, as charged in the indictment, the variance was not fatal.—*State v. Porter* (Iowa) 66 N. W. 745.

[d] (Iowa; 1896.)

Where, on a prosecution for burglary, the evidence showed that the office entered, instead of being, as alleged, in the possession of a person individually, was in his possession as president of a corporation, the variance was immaterial.—*State v. Porter* (Iowa) 66 N. W. 745.

III. EVIDENCE.

Of other crimes, see "Criminal Law," §§ 122-125.

§ 6. Possession of stolen property.

[a] (Iowa; 1895.)

It is not error to instruct that, if the building was broken into, and property stolen

therefrom, and within a few hours thereafter the property so stolen was found in the possession of defendant, the jury would be warranted in believing that the property was stolen by defendant by breaking and entering the building, unless the evidence raised in their minds a reasonable doubt as to whether he came honestly into possession of it.—*State v. La Grange* (Iowa) 62 N. W. 664.

[b] (Iowa; 1896.)

An instruction that if goods were, by some person, stolen from a building in the night, by breaking and entering it, and were found within a few days in defendant's possession, the jury would be "warranted in concluding that they * * * were stolen by said defendant by breaking and entering such building in the nighttime," was proper.—*State v. Ham* (Iowa) 66 N. W. 1028.

[c] (Neb.; 1895.)

The facts that it appeared that a building was burglarized, and that property was stolen therefrom, which was soon after found in defendant's possession, do not raise a presumption of law of defendant's guilt of burglary.—*Metz v. State*, 65 N. W. 190, 46 Neb. 547.

§ 7. Identity of stolen property.

(Mich.; 1895.)

On trial for breaking into a store in the night, with intent to commit larceny, the indictment also containing a count for larceny, bottles of peppermint, brought from the store at the time of the trial, were admissible to identify similar bottles found in defendant's house after the burglary.—*People v. Van Dam* (Mich.) 65 N. W. 277.

§ 8. Sufficiency.

[a] (Iowa; 1895.)

The possession by defendant of goods recently stolen by breaking into a building is prima facie evidence that he is guilty of the burglary.—*State v. La Grange* (Iowa) 62 N. W. 664.

[b] (Wis.; 1895.)

Where, on prosecution for having possession of burglars' tools, with an intent to use them, there is evidence by the prosecution that, on arrest of defendant while stealing a ride on an express train, the tools were found concealed in his pants and shoes; that the tools form a complete burglars' kit, except the brace, which is always obtained at the place of operation; and by defendant that he found the tools, —a refusal to take the case from the jury is proper.—*Scott v. State*, 65 N. W. 61, 91 Wis. 552.

IV. INSTRUCTIONS.

§ 9. Province of court and jury.

[a] (Iowa; 1895.)

An instruction that if the jury found that defendant went to a certain dwelling secretly, in the nighttime, and secretly entered the dwelling, and shortly thereafter was found in bed with a woman, both undressed, a strong presumption would arise that he entered for the purpose of committing adultery, is not objectionable as presuming the intent charged, notwithstanding there was evidence tending to show that he did not have that intention when he went to the house.—*State v. Mecum* (Iowa) 64 N. W. 286.

[b] (Neb.; 1895.)

On a trial for burglary, wherein it appeared that the property was found in defendant's possession, and wherein defendant denied that the property was stolen, it was reversible error to assume larceny of the property in instructing, though the law on that point was elsewhere correctly stated.—*Metz v. State* (Neb.) 65 N. W. 190, 46 Neb. 547.

BURIAL.

See "Cemeteries."

BURNING.

See "Arson."

BY-LAWS.

Of building association, see "Building and Loan Association," § 2.
Unconscionable contract of building association, see "Building and Loan Associations," § 4.

C.**CADUCITY.**

See "Descent and Distribution."

CANCELLATION.

Of certificate of stock, see "Corporations," §§ 54, 55.
Of contract in equity, see "Equity," §§ 14-20.
Of entries on public lands, see "Public Lands," § 15.
Of policy, see "Insurance," §§ 24, 25.

CANVASS.

Of votes, see "Elections and Voters," §§ 16-24.

CAPIAS AD SATISFACIENDUM.

See "Arrest," §§ 2, 3.

CAPTION.

Of indictment, see "Indictment and Information," §§ 5, 6.

CARELESS DRIVING.

See "Negligence," § 3.

CARNAL KNOWLEDGE.

See "Adultery"; "Rape"; "Seduction."

CARRIERS.**I. CARRIERS IN GENERAL, §§ 1, 2.****II. CARRIERS OF GOODS, §§ 3-32.**

1. In General, § 3.
2. Acceptance and Delivery, §§ 4-9.
3. Delay in Transportation, § 10.
4. Liability for Loss or Injury, §§ 11, 12.
5. Liability as Warehousemen, § 13.
6. Live-Stock Shipments, § 14.
7. Limiting Liability, §§ 15-19.
8. Connecting Lines, §§ 20-25.
9. Discrimination and Overcharge, §§ 26, 27.
10. Freight and Lien, §§ 28-32.

III. CARRIERS OF PASSENGERS, §§ 33-71.

1. Contract of Carriage, §§ 33-37.
2. Who are Passengers, §§ 38, 39.
3. Injuries to Passengers, §§ 40-54.
4. Contributory Negligence of Passengers, §§ 55-62.
5. Ejection of Passengers, §§ 63-70.
6. Passengers' Effects, § 71.

Duty of telegraph company as public carrier, see "Telegraph Companies," § 2.

I. CARRIERS IN GENERAL.**§ 1. Combinations of carriers.**

(S. D.; 1896.)

A regulation promulgated and observed by a freight association, consisting of numerous railway companies, by which the capacity of tank cars owned by shippers, and not listed in what is denominated a "Joint Tank Line Circular," showing the actual weight, shall be estimated at 40,000 pounds, will not be declared unreasonable, in the absence of a reliable basis for computation, or anything to show that the gross amount of freight charged and collected thereunder was excessive.—*Coates v. Chicago, M. & St. P. Ry. Co.* (S. D.) 65 N. W. 1067.

§ 2. Interstate commerce act.

(Iowa; 1895.)

The interstate commerce act (section 22), providing that the act shall not abridge the remedies "now existing" at common law or by statute, does not confer on the shipper the right to recover overcharges on shipments made prior to the passage of the act, on the ground that it recognizes a common-law or statutory liability on the part of the carrier therefor.—*Gatton v. Chicago, R. I. & P. Ry. Co.* (Iowa) 63 N. W. 589.

II. CARRIERS OF GOODS.

Act regulating freights, due process of law, see "Constitutional Law," § 41.

Garnishment of property in hands of carrier, see "Garnishment," § 6.

Interstate commerce regulations, see "Constitutional Law," § 46.

Manner of serving notice of proceeding for violating orders of railroad and warehouse commission, delegation of legislative power, see "Constitutional Law," § 15.

1. IN GENERAL.**§ 3. Bills of lading.**

[a] (Iowa; 1897.)

A bill of lading given to a bank as security for money advanced on a draft for the price of the goods is sufficient to pass title to the bank.—*Ayres, Weatherwax & Reed Co. v. Dorsey Produce Co.* (Iowa) 70 N. W. 111.

[b] (Mich.; 1896.)

The receipt of a bill of lading issued by a carrier by the consignee without objection constitutes the contract of carriage, and fixes the rights and liabilities of the parties.—*Smith v. American Exp. Co.* (Mich.) 66 N. W. 479.

[c] (Minn.; 1895.)

An instrument issued by the carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destina-

tion, is a bill of lading.—*Freeman v. Kraemer* (Minn.) 65 N. W. 455.
63 Minn. 212.

[d] (Neb.; 1895.)

The indorsement and delivery of a bill of lading is constructive delivery of the property to the indorsee.—*Union Pac. Ry. Co. v. Johnston* (Neb.) 63 N. W. 144.
45 Neb. 57.

Embodiment contract for through transportation, see post, § 21.

2. ACCEPTANCE AND DELIVERY.

§ 4. Furnishing facilities for shipment.

(Mich.; 1895.)

Where an express company establishes limits in a city, beyond which it will not call for or deliver packages, it is not liable for refusing to call for or deliver packages at the store of one who, knowing of the limits, moved his store outside thereof, though the limits established in another direction were further from the company's office than such store.—*Bullard v. American Exp. Co.* (Mich.) 65 N. W. 531.

§ 5. Delivery by carrier.

[a] (Minn.; 1896.)

A carrier received goods to be carried to a point beyond its own line, with directions to deliver them to certain connecting carriers, with the last of which the shipper had made an agreement for the stopping of the car at two intermediate points on its line, so that part of the goods could be taken out at each point. It, however, wrongfully sent the goods by a different carrier, whose lines did not reach the place of destination, and reached but one of the intermediate points. On arrival of the goods at that point, the shipper disclosed his contract to have them distributed at three points, but compliance therewith was refused until the freight for the entire route was paid. *Held* that, by paying the freight, and accepting the portion of the goods destined for that point, the shipper did not accept a delivery of the entire shipment.—*Brown & Haywood Co. v. Pennsylvania Co.* (Minn.) 65 N. W. 961.
63 Minn. 546.

[b] (Neb.; 1895.)

The delivery of goods by a carrier to the consignee thereof is at the peril of the carrier unless such consignee surrendered the bill of lading either made or indorsed to himself.—*Union Pac. Ry. Co. v. Johnston* (Neb.) 63 N. W. 144.
45 Neb. 57.

§ 6. — To whom delivery may be made.

[a] (Minn.; 1896.)

The shipper of goods consigned them to himself, and received a bill of lading from the railway company accordingly. The railway company delivered them, with a proper waybill, to the next connecting railway company, who, at the shipper's request, delivered the goods to him in transit at an intermediate point, without the surrender or cancellation of the bill of lading, which he thereafter, and before the goods would have arrived at their original destination if the transit had continued, pledged, in the usual course of business, to an innocent pledgee, for value. *Held*, the latter railway company is liable to the pledgee for failure to deliver the goods at the place of destination, and is estopped from showing such intermediate delivery to the shipper.—*Ratzer v. Burlington, C. R. & N. Ry. Co.*, 66 N. W. 988, 64 Minn. 245.

[b] (Neb.; 1896.)

Directions, contained in a bill of lading, to notify a certain person of the arrival of the shipment at the place of destination, is no authority to the carrier to make delivery of such shipment to the person so to be notified, without the production of the bill of lading.—*Union Stock-Yards Co. v. Westcott*, 66 N. W. 419, 47 Neb. 300.

§ 7. — Liability for conversion.

(Neb.; 1895.)

The refusal of a common carrier to surrender goods to the rightful owner amounts to a conversion, for which the owner may recover, if entitled to possession at the time of his demand, though the owner was a stranger to the contract of bailment.—*Shellenberg v. Fremont, E. & M. V. R. Co.* (Neb.) 63 N. W. 859.
45 Neb. 487.

§ 8. Liability for failure to deliver.

[a] (Minn.; 1895.)

In an action against an express company, as warehouseman, to recover a package of money, it appeared that defendant's agent, on retiring, placed the money on his dresser, and that he did not miss it till the consignee called for it on the following day, at which time, instead of going to the dresser, he looked for it in his express case and other places, and stated that he must have sent the money away that morning by mistake. It did not appear that the door of the agent's sleeping room was locked, and there was no evidence of a theft or loss of the money, other than the fact that it was missing. *Held*, that a verdict for plaintiff was warranted.—*Geo. C. Bagley Elevator Co. v. American Exp. Co.* (Minn.) 65 N. W. 264.
63 Minn. 142.

[b] (Minn.; 1896.)

It was no excuse for the carrier's failure to deliver a quantity of fish to the consignee that they were seized by the game warden for the alleged reason that they were caught out of season, where, as a matter of law, the warden had no right to seize them.—*Merriman v. Great Northern Exp. Co.* (Minn.) 65 N. W. 1080.
63 Minn. 543.

[c] (Neb.; 1897.)

In an action by the consignor for failure to deliver goods, he must aver that he was the owner, that he is liable for their loss, or that he has sustained special damage.—*Union Pac. R. Co. v. Metcalf* (Neb.) 69 N. W. 961.

§ 9. Liability for misdelivery.

(S. D.; 1895.)

Cattle shipped by defendant's road were consigned to the shipper in care of P., on the order of plaintiffs, the shipper drawing a draft in favor of plaintiffs on P., which plaintiffs discounted, and, attaching thereto the bill of lading, forwarded for collection. Defendant, however, delivered the cattle to P., without the order or consent of plaintiffs, and without the bill of lading. Sheep having been shipped to P. by the same shipper, a draft was drawn on him by the latter in favor of plaintiffs, who discounted the same. Afterwards the sheep were delivered to P., who paid the draft, the proceeds whereof were delivered to plaintiffs. Thereafter P. refused to accept the sheep, and turned them over to the shipper, who delivered them to plaintiffs as security for the unpaid cattle draft. *Held* that, on plaintiffs' failure to realize anything from the sheep through no fault of theirs, they could recover of defendant the amount of the cattle draft to the extent of the value of the cattle.—*Stone v. Chicago, M. & St. P. Ry. Co.* (S. D.) 65 N. W. 29.

3. DELAY IN TRANSPORTATION.

§ 10. Damages.

[a] (Mich.; 1895.)

In an action against a carrier for delay in delivering goods, plaintiffs testified that the market value of the goods depreciated during the delay. One of them testified that they could not say what they could be sold for; that they might have disposed of them at cost, to the detriment of goods selling at a profit; that possibly they could not have been bought at the time they were received for less than when plaintiffs bought them. The other admitted

that the market value had not depreciated. *Held*, that a finding that there was no depreciation was supported by the evidence.—*Houseman v. Merchants' Dispatch Transp. Co.* (Mich.) 62 N. W. 290.

104 Mich. 300.

[b] (Wis.; 1896.)

Damages recoverable for a breach of contract of carriage must be such as might reasonably have been contemplated by the parties at the time the contract was made, and, where the carrier is not notified by the shipper, at the time of the delivery, of the character of the goods or of the purpose of the shipment, it is not liable for damages resulting from a delay in shipment; nor will a subsequent notice, given in time to prevent a delay, of the nature of the goods, and that special damages will result from delay, modify the contract, or render the carrier liable for such damages.—*Bradley v. Chicago, M. & St. P. Ry. Co.* (Wis.) 68 N. W. 410.

4. LIABILITY FOR LOSS OR INJURY.

§ 11. Liability as gratuitous bailee.

(Wis.; 1895.)

An agreement by an agent of a carrier to have goods forwarded to their proper destination from a point on a connecting line to which they were carried through the mistake of the shipper, in addressing them, makes such carrier merely a gratuitous bailee of the goods.—*Treleven v. Northern Pac. R. Co.* (Wis.) 62 N. W. 536, 89 Wis. 598.

§ 12. Amount of damages.

(Minn.; 1895.)

Where a shipper of first-class freight stated the value of the goods shipped so low as to entitle them to be classed as second-class freight, in order to obtain the benefit of a lower freight rate, and the bill of lading provided that loss should be adjusted at the value given by the shipper, the shipper could not, in case of loss, recover more than that value.—*J. J. Douglas Co. v. Minnesota Transfer Ry. Co.* (Minn.) 64 N. W. 899.
62 Minn. 288.

5. LIABILITY AS WAREHOUSEMEN.

§ 13. When relation arises.

[a] (Wis.; 1895.)

Where goods were originally delivered to a railroad company to be kept until further orders, the company's custody thereof was that of a warehouseman until receipt of orders to ship the goods.—*Schmidt v. Chicago & N. W. Ry. Co.* (Wis.) 63 N. W. 1057.
90 Wis. 504.

[b] (Wis.; 1896.)

The liability of a carrier, as such, ceases when a reasonable time has elapsed, after the goods reach their destination, for the consignee to remove them.—*Backhaus v. Chicago & N. W. Ry. Co.* (Wis.) 66 N. W. 400.
92 Wis. 393.

[c] (Wis.; 1896.)

Actual notice of the arrival of goods, given by the carrier to the consignee's agent three days before the property was destroyed by accidental fire, released the carrier from liability.—*Backhaus v. Chicago & N. W. Ry. Co.* (Wis.) 66 N. W. 400.
92 Wis. 393.

6. LIVE-STOCK SHIPMENTS.

Limitation of liability, see post, §§ 15, 17, 18.

§ 14. Loss or injury.

[a] (Mich.; 1896.)

In the absence of a special contract by a carrier to look after stock shipped over its line,

a shipper who neglects to send a care taker with his cattle assumes all damages caused by their unduly crowding and injuring one another, and that which results from their natural restiveness and viciousness.—*Heller v. Chicago & G. T. Ry. Co.* (Mich.) 66 N. W. 667.

[b] (Mich.; 1896.)

A railroad company does not assume the common-law duties of a common carrier in respect to stock shipped over its line, but is only bound to transport the same with ordinary care and skill, and with reasonable dispatch.—*Heller v. Chicago & G. T. Ry. Co.* (Mich.) 66 N. W. 667.

[c] (Wis.; 1896.)

Whether it is negligence for a carrier to drive horses loose into a pen, instead of leading them separately, is a question for the jury.—*Loeser v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 372.

[d] (Wis.; 1897.)

A carrier is liable for injury to animals shipped, from a defect in the car, which a reasonably careful inspection by an experienced person would have disclosed, but which was not obvious or such as would ordinarily be discovered by an inexperienced person, notwithstanding a stipulation that the shipper examine the car, and assume the risk of its suitability, unless he accepted it with full knowledge of the defect.—*Leonard v. Whitecomb* (Wis.) 70 N. W. 817.

7. LIMITING LIABILITY.

To end of line, see post, § 25.

§ 15. In general.

[a] (Iowa; 1897.)

A stipulation in a shipping contract that no claim "for loss or damage to stock" shall be valid unless presented to the carrier in writing within 30 days thereafter does not apply to damage from depreciation in the market price of stock occasioned by the carrier's neglect to seasonably deliver to the consignee.—*Kramer v. Chicago, M. & St. P. Ry. Co.* (Iowa) 70 N. W. 119.

[b] (Minn.; 1895.)

If the acceptance of goods for transportation by a carrier be special, the burden of proof in case of loss is on him to show, not only that the cause of the loss was within the terms of the exception, but that there was on his part no negligence.—*Shea v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.) 65 N. W. 458.
63 Minn. 228.

[c] (Neb.; 1897.)

A limitation of liability contained in a shipping contract will not be enforced, though valid in the state where made, if contrary to the public policy of Nebraska.—*Chicago, B. & Q. R. Co. v. Gardiner* (Neb.) 70 N. W. 508.

§ 16. Consideration of contract.

(Minn.; 1895.)

Where receipts given by a carrier for a shipment of flour were unqualified and unrestricted, the presumption is that a stipulation in the bills of lading subsequently issued, whereby the association attempted to relieve itself from liability in case the flour was lost in transit, was without consideration.—*Southard v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.) 62 N. W. 442.
60 Minn. 382.

§ 17. Exemptions from particular risk.

[a] (Mich.; 1896.)

A carrier is not liable for loss of property by fire, where the shipping contract expressly exempts it from such liability unless there is evidence to show that it was caused by the carrier's negligence.—*Smith v. American Exp. Co.* (Mich.) 66 N. W. 479.

[b] (Minn.; 1895.)

Where the carriage contract exempts the carrier from liability for loss by fire, to enable it to claim such exemption the burden of proof is on it to show that the fire was not caused by its negligence.—*Southard v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.)* 62 N. W. 619.

60 Minn. 382.

[c] (Wis.; 1896.)

The provision that the company shall not be liable for the acts of the animals themselves, or injuries to each other, such as biting, kicking, and smothering, nor for loss or damage arising from unloading them, does not relieve it from liability for injury to one of them occasioned by his own act of kicking; it being caused by the negligence of the company's servants in driving them loose, instead of leading them separately, into a pen for rest or food.—*Loeser v. Chicago, M. & St. P. Ry. Co. (Wis.)* 69 N. W. 372.

§ 18. Requirement of notice of loss.**[a] (Minn.; 1896.)**

Defendant contracted with plaintiff to transport live stock to a point beyond the line of its road, it having to deliver it to a connecting road for transportation to its destination. The contract provided that, as a condition precedent to his right to recover any damage for any loss or injury to said stock, plaintiff should give notice in writing of his claim therefor to some officer of defendant or its nearest station agent, before the stock should be removed from the place of its destination or delivery, or mingled with other stock. It did not appear that defendant had any officer or agent at the place of destination or delivery. *Held*, that the condition was unreasonable and void.—*Engesether v. Great Northern Ry. Co. (Minn.)* 68 N. W. 4.

[b] (Minn.; 1897.)

A provision requiring the owner of the stock shipped, as a condition precedent to recovery for loss or injury, to give written notice of his claim to some officer or agent of the carrier before removal of the stock from the place of its destination or delivery, is unreasonable if the carrier has no officer or agent at such place.—*Carpenter v. Eastern Ry. Co. (Minn.)* 69 N. W. 729.

§ 19. Limitation of amount of liability.**[a] (Mich.; 1896.)**

A provision in a shipping contract limiting the amount of the carrier's liability, if the value of the property is not given, is valid and binding on the shipper, where there is no evidence that the shipper was ignorant of the condition.—*Smith v. American Exp. Co. (Mich.)* 66 N. W. 479.

[b] (Minn.; 1895.)

A condition in a bill of lading providing that the amount of loss or damage incurred by the carrier is to be computed at the value of the property at the time and place of shipment, and wholly failing to provide for restitution of the amount which may have been paid by the consignee as freight charges, is invalid.—*Shea v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.)* 65 N. W. 458.

63 Minn. 228.

[c] (Wis.; 1896.)

A provision limiting the carrier's liability to an agreed valuation of the property is valid.—*Loeser v. Chicago, M. & St. P. Ry. Co. (Wis.)* 69 N. W. 372.

S. CONNECTING LINES.

Care of passenger's effects, see post, § 71.

§ 20. In general.**[a] (Neb.; 1897.)**

It is the duty of a railroad company, subject to reasonable rules, to receive and trans-

port to the end of its line goods offered for shipment, and, if consigned to a point beyond its line, to safely deliver them to a connecting carrier.—*Fremont, E. & M. V. R. Co. v. Waters (Neb.)* 70 N. W. 225.

[b] (Neb.; 1897.)

A railroad company receiving goods consigned to a point on the line of a connecting carrier under an agreement to transport them to the terminus of its own road is neither at common law nor by statute answerable therefor after their safe delivery to the connecting line named in the contract of shipment.—*Fremont, E. & M. V. R. Co. v. Waters (Neb.)* 70 N. W. 225.

§ 21. Contracts for through transportation.**[a] (Neb.; 1897.)**

By the bill of lading, defendant agreed to carry goods to M., and there deliver them to a connecting carrier named, stipulating that defendant's liability should cease upon such delivery. *Held*, that evidence tending to prove that defendant's line and that of the connecting carrier were parts of the same "system" was not sufficient to render the bill of lading a contract for carriage to a point on the connecting line, to which they were consigned.—*Fremont, E. & M. V. R. Co. v. Waters (Neb.)* 70 N. W. 225.

[b] (S. D.; 1895.)

On an issue whether a railroad company adopted a contract made with plaintiff by its station agent to transport freight beyond its line over a connecting line in a through car without transshipment or rehandling of the goods, an agreement to that effect with the agent, and a payment to him of an entire freight charge to the destination, and the sending by the carrier of a car ordered by the agent over the connecting line, were circumstances sufficient to take the question to the jury.—*Page v. Chicago, St. P., M. & O. Ry. Co. (S. D.)* 64 N. W. 137.

§ 22. Misdelivery of goods.**(Minn.; 1895.)**

A carrier, the last of several connecting carriers, who delivered the goods at their destination to one other than the consignee, by reason of erroneous directions given him by an intermediate connecting carrier, without authority of either consignor or consignee, and without surrender of the bill of lading issued by the initial carrier, was liable for conversion.—*Foy v. Chicago, M. & St. P. Ry. Co. (Minn.)* 65 N. W. 627.

63 Minn. 255.

§ 23. Liability for negligence and delay.**[a] (Mich.; 1896.)**

Defendant gave a bill of lading for two car loads of goods "to the order of C., Detroit, Mich. Notify H. & Co.," which bill contained a provision that defendant should not be liable for delay after delivery to a connecting carrier. Defendant delivered the cars to another carrier, who separated and sent them to their destination over different lines, whereby one car was delayed for a month. *Held*, that the initial carrier was not liable for the delay.—*Hope v. Delaware & H. Canal Co. (Mich.)* 69 N. W. 487.

[b] (Minn.; 1895.)

A traffic association issued a through bill of lading for flour from Minneapolis to Boston, containing a stipulation that in case of loss, detriment, or damage, the carrier alone should be liable in whose actual custody it should be at the time of the loss. *Held*, that the shipper was entitled to an uninterrupted and continuous transportation from Minneapolis to Boston, and that the carrier who had transported the freight to a point where another was to assume custody and control became a guarantor or surety that the latter would receive it, and was liable as an actual custodian, where the connecting carrier unreasonably neglected or refused to

receive it.—*Southard v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 62 N. W. 442.*
60 Minn. 382.

§ 24. Loss of or injury to goods.

[a] (Minn.; 1896.)

A carrier received goods to be carried to a point beyond its own line, with directions to deliver them to certain connecting carriers, with the last of which the shipper had made an agreement for stopping the car at intermediate points on its line for delivery of portions of the goods. It, however, wrongfully sent the goods by different connecting carriers, whose lines reached but one of the intermediate points. On arrival of the goods there, the shipper disclosed his contract to have them distributed at the three points, and demanded compliance therewith. The carrier refused compliance until payment of freight for the whole route, when it delivered the goods destined to that point, and undertook, at its own cost, to carry to each of the other points the portion of the goods to be delivered there, and in doing so the goods were injured. *Held*, that the initial carrier though it did not know of the shipper's agreement with the last connecting carrier, to which it was directed to deliver the goods, was liable for the damage.—*Brown & Haywood Co. v. Pennsylvania Co. (Minn.) 65 N. W. 961.*
63 Minn. 546.

[b] (Minn.; 1896.)

A carrier is not relieved from its duty to provide cars reasonably fit for the conveyance of the particular class of goods it intends to carry, by transporting the goods over its own line in the car of the connecting carrier in which it received them, since, if it uses the cars of the connecting carrier, it makes them its own for the purpose of conveying the goods.—*Shea v. Chicago, R. I. & P. Ry. Co. (Minn.) 68 N. W. 608.*

§ 25. Limitation of liability.

(Mich.; 1896.)

A carrier is not liable for loss or injury to property after delivery to a succeeding carrier, where the contract expressly limits its liability to its own line.—*Smith v. American Exp. Co. (Mich.) 66 N. W. 479.*

9. DISCRIMINATION AND OVERCHARGE.

Overcharges of freight, see post, § 31.

§ 26. Discrimination.

(Iowa; 1895.)

The fact that a railroad company carries freight free of charge to one of its eating houses, provides it with fuel and ice, and furnishes transportation for its proprietor and his family, does not require it to perform a like service for the proprietor of any eating house on its line of road, regardless of any existing contract between them.—*Kelly v. Chicago, M. & St. P. Ry. Co. (Iowa) 61 N. W. 957.*
93 Iowa, 436.

§ 27. Before passage of interstate commerce act—Common-law remedy.

(Iowa; 1895.)

Since the common law, as such, is no part of the national jurisprudence, and since the exclusive right to regulate commerce is vested in congress, overcharges for freight on an interstate shipment, involving unjust discrimination, made prior to the interstate commerce act, cannot be recovered.—*Gatton v. Chicago, R. I. & P. Ry. Co. (Iowa) 63 N. W. 589.*

10. FREIGHT AND LIEN.

§ 28. Impeaching freight receipts.

(Iowa; 1896.)

One who had made shipments for a number of years over a railroad, paid the freight

bills presented therefor, and accepted receipts which recited the weight of the shipments, was not estopped from showing that the weight was less than that stated in such receipts.—*Higley v. Burlington, C. R. & N. Ry. Co. (Iowa) 68 N. W. 829.*

§ 29. Charge for carrying money.

(Minn.; 1896.)

Where one delivered to an express company, for carriage, bonds of the value of \$234,000, informing the company that they were valued at \$1,000, and paid for carriage the usual price for carrying a package valued at the latter sum, on carrying the package the company was not entitled to recover additional compensation to the amount usually charged by it for carrying a package of the value of \$234,000, since if it had lost the package its liability would not have exceeded \$1,000; but it was entitled to recover compensation for any increase of risk, within the \$1,000 limit, caused by the fact that the package carried was of so great a value.—*United States Exp. Co. v. Koerner (Minn.) 68 N. W. 181.*

§ 30. Payment of freight.

(Minn.; 1895.)

When property is delivered by the carrier to the consignee, a presumption arises that the latter paid the freight.—*Shea v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 65 N. W. 458.*
63 Minn. 228.

§ 31. — Recovering back overcharges.

(Neb.; 1897.)

A railroad quoted to a shipper a rate on grain from Nebraska to Colorado, but by mistake the rate quoted was less than the usual rate. The shipper, relying thereon, sold grain to parties in Colorado, basing the price on such freight rate; the purchasers to pay such freight on its delivery, and the shipper guarantying that the rate should not exceed the one quoted. The grain was shipped to the purchasers in Colorado. The last carrier, before it would deliver the grain, compelled the purchasers to pay a higher freight rate than that quoted. The shipper then paid to the purchasers this excessive freight. *Held*, that the railway company was liable for the overcharge paid by the shipper.—*Missouri Pac. Ry. Co. v. Crowell Lumber & Grain Co. (Neb.) 70 N. W. 964.*

§ 32. Waiver of lien.

(Wis.; 1896.)

The delivery of part of a consignment of lumber which had been held by the railroad company for freight and other charges will not operate as a delivery of the whole consignment in the absence of a clear showing of an intention to that effect.—*Jeffris v. Fitchburg R. Co. (Wis.) 67 N. W. 424.*
93 Wis. 250.

III. CARRIERS OF PASSENGERS.

1. CONTRACT OF CARRIAGE.

§ 33. Limitation of liability.

[a] (Iowa; 1895.)

Plaintiff was injured in Iowa by defendant's negligence while in charge of cattle shipped on defendant's train from Iowa to Illinois. The contract of shipment provided that the company should not be liable for such injury in an amount exceeding \$500. *Held*, that such contract was void under Code, § 1308, providing that a railroad corporation shall not exempt itself by contract from any of its liabilities as a common carrier.—*Solan v. Chicago, M. & St. P. Ry. Co. (Iowa) 63 N. W. 692.*

[b] (Minn.; 1896.)

A contract between a railroad company and a news agent on its train, exempting the

company from liability for injuries to the agent caused by its negligence, is void as against public policy, as respects negligence consisting in the violation of a statute requiring trains to be stopped a certain distance from railway crossings.—*Starr v. Great Northern Ry. Co.* (Minn.) 69 N. W. 632.

[c] (Neb.; 1896.)

A provision in a contract for the shipment of live stock, under which a shipper's pass is issued, that the person traveling on the pass shall be deemed an employé of the railroad company, and entitled to recover of the company only for such injuries or damages as might be recovered by a regular employé, is invalid, in so far as it requires such person to assume risks beyond those incidental to taking care of the stock, and hence to that extent does not preclude a recovery by such person for personal injuries caused by neglect of the company to perform its duties as a common carrier for hire.—*Missouri Pac. Ry. Co. v. Tietken* (Neb.) 68 N. W. 336.

[d] (Wis.; 1896.)

A stipulation by a common carrier in contracts for interstate carriage for exemption from liability for injuries to a passenger caused by the negligence of its employés is void at common law, as against public policy.—*Davis v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 16.

93 Wis. 470.

[e] (Wis.; 1896.)

In the absence of legislation by the federal government as to the validity of stipulations by a common carrier for exemption from liability for injuries to passengers, in contracts for interstate carriage, their validity is to be determined by the common law.—*Davis v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 16. 93 Wis. 470.

§ 34. Conditions of ticket.

[a] (Iowa; 1895.)

As between a person who buys a ticket bearing a date prior to the purchase and the company, he is entitled to passage on the date of purchase under the provision thereon, "continuous passage within one day of date of sale."—*Ellsworth v. Chicago, B. & Q. Ry. Co.* (Iowa) 63 N. W. 584.

[b] (Minn.; 1896.)

Where a mileage book provided that it was to be used only by the person to whom it was issued, "whose signature appears on the last page," and that it was "subject to the conditions named in the contract, and made a part hereof," one of which was that it was not transferable, and that it might be taken up if presented by any other than the original holder, "whose signature is hereon," the fact that the original purchaser never signed the book did not render it assignable.—*Rahilly v. St. Paul & D. Ry. Co.* (Minn.) 68 N. W. 853.

§ 35. — Waiver.

(Minn.; 1895.)

A practice on the part of a carrier of receiving as fare coupons detached from a commutation ticket is evidence of waiver of a condition that the coupons must be detached by the conductor on presentation.—*Thompson v. Truesdale* (Minn.) 63 N. W. 259.

61 Minn. 129.

Ejection of holder of expired or defective ticket, see post, §§ 64-66.

§ 36. Rules of carrier.

[a] (Iowa; 1896.)

Whether a regulation of a railroad company relating to the safety, comfort, or conduct of passengers is a reasonable one is a question of law for the court.—*Gregory v. Chicago & N. W. Ry. Co.* (Iowa) 69 N. W. 532.

[b] (Iowa; 1896.)

Rules prohibiting passengers from taking dogs with them in passenger cars, and requiring payment for carrying dogs in baggage cars, are reasonable.—*Gregory v. Chicago & N. W. Ry. Co.* (Iowa) 69 N. W. 532.

[c] (Minn.; 1895.)

Where the conductor and collector of a suburban train were required to commence, one at the front of the train, and the other at the rear, and work towards each other, collecting fares and tickets, until they met, a regulation, to secure the orderly and certain collection of fares and tickets from all passengers, that neither conductor nor collector should permit passengers to go past him into his part of the train, where he had completed his collection, until the entire collection was completed, unless such passengers presented tickets or fares, or satisfied the conductor or collector that they had paid, was a reasonable rule, of which passengers were bound to take notice.—*Faber v. Chicago G. W. Ry. Co.* (Minn.) 61 N. W. 918.

62 Minn. 433.

§ 37. Special contract for transportation.

(Iowa; 1896.)

Where a shipping contract, permitting the shipper to accompany his stock, and return, without extra charge, does not specify the route by which he shall return, a general usage of the carrier to allow a return by either of two routes will, if known to the shipper when the contract is made, be presumed a part thereof.—*Milroy v. Chicago, M. & St. P. Ry. Co.* (Iowa) 67 N. W. 276.

2. WHO ARE PASSENGERS.

§ 38. In general.

[a] (Iowa; 1895.)

A person who gets a ticket on his promise to the agent to pay therefor on his return, there not being time to pay before the starting of the train, and who thereafter makes such payment, is to be treated as a purchaser of the ticket in an action for ejection from the train.—*Ellsworth v. Chicago, B. & Q. Ry. Co.* (Iowa) 63 N. W. 584.

[b] (Neb.; 1896.)

A shipper of cattle, who, for the purpose of enabling him to care for his stock in transit, receives a driver's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire.—*Omaha & R. V. Ry. Co. v. Crow* (Neb.) 66 N. W. 21. 47 Neb. 84.

[c] (Wis.; 1895.)

In an action against a railroad for being put off a freight train which plaintiff had boarded as a passenger, where there is evidence that defendant was in the habit of selling passenger tickets for regular freight trains, it is proper to instruct that, when a railroad company ordinarily carries passengers on its freight trains, "if a passenger in good faith boards such a train, and is not notified to the contrary" before it leaves, he becomes a passenger, and is entitled to ride to the first station, if there is nothing in the condition of the train from which he might infer that it did not carry passengers.—*Boehm v. Duluth, S. S. & A. Ry. Co.* (Wis.) 65 N. W. 506, 91 Wis. 592.

[d] (Wis.; 1895.)

The relation of carrier and passenger exists between a railroad company whose train was stopped before a wrecked tank containing burning oil, which obstructed the track, and one who had been a passenger on its train, but had left it, under the direction of the company's servants, to await, on the company's premises, another of its trains on the other side of the wreck, and was injured by an explosion of the tank.—*Conroy v. Chicago St. P., M. & O. Ry. Co.* (Wis.) 70 N. W. 486.

§ 39. Invitation or acquiescence of carrier's employés.

[a] (Minn.; 1895.)

Since a brakeman on a freight train has no authority to collect fares, a trespasser by giving money to him does not become a passenger.—*McNamara v. Great Northern Ry. Co.* (Minn.) 63 N. W. 726.

61 Minn. 296.

[b] (Minn.; 1896.)

One who, on invitation of a brakeman of a freight train, takes passage in a car exclusively for freight, and loaded therewith, paying to the brakeman less than the regular fare, is not a passenger.—*Janny v. Great Northern Ry. Co.* (Minn.) 65 N. W. 450.

63 Minn. 380.

[c] (Minn.; 1896.)

One who bribed a brakeman to permit him to ride in a freight car was not a passenger, though the conductor, on discovering him, locked him in the car, and kept him there for some time before causing him to be ejected.—*Brevig v. Chicago, St. P., M. & O. Ry. Co.*, 66 N. W. 401, 64 Minn. 168.

3. INJURIES TO PASSENGERS.

Liability of carrier for exemplary damages, see "Damages," § 3.

§ 40. In general.

[a] (Minn.; 1896.)

A railroad company was not negligent in permitting an ordinary freight car, on which plaintiff voluntarily took passage, to stand 30 minutes in the yards at a way station for the purpose of discharging freight, after 40 minutes had been consumed in arriving at the station, without providing means of safe egress for passengers who might be required to leave the car by calls of nature. *Oviatt v. Railway Co.*, (1890) 45 N. W. 436, 43 Minn. 300, followed.—*Schilling v. Winona & St. P. R. Co.*, 68 N. W. 1083.

[b] (Wis.; 1896.)

It is the duty of a railroad company, which sells a passenger a ticket to a place on its line of road, and a sleeping-car ticket to an intermediate point, where the passenger is required to change cars, to awaken the passenger a sufficient time before reaching such point to allow an opportunity to dress and prepare to make the change.—*McKeon v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 175.

[c] (Wis.; 1897.)

A carrier is not guilty of negligence in not restraining a passenger by physical force from approaching a wrecked tank containing burning oil, which obstructed the passage of the train, where it has provided a safe place for passengers, and the danger is obvious.—*Conroy v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 70 N. W. 486.

[d] (Wis.; 1897.)

Where the flames from a tank of burning oil, which obstructed a carrier's track, rose to a great height, and the danger of approaching the tank was obvious, the carrier was not guilty of negligence in not giving warning of the danger to a passenger who had left its train on one side of the obstruction to take a train on the other.—*Conroy v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 70 N. W. 486.

§ 41. Care required by carrier.

[a] (Iowa; 1895.)

A railroad company is only required to use ordinary and reasonable care in lighting its depot platform, so that persons may use the same in going to or from the trains with reasonable safety.—*Hiatt v. Des Moines, N. & W. Ry. Co.* (Iowa) 64 N. W. 766.

[b] (Neb.; 1897.)

A street-railway company, by undertaking the transportation of passengers for hire, be-

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comes a common carrier, though the road is constructed on private property.—*East Omaha St. R. Co. v. Godola* (Neb.) 70 N. W. 491.

[c] (Neb.; 1897.)

Street-railway companies are common carriers, and required to exercise more than ordinary skill and precaution to insure the safety of passengers.—*East Omaha St. R. Co. v. Godola* (Neb.) 70 N. W. 491.

[d] (Wis.; 1896.)

A carrier is bound to exercise extraordinary care for the safety of passengers.—*Davis v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 1132.

93 Wis. 470.

[e] (Wis.; 1896.)

In an action by a passenger for personal injuries caused by a derailment, defendant's negligence cannot be considered the proximate cause of the injury, so as to warrant a recovery, unless the accident might have been reasonably foreseen by a competent man, accustomed to the management of the roadbed and track of a railway, while in the exercise of extraordinary care and prudence.—*Davis v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 1132.

93 Wis. 470.

[f] (Wis.; 1897.)

Where a passenger was injured by the explosion of a burning oil tank while waiting for a train, a charge that it was "the duty of the carrier to exercise extraordinary vigilance, aided by the highest skill, and to exercise the highest degree of care to prevent the interposition of any obstacle to expose the plaintiff to danger while waiting for the train," was reversible error, though the court correctly stated elsewhere that the duty to protect plaintiff from injury from the burning tank was "only that of ordinary care and prudence."—*Conroy v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 70 N. W. 486.

§ 42. Proximate cause of injury.

[a] (Neb.; 1896.)

Unless a passenger's going into the express car was the proximate cause of injuries received by him, or increased his risk, his doing so is not a defense to an action for the injuries.—*Fremont, E. & M. V. R. Co. v. Root* (Neb.) 69 N. W. 397.

[b] (Neb.; 1897.)

Whether the ejection of plaintiff was the proximate cause of injuries arising on his continuation of the journey by vehicle is ordinarily a question for the jury.—*Chicago, B. & Q. R. Co. v. Spirk* (Neb.) 70 N. W. 926.

[c] (Wis.; 1896.)

In an action by a passenger for personal injuries received in a derailment accident, plaintiff claimed that the injuries were caused by the negligence of defendant in the repair of its track, whereas defendant claimed that it was due to the wrongful act of third persons in placing an obstruction upon the track. There was evidence to support each claim. *Held*, that a special verdict merely finding that defendant was negligent in the repair of the track, and that defendant was guilty of negligence which occasioned the injuries, does not sufficiently show that the negligence in the repair of the tracks was the proximate cause of the injuries.—*Davis v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 16.

93 Wis. 470.

§ 43. Torts of servants of carrier.

[a] (Minn.; 1895.)

The conductor of a train could use necessary force to prevent a passenger from violating a reasonable regulation of the company.—*Faber v. Chicago G. W. Ry. Co.* (Minn.) 64 N. W. 918.

62 Minn. 433.

[b] (Wis.; 1895.)

A complaint alleging that defendant was a common carrier of passengers by steamboat, for hire; that plaintiff became a passenger on his boat; and that defendant failed to transport plaintiff with reasonable comfort and safety, or to exercise care in the selection of servants, and permitted plaintiff to be assaulted and beaten and insulted by such servants, does not state a cause of action for assault and battery, but for the negligence and misconduct of defendant as a common carrier.—*Mace v. Reed* 62 N. W. 186, 89 Wis. 440.

§ 44. Acts of fellow passengers.

(Minn.; 1896.)

There being evidence, in an action by a passenger against a railroad company for damages for failing to exercise proper police powers to protect her, by reason of which a drunken fellow passenger used towards her vile and abusive language, that the conductor failed to interfere after being notified of the passenger's misconduct, a finding that such powers were not exercised was warranted.—*Lucy v. Chicago G. W. Ry. Co.* (Minn.) 65 N. W. 944.

64 Minn. 7.

§ 45. Carriers by elevator.

(Mich.; 1895.)

Where defendant provides both a passenger and a freight elevator, there is an express invitation to take the passenger elevator; and one injured by defects on the freight elevator cannot recover.—*Amerine v. Porteous* (Mich.) 63 N. W. 300.

105 Mich. 347.

§ 46. Concurrent negligence of carrier and third persons.

[a] (Neb.; 1895.)

Street-railway companies, in Nebraska, are common carriers, and presumptively liable for the concurrent negligence of their servants and third persons resulting in personal injury to passengers.—*Pray v. Omaha St. Ry. Co.* (Neb.) 62 N. W. 447.

44 Neb. 167.

[b] (Neb.; 1895.)

A common carrier is liable for personal injuries to passengers produced by the concurrent negligence of its servants and third persons.—*St. Joseph & G. I. R. Co. v. Hedge* (Neb.) 62 N. W. 887.

44 Neb. 448.

§ 47. Sufficiency of cars and defects therein.

(Mich.; 1894.)

The complaint in an action for personal injuries alleged that defendant's car was negligently started, and that a chain with a hook at the end, which caught in plaintiff's dress and dragged her with the car, was negligently permitted to hang from the platform, near the steps. *Held*, that it was error to charge that defendant was not liable if the hook was displaced by a passenger, without charging that defendant was liable if the hook was caused to catch plaintiff's dress through the negligent starting of the car.—*Bowdle v. Detroit St. Ry. Co.* (Mich.) 61 N. W. 529.

103 Mich. 272.

§ 48. In transit.

(Neb.; 1895.)

It is evidence of negligence on the part of a street-railway company to carry passengers greatly in excess of the seating capacity of its trains, and to permit them to stand on the platform and steps of the cars.—*Pray v. Omaha St. Ry. Co.* (Neb.) 62 N. W. 447.

44 Neb. 167.

§ 49. — Derailment.

[a] (Mich.; 1895.)

In a suit by a passenger for injuries alleged to have resulted from the defective loading of logs on a train, it appeared that such logs were usually loaded from 4½ to 6 feet high, but that the loads in question were about 7 feet high; that the bottom tier was fastened with 18-inch stakes, and the top log secured by a block because of a crooked log underneath it; and that the one who loaded the logs thought the loading defective at the time. *Held*, that the question of negligence as to the loading was for the jury.—*Keating v. Detroit, B. C. & A. R. Co.* (Mich.) 62 N. W. 575.

104 Mich. 418.

[b] (Mich.; 1895.)

Where a passenger was injured by the defective loading of logs on the train, the fact that defendant's men inspected the cars before starting, and found them properly loaded, does not relieve defendant of liability.—*Keating v. Detroit, B. C. & A. R. Co.* (Mich.) 62 N. W. 575.

104 Mich. 418.

§ 50. Setting down and discharging passengers.

[a] (Neb.; 1896.)

There may be a recovery by one, whether he was a passenger or merely a licensee or trespasser, under allegations that he had become a passenger; that defendant failed to stop the train at his destination long enough to permit him to alight safely; that, as he was trying to alight, the train was negligently started; and that he then attempted to get back in the car, and was seized by the conductor, and wrongfully, negligently, and violently pulled from the car, and thrown to the ground and injured.—*Premont, E. & M. V. R. Co. v. Root* (Neb.) 69 N. W. 397.

[b] (Wis.; 1895.)

In an action against a street-railroad company for personal injuries received while plaintiff was alighting from a car, it was error to refuse to charge that the speed of the car coming down the street, before the accident, had no bearing on the question of defendant's or plaintiff's negligence, and that it should not be considered on the question of defendant's negligence.—*Hardy v. Milwaukee St. Ry. Co.* (Wis.) 61 N. W. 771, 89 Wis. 183.

§ 51. Actions for injuries—Evidence.

[a] (Mich.; 1895.)

In an action by a passenger in a coach attached to a logging train, who was injured through alleged negligence in loading the logs, whereby the coach was derailed, evidence as to the speed of the train, and the absence of a bell cord, was admissible on the question whether it was negligent to load the cars as they were loaded, in view of the probable speed of the train and the absence of a bell cord.—*Keating v. Detroit, B. C. & A. R. Co.* (Mich.) 62 N. W. 575.

104 Mich. 418.

[b] (Mich.; 1896.)

In an action against an electric street railway, by a passenger, for personal injuries, evidence merely that plaintiff, who was upon the platform to alight as soon as the car, which was slowing up, stopped at the far side of the street, its usual stopping place, was thrown from the car, by a sudden jerk, when the car was only halfway across the street, is insufficient, in the absence of evidence as to the cause of the sudden jerk, to warrant a recovery by plaintiff.—*Etson v. Ft. Wayne & B. I. Ry. Co.* (Mich.) 68 N. W. 298.

[c] (Neb.; 1895.)

Since negligence on the part of a railroad company is presumed from the fact of an injury to a passenger, the burden is on the company to prove that the injury occurred through violation of its rules or negligence by the passenger.—*St.*

Joseph & G. I. R. Co. v. Hedge (Neb.) 62 N. W. 887.

44 Neb. 448.

[d] (Neb.; 1896.)

Under Comp. St. c. 72, art. 1, § 3, providing that every railroad company shall be liable for damages done a passenger while being transported over the road, except when the injury arises from the criminal negligence of the passenger, or from a violation by him of a rule of the company, a prima facie right to recover of the company is established by a showing that the injured plaintiff was at the time of injury being transported as a passenger over defendant's road, and that the injury resulted from the operation of the road.—Chicago, B. & Q. R. Co. v. Illague (Neb.) 66 N. W. 1000.

48 Neb. 97.

§ 52. — Instructions.

[a] (Iowa; 1895.)

Where, in an action against a carrier for personal injuries, the complaint alleged that defendant was negligent in starting the train from which plaintiff had alighted; that the conductor carelessly abandoned plaintiff, a child of five years of age, and started the train while plaintiff was in a dangerous place; and that defendant failed to properly light its depot platform, and the only evidence of negligence was its failure to light the platform,—the jury should be instructed as to defendant's liability for failure to light the platform.—Hiatt v. Des Moines, N. & W. Ry. Co. (Iowa) 64 N. W. 766.

[b] (Iowa; 1897.)

A petition alleged that the brakeman called plaintiff's station; that the car stopped; that plaintiff, while attempting to alight, was thrown off, by the sudden starting of the car; and that "defendant was negligent in stopping the car where it did, and in inviting and permitting passengers to leave the train." The first paragraph of an instruction stated the negligence charged in the language of the petition. Another paragraph told the jury that they might find defendant negligent if, when plaintiff attempted to alight, the brakeman failed to warn him that the train had not yet reached the station, and plaintiff could not see that the train was not at the station, and, while exercising ordinary care, he was thrown off and injured by the starting of the car. *Held*, that the instructions were not contradictory in stating the negligence charged.—Devine v. Chicago, M. & St. P. R. Co. (Iowa) 69 N. W. 1042.

[c] (Wis.; 1896.)

In an action for injuries to a passenger caused by the derailment of a train, where a vital question in dispute was whether the proximate cause of plaintiff's injury was defendant's negligence, the court should have instructed that it was not enough to prove that the injury to the plaintiff was the natural consequence of the negligence of the defendant, but that it must also have been the probable consequence, and that the injury might have been reasonably foreseen with ordinary intelligence.—Davis v. Chicago, M. & St. P. R. Co. (Wis.) 67 N. W. 16.

93 Wis. 470.

§ 53. — Questions for jury.

[a] (Minn.; 1896.)

The entrance to an open street car was by an opening on the side of the rear platform, and up two steps. From the back of the first rear seat to the extreme rear end of the car it was four feet, and from the edge of the top step to the center of the aisle it was three feet five inches. While plaintiff was on the first step, with a satchel in her right hand, and in the act of taking the second step, the car started violently, and, to save herself from being thrown into the street, she stepped forward quickly to reach the first bench. Just as she reached it the car jerked as though slackening in speed, and threw her across the arm of the bench, in-

juring her. *Held*, that the question of the company's negligence was for the jury.—Miller v. St. Paul City Ry. Co. (Minn.) 68 N. W. 862.

[b] (Neb.; 1896.)

In an action for damages from injuries inflicted by an engine upon a shipper of live stock, who was accompanying and caring for such stock under a drover's pass, the question of the existence of negligence such as would give rise to a cause of action, or of such contributory negligence as would defeat it is one of fact, to be determined by the jury.—Omaha & R. V. Ry. Co. v. Crow (Neb.) 66 N. W. 21.

47 Neb. 84.

§ 54. — Damages.

(Minn.; 1896.)

A verdict of \$250 in favor of a passenger against a railroad company for failing to exercise proper police powers, as a result of which a drunken fellow passenger used abusive language concerning plaintiff, will not, after having been approved by the trial court, be disturbed, as excessive.—Lucy v. Chicago G. W. Ry. Co. (Minn.) 65 N. W. 944.

64 Minn. 7.

4. CONTRIBUTORY NEGLIGENCE OF PASSENGERS.

§ 55. Awaiting transportation.

[a] (Mich.; 1895.)

In an action against a railroad company for personal injuries, it appeared that at a certain station the only light at the platform, which was 189 feet long and 12½ feet wide, was one lamp; and that plaintiff went to such station at night, to take a train. He testified that he saw the train coming, and started to go forward to where he thought the baggage car would stop, so as to put a package on it; that, as he went away from the lamp, it was pretty dark; that he stepped off the platform on the track, and was struck by the engine; and that he knew it was dark, but thought he would be safe in going up there. *Held*, that a direction of a verdict for defendant was proper.—Bradley v. Grand Trunk Ry. Co. (Mich.) 65 N. W. 102.

[b] (Wis.; 1897.)

Where a train was stopped before reaching a wrecked tank containing burning oil, and a safe place was designated for passengers until another train could be brought up on the other side of the wreck, a passenger who voluntarily went nearer to the tank, and was injured by its explosion, cannot recover damages.—Conroy v. Chicago, St. P., M. & O. Ry. Co. (Wis.) 70 N. W. 486.

§ 56. Entering conveyance.

[a] (Iowa; 1896.)

Hurd's Rev. St. Ill. 1891, c. 114, § 79, forbids any person to board a moving train except in compliance with law, or by permission, under the lawful rules and regulations of the company. *Held*, that the burden is on one injured while making such attempt to show that the permission or direction of the conductor of the train relied on as justifying the attempt was in accordance with the rules and regulations of the company.—Young v. Chicago, M. & St. P. Ry. Co. (Iowa) 69 N. W. 682.

[b] (Minn.; 1896.)

A passenger who goes upon the lowest step of a street car running over seven miles an hour, without steadying himself by grasping the hand rail or otherwise, is negligent.—Saiko v. St. Paul City Ry. Co. (Minn.) 69 N. W. 473.

[c] (Neb.; 1896.)

The fact that one attempting to board a street car carried a large package did not require him to exercise a greater degree of care than ordinary care.—Omaha St. Ry. Co. v. Martin (Neb.) 66 N. W. 1007.

48 Neb. 65.

[d] (Neb.; 1896.)

Whether the act of a party in attempting to board a moving street car is negligence, or not, is generally a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case.—*Omaha St. Ry. Co. v. Martin* (Neb.) 66 N. W. 1007.
48 Neb. 65.

§ 57. In transit—Dangerous position.

[a] (Minn.; 1896.)

A passenger on an electric car who, knowing that the car was approaching a sharp curve at a high rate of speed, left his seat, and spoke to the conductor in the vestibule, was not, as a matter of law, guilty of negligence contributing to injuries received by being thrown against the side of the car when the curve was reached, since he had a right to presume that the speed would be slackened before the car arrived at that point.—*Blondel v. St. Paul City Ry. Co.* (Minn.) 68 N. W. 1079.

[b] (S. D.; 1895.)

In the absence of gross negligence on the part of the company, a recovery could not be had for the death of a shipper of stock who rode in the car with the stock against the objection of the conductor and in violation of the contract of shipment, when death resulted solely from his riding in that car.—*Humphreus v. Fremont, E. & M. V. R. Co.* (S. D.) 65 N. W. 466.

[c] (S. D.; 1895.)

It was no evidence of a waiver by the company of a stipulation prohibiting plaintiff's intestate from riding in the car with the stock shipped by him, that witnesses had in several cases ridden in the car with stock shipped by them over defendant's road, in the absence of evidence that their contracts prohibited them from riding with the stock, or that defendant knew of their violation of the contracts.—*Humphreus v. Fremont, E. & M. V. R. Co.* (S. D.) 65 N. W. 466.

§ 58. — Standing on steps and platform.

[a] (Minn.; 1895.)

Where a passenger on a train going at a dangerous rate of speed stepped out on the platform, so as to be ready to get off when the train stopped, and the train suddenly increased its speed at the station, and threw plaintiff off, the railroad company was not liable.—*Scheiber v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 63 N. W. 1034.

61 Minn. 499.

[b] (Neb.; 1895.)

For a passenger to stand on the front steps of a crowded street car, while in motion, is not such negligence as will, per se, prevent a recovery for injuries received through negligence of persons in charge thereof.—*Pray v. Omaha St. Ry. Co.* (Neb.) 62 N. W. 447.

44 Neb. 167.

[c] (Neb.; 1895.)

A person standing on the steps of a moving street car, because unable to secure a seat or standing room within, is presumed to be there with the consent of the servants in charge of the train.—*Pray v. Omaha St. Ry. Co.* (Neb.) 62 N. W. 447.

44 Neb. 167.

[d] (Neb.; 1897.)

For a passenger to stand upon the platform of a crowded street car, while in motion, is not negligence per se.—*East Omaha St. R. Co. v. Godola* (Neb.) 70 N. W. 491.

§ 59. — Attempt to avoid injury.

(Neb.; 1895.)

A passenger who was placed in imminent peril through the negligence of a carrier may recover for injuries received while endeavoring to escape, if he exercised ordinary care in view of the circumstances as they appeared to him at

the time.—*St. Joseph & G. I. R. Co. v. Hedge* (Neb.) 62 N. W. 887.

44 Neb. 418.

§ 60. Leaving conveyance.

(Neb.; 1896.)

A passenger who attempted to alight from a car standing on a high trestle, with notice of its situation, was guilty of criminal negligence precluding a recovery for his death, which occurred as the result of the attempt.—*Chicago, B. & Q. R. Co. v. Hague* (Neb.) 65 N. W. 1000.

48 Neb. 97.

§ 61. — Alighting from car in motion.

[a] (Mich.; 1895.)

The brakeman, when the train on which plaintiff, a girl 18 years old, used to traveling, was a passenger, came to a full stop before reaching the station, called out the station, and plaintiff thereupon left the car, and went out on the platform on which the brakeman was standing, and, thinking she had passed her station, stepped off the train while it was moving about four miles an hour. *Held*, plaintiff was guilty of contributory negligence. *McGrath, C. J.*, and *Montgomery, J.*, dissenting.—*Jacob v. Flint & P. M. R. Co.* (Mich.) 63 N. W. 502.

105 Mich. 450.

[b] (Neb.; 1896.)

On attempting to alight at her destination from the car in which she rode, plaintiff discovered that the car had stopped before it reached the station platform, and that the ground at that place was covered with water. She then hurried through the car, and through the next car in front, in order to reach the platform; but, before she had time to alight, the train started, and, there being no one at the step to help her, she jumped off on the platform, and was injured. *Held*, that she was not guilty of "criminal negligence," within Comp. St. c. 72, art. 1, § 3 (making every railroad company the insurer of its passengers' safety, except when the injury done arises from the criminal negligence of the passenger injured), and was hence entitled to recover.—*Chicago, B. & Q. R. Co. v. Hyatt* (Neb.) 67 N. W. 8.

48 Neb. 161.

§ 62. Province of court and jury.

[a] (Neb.; 1895.)

Plaintiff, a lad of 14 years, boarded defendant's train which was so crowded that he was unable to get inside, but secured standing room on the rear platform of the trailer. When the first stop was made, he stepped off to allow a fellow passenger to alight, and was unable to get on the platform again. He went forward, and secured standing room on the front step of the trailer, holding on to the dashboard and to the iron rail attached to the car for some distance, when he was forced, by the pressure of the other passengers, to relinquish his hold, and fell. There was evidence that the pressure which forced him off was occasioned by the conductor forcing his way through the crowd while engaged in collecting fares. *Held*, that the question of negligence was for the jury, and that it was error to direct a verdict for the defendant.—*Pray v. Omaha St. Ry. Co.* (Neb.) 62 N. W. 447.

44 Neb. 167.

[b] (Neb.; 1896.)

Where one traveling on a stock shipper's pass was suddenly notified that his train was leaving the station, and, on reaching the moving train, was ordered by the conductor to board a freight car some distance ahead of the caboose, and fearing that if he waited for the caboose he would be unable to board it because of the increasing speed of the train, and not knowing of the danger attending the boarding of a freight car, attempted to obey the order and received injuries, the question whether he was guilty of contributory negligence was for

the jury.—*Missouri Pac. Ry. Co. v. Tietken* (Neb.) 68 N. W. 336.

5. EJECTION OF PASSENGERS.

Proximate cause of injury, see ante, § 42.

Liability of master for malicious acts of servant, see "Master and Servant," § 21.

§ 63. Right to eject.

(Iowa; 1896.)

When a passenger refuses to remove his dog from a passenger car, in compliance with a regulation of the railroad company, the conductor is authorized to remove both.—*Gregory v. Chicago & N. W. Ry. Co.* (Iowa) 69 N. W. 532.

§ 64. — Expired and defective ticket.

[a] (Iowa; 1895.)

Where a ticket is presented on the day of purchase, but the conductor refuses to accept because it bears a prior date, which, if the true date of the sale, would not entitle him to passage, he may refuse to pay or get off, and, being forcibly ejected, may recover therefor.—*Ellsworth v. Chicago, B. & Q. Ry. Co.* (Iowa) 63 N. W. 584.

[b] (Minn.; 1895.)

After having waived a provision in a commutation ticket requiring the coupons to be detached by the conductor, a carrier cannot, without notifying the passenger of a revocation of such waiver, eject him for failure to present the whole ticket.—*Thompson v. Truesdale* (Minn.) 63 N. W. 259.
61 Minn. 129.

§ 65. — Refusal to pay extra fare.

[a] (Iowa; 1895.)

The fact that the passenger, though claiming his right to passage on his ticket, offered to pay the regular fare, refusing only to pay the extra charges on train, does not prevent his recovery for ejection, his offer not having been accepted.—*Ellsworth v. Chicago, B. & Q. Ry. Co.* (Iowa) 63 N. W. 584.

[b] (Mich.; 1896.)

A passenger who tenders the legal fare, and is put off the train because he will not pay a higher fare charged, may recover damages. He is not bound to pay the fare charged, with right to sue for excess.—*Chamberlain v. Lake Shore & M. S. Ry. Co.* (Mich.) 68 N. W. 423.

[c] (Minn.; 1896.)

Where a passenger was not entitled to ride on a ticket presented for his fare, the fact that the conductor wrongfully took up the ticket did not justify the passenger in refusing to pay fare except on condition that the ticket be returned.—*Rahilly v. St. Paul & D. Ry. Co.* (Minn.) 68 N. W. 853.

§ 66. — Questions for court and jury.

[a] (Iowa; 1895.)

Plaintiff, having tried to purchase a ticket to ride on defendant's freight train, and being directed by the agent to pay on the train, climbed onto one of the freight cars, the platform of the caboose being crowded. The brakeman, while the train was running, assaulted him, and compelled him to get off, refusing to stop the train or to let him ride to the next station, where he promised to get a ticket. *Held*, that the questions as to whether plaintiff was a passenger and as to defendant's liability for the conduct of the brakeman should have been submitted to the jury.—*Ramm v. Minneapolis & St. L. R. Co.* (Iowa) 62 N. W. 751.

[b] (Neb.; 1896.)

There being no express agent at his destination, after arriving there the passenger went into the express car to get goods billed to him. The train started, but was stopped on the conductor's discovering him in the car, and he was then told to get out because he was

delaying the train. This he refused to do unless he could get his express. The conductor then started the train, and the passenger attempted to get out, but, finding that the car had passed the station platform, he tried to withdraw into the car, when he was seized by the conductor, who was on the ground, and pulled out. *Held*, that whether the conductor was acting within the scope of his duties, he having no authority to eject persons in the express car without right, was for the jury.—*Fremont, E. & M. V. R. Co. v. Root* (Neb.) 69 N. W. 397.

§ 67. Place of ejection.

(Wis.; 1895.)

Rev. S. § 1818, authorizing a conductor to eject a passenger refusing to pay his fare "at any usual stopping place or near any dwelling house," prohibits by implication such ejection at other places.—*Boehm v. Duluth, S. S. & A. Ry. Co.*, 65 N. W. 506, 91 Wis. 592.

§ 68. Contributory act of person ejected.

(Mich.; 1895.)

A passenger who has had mileage taken from his book by the conductor for his entire trip, but who, at an intermediate station, changes his seat, cannot recover for being ejected on his refusal to pay when fare was afterwards demanded; he having simply said he had paid his fare, and, on being asked where to, told the conductor that he ought to know; that it was his business to know.—language which on a former occasion the conductor had used to him, —and having, when the conductor, for the first time recognizing him, asked him to get on again, refused to do so, with the statement that he would fix him.—*White v. Grand Rapids & I. R. Co.* (Mich.) 65 N. W. 521.

§ 69. Actions for wrongful ejection.

[a] (Neb.; 1897.)

Parties rightfully on a railroad train, by virtue of a contract for their carriage to an agreed destination, and who are wrongfully ejected before the journey is completed, may sue for a breach of the contract, or in an action ex delicto for tort or negligence of the carrier.—*Chicago, B. & Q. R. Co. v. Spirk* (Neb.) 70 N. W. 926.

[b] (Neb.; 1897.)

A complaint alleging, in effect, that plaintiffs purchased a ticket entitling them to passage over defendant's road to a certain point, and took seats in a car, and were wrongfully ejected before reaching such point, is sufficient.—*Chicago, B. & Q. R. Co. v. Spirk* (Neb.) 70 N. W. 926.

[c] (Wis.; 1895.)

In an action against a railroad company for being put off a freight train which plaintiff had boarded as a passenger with a ticket, believing that it was his train, it is proper to instruct that it is the duty of passengers to inquire whether a given train stops at their station, and the duty of trainmen to warn passengers not to board or remain on wrong trains.—*Boehm v. Duluth, S. S. & A. Ry. Co.* (Wis.) 65 N. W. 506, 91 Wis. 592.

§ 70. — Damages.

[a] (Neb.; 1897.)

Plaintiff, after being ejected, waited until more than half the succeeding day had expired before pursuing his journey by vehicle, and consequently was compelled to spend the night in the open air. *Held*, that he could not recover for such exposure.—*Chicago, B. & Q. R. Co. v. Spirk* (Neb.) 70 N. W. 926.

[b] (Neb.; 1897.)

A railroad company is liable for all injuries caused by the act of the conductor in ejecting a passenger in accordance with the company's rules, because the train did not stop at the destination called for by the passenger's ticket, if this situation was the result of the negligence of

the company.—Chicago, B. & Q. R. Co. v. Spirk (Neb.) 70 N. W. 926.

[c] (Wis.; 1895.)

In an action for wrongful ejection from a street car, the jury may take into consideration plaintiff's professional standing, for the purpose of estimating his feeling of humiliation.—Schmitt v. Milwaukee St. Ry. Co. (Wis.) 61 N. W. 834, 89 Wis. 195.

[d] (Wis.; 1895.)

In estimating damages for wrongful ejection from a street car, allowance should not be made for injury to plaintiff's business or professional reputation.—Schmitt v. Milwaukee St. Ry. Co., 61 N. W. 831, 89 Wis. 195.

[e] (Wis.; 1895.)

A judgment for \$750 for the wrongful ejection of a passenger from a train on a rainy day, more than a mile from any house, and three or four miles from a station, is excessive, in the absence of any ground for substantial damages other than physical and mental suffering, or any facts entitling him to exemplary damages.—Gillan v. Minneapolis, St. P. & S. S. M. Ry. Co., 65 N. W. 373, 91 Wis. 633.

[f] (Wis.; 1895.)

In an action for wrongful ejection from a railroad train, personal "inconvenience" and "loss of time" are proper elements of damages.—Boehm v. Duluth, S. S. & A. Ry. Co. (Wis.) 65 N. W. 506, 91 Wis. 592.

6. PASSENGERS' EFFECTS.

§ 71. Connecting lines.

(Neb.; 1895.)

A passenger who, before starting on her journey, delivered her trunk to an expressman for delivery at the depot, could not, after completing the journey, hold the railroad company liable for goods stolen from the trunk, without showing that the trunk was not opened while in the possession of the drayman.—Ringwalt v. Wabash R. Co., 64 N. W. 219, 45 Neb. 760.

CASE MADE.

See "Appeal," § 130.

CASHIERS.

See "Banks and Banking," §§ 26, 27.

CATTLE.

See "Agistment"; "Animals."

CAUCUS.

See "Elections and Voters," § 5.

CAUSA MORTIS.

See "Gifts," §§ 4-6.

CAUSING DEATH.

See "Death by Wrongful Act."

CEMETERIES.

Body stealing, see "Body Stealing."

Rights of widow.

[a] (Iowa; 1895.)

The right of the widow to build the monument does not give her authority to inclose the lot with coping.—Thompson v. Deeds (Iowa) 61 N. W. 812, 93 Iowa, 228.

[b] (Iowa; 1895.)

The monument, as to size and location, must be so erected as to respect the right of the daughter to use the balance of the lot.—Thompson v. Deeds (Iowa) 61 N. W. 812, 93 Iowa, 228.

[c] (Iowa; 1895.)

Where a daughter who owns a burial lot permits her father's remains to be interred therein, she impliedly gives to his widow the right to erect a monument on the lot.—Thompson v. Deeds (Iowa) 61 N. W. 812, 93 Iowa, 228.

[d] (Iowa; 1895.)

A widow will be enjoined from removing the remains of her deceased husband, where the only reason for the removal is that his daughter, who owns the burial lot, refuses to allow her to erect a monument thereon, where, in his lifetime, deceased expressed the desire to be buried in the lot.—Thompson v. Deeds (Iowa) 61 N. W. 812, 93 Iowa, 228.

CERTAINTY.

As to sum payable in note, see "Negotiable Instruments," §§ 9-12.

In assignments of error, see "Appeal," § 90.

In complaint, see "Pleading," § 10.

In contracts, see "Contracts," § 5.

In statutes, see "Statutes," § 14.

In wills, see "Wills," § 39.

Motion to make pleading more definite, see "Pleading," §§ 51-53.

CERTIFICATE.

As evidence, see "Evidence," § 77.

As to evidence, see "Appeal," §§ 144, 145.

Authenticating record on appeal, see "Appeal," §§ 112-115.

For review of questions of law, see "Appeal," § 263.

Of acknowledgment, see "Acknowledgment," § 4.

Of copy of writ of replevin, see "Replevin," § 8.

Of deposit, see "Banks and Banking," § 14.

Of membership in benevolent society, see "Benevolent Societies," §§ 2, 3.

Of mutual benefit insurance, see "Insurance," §§ 164, 166, 181-184.

Of nomination, see "Elections and Voters," § 9.

Of notary to affidavit, see "Affidavit," § 1.

Of physician, see "Physicians and Surgeons," § 2.

Of purchaser at tax sale, see "Taxation," § 163.

Of qualification of teacher, see "Schools and School Districts," § 24.

Of stock, see "Corporations," §§ 45, 49.

Of taking of deposition, see "Deposition," § 3.

That all evidence is in record, see "Appeal," § 121.

To amendment of constitution, see "Constitutional Law," § 4.

CERTIORARI.

Review of contempt proceedings, see "Contempt," §§ 17, 18.

— proceeding by city to levy tax, see "Municipal Corporations," § 189.

— proceedings vacating highway, see "Highways," § 21.

§ 1. When lies, in general.

[a] (Iowa: 1897.)

Under Code, § 322, providing that on certiorari the court may merely give judgment affirming or annulling the proceeding, or correcting the same, and directing further proceedings, certiorari would not furnish adequate relief to a school district against proceedings by the board of county supervisors in refunding a tax collected for the benefit of the school district, where the money had been actually refunded, and the taxpayer had no money in the hands of the county officers.—*Independent Dist. of Ottumwa v. Taylor* (Iowa) 69 N. W. 1009.

[b] (Iowa: 1897.)

Personal property was listed in a town by an executor who then resided in another district of the same county, and was taxed \$168, of which \$25 was for the benefit of said town. The town supervisors ordered the assessment transferred to the district in which he resided, and that \$25 be refunded. *Held* that, on certiorari by the town to annul the action of the supervisors, the amount in controversy was but \$25.—*Incorporated Town of Central City v. Treat* (Iowa) 70 N. W. 110.

[c] (Mich.: 1896.)

Where the common council acts in good faith for the benefit of the public in the vacation of a street, certiorari will not lie at the instance of a member of the traveling public to review such proceedings, where such member, being aware of such proceedings, and that large expenditures were being made by a railroad company in furtherance of the change, fails to invoke the aid of any court to restrain such action.—*Baudistel v. Recorder and Common Council of City of Jackson* (Mich.) 68 N. W. 292.

§ 2. Who entitled to writ.

(Mich.: 1895.)

Proceedings to establish a drain cannot be quashed, or their validity questioned, by writ of certiorari at the instance of one who will not be injured thereby.—*Wolpert v. Newcomb* (Mich.) 64 N. W. 326.

§ 3. To courts.

[a] (Iowa: 1895.)

Where a judge of the district court modifies in vacation a decree of divorce rendered the previous term, a writ of certiorari is the proper remedy, under Code, § 3216.—*Hamman v. Van Wagenen* (Iowa) 62 N. W. 795.

[b] (Mich.: 1895.)

In contempt proceedings on the relation of a party to an action for inducing a witness to absent himself from the trial, a judgment refusing to compel the party in contempt to reimburse relator for loss incurred through his act of contempt, on the ground that relator incurred no loss, is not reviewable on certiorari by relator.—*Montgomery v. Muskegon Booming Co.* (Mich.) 62 N. W. 561; *In re Lange, Id.* 104 Mich. 411.

[c] (Mich.: 1895.)

Certiorari is a proper remedy to review the action of a court which refuses to go on with a trial and quashes the proceedings for invalidity of the ordinance under which they were instituted.—*City of Grand Rapids v. Brandy* (Mich.) 64 N. W. 29.

105 Mich. 670.

[d] (Mich.: 1896.)

Certiorari will not lie to review the ruling of the circuit court in overruling objections taken

by special appeal, where no final judgment was entered.—*Travis v. Culver* (Mich.) 66 N. W. 575.

[e] (Minn.: 1894.)

Certiorari will lie to review the action of the district court in refusing to appoint persons, under Gen. Laws 1893, c. 4, § 188, to inspect the ballots on an election contest.—*In re Election Contest* (Minn.) 61 N. W. 553; *State v. District Court Seventh Judicial District, Id.*

[f] (Minn.: 1895.)

Certiorari will not lie to review an order of probate court requiring the executor to pay an allowance to the widow in accordance with a previous order therefor, which was affirmed by the district court on appeal therefrom by the executor.—*State v. Probate Court of Hennepin County* (Minn.) 63 N. W. 1117.

§ 4. — Remedy by writ of error.

(Mich.: 1895.)

Certiorari will not lie to review the allowance of a contingent claim against a decedent's estate, the remedy of an heir being by writ of error. *Insurance Co. v. Durfee* (1893) 57 N. W. 189, 97 Mich. 613, followed.—*In re Hill's Estate*, 65 N. W. 748; *John Hancock Mut. Life Ins. Co. v. Bement, Id.*

§ 5. To justices of the peace.

[a] (Mich.: 1895.)

In an action in justice's court, in the absence of an appearance or objection by defendant, where an affidavit in form sufficient to sustain plaintiff's claim is introduced, defendant cannot for the first time raise the question by certiorari that the preliminary service entitling plaintiff to make use of it was not made.—*Forbes Lithograph Manuf'g Co. v. Winter* (Mich.) 64 N. W. 1053.

[b] (Mich.: 1895.)

On certiorari to vacate a justice's judgment, errors not urged in the justice court, but alleged in the affidavit for certiorari, may be considered.—*Harbour v. Eldred* (Mich.) 64 N. W. 1054.

[c] (Mich.: 1895.)

Certiorari is the proper proceeding to set aside a void judgment.—*Harbour v. Eldred* (Mich.) 64 N. W. 1054.

[d] (N. D.: 1896.)

Where defendant appeared by attorney before a justice of the peace on the return day, and the attorney asked to have his appearance entered on the justice's docket, and the justice refused to do so, and entered judgment against defendant as for a default, the action of the justice was reviewable on appeal on questions of law, after settling and filing a statement with the justice setting out the facts of the appearance, and hence certiorari will not lie.—*Lewis v. Gallup* (N. D.) 67 N. W. 137.

5 N. D. 384.

[e] (S. D.: 1895.)

Since Comp. Laws, § 6129, authorizing one against whom a justice of the peace has rendered a judgment to appeal therefrom, permits an appeal from a default judgment, and since section 6065 authorizes a justice to set aside a judgment by default, certiorari does not lie to review a default judgment rendered by a justice.—*Perrott v. Owen* (S. D.) 64 N. W. 526.

§ 6. To state boards and officers.

[a] (Iowa: 1896.)

Certiorari to compel the state board of medical examiners to recognize petitioner as a medical college in good standing, after having declared it to be otherwise, is a "civil matter" (McClain's Code, § 769), of which the superior court has jurisdiction.—*College of Physicians & Surgeons of Keokuk v. Guilbert* (Iowa) 69 N. W. 453.

[b] (Minn.: 1896.)

The proceedings of the governor, secretary of state, and state auditor, under Gen.

Laws 1865, c. 298, providing for the enlargement of organized counties by attaching thereto, and incorporating therein, territory from an adjoining county or counties, are neither judicial nor quasi judicial in their nature, and cannot be reviewed on certiorari.—*State v. Clough* (Minn.) 67 N. W. 202.
64 Minn. 378.

§ 7. Parties.

(Wis.; 1896.)

Action of the county board in declaring part of a town to be attached to another town should be reviewed by certiorari, directed to that board, and not to the county clerk; and neither a return by the clerk nor appearance by the towns or county gives jurisdiction, where the writ is directed to such clerk.—*State v. Weinfurther* (Wis.) 66 N. W. 702.
92 Wis. 546.

§ 8. Review—Presumptions.

(Mich.; 1895.)

On review of an order removing defendant from his office as township assessor, for misfeasance and neglect of duty, where all the evidence taken before the board was not in the record, a return stating that defendant testified that he had paid out the sums of money set forth in the complaint, from funds belonging to the district, without orders drawn as required by law, and that there was testimony showing that defendant did neglect and refuse to perform his duties as assessor, will be presumed to be true.—*Taylor v. Shimmel* (Mich.) 65 N. W. 548.

§ 9. Costs.

(Minn.; 1897.)

Where, on certiorari to the probate court, the action of the court is reversed, relator is entitled to costs and disbursements against the opposite party in interest.—*State v. Probate Court of Rock County* (Minn.) 69 N. W. 908.

To assessment book or roll, see "Taxation," § 28.

CESSION OF PROPERTY.

See "Assignment for Benefit of Creditors"; "Insolvency."

CESTUI QUE TRUST.

See "Trusts."

CHALLENGE.

Of juror, see "Jury," §§ 14-22.

CHAMBER OF COMMERCE.

Power to increase capital stock, see "Corporations," § 46.

CHAMBERS.

Authority of judge at, see "Judge," § 5.

CHAMPERTY AND MAINTENANCE.

§ 1. Contracts with attorney.

(a) (Minn.; 1897.)

A contract entered into by a person having a claim for unliquidated damages against a railroad company, by which plaintiff, who was a stranger to both the company and the claim,

was employed as attorney to collect the claim at his own cost, he to have as compensation one-half of the amount recovered, and defendant to have no right to settle the claim without plaintiff's written consent, is against public policy and void.—*Huber v. Johnson* (Minn.) 70 N. W. 806.

(b) (Wis.; 1896.)

An agreement by an attorney to pay or contribute to the payment of, expenses of litigation in which he is interested as a party, does not render the action champertous.—*Gilbert-Arnold Land Co. v. City of Superior* (Wis.) 67 N. W. 38.

93 Wis. 194.

(c) (Wis.; 1896.)

A contract by which an attorney agrees to render services for a fee contingent upon success, the fee to be a stipulated per cent. of the amount recovered, is not champertous, where he does not undertake to pay any part of the expenses of litigation.—*Dockery v. McLellan* (Wis.) 67 N. W. 733.

93 Wis. 381.

§ 2. Purchase of land adversely held.

(a) (Mich.; 1895.)

The fact that land is in possession of a third person at the time one receives a deed of it does not invalidate the deed. How. Ann. St. § 5657.—*Wagar v. Bowley* (Mich.) 62 N. W. 293.

104 Mich. 38.

(b) (N. D.; 1896.)

Comp. Laws, § 3303, declaring void every grant of realty in the actual possession of one "claiming under a title adverse to that of the grantor," does not apply where the party in possession relies only on naked possession, which, on his own showing, has not continued long enough to give title by prescription under the statute.—*Krenger v. Schultz* (N. D.) 70 N. W. 269.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

See "Criminal Law," §§ 39-44; "Venue in Civil Cases," §§ 11-23.

CHARACTER.

Evidence of, see "Criminal Law," § 119; "Rape," § 5.

CHARITIES.

Exemption of property of charitable institution from taxation, see "Taxation," § 23.

§ 1. Validity of devise or bequest.

(a) (Iowa; 1894.)

The provision, in a devise to a city of property in trust for charitable objects, that an hotel included in the property should be kept perpetually, and that a fund should be provided from the income to preserve and improve it, does not prevent the taking of the devise by the city; and a provision of the devise that the name of the hotel should be retained does not affect its validity.—*Phillips v. Harrow* (Iowa) 61 N. W. 434.

93 Iowa, 92.

(b) (Iowa; 1894.)

The objects of a library association are for public welfare, and charitable, though it

was organized as a private corporation, where it was not organized for pecuniary profit, and never was conducted for that purpose, and all moneys obtained by it are used to maintain the library and purchase books, and all are entitled to use of the books in the library room, though one may take a book therefrom only by becoming a subscriber for a fixed time and paying a prescribed fee, or by paying a certain amount for each book without becoming a subscriber.—*Phillips v. Harrow* (Iowa) 61 N. W. 434.

93 Iowa, 92.

[c] (Wis.; 1897.)

Testator devised property to his executors in trust to pay the income to his widow and son, and on their death to convey the same to the city in trust for specific public and charitable purposes. *Held*, that the trust thus created in the city was not invalid as passive and indefinite.—*Baurhaus v. City of Watertown* (Wis.) 69 N. W. 986.

§ 2. Capacity to take gifts.

[a] (Iowa; 1894.)

The establishment and maintenance of infirmaries for the poor is a proper municipal object, and, though a city of the second class cannot do so at the public expense, it may take a devise in trust for that purpose.—*Phillips v. Harrow* (Iowa) 61 N. W. 434.

93 Iowa, 92.

[b] (Iowa; 1894.)

A foundling hospital for the special purpose of relieving unfortunate females and caring for and protecting their offspring is in effect a provision for the poor, and hence a city may accept a devise in trust for the maintenance of such a hospital.—*Phillips v. Harrow* (Iowa) 61 N. W. 434.

93 Iowa, 92.

[c] (Iowa; 1894.)

The provision of a devise to a city that from the income of the property a fund should be raised for the benefit of a public library is germane to the objects of the city, cities being authorized by Code, § 461, to establish and maintain free public libraries, and to receive gifts, devises, and bequests therefor.—*Phillips v. Harrow* (Iowa) 61 N. W. 434.

93 Iowa, 92.

[d] (Wis.; 1897.)

A devise to a city for the establishment and maintenance of a public library and business men's club is not invalid for the reason that the city has no power to establish and maintain a club, such provision being a mere accessory to the principal devise for library purposes.—*Baurhaus v. City of Watertown* (Wis.) 69 N. W. 986.

§ 3. Sale of gift by beneficiary.

(Wis.; 1897.)

Testator devised real and personal property to his executors in trust to pay the income to his widow and son, and, on their death, to convey the same to the city in trust for various charitable purposes, and authorized the city to purchase ground on which to erect a library, and to erect and pay for the building out of personal securities or money in its hands. He left no personality which was to go into this fund, and in effect prohibited the trustees from selling the greater part of the real estate. *Held*, that the city had power to sell real estate conveyed to it by the trustees.—*Baurhaus v. City of Watertown* (Wis.) 69 N. W. 986.

§ 4. Want of trustee—Power of court.

[a] (Iowa; 1894.)

A devise to a city in trust for charitable purposes will not be defeated by the refusal of the city to accept the trust, courts having power to appoint another trustee.—*Phillips v. Harrow* (Iowa) 61 N. W. 434.

93 Iowa, 92.

[b] (Wis.; 1896.)

A bequest to executors in trust to apply the income to the support and education of such indigent orphan-children in a county as, in the judgment of the executors, may be the most deserving, and, after a certain time, to divide the principal among them, may be executed by a trustee appointed by the court when the executors refuse to act; Rev. St. § 2098, authorizing such substitution.—*Sawtelle v. Witham* (Wis.) 69 N. W. 72.

§ 5. Designation of beneficiaries.

[a] (Iowa; 1895.)

Decedent's will bequeathed money to "the Old Ladies' Home in Iowa, if any such is organized in the state"; if not, then to a similar institution in Ohio. *Held*, that the bequest vested at testator's death, and could not go to an institution thereafter organized.—*Bond v. Home for Aged Women of Cedar Rapids* (Iowa) 62 N. W. 838.

[b] (Iowa; 1895.)

An institution for destitute women, whose by-laws provided that no one shall be admitted as a permanent inmate unless over 60 years of age, but which allowed women to enter as transient inmates, regardless of age, is entitled to take a bequest to an "Old Ladies' Home," though it is especially designed for the benefit of the residents of one county. Deemer and Rothrock, JJ., dissenting.—*Bond v. Home for Aged Women of Cedar Rapids* (Iowa) 62 N. W. 838.

§ 6. — Indefiniteness.

[a] (Iowa; 1894.)

The beneficiaries are described with sufficient certainty in a devise in trust for "poor and needy people" of a city "who are dependent upon their own labor for a livelihood," "religious societies of said city, without regard to sect, and to include all denominations professing to work for the good and well-being of mankind," and the building and maintenance of a "foundling hospital, with the special view and purpose of relieving unfortunate females, and for protecting and caring for their offspring."—*Phillips v. Harrow* (Iowa) 61 N. W. 434.

93 Iowa, 92.

[b] (Mich.; 1896.)

Testatrix devised her property to her executors in trust to pay the same to certain charities, "in such sums and portions as, in their discretion, they shall think proper," the amount to be paid or sums to be distributed to each being left to the discretion of the executors, and, if they thought best, to appropriate a portion of the money, and pay the same, in such sums and at such times as they may determine, to such "worthy poor girls" as they may select. *Held*, that the will is inadequate to create a valid trust, under How. Ann. St. 1883, § 5573, providing that a trust for the benefit of any person may be created only when fully expressed and clearly defined upon the face of the instrument creating it.—*Wheelock v. American Tract Soc.* (Mich.) 66 N. W. 955.

[c] (Wis.; 1896.)

A bequest to executors in trust to apply the income to the support and education of such indigent orphan children in a county as, in the judgment of the executors, may be the most deserving, and, after a certain time, to divide the principal among them, is not invalid as a charitable trust for uncertainty in the beneficiaries.—*Sawtelle v. Witham* (Wis.) 69 N. W. 72.

CHARTER.

Of city, see "Municipal Corporations," § 2.
Of corporation, see "Corporations," § 1.

CHATTEL MORTGAGES.

- I. WHAT CONSTITUTES, §§ 1, 2.
- II. VALIDITY, CONSTRUCTION, AND EFFECT, §§ 3-18.
- III. FILING AND RECORDING, §§ 19-25.
- IV. LIEN AND PRIORITY—ADJUSTMENT OF RIGHTS BETWEEN MORTGAGEES, §§ 26-30.
- V. ASSIGNMENT, §§ 31, 32.
- VI. RELEASE AND DISCHARGE, §§ 33-37.
- VII. MUTUAL RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE, §§ 38-42.
- VIII. ENFORCEMENT AGAINST MORTGAGOR—FORECLOSURE, §§ 43-51.
- IX. REDEMPTION, §§ 52-54.
- X. ENFORCEMENT AGAINST LEVYING CREDITORS AND THIRD PERSONS GENERALLY, §§ 55-57.
- XI. SALE OF PROPERTY BY MORTGAGOR, §§ 58-60.

See, also, "Pledge."

Distribution of proceeds of execution sale of chattels, see "Execution," § 33.
 Garnishment of mortgagee, see "Garnishment," § 3.
 Rights to crops as between mortgagee and landowner, see "Crops."
 — fixtures, see "Fixtures," § 2.
 Vested rights of mortgagee, see "Constitutional Law," § 33.

I. WHAT CONSTITUTES.

§ 1. In general.

[a] (Mich.; 1895.)
 A contract (reserving title in the vendor) for the conditional sale of the stock and fixtures in a saloon, by which the purchaser agreed "to replace such of said property as is broken or destroyed, and to submit such substituted goods to the lien of this agreement," operates, as to the subsequently acquired goods, as a mortgage.—Hudson v. McKale (Mich.) 64 N. W. 727.

[b] (Mich.; 1896.)
 Where the consideration of a bill of sale of horses on which D held a mortgage was \$1,000, \$250 to be paid as forfeit, and the balance at a future date to D, and the \$250 was given by the vendor to the vendee, who paid it to D, and the horses were never delivered to the vendee, and he never claimed any interest in them, and the vendor, wishing to prevent the horses from being taken under D's mortgage, borrowed from P. \$750, which was paid to D, and, at the vendor's request, the vendee assigned the bill of sale to P., under a verbal agreement that the vendor would execute to P. a note for the amount loaned and the amount of an old debt, and secure the note on the horses and certain land, which note and land security were never given, the bill of sale should be treated as a chattel mortgage from the vendor to P.—Pinch v. Willard (Mich.) 66 N. W. 42.

[c] (Minn.; 1895.)
 After the sale and delivery of a machine to the vendee, they delivered to the vendor an instrument purporting to be a receipt for the machine; stating that it was held by them as the property of the vendor, on a conditional sale to them; that title to it was not to pass until it was paid for, and that on failure to pay for the same the vendor should have a right to take possession and sell it, and pay the balance of the proceeds of the sale, above the claim of the vendor, to the vendee. Held that, conceding the sale to have been absolute,

and not conditional, this instrument constituted an equitable chattel mortgage, which gave to the vendor a lien on the machine, and a right to take possession and enforce that lien.—Berlin Mach. Works v. Security Trust Co. (Minn.) 61 N. W. 1131.
 60 Minn. 161.

§ 2. Parol evidence.

(Mich.; 1896.)
 A bill of sale absolute on its face may, in an action by the vendee for possession of the property, be shown by parol to have been given as security.—Pinch v. Willard (Mich.) 66 N. W. 42.

II. VALIDITY, CONSTRUCTION, AND EFFECT.

As preferences, see "Assignment for Benefit of Creditors," § 13.
 When mortgage operates as assignment, see "Assignment for Benefit of Creditors," § 4.

§ 3. In general.

[a] (Iowa; 1896.)
 That a mortgage purported to cover more cattle than were on the farm, where they were described as being, does not affect its validity as to cattle actually placed there.—Iowa State Nat. Bank v. Taylor (Iowa) 67 N. W. 677.

[b] (Neb.; 1897.)
 A chattel mortgage does not pass title, but only creates a lien.—Omaha Fire Ins. Co. v. Thompson (Neb.) 70 N. W. 30.

[c] (Neb.; 1897.)
 A chattel mortgage delivered by the mortgagor unconditionally to an unauthorized third person, by whom, under the directions of the mortgagor, it was filed for record, and subsequently accepted by the mortgagee, takes effect, as between the mortgagor and mortgagee, from the time of the first delivery, but as to persons who have acquired title to, or a lien upon, the property, on actual acceptance by the mortgagee.—Rogers v. Heads Iron Foundry (Neb.) 70 N. W. 527.

§ 4. Consideration.

(Neb.; 1896.)
 Extension of time for the payment of a debt is a sufficient consideration for a chattel mortgage given by the debtor to secure such indebtedness.—Fuller v. Brownell (Neb.) 67 N. W. 6.
 48 Neb. 145.

§ 5. — Pre-existing debt.

[a] (Minn.; 1895.)
 A pre-existing debt is a sufficient consideration for a chattel mortgage.—Berlin Mach. Works v. Security Trust Co. (Minn.) 61 N. W. 1131.
 60 Minn. 161.

[b] (Neb.; 1895.)
 A pre-existing debt is a sufficient consideration for a chattel mortgage, and protects the mortgagee, as if there had been a new consideration.—Chaffee v. Atlas Lumber Co. (Neb.) 61 N. W. 637, 43 Neb. 224.

§ 6. On animals—Right to increase.

[a] (Iowa; 1895.)
 A chattel mortgage in terms covering the increase of the live stock mortgaged is valid as to such increase.—Thompson v. Anderson (Iowa) 63 N. W. 355.

[b] (Mich.; 1896.)
 A chattel mortgage on all the cows and calves of the mortgagor, or that may be "raised" on his farm during the season, is broad enough to cover calves from the cows mortgaged, which they carried at the time the mortgage was given.—Cleveland v. Koch (Mich.) 66 N. W. 376.

§ 7. Mortgageable interest and after-acquired property.

[a] (Iowa; 1896.)

A landlord who is to receive as rent for a farm a share of the crop, to be delivered by the tenant, has such an interest in the crop that he may, before its division, make a valid mortgage thereon, which will attach to his share as soon as segregated, and will take precedence of a garnishment of the tenant by a creditor of the landlord after the execution of the mortgage.—*Riddle v. Dow* (Iowa) 66 N. W. 1066; *Thompson Nat. Bank v. Same*, *Id.*

[b] (Iowa; 1896.)

A chattel mortgage upon cattle, described as owned by the mortgagor at the time the mortgage was given, and as being on a certain farm, does not cover cattle acquired by the mortgagor two months afterwards, as against a subsequent bona fide mortgagee.—*Iowa State Nat. Bank v. Taylor* (Iowa) 67 N. W. 677.

[c] (Mich.; 1896.)

A mortgage covering after-acquired property is good as against creditors of the mortgagor.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

[d] (N. D.; 1895.)

The owner and operator of a threshing rig may mortgage the future earnings thereof.—*Sykes v. Hannawalt* (N. D.) 65 N. W. 682.
5 N. D. 335.

§ 8. Crops to be thereafter planted.

[a] (Iowa; 1894.)

The owner of land cannot mortgage a future crop to be raised thereon, as against a tenant raising the crop on shares under a lease prior to the mortgage.—*Knaebel v. Wilson* (Iowa) 61 N. W. 178.
92 Iowa, 536.

[b] (Minn.; 1895.)

Gen. St. 1894, § 4154, prohibiting the mortgage of crops, before the seed is sown, for more than one year in advance, does not render void a chattel mortgage executed on the 15th of August, mortgaging crops to be grown the next year.—*Plano Manuf'g Co. v. Hallberg* (Minn.) 63 N. W. 1114.
61 Minn. 528.

[c] (Minn.; 1896.)

A mortgage of all the wheat which shall be sown, grown, and harvested during a certain season on certain land is valid, though, at the time of its execution, the mortgagor has no possession of, or interest in, the land.—*Hogan v. Atlantic Elevator Co.* (Minn.) 69 N. W. 1.

[d] (N. D.; 1894.)

Under Comp. Laws, § 4379, requiring a chattel mortgage to be filed in the county where the property "is at such time situated," an instrument in the form of a chattel mortgage, covering a crop not yet planted, may be filed in the office of the register of deeds of the county where the land described in the mortgage is situated, and such filing will be constructive notice to third parties of the rights of the mortgagee, as in other cases.—*Hosetter v. Brooks Elevator Co.* (N. D.) 61 N. W. 49.
4 N. D. 357.

See, also, post, § 13.

§ 9. Certainty.

[a] (Mich.; 1895.)

An objection as to indefiniteness of a chattel mortgage, sufficiently certain as between the parties, cannot be raised by one who had acquired no valid lien on the property.—*First Nat. Bank v. Marshall & Ilsley Bank* (Mich.) 65 N. W. 604.

[b] (Mich.; 1896.)

A chattel mortgage, reciting that the party of the first part is indebted to the party of the second part in a certain sum, and whereas said party of the "first part" desires to secure to said party of the "first part" the payment of said sum, "now, therefore, in consideration of the above

sum of money, to him paid by the party of the second part, does grant unto said party of the second part certain property," is not invalid for uncertainty.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

§ 10. Description.

[a] (Iowa; 1894.)

A chattel mortgage described the property as 19 pure-blood Hereford cattle, and gave their names, adding, "The above names are the names as recorded in the American Hereford Herd Book." The American Hereford Herd Book was published in Missouri, and, when a breeder wished to register cattle, he sent the name of each animal there, and, when there were enough names to make a volume, they were placed in alphabetical order, and a number given to each. An animal might not be numbered until a year after its name was sent in. The numbers were never duplicated, but the names often were. *Held* that, as to a subsequent mortgagee, the description was too indefinite.—*Taylor v. Gilbert* (Iowa) 61 N. W. 203.
92 Iowa, 587.

[b] (Iowa; 1895.)

A description in a mortgage, "one McCormick mower, * * * and all farm machinery now owned and kept by me," identifies the mower sufficiently to give constructive notice to third persons.—*King v. Howell* (Iowa) 62 N. W. 738.

[c] (Iowa; 1895.)

A description of the property mortgaged by reference to another mortgage, wherein the property is specifically described, is sufficient.—*Thompson v. Anderson* (Iowa) 63 N. W. 355.

[d] (Iowa; 1896.)

A mortgage of book accounts, describing them as "all books of account, and accounts and notes, contracted and to be contracted from the sale of merchandise" theretofore mortgaged, and described as situated in a certain building, sufficiently describes the accounts as between the mortgagee and third persons.—*Davis v. Piteher* (Iowa) 65 N. W. 1005.

[e] (Iowa; 1896.)

A chattel mortgage described the property as "one double buggy, one set bob sleighs, one wagon, one pair wagon scales in Water-ville, Iowa, one pair small scales, three cutters, etc." *Held*, that the description was insufficient as to the one pair of wagon scales. *Granger, J.*, dissenting.—*Gilchrist v. McGhee* (Iowa) 67 N. W. 392.

[f] (Iowa; 1896.)

A chattel mortgage which does not allege in terms who owned the property, in whose possession it was when the mortgage was executed, or where it was kept, is void as to subsequent incumbrancers for want of a sufficient description.—*State Bank of Dayton v. Felt* (Iowa) 68 N. W. 818.

[g] (Mich.; 1896.)

A mortgage of "all the stock in trade, wares and merchandise, furniture and fixtures, of every name and nature, situated in the building now occupied by said party of the first part in the village of T, and all goods and wares and merchandise that may be hereafter acquired by us and placed in said store building, excepting from the terms and condition of this mortgage such property as is by law exempt from levy and sale upon execution, hereby reserving the right to make selection of said exempt property," is not invalid, as against attaching creditors of the mortgagor, for failure to identify the property.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

[h] (Minn.; 1895.)

A chattel mortgage erroneously describing the property cannot be the basis of an action in claim and delivery without first having the description reformed.—*First Nat. Bank v. Hendrickson* (Minn.) 63 N. W. 725.
61 Minn. 293.

[i] (S. D.; 1896.)

A chattel mortgage, duly filed, which described a colt correctly, except in calling it a

yearling when, in reality it was but about six months old, but which further stated that it was the only colt owned by the mortgagors, was sufficient to charge a subsequent purchaser with notice, it being shown that the mortgagors owned no other colt during the year.—*First Nat. Bank v. Koechel* (S. D.) 66 N. W. 933.

§ 11. — Property covered.

[a] (Iowa; 1895.)

A chattel mortgage on "all the fixtures" contained in a certain store covers show cases, counters, and a wall case.—*Myers v. Snyder* (Iowa) 64 N. W. 771.

[b] (Mich.; 1894.)

A mortgage by an electric light company of its buildings, "apparatus," etc., includes street lamps. *Ramsdell v. Citizens' Electric Light & Power Co.* (Mich.) 61 N. W. 275.
103 Mich. 89.

§ 12. — Location of property.

[a] (Iowa; 1895.)

Where property in a mortgage was described as "all hay in stack belonging to me, now on" certain land in township "91," and the only hay the mortgagor had in stack was in township "92," such description is sufficient to identify the property, notwithstanding the error in designating the township.—*King v. Howell* (Iowa) 62 N. W. 738.

[b] (Iowa; 1895.)

A description in a mortgage of "all corn now growing on the above-described land," such land being designated as being in township "91," is insufficient to give third persons constructive notice, where the corn in question was in fact located in township "92."—*King v. Howell* (Iowa) 62 N. W. 738.

§ 13. — Mortgage of crops.

[a] (Minn.; 1895.)

A mortgage of wheat on the W. $\frac{1}{4}$ of section 36, township 139, range 34, described as being in the mortgagor's possession in the town of his residence, was invalid as a mortgage on wheat on the N. W. $\frac{1}{4}$ of section 36, township 139, range 33, in the possession of the mortgagor's copartner on that land.—*First Nat. Bank v. Hendrickson* (Minn.) 63 N. W. 725.
61 Minn. 293.

[b] (S. D.; 1897.)

A mortgage on "all the crops of 1891 to be raised upon the N. E. 4, Sec. 6, Tp. 10, R. 48, consisting of 90 acres," sufficiently describes the property.—*Conghran v. Sundback* (S. D.) 70 N. W. 644.

[c] (S. D.; 1897.)

A chattel mortgage given in 1893 recited that "B., of the town of B., county of M., S. D.," conveyed to the mortgagee "my one-half share of all the crops raised upon the S. W. 4, Sec. 31—104—54; also the N. W. 4, Sec. 6—103—54,—consisting of wheat, oats, corn, and other grains as raised upon the above-described land, as stated above, for the years 1894 and 1895." Then followed a description of cows and horses, and the statement that "all the above property is now in my possession," etc. *Held*, that the description of the grain mortgage was sufficient.—*Advance Thresher Co. v. Schmidt* (S. D.) 70 N. W. 646.

§ 14. Possession, control, and power of sale by mortgagee.

[a] (Iowa; 1897.)

Provision that the mortgagee in a chattel mortgage will not take possession till default, unless necessary for protection against other creditors, is not per se fraudulent.—*Gilmore v. Kilpatrick-Koch Dry-Goods Co.* (Iowa) 70 N. W. 175.

[b] (Iowa; 1897.)

A recorded chattel mortgage is not fraudulent where possession of the property is retained by the mortgagor, though the instrument

giving him right to possession is separate from the mortgage, and not recorded.—*Gilmore v. Kilpatrick-Koch Dry-Goods Co.* (Iowa) 70 N. W. 175.

[c] (Mich.; 1896.)

Permission in the mortgage to the mortgagor to sell the mortgaged property in the usual course of trade does not invalidate the mortgage, as against attaching creditors of the mortgagor.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

[d] (Minn.; 1895.)

Where a chattel mortgage provided that the mortgagor should act as the mortgagee's agent, and dispose of the goods in the usual course of trade, and deduct from the proceeds the expenses, and pay the balance to the mortgagee; and it appeared that in eight months but \$180 were paid on the debt of \$629, and that no other debts were paid, and that the mortgagor had not accounted for the proceeds of the sales,—the issue as to whether the mortgage was fraudulent as to creditors was for the jury.—*Blakely v. Hammerel* (Minn.) 61 N. W. 821.
62 Minn. 307.

[e] (Minn.; 1896.)

The presumption, arising from the continued possession of the mortgagor, that a chattel mortgage was not executed in good faith (Gen. St. 1894, § 4129), obtains only in favor of creditors and purchasers of the mortgagor.—*Hazlett v. Babcock* (Minn.) 66 N. W. 971.
64 Minn. 254.

[f] (Minn.; 1896.)

A mortgage on a stock of goods, providing that the mortgagor may retain possession, with power to use the proceeds of the property in maintaining the business and in his own support, and for his own benefit, without satisfying the mortgage debt, is invalid as to creditors.—*Pierce v. Wagner* (Minn.) 66 N. W. 977.
64 Minn. 265.

[g] (Minn.; 1897.)

A chattel mortgage on a retail stock of goods provided that the mortgagor should sell the goods in the regular course of business, and apply the proceeds in keeping up the stock and defraying the expenses of running the business, and that the balance of the proceeds should be paid to the mortgagee, to be applied on the mortgage debt. *Held*, that the mortgage was, on its face, fraudulent as to the mortgagor's creditors.—*Pabst Brewing Co. v. Butchart* (Minn.) 69 N. W. 809.

[h] (Neb.; 1895.)

The presumption of fraud, arising from the possession of mortgaged chattels by the mortgagor, remains only so long as he retains possession.—*Chaffee v. Atlas Lumber Co.* (Neb.) 61 N. W. 637, 43 Neb. 224.

[i] (Neb.; 1896.)

A chattel mortgage is not avoided by the fact that subsequent to its execution the mortgagee consented to a sale of the property by the mortgagor for the benefit of both parties; no other liens existing, and the sale not having been consummated.—*Houck v. Linn* (Neb.) 66 N. W. 1103.

48 Neb. 227.

[j] (Neb.; 1896.)

The benefit of the presumption of fraud arising, under Comp. St. c. 32, § 11, from the retention of possession by the mortgagor, cannot be claimed by a subsequent purchaser until he has shown that he acquired the chattels for value, without actual or constructive knowledge of the mortgage.—*Sanford v. Jensen* (Neb.) 69 N. W. 108.

§ 15. — Burden of proof as to good faith.

(Neb.; 1896.)

In a contest between a chattel mortgagee and a creditor of the mortgagor the burden of proof is on the former to establish the good faith of the mortgage when he has not taken posses-

sion of the mortgaged property.—*Darnell v. Mack*, 65 N. W. 805, 46 Neb. 740.

§ 16. Sufficiency of change of possession.
(Iowa; 1896.)

That a servant of the mortgagor, in charge of the mortgaged chattels of his master, promised the mortgagee to hold them for him, is not a sufficient change of possession, as against a subsequent bona fide mortgagee.—*Iowa State Nat. Bank v. Taylor* (Iowa) 67 N. W. 677.

§ 17. Delivery.

(Minn.; 1895.)

After delivery of a chattel mortgage to the mortgagee, a return of it to the mortgagor, for the purpose of having the signature witnessed, did not avoid the instrument.—*Berlin Mach. Works v. Security Trust Co.* (Minn.) 61 N. W. 1131.

60 Minn. 161.

§ 18. Acceptance.

[a] (Mich.; 1896.)

That a mortgagee was, after the execution and filing of a chattel mortgage, informed thereof, and authorized her attorney to take possession of the property is a sufficient acceptance of the mortgage, as against other creditors of the mortgagor subsequently attaching the property.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

[b] (Mich.; 1896.)

That the mortgagee, in answer to the question whether she was satisfied with what her agent had done in regard to the mortgage, said, "Well, I am satisfied if I get my pay, and not before," does not contradict her testimony that she gave her attorney authority to take possession of the property.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

III. FILING AND RECORDING.

§ 19. Necessity of filing or recording.

[a] (Neb.; 1896.)

A chattel mortgage is good, between the parties thereto and all others except creditors of the mortgagor or subsequent purchasers and mortgagees in good faith, though not filed as required by statute.—*Fuller v. Brownell* (Neb.) 67 N. W. 6.

48 Neb. 145.

[b] (Neb.; 1896.)

A mortgage of chattels, where the mortgagor is permitted to retain the exclusive possession and control of the property conveyed, is void, as against creditors of such mortgagor, unless filed for record, as required by Comp. St. c. 32, § 14.—*Spaulding v. Johnson* (Neb.) 67 N. W. 874.

48 Neb. 830.

[c] (N. D.; 1895.)

A mortgage of the future earnings of a threshing rig must be filed for record as a chattel mortgage, to be effective as against the mortgagor's creditors.—*Sykes v. Hannawalt* (N. D.) 65 N. W. 682.

5 N. D. 335.

[d] (S. D.; 1896.)

Under Comp. Laws, § 4379, a chattel mortgage, executed and delivered, but not properly deposited in the office of the register of deeds, is void as against creditors of the mortgagor who became such while the mortgage was withheld from record.—*Noyes v. Brace* (S. D.) 65 N. W. 1071.

[e] (Wis.; 1894.)

Where Rev. St. § 2313, declaring that no mortgage of personal property shall be valid, as against third persons, unless the property be delivered to and retained by the mortgagee, or unless the mortgage, or a copy thereof, be filed, is not complied with, the law conclusively presumes the mortgage to be fraudulent

as to creditors, and no evidence of good faith, however clear, will render it valid.—*Ryan Drug-Store Co. v. Hvambasli* (Wis.) 61 N. W. 209, 89 Wis. 61.

§ 20. Time of filing or recording.

[a] (Iowa; 1897.)

Where a chattel mortgagee records a mortgage within a reasonable time after execution, it is not void as to creditors of the mortgagor becoming such between the time of the execution of the mortgage and the time of its recording.—*II. E. Spencer Co. v. Papach* (Iowa) 70 N. W. 748.

[b] (Neb.; 1896.)

Comp. St. c. 32, § 14, provides that a chattel mortgage not accompanied by immediate delivery and change of possession shall be void as against creditors unless filed. *Held*, that a mere delay in delivery or filing does not affect the lien of the mortgage as against subsequently attaching creditors, if the filing or delivery actually take place before the levy.—*Forrester v. Kearney Nat. Bank* (Neb.) 68 N. W. 1059.

§ 21. Effect of removal of property to another county.

[a] (S. D.; 1897.)

Before the filing of a chattel mortgage, the property was removed to another county, where it was sold for value. Afterwards the mortgage was filed in the county where it was given, and where the property had been situated; and subsequently, by agreement with said purchaser, a prior mortgagee seized and sold the property in a mode other than that prescribed by statute for sales in foreclosure of chattel mortgages. The subsequent mortgagee sued the purchaser and the prior mortgagee for conversion. *Held*, that the mortgage not having been filed in the county where the property was situated at the time of filing, as required by Comp. Laws, §§ 4379, 4380, the burden was on plaintiff mortgagee to show that the purchaser took with actual notice of the mortgage.—*La Crosse Boot & Shoe Manufg Co. v. Mons Anderson Co.* (S. D.) 70 N. W. 877.

[b] (Wis.; 1896.)

On the removal by the mortgagor of the chattel to another county, the mortgagee is not required to refile his mortgage in that county.—*Bailey v. Costello* (Wis.) 68 N. W. 663.

§ 22. Effect of record as notice.

[a] (Mich.; 1894.)

The record of a mortgage of land in the office of the register of deeds is not notice to the world of a mortgage of chattels included in the same instrument.—*Ramsdell v. Citizens' Electric Light & Power Co.* (Mich.) 61 N. W. 275.

103 Mich. 89.

[b] (Minn.; 1896.)

The filing of a chattel mortgage on a growing crop of grain continues to be constructive notice after the grain is threshed and removed from the land on which it was raised.—*Hogan v. Atlantic Elevator Co.* (Minn.) 69 N. W. 1.

[c] (Wis.; 1896.)

The failure of the clerk to make an indorsement of filing on the chattel mortgage itself will not prevent the record from being constructive notice to subsequent purchasers.—*Bailey v. Costello* (Wis.) 68 N. W. 663.

§ 23. Bona fide mortgagee.

(Neb.; 1896.)

Under Comp. St. c. 32, § 14, a mortgagee in good faith is one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether pre-existing or not, without actual or constructive notice of prior equities against the mortgaged property. *Tootle v. Bank* (1892) 52 N. W. 396, 34 Neb. 833, distin-

gnished.—*State Bank of Lushton v. O. S. Kelly Co.*, 68 N. W. 481.

§ 24. Priority over unrecorded mortgage.

[a] (Neb.; 1896.)

A mortgagee in good faith, within Comp. St. c. 32, § 11, is one who takes his mortgage to secure a debt actually and justly owing to him, whether pre-existing or not, without notice, actual or constructive, of other existing claims against the mortgaged property.—*State Bank of Lushton v. O. S. Kelley Co.* (Neb.) 66 N. W. 619. 47 Neb. 675.

[b] (S. D.; 1896.)

Under Comp. Laws, § 4379, providing that a chattel mortgage shall be void, as against "subsequent purchasers and incumbrancers of the property in good faith for value," unless the mortgage, or an authenticated copy, be filed, a partner who, on dissolution, takes a mortgage, for an amount then becoming due him, on the individual property of his former partner, without notice of other incumbrances thereon, is an incumbrancer in good faith for value.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Lee* (S. D.) 68 N. W. 170.

[c] (S. D.; 1897.)

A chattel mortgagee in Illinois, who permits the mortgagor to take the chattels into another state, on an agreement that a duplicate mortgage should be executed and filed in such other state when the chattels arrive there, and fails to file the first mortgage in Illinois until the chattels are removed, whereby it does not become constructive notice (Rev. St. Ill. c. 95, § 4), thereby waives his priority as against one who in good faith takes a mortgage on the chattels in such other state, the duplicate mortgage not having been executed.—*Carroll v. Nisbet* (S. D.) 70 N. W. 634.

§ 25. — Levy of execution.

(Wis.; 1896.)

Under Sanb. & B. Ann. St. § 2313, making the filing of a chattel mortgage essential to its validity against third persons, unless accompanied by delivery and continued possession of the property, the holder of a bill of sale, taken as security, and not filed for two months thereafter, cannot recover the property from the sheriff, who, in the meantime, seized it from the debtor on an execution against him, and is in possession; nor can such person be aided by the invalidity of the defendant's seizure.—*Wagg-Andersen Woolen Co. v. Dunn* (Wis.) 66 N. W. 334. 92 Wis. 409.

IV. LIEN AND PRIORITY—ADJUSTMENT OF RIGHTS BETWEEN MORTGAGEES.

See, also, ante, § 3.

Effect of private sale on lien of mortgagee, see post, § 50.

§ 26. Lien.

(Iowa; 1897.)

A mortgagee of chattels, who permits the mortgagor to sell them, taking notes payable to himself, under an agreement that they shall be applied on the mortgage debt, is not entitled to a lien on such notes, as against a judgment creditor levying on them, while in the possession of the mortgagor, without notice of such agreement.—*Smith v. Clark* (Iowa) 69 N. W. 1011.

§ 27. Priority and rights as between mortgagees.

[a] (Iowa; 1896.)

In an action to determine the priorities and validity of the liens, where a chattel mortgage, because of an insufficient description, does not impart notice, if the mortgagee relies on actual notice to a subsequent mortgagee, he must

allege and prove it.—*State Bank of Dayton v. Felt* (Iowa) 68 N. W. 818.

[b] (Iowa; 1897.)

In an action to foreclose an unrecorded chattel mortgage, in which one of the defendants, in a cross petition, asked that his subsequent mortgage be declared superior, it appeared that the mortgagor, in executing defendant's mortgage, intended to defeat plaintiffs; and the evidence warranted the conclusion that it was not taken in good faith. The mortgagor made no defense. *Held*, that it was error to dismiss the cross petition, instead of rendering judgment on it against the mortgagor.—*Hartney v. Jordan* (Iowa) 69 N. W. 1037.

[c] (Mich.; 1895.)

In an action between two parties claiming property under chattel mortgages from different persons, the court properly refused to direct a verdict for defendant on the ground that plaintiff's mortgage was not on file when defendant extended credit to its mortgagor; it appearing that plaintiff's mortgagor was the owner of the property when plaintiff's mortgage was given, and the evidence not being conclusive that defendant's mortgagor ever succeeded to the rights in the property of plaintiff's mortgagor.—*First Nat. Bank v. Marshall & Hsley Bank* (Mich.) 65 N. W. 604.

[d] (S. D.; 1895.)

The holder of a second chattel mortgage merely of the mortgagor's "right, title, and interest in and to" the chattels, takes subject to the first mortgage.—*Rosenbaum v. Foss* (S. D.) 63 N. W. 538.

[e] (S. D.; 1895.)

The holder of a second chattel mortgage, who takes only the right, title, and interest of the mortgagor in the property, cannot attack the validity of the first mortgage.—*Rosenbaum v. Foss* (S. D.) 63 N. W. 538.

§ 28. — Action for conversion.

[a] (Iowa; 1896.)

The holder of a first mortgage on personal property, who redeems it from a second mortgagee, or his grantee, without demand, is not entitled to damages for its wrongful detention, the possession of the defendant being rightful.—*Nichols v. Sheldon Bank* (Iowa) 67 N. W. 582.

[b] (Minn.; 1895.)

Plaintiff took a mortgage on an undivided one-third of a growing crop, and subsequently the mortgagor gave defendant a mortgage of the whole crop. After the harvest a payment in specie was made on each mortgage, and the balance of the crop misappropriated by the mortgagor. *Held*, that defendant was not liable to plaintiff as for a conversion for so much of the crop received by him as was equal to the difference between the amount of the crop received by plaintiff and one-third of the crop.—*McRae v. O'Hara* (Minn.) 64 N. W. 146. 62 Minn. 143.

[c] (N. D.; 1896.)

Where a first mortgagee takes possession of the mortgaged chattels, and sells them at private sale without foreclosure, and the second mortgagee sues him for the conversion, defendant may recoup damages to the value of his special interest in or lien upon the mortgaged property, so that, where the value of said property was less than defendant's mortgage debt, the sale being without fraud, plaintiff suffered no damages by the conversion, and hence could not recover.—*Lovejoy v. Merchants' State Bank* (N. D.) 67 N. W. 356. 5 N. D. 623.

[d] (N. D.; 1896.)

Where the mortgagee, after taking possession of property under his mortgage, sells the same without foreclosure, and at private sale, and a second mortgagee brings an action against the first mortgagee for the wrongful conversion of the property covered by the two mortgages,

plaintiff's measure of damages is the value of the property converted, modified by the principle of compensation for the actual injury suffered on account of the wrongful conversion.—*Lovejoy v. Merchants' State Bank* (N. D.) 67 N. W. 956.
5 N. D. 623.

§ 29. Priority of subsequent mortgage given elsewhere.

(Mich.; 1896.)

A chattel mortgage was given plaintiffs in Michigan, by L., on his half interest in three horses, the other half interest in two of which was owned by plaintiffs. An arrangement between plaintiffs and L. for racing them on shares was made, and they were taken into Canada; plaintiffs giving a bond for their return to the United States within 70 days. While they were in Canada, L. gave a mortgage on the horses to defendant, who, with the consent of L., put them in the care of an hotel keeper, at the race track, to hold possession of for him. L. having abandoned the horses, plaintiffs got them of the hotel keeper, who said nothing of defendant's claim. *Held*, that defendant's mortgage had priority, he having been a mortgagee in possession when plaintiffs took the horses from the hotel keeper. *Grant, J.*, dissenting.—*Vining v. Millar* (Mich.) 67 N. W. 126.

§ 30. Rights of bona fide purchaser of property.

(Mich.; 1894.)

A mortgage given to secure sureties on a recognizance bond, and conditioned that it should be void if the mortgagor "appear" at the next term of court, is not avoided, as against bona fide purchasers of the property, by the fact that the mortgagor presented himself at such term, if the case was continued, and the mortgage was kept alive by renewals properly filed before the sale of the property.—*Crawford v. Vinton* (Mich.) 62 N. W. 988.
102 Mich. 83.

V. ASSIGNMENT.

§ 31. Of unacknowledged mortgage.

(Minn.; 1896.)

The taking by assignment in Wisconsin of a chattel mortgage on property situated in Minnesota, which mortgage is not acknowledged, and consequently cannot be recorded, is not an acquisition in good faith, assuming the mortgage to be negotiable paper.—*Hargreaves v. Reese* (Minn.) 69 N. W. 223.

§ 32. Rights of indorsee of note.

[a] (Neb.; 1896.)

The indorsement of notes secured by chattel mortgage, as collateral security for a debt of the mortgagee, passes the mortgage security to the indorsee of the notes; and such indorsee is, as against both mortgagor and mortgagee, entitled, on breach of condition, to the possession of the mortgaged property.—*Houck v. Linn* (Neb.) 66 N. W. 1103.
48 Neb. 227.

[b] (Neb.; 1896.)

A sale and transfer of a negotiable note secured by chattel mortgage operates to assign the mortgage; hence the transferee is not bound by the subsequent contracts of the original mortgagee with reference to the mortgaged property.—*Tilden v. Stilson* (Neb.) 68 N. W. 478.

VI. RELEASE AND DISCHARGE.

§ 33. Effect of tender.

(Neb.; 1896.)

A purchaser at execution sale of mortgaged chattels of which the mortgagor was in

possession tendered the amount of the debt to the mortgagee, who had subsequently taken possession, with all expenses incurred in taking possession, and kept the tender good. *Held*, that the lien of the mortgage was thereby divested.—*Gould v. Armagost*, 65 N. W. 1064, 46 Neb. 897.

§ 34. Effect of proceeding without foreclosure.

(N. D.; 1896.)

Where the mortgagee, after taking possession of property under his mortgage, sells the same without foreclosure, and at private sale, such sale is a wrongful conversion of the property, and operates to extinguish the lien of the mortgage.—*Lovejoy v. Merchants' State Bank* (N. D.) 67 N. W. 956.
5 N. D. 623.

§ 35. Release of part of property—Rights of junior mortgagee.

(Minn.; 1894.)

Where first and second chattel mortgages cover the same property, the holder of the first, having actual notice of the existence of the second, cannot release property covered by the first, but not by the second, to the prejudice of the holder of the second mortgage.—*Love-land v. Cooley* (Minn.) 61 N. W. 138.
59 Minn. 259.

§ 36. Effect of release as evidence of payment.

(Neb.; 1894.)

The execution and filing of a release of a chattel mortgage are not conclusive evidence of the payment of the debt secured by such mortgage in favor of the mortgagee whose lien attached prior to the execution and filing of such release.—*Waggoner v. First Nat. Bank*, 61 N. W. 112, 43 Neb. 84.

§ 37. Penalty for failure to satisfy.

[a] (Neb.; 1895.)

A demand should be made on the mortgagee or his assignee for the satisfaction of a mortgage after payment before an action can be maintained for the penalty for failure to do so provided by Comp. St. c. 32, § 15.—*Clearwater Bank v. Kurkonski* (Neb.) 63 N. W. 133.
45 Neb. 1.

[b] (Neb.; 1895.)

The entry of satisfaction of a chattel mortgage after the statutory period therefor will defeat an action for the penalty for refusing to discharge the same.—*Clearwater Bank v. Kurkonski* (Neb.) 63 N. W. 133.
45 Neb. 1.

Constitutionality of act, see "Constitutional Law," §§ 41, 42, 70.

VII. MUTUAL RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE.

Right of mortgagee to costs of private sale, see post, § 51.

§ 38. In general.

[a] (Iowa; 1895.)

Written directions sent by a mortgagor to the mortgagee subsequent to the execution of the mortgage, and relative to the application of the proceeds, and after application thereof, were of no effect.—*Wyland v. Griffith* (Iowa) 64 N. W. 673.

[b] (Mich.; 1896.)

The fact that, after default, a mortgagee furnishes feed for the stock while remaining in the mortgagor's possession, does not constitute the latter the mortgagee's agent as to contracts afterwards made for the keeping of the

stock.—*Cleveland v. Koch* (Mich.) 66 N. W. 376.

§ 39. Expenses of mortgagee before realizing.

(Iowa; 1896.)

Where the mortgagee does not claim that he was in possession for foreclosure, expenses incurred by him in the care of the property cannot be allowed in his favor.—*Howery v. Hoover* (Iowa) 66 N. W. 772.

§ 40. Liability of mortgagee to mortgagor.

[a] (Minn.; 1895.)

The fact that the mortgagee, pending foreclosure of a chattel mortgage, forcibly took the property from the mortgagor, and thereby became liable to the mortgagor in trespass, did not give the mortgagor a right to maintain replevin for the property.—*Nichols v. Knudtson* (Minn.) 64 N. W. 391.

62 Minn. 237.

[b] (Neb.; 1896.)

A mortgagee who, on breach of condition, took possession of the property, and kept it eight months before causing the same to be sold under the mortgage, is liable to the mortgagor for the use of the same.—*Murray v. Loushman* (Neb.) 66 N. W. 413.

47 Neb. 256.

§ 41. — For conversion.

[a] (Iowa; 1896.)

Where the mortgagee, authorized to take possession of the mortgaged chattels on default in payment, and sell the same for the payment of the debt, takes possession, and, instead of foreclosing the mortgage, keeps the property, treating it as his own, he is liable as for a conversion thereof.—*Howery v. Hoover* (Iowa) 66 N. W. 772.

[b] (Iowa; 1896.)

A mortgagee, after conversion of the chattel by sale at private sale, instead of public sale, as required by the mortgage, cannot affect the right of the mortgagor to recover the value of the chattel by regaining possession, and tendering the chattel on condition that the amount due under the mortgage be paid.—*Colby v. W. W. Kimball Co.* (Iowa) 68 N. W. 786.

Action by mortgagee against purchaser of goods, see post, § 59.

Selling at private, where mortgage requires public, sale, see post, §§ 50, 51.

§ 42. — Measure of damages for conversion by mortgagee.

[a] (Iowa; 1896.)

Where the mortgagee, authorized to take possession of the mortgaged chattels on default in payment, and sell the same for the payment of the debt, takes possession, and, instead of foreclosing the mortgage, keeps the property, treating it as his own, and claims the absolute ownership of the property from the time he takes possession, the value of the property in estimating the damages may be considered as of the time he took possession.—*Howery v. Hoover* (Iowa) 66 N. W. 772.

[b] (Wis.; 1897.)

In an action by a mortgagor of chattels against a mortgagee, for conversion, based on defendant's refusal of a tender of the debt, which, however, was not kept good by payment into court, the measure of damages was the value of plaintiff's right to the property at the time of conversion, to be determined by deducting from the value of the property at said time the amount then necessary to redeem from the mortgage lien, together with interest to the day of trial.—*Gauche v. Milbrath* (Wis.) 69 N. W. 999.

VIII. ENFORCEMENT AGAINST MORTGAGOR—FORECLOSURE.

§ 43. Effect of delay to enforce forfeiture.

(Neb.; 1896.)

A chattel mortgage is not avoided by the failure of the mortgagee to foreclose immediately upon default.—*Houck v. Linn* (Neb.) 66 N. W. 1103.

48 Neb. 227.

§ 44. Right to possession.

[a] (Minn.; 1895.)

On breach of a condition of a chattel mortgage that the mortgagee may take possession if any attempt is made to dispose of or remove the mortgaged property, the mortgagee, in taking possession, does not violate Gen. St. 1891, § 4145, which provides that no mortgagee shall have any right, arbitrary, or without just cause, based on actual facts, to declare any condition broken prior to a default in the payment of the mortgage, or to the time when such conditions should be performed.—*Plano Manuf'g Co. v. Hallberg* (Minn.) 63 N. W. 1114.

61 Minn. 528.

[b] (Minn.; 1896.)

In September, 1893, plaintiff, as security for a debt payable in September, 1894, executed to defendant a mortgage on crops to be raised on plaintiff's farm during the season of 1894. By the mortgage the mortgagor was to remain in possession as long as its covenants and conditions were fulfilled, but it was also provided that, if the mortgagor should make any attempt to dispose of the property, thereupon the mortgagee should have the right to take possession. Shortly afterwards plaintiff, as security for a debt payable in October, 1894, executed another chattel mortgage of like terms on the same property to another person. Held, that the execution of the second mortgage was not an attempt to dispose of the property within the meaning of the first mortgage.—*Donovan v. Sell* (Minn.) 66 N. W. 722.

64 Minn. 212.

[c] (Neb.; 1896.)

The discretion conferred upon a mortgagee by a stipulation authorizing him to take possession of the mortgaged chattels at any time he feels himself insecure is not an arbitrary one, but depends upon some act of the mortgagor, done or threatened, which tends to impair the security.—*Brown v. Hogan* (Neb.) 69 N. W. 100.

§ 45. Right to sell before default.

[a] (Iowa; 1897.)

Though a chattel mortgage authorizes the mortgagee to take possession of the mortgaged property at any time he may choose, and to sell sufficient of the same to pay the debt secured, where it also contains a provision that on payment of such debt according to the tenor of the notes given for the same the mortgage shall be void, the mortgagee is not authorized to sell the property in advance of the maturity of the debt, or some part thereof, until which time the mortgagor's equity of redemption does not expire. *Robinson, J., dissenting.*—*Koster v. Seney* (Iowa) 69 N. W. 868.

[b] (Mich.; 1895.)

Under a chattel mortgage, which provides that, if the mortgagee deems himself insecure, he may take possession of the property, and sell the same, as on default, the mortgagee may sell the property before the debt becomes due.—*Cole v. Shaw* (Mich.) 61 N. W. 869.

103 Mich. 505.

§ 46. Pleading.

(S. D.; 1897.)

A pleading filed by defendant O. in an action to foreclose a chattel mortgage executed by defendant P. to secure plaintiff's notes, and

certain others, owned, as alleged in the complaint, by defendant O., is an answer in the nature of a cross bill, entitling O. to affirmative relief in equity against P., it being therein admitted that he is the owner of the notes, as alleged in the complaint, and alleged that by agreement of the parties the mortgage was security, first for his notes, and then for plaintiff's; that the mortgage provided for foreclosure on default of any payment, and that by the terms thereof the entire amount is due and payable; and the pleading concluding with a prayer for a decree foreclosing the mortgage.—*Bank of Iowa & Dakota v. Price* (S. D.) 70 N. W. 836.

§ 47. Sale.

[a] (Mich.; 1896.)

Where a mortgage is given to secure payment of several notes, on default in the payment of the first, the mortgagor, acting in good faith, as against his other creditors not having liens on the property, may authorize the mortgagee to sell all the property, and apply the proceeds in payment of the other notes which were soon to mature.—*Hogan v. Hudson* (Mich.) 67 N. W. 1081.

[b] (Mich.; 1896.)

Other creditors of a mortgagor cannot object that the foreclosure sale was in bulk, in accordance with an agreement between the mortgagor and mortgagee, who acted in good faith.—*Hogan v. Hudson* (Mich.) 67 N. W. 1081.

[c] (Wis.; 1896.)

A provision in a chattel mortgage authorizing the mortgagee, if at any time he deems himself insecure, to seize and sell the property with or without notice at public or private sale, is not a waiver by the mortgagor of the provisions of Sanb. & B. Ann. St. § 2316a, prohibiting the sale of property without the consent of the mortgagor until five days after seizure, and giving the mortgagor the right to redeem during the time.—*Vreeland v. Waddell* (Wis.) 67 N. W. 51.

93 Wis. 107.

§ 48. — Appraisalment.

(Iowa; 1895.)

Though it was stipulated in a chattel mortgage that the mortgagor waived appraisalment, and the mortgagee was present at the foreclosure sale, the mortgagee is not precluded from moving to set aside the sale on the ground that there was no appraisalment, as is required by statute.—*Minneapolis Threshing Machine Co. v. Beck* (Iowa) 64 N. W. 637.

§ 49. — Collateral attack.

(Mich.; 1895.)

Where the mortgagor acquiesced in a foreclosure, at which the mortgagee bid in the property, an attaching creditor who had not then levied cannot collaterally attack the sale.—*Brown v. Mynard* (Mich.) 65 N. W. 293.

§ 50. Private sale.

[a] (Iowa; 1896.)

Where a chattel mortgage authorizes the mortgagee, on default, to take possession and sell the chattel at public sale, a sale by the mortgagee at a private sale is a conversion.—*Colby v. W. W. Kimball Co.* (Iowa) 68 N. W. 786.

[b] (Neb.; 1895.)

Where the mortgagee of chattels has taken possession of the property, he does not lose his lien thereon by selling the same in the usual course of business, instead of at public auction.—*Chaffee v. Atlas Lumber Co.* (Neb.) 61 N. W. 637, 43 Neb. 224.

§ 51. — Costs.

[a] (Iowa; 1895.)

Chattel mortgagees, selling the property under the mortgage at private sale, cannot

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reimburse themselves for sheriff's fees and the cost of appraisalment out of the proceeds, as such expenses were unnecessary.—*Myers v. Snyder* (Iowa) 64 N. W. 771.

[b] (Iowa; 1895.)

Where a chattel mortgage authorized a sale of the property at public or private sale, and the proceeds to be applied, after deducting all expenses of sale, to the payment of the debt, the mortgagees had a right to sell the property at private sale, and to reimburse themselves for the necessary expenses incurred therein.—*Myers v. Snyder* (Iowa) 64 N. W. 771.

[c] (Iowa; 1897.)

A chattel mortgagee, authorized to take possession and sell "at public auction," is not entitled to credit for his services, or for clerk hire, in selling the goods at retail.—*H. E. Spencer Co. v. Papach* (Iowa) 70 N. W. 748.

IX. REDEMPTION.

§ 52. Right to redeem.

[Wis.; 1896.]

Where one, in collusion with a mortgagee, and with intent to cut off the mortgagor's right of redemption, purchased property at a chattel mortgage sale held in violation of the statute, the mortgagor's right of redemption was unaffected by the sale.—*Vreeland v. Waddell* (Wis.) 67 N. W. 51.

93 Wis. 107.

§ 53. Sufficiency of tender.

[a] (Wis.; 1896.)

Under Sanb. & B. Ann. St. § 2316a, providing for redemption of property taken and sold under a chattel mortgage by payment of the mortgage debt and expenses incurred by the mortgagee in taking and keeping the property, a tender of the full amount of the mortgage debt was sufficient, when no demand was made by the mortgagee for expenses of taking and keeping the property.—*Vreeland v. Waddell* (Wis.) 67 N. W. 51.

93 Wis. 107.

[b] (Wis.; 1897.)

An unaccepted tender of the amount necessary to redeem from a chattel mortgage does not entitle the owner to recover the value of the property irrespective of the debt, unless such tender is made good by payment into court.—*Gauche v. Milbrath* (Wis.) 69 N. W. 999.

[c] (Wis.; 1897.)

Refusal to allow a mortgagor of chattels to redeem, on the ground that the property had been sold, was a waiver of the sufficiency of the tender necessary for redemption.—*Gauche v. Milbrath* (Wis.) 69 N. W. 999.

§ 54. Damages for sale before statutory time.

[a] (Wis.; 1897.)

Sanb. & B. Ann. St. § 2316a, providing that, in case of the sale of property taken under a chattel mortgage in less than five days after the same was actually taken, the owner may recover \$25 liquidated damages in addition to actual damages, and the mortgage debt shall be deemed paid, entitles the owner, in case of such sale, to recover as actual damages only the value of the property, less the mortgage debt and necessary costs and expenses, and any special damages which he has suffered.—*Gauche v. Milbrath* (Wis.) 69 N. W. 999.

[b] (Wis.; 1897.)

The refusal of the mortgagee, during the five days, to allow the owner to redeem, on the ground that he had sold the property, entitles the owner to recover such damages, though the sale was merely pretended.—*Gauche v. Milbrath* (Wis.) 69 N. W. 999.

X. ENFORCEMENT AGAINST LEVYING CREDITORS AND THIRD PERSONS GENERALLY.

Action by mortgagee against purchaser of goods for conversion, see post, § 59.

§ 55. Rights as against creditors and third persons.

[a] (Iowa; 1896.)

In conversion by the mortgagee of a stock of goods it was competent for the plaintiff to introduce in evidence, for the purpose of showing the whole transaction between the parties, the original chattel mortgage and the renewals thereof. *Casey v. Ballou Banking Co.* (Iowa) 67 N. W. 98.

[b] (Iowa; 1897.)

One who wrongfully takes part of the chattels subject to a mortgage cannot claim that the mortgagee abandons his mortgage, and waives his right against him as to the chattels so taken, by taking a decree of foreclosure only on the remaining chattels.—*Gilmore v. Kilpatrick-Koch Dry-Goods Co.* (Iowa) 70 N. W. 175.

[c] (Mich.; 1897.)

A chattel mortgage on a stock of merchandise, and including the accounts of the mortgagor, which provides that until default the mortgagor shall have the right to "possess, sell, and use said mortgaged property in the regular course of retail business," is not an absolute assignment of the accounts, and does not deprive the mortgagor of the right before default to sue an account covered by the mortgage in his own name.—*Swan v. Thurman* (Mich.) 70 N. W. 1023.

[d] (Minn.; 1897.)

A mortgagee claiming under an unrecorded mortgage has the burden of showing that the creditors of the mortgagor knew of its existence.—*Shay v. Security Bank of Duluth* (Minn.) 69 N. W. 920.

[e] (Neb.; 1897.)

In an action by a chattel mortgagee against a stranger for conversion, the petition must plead facts stating special ownership.—*Raymond v. Miller* (Neb.) 70 N. W. 22.

§ 56. Levy by mortgagee's creditors.

[a] (Mich.; 1895.)

A mortgagee in possession of the mortgaged chattels may defend his possession, as against a person claiming title under a void attachment sale against the mortgagor.—*Cary v. Everett* (Mich.) 65 N. W. 566.

[b] (Neb.; 1896.)

In an action by a mortgagee against a creditor of the mortgagor for conversion of the property included in the mortgage, it was error to exclude evidence that the debt due the mortgagee had been lessened by payments since the mortgage was given.—*Plummer v. Green* (Neb.) 68 N. W. 500.

[c] (S. D.; 1897.)

A chattel mortgagee, entitled under the mortgage to take possession of the property whenever he deems himself insecure, may maintain replevin against an officer who seizes the same under execution, without first paying, tendering, or depositing the amount due on the mortgage, as required by Comp. Laws, § 4389.—*Coughran v. Sundback* (S. D.) 70 N. W. 644.

[d] (S. D.; 1897.)

Where mortgaged chattels are wrongfully seized under execution, the right of the mortgagee to maintain replevin for their recovery, or their value, is unaffected by the fact that the mortgagor has other property covered by the mortgage, sufficient to pay the debt.—*Coughran v. Sundback* (S. D.) 70 N. W. 644.

§ 57. Damages recoverable by mortgagee.

[a] (Mich.; 1895.)

In trover by the assignee of a chattel mortgage against an attaching officer, where it appeared that on foreclosure sale plaintiff bought the mortgaged property, and thereafter sold it at an advance on the price paid, the amount paid on the foreclosure sale, and not that subsequently received, is the sum which should be deducted from the mortgage debt.—*Hull v. Bernatz* (Mich.) 61 N. W. 473.

[b] (Mich.; 1895.)

In trover by the assignee of a chattel mortgage against an attaching officer, defendant is not entitled to have collections made by plaintiff's assignor on the mortgage collateral, prior to the assignment, credited on the mortgage debt.—*Hull v. Bernatz* (Mich.) 61 N. W. 473.

[c] (Mich.; 1896.)

A mortgagee in a mortgage given to secure her from liability as surety on a note may, as against other creditors of the mortgagor wrongfully seizing the property, recover the amount of her liability.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

[d] (Mich.; 1897.)

Recovery from one who, on execution against the mortgagor, sells mortgaged chattels, may be had by the mortgagee, without regard to other security; but any payment on the debt he had received will be considered in reduction of damages.—*Huellmantel v. Vinton* (Mich.) 70 N. W. 412.

[e] (Neb.; 1896.)

The measure of damages in an action of conversion by the mortgagee of personal property against the sheriff or other officer who has levied and taken the property by virtue of the process issued in favor of creditors of the mortgagor, is the actual market value of the property when converted, with interest thereon from such time, deducting therefrom the market value of any of the property afterwards returned to the mortgagee, or which he has received, or the proceeds of any of the property of which he has received the advantage, and not in any event to exceed the amount due on the mortgage debt.—*Coburn v. Watson* (Neb.) 67 N. W. 171.

48 Neb. 257.

[f] (Neb.; 1896.)

The measure of damage in an action by the mortgagee for the conversion of mortgaged chattels is the amount of the mortgage debt, not exceeding the value of the property converted.—*Kasper v. Walla* (Neb.) 68 N. W. 476.

XI. SALE OF PROPERTY BY MORTGAGOR.

§ 58. With consent of mortgagee.

(Iowa; 1895.)

Where a mortgagor is allowed by the mortgagee to retain possession of the mortgaged chattels, and to dispose of them in the ordinary course of business, the mortgagee cannot maintain replevin for a portion of the goods sold on credit, nor sue for their value.—*Byam v. Johnson* (Iowa) 61 N. W. 970.

93 Iowa, 243.

§ 59. Action by mortgagee for conversion.

[a] (Minn.; 1896.)

In an action by a mortgagee of grain for conversion, evidence that defendant bought the grain in the market in the usual course of business, and paid for it, cast the burden on plaintiff to show that the mortgage was executed in good faith.—*Hogan v. Atlantic Elevator Co.* (Minn.) 69 N. W. 1.

[b] (N. D.; 1896.)

Where a mortgage empowered the mortgagee to take immediate possession on a sale or oth-

er disposition of the property by the mortgagor, and after it was filed, but before maturity of the debt secured thereby, the mortgagor sold the property, the mortgagee was entitled to sue the purchaser for conversion.—*Elstad v. Northwestern Elevator Co.* (N. D.) 69 N. W. 44.

§ 60. Criminal prosecution.

[a] (Neb.; 1895.)

An information under Comp. St. c. 12, § 10, for fraudulently removing mortgaged property out of the county, is sufficient if it alleges that defendant "duly mortgaged and thereby conveyed" certain property, and that such property was fraudulently removed from the county where it was situated when the mortgage was given, with intent to deprive the owner of the mortgage of his security, without alleging that the mortgage was in writing, that the owner of the mortgage was the owner of the debt secured thereby, or the value of the property at the time of the removal.—*Wilson v. State* (Neb.) 62 N. W. 209, 43 Neb. 745.

[b] (Neb.; 1895.)

Under Comp. St. c. 12, § 10, making it a felony to fraudulently remove mortgaged chattels from the county, a mortgagor who removes only a portion of the mortgaged property is as amenable as if he had removed all thereof.—*Wilson v. State*, 62 N. W. 209, 43 Neb. 745.

[c] (N. D.; 1896.)

To constitute the offense defined by Comp. Laws, § 6923, relating to the sale of mortgaged property, it is sufficient to show merely a sale of mortgaged property without the consent of the mortgagee, while the mortgage was in force, willfully, and not by mistake; an intent to defraud not being an essential ingredient.—*State v. Bronkol* (N. D.) 67 N. W. 680.

5 N. D. 507.

CHATELS.

See "Bailment"; "Chattel Mortgages"; "Pledge"; "Sale."

CHEAT.

See "False Pretenses"; "Forgery"; "Larceny."

CHECKS.

See "Negotiable Instruments," §§ 60-62.

Duty of bank as to, see "Banks and Banking," § 16.

CHILD.

See "Adoption"; "Guardian and Ward"; "Infancy"; "Parent and Child."

CHILLING BIDDING.

See "Judicial Sales," § 5.

CHOSE IN ACTION.

Assignability, see "Assignment," § 4.

CHURCH.

See "Religious Societies."

CIRCUIT COURT.

See "Courts," § 17.

CIRCUMSTANTIAL EVIDENCE.

Instructions on, see "Criminal Law," § 163.

CITATION.

See "Writs and Notice of Suits."

In drainage proceedings, see "Drainage," §§ 4, 5.

CITIZENSHIP.

See "Elections and Voters."

CITY.

See "Municipal Corporations."

CITY COURTS.

See "Courts."

CIVIL DAMAGE LAWS.

See "Intoxicating Liquors," §§ 54-63.

CIVIL DISABILITIES.

See "Husband and Wife"; "Infancy"; "Insanity."

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against assigned estate, see "Assignment for Benefit of Creditors," §§ 34-36.

— city, see "Municipal Corporations," §§ 175-178.

— county, see "Counties," §§ 46-53.

— decedent's estate, see "Executors and Administrators," §§ 12-14.

— insolvent bank, see "Banks and Banking," § 38.

— insolvent corporation, see "Corporations," § 94.

— insolvent estate, see "Insolvency," §§ 10-14.

— school district, see "Schools and School Districts," § 33.

— telegraph company for damages, see "Telegraph Companies," § 6.

By third persons in attachment, see "Attachment," §§ 44-48.

— in execution, see "Execution," §§ 15-18.

CLASS LEGISLATION.

See "Constitutional Law," § 24.

CLERGYMEN.

See "Religious Societies."

CLERK.

Compensation of county clerk, see "Counties," § 24.

CLERK OF COURT.

Authenticating and certifying bill of exceptions, see "Appeal," § 131.

Power of circuit court to appoint assistant clerk, see "Courts," § 4.

Service of notice of appeal on clerk, see "Appeal," § 59.

Settlement of bill of exceptions, see "Exceptions, Bill of," §§ 3, 4.

When guilty of contempt, see "Contempt," § 5.

[a] (Minn.: 1895.)

Under Laws 1885, c. 2, § 5 (Gen. St. 1891, § 1567), providing that the county clerk shall issue warrants for delinquent taxes, for each of which he shall receive 25 cents, to be collected by the sheriff from delinquents, "provided that in case the sheriff shall fail to collect such tax, such sum of 25 cents from each delinquent, as compensation, shall be paid by the county," the clerk is entitled to recover from the county 25 cents for each delinquent personal property tax warrant issued by him which the sheriff failed to collect.—*O'Connor v. Board of Com'rs of Ramsey County* (Minn.) 63 N. W. 1025.

61 Minn. 370.

[b] (Minn.: 1896.)

The effect of Laws 1891, c. 39, §§ 1, 2 (Gen. St. 1894, §§ 866, 867), was to create vacancies in the office of clerk of the district court, in all of the counties affected by the act, on the first Monday in January, 1896, which were to be filled by appointments in accordance with Gen. St. 1894, § 865.—*State v. O'Leary* (Minn.) 66 N. W. 264.

64 Minn. 207.

[c] (Neb.: 1895.)

Since it is not the duty of a clerk of a district court to approve a delivery bond in attachment proceedings, the sureties on his official bond are not liable for loss occasioned by his approval thereof.—*Dewey v. Kavanagh* (Neb.) 63 N. W. 396.

45 Neb. 233.

CLOUD ON TITLE.

See "Quieting Title—Removal of Cloud."

CLUBS.

See "Associations."

CODICIL.

See "Wills," §§ 14, 15.

COLLATERAL ATTACK.

On appointment of receiver, see "Receivers," § 9.
On assignment, see "Assignment for Benefit of Creditors," § 22.

On execution sale, see "Execution," § 28.

On existence of de facto corporation, see "Corporations," §§ 7, 11.

On foreclosure under power of sale, see "Mortgages," § 84.

On judgment, see "Judgment," §§ 68-75.

—in tax proceedings, see "Taxation," § 77.

On land patent, see "Public Lands," § 14.

On mortgage foreclosure sale, see "Chattel Mortgages," § 49.

On proceedings to assess damages for the taking of land for public use, see "Eminent Domain," § 31.

COLLATERAL SECURITY.

See "Pledge."

Equitable pledge of stock, see "Corporations," § 61.

Taking note as collateral, bona fide holders, see "Negotiable Instruments," § 46.

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 8.

COLLECTION.

See "Banks and Banking," §§ 18-23.

Indorsement of note for collection, see "Negotiable Instruments," § 32.

Of taxes, see "Taxation," §§ 63-92.

COLLEGES AND UNIVERSITIES.

Qualification of students as voters, see "Elections and Voters," § 4.

[a] (Mich.: 1896.)

A private individual, without permission of court, cannot seek to compel the board of regents of the university to comply with an act requiring the removal of one of its departments.—*Sterling v. Regents of the University of Michigan* (Mich.) 68 N. W. 253.

[b] (Mich.: 1896.)

Const. 1850, art. 13, § 2 et seq., provides, in regard to the state university, which therefore had been under the control of the legislature, with the intention, as shown by the discussions at the time of its adoption, of placing the university under the control of regents elected by the people, that the regents and their successors shall constitute a body corporate, and shall have general supervision of the university, and the direction and control of all expenditures from the university fund. *Held*, that the legislature was without authority to legislate in regard to the management of the university, and therefore Laws 1895, Act No. 257, directing the removal of the university homœopathic medical college to Detroit, was invalid.—*Sterling v. Regents of the University of Michigan* (Mich.) 68 N. W. 253.

COLLUSION.

By attorney, see "Attorney and Client," § 9.

COLOR OF TITLE.

See "Adverse Possession," §§ 26-29.

COMBINATIONS.

Monopolies, see "Constitutional Law," § 23.

Of carriers, see "Carriers," § 1.

COMITY.

See "Courts," § 30.

COMMERCE.

Combinations of carriers, see "Carriers," § 1.
 Interstate commerce act, see "Carriers," § 2.
 Regulation of, see "Constitutional Law," §§ 46-52.

COMMERCIAL TRAVELERS.

Regulations interfering with interstate commerce, see "Constitutional Law," § 51.

COMMISSION.

See "Factors and Brokers," §§ 7-21.

COMMISSIONER.

See "Court Commissioners."

In condemnation proceedings, see "Eminent Domain," § 14.
 Of highways, see "Highways," § 7.
 Railroad commissioners, see "Railroad Companies," § 2.
 To establish boundary, see "Boundaries," § 11.

COMMITMENT.

After sentence, see "Criminal Law," § 188.
 For contempt, see "Contempt," § 19.
 To asylum, see "Insanity," § 3.

COMMON LAW.

Marriage, see "Marriage," §§ 1, 2.
 Right to costs, see "Costs," § 1.

[a] (Iowa; 1895.)

Const. U. S. art. 3, § 2, providing that "judicial power shall extend to all cases in law and equity arising under the constitution, laws and treaties of the United States," does not make the common law a part of the national jurisprudence.—*Gatton v. Chicago, R. I. & P. Ry. Co.* (Iowa) 63 N. W. 589.

[b] (Iowa; 1895.)

The common law, as such, is not a part of the national jurisprudence.—*Gatton v. Chicago, R. I. & P. Ry. Co.* (Iowa) 63 N. W. 589.

COMMUTATION.

Of sentence, see "Pardon."

COMPANY.

See "Associations"; "Corporations"; "Partnership."

COMPARATIVE NEGLIGENCE.

See "Negligence," §§ 29-31.

COMPENSATION.

For legal printing, see "Newspapers," § 3.
 For property taken for public use, see "Eminent Domain," §§ 3, 4, 25-40.
 Of adjutant general, see "Militia," § 2.
 Of agent, see "Principal and Agent," § 22.
 Of assignee, see "Insolvency," § 7.

Of attorney, see "Attorney and Client," §§ 13-23.

—appointed to assist district attorney, see "District and Prosecuting Attorneys."

Of city officer, see "Municipal Corporations," §§ 47-49.

Of clerk, see "Clerk of Court."

Of coroner, see "Coroner."

Of county officer, see "Counties," §§ 23-25.

Of executor or administrator, see "Executors and Administrators," §§ 29, 30.

Of factor or broker, see "Factors and Brokers," §§ 7-21.

Of health officer, see "Health," § 2.

Of insurance agent, see "Insurance," § 103.

Of jailer, see "Jail and Jailer."

Of justice, see "Justices of the Peace," § 14.

Of physician, see "Physicians and Surgeons," § 4.

Of public officer, see "Office and Officer," §§ 12-15.

Of receiver, see "Receivers," §§ 22, 23.

Of servant, see "Master and Servant," §§ 10-13.

Of sheriff or constable, see "Sheriffs and Constables," § 1.

Of trustee, see "Trusts," § 24.

Of witness, see "Witness," §§ 76, 77.

COMPETENCY.

Of arbitrator, see "Arbitration and Award," § 3.

Of evidence, see "Evidence," §§ 106, 107.

Of juror, see "Jury," §§ 1-7.

Of witness, see "Witness," §§ 1-26.

COMPLAINT.

See "Pleading," §§ 5-15.

In contempt proceedings, see "Contempt," § 12.

In criminal cases, see "Criminal Law," § 15.

COMPOSITION WITH CREDITORS.

§ 1. Validity.

[a] (Wis.; 1896.)

The fact that a creditor of a firm and of an individual jointly liable with the firm received collaterals on the debt from the individual did not invalidate a composition thereafter entered into by it with the other creditors of the firm.—*Continental Nat. Bank v. McGeoch* (Wis.) 66 N. W. 606.

92 Wis. 286.

[b] (Wis.; 1896.)

In an action for an alleged balance, it appeared that defendants McG. and W. illegally undertook to corner the lard market; that McG. was a partner in the firm through whom the transactions were carried on, but that W. was not; that the deal ruined the firm, and that the receiver for it undertook to effect a settlement; that defendants were personally liable for a part of the indebtedness by their indorsements on the firm's notes, and that, at the receiver's solicitation, they agreed to contribute a certain sum each, on consideration of a release from all creditors; that the receiver thereupon submitted the firm's proposition to pay 50 per cent. of the indebtedness, in full settlement of all unsecured claims, stating that the affairs of the firm were in great confusion, and that unless the compromise were effected the matter would "only terminate after long, vexatious, and fruitless litigation"; that all of the creditors accepted the payment, and signed a release in full. *Held*, that the transaction was a valid compromise. *Winslow and Pinney, JJ.*, dissenting.—*Continental Nat. Bank v. McGeoch* (Wis.) 66 N. W. 606.
 92 Wis. 286.

§ 2. — Evidence as to knowledge of other preferences.

[a] (Wis.; 1896.)

Where one of several creditors who entered into a composition repudiated the composition on the ground that one of the other creditors had received payment in full, an issue of a newspaper of general circulation, which the president and cashier of the repudiating creditor were accustomed to read, which contained an article concerning the preferred creditor's security in full, was admissible to prove the repudiating creditor's knowledge of the preference.—*Continental Nat. Bank v. McGeech* (Wis.) 66 N. W. 606.

92 Wis. 286.

[b] (Wis.; 1896.)

The fact that a majority of plaintiff's directors were members of the board of trade, that its cashier was frequently there, and that the security in full of such creditor became publicly and generally known on the board of trade and in the city, are circumstances admissible to show plaintiff's knowledge.—*Continental Nat. Bank v. McGeech* (Wis.) 66 N. W. 606.

92 Wis. 286.

§ 3. Operation and effect.

[a] (Minn.; 1895.)

Plaintiffs, having both a secured and an unsecured claim against defendant, joined with other creditors in a composition agreement, in which they all designated themselves as "general creditors," and agreed to take from defendant a certain consideration for their claims, plaintiffs stating only their unsecured claim. *Held*, that the agreement did not release plaintiffs' secured claim.—*Noyes v. Chapman-Drake Co.* (Minn.) 61 N. W. 901.

60 Minn. 88.

[b] (Wis.; 1896.)

Plaintiff, one of the creditors, cannot avoid the compromise because a certain creditor had been secured in full, where it had knowledge of this fact before it accepted the money and gave a release.—*Continental Nat. Bank v. McGeech* (Wis.) 66 N. W. 606.

92 Wis. 286.

COMPOUNDING FELONY.

Contract against public policy, see "Contracts," § 21.

COMPROMISE.

See, also, "Accord and Satisfaction"; "Composition with Creditors"; "Payment"; "Release and Discharge."

Authority of attorney, see "Attorney and Client," § 2.

Effect on lien of attorney, see "Attorney and Client," § 22.

Of claim against state, see "States and State Officers," § 4.

Offer as evidence of admission, see "Evidence," § 29.

Of school debts, see "Schools and School Districts," § 22.

Receipt of part payment, see "Accord and Satisfaction," § 2.

Verdict, see "Trial," § 100.

With one of two defendants pending appeal, see "Appeal," § 264.

§ 1. What constitutes.

[a] (Iowa; 1896.)

Plaintiff had an account with defendant railroad company for services rendered as general manager, and, at a meeting of the directors of the company, was empowered to make settlement with one B., who was the principal stockholder, of all matters in which the company had

an interest. A contract between plaintiff and B. recited that B. held certain notes against plaintiff, and that plaintiff agreed to pay the notes, or, in lieu thereof, surrender certain bonds, and cancel, "so far as it relates to Mr. B.'s interest, either personally, or as interested" in the defendant company, an account which plaintiff held against the company. *Held*, that it was error to refuse to allow defendant to show that the account referred to in the contract was the account in suit, and had been fully paid by B., on the ground that the contract disclosed no privity between plaintiff and defendant.—*Porter v. Chicago, I. & D. Ry. Co.* (Iowa) 68 N. W. 721.

[b] (Mich.; 1896.)

That one purchasing land for a corporation, from one whom he, at the time, made manager of the corporation, being dissatisfied with the latter's management, obtained the latter's relinquishment of the office and surrender of a stock bonus by paying him the balance of salary due him as manager, does not necessarily show a compromise of a claim for damages on account of fraud in the sale of the land.—*Stoney Creek Woolen Co. v. Smalley* (Mich.) 69 N. W. 722.

§ 2. Consideration.

[a] (Mich.; 1895.)

Where the assignee of a mortgage brings foreclosure after the mortgagor is garnished as a creditor of the mortgagee, when he is not entitled to maintain it, the mortgagor's right to costs in the proceeding are sufficient consideration for a contract by such assignee to accept less than the amount due in satisfaction of the mortgage.—*Gemberling v. Spaulding* (Mich.) 62 N. W. 312.

191 Mich. 217.

[b] (Neb.; 1895.)

The arbitrary refusal to pay by a debtor, for the purpose of exacting terms which are inequitable, is not such a dispute as will of itself support a compromise resulting in the reduction of the amount of the indebtedness.—*Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.) 62 N. W. 899.

[c] (Neb.; 1896.)

In order to sustain a contract which has for its consideration the release of a claim for damages against the promisor, it is not necessary that the claim should be one which, on litigation, would have proved to be valid.—*Carter White-Lead Co. v. Kinlin* (Neb.) 66 N. W. 536.

47 Neb. 409.

[d] (Neb.; 1896.)

The fact that the sum paid in compromise of a disputed claim is only the amount that the debtor concedes to be due does not invalidate the settlement.—*Treat v. Price* (Neb.) 66 N. W. 834.

47 Neb. 875.

[e] (Wis.; 1896.)

The fact that the validity of the claims was questionable was a good consideration for a compromise of them.—*Continental Nat. Bank v. McGeech* (Wis.) 66 N. W. 606.

92 Wis. 286.

[f] (Wis.; 1896.)

The fact that defendants agreed to do something which they were not bound to do by the original contract was a good consideration for compromise of claims against them arising from the contract.—*Continental Nat. Bank v. McGeech* (Wis.) 66 N. W. 606.

92 Wis. 286.

§ 3. Rescission or cancellation.

[a] (Iowa; 1895.)

The settlement of an action, made without the consent of plaintiff, by which another person assumed the liabilities of defendant, may be avoided by plaintiff without proof of fraud.—*Kinney v. Kinney* (Iowa) 63 N. W. 432.

[b] (Iowa; 1896.)

Where settlements were had between parties from time to time, the burden of proof is on one seeking to assail the settlement to show that certain items in dispute were, through mistake or oversight, not taken into account.—*Tank v. Rohweder* (Iowa) 67 N. W. 106.

[c] (Iowa; 1897.)

A judgment creditor who was induced by fraud to accept a settlement for less than the amount of the judgment may rescind the settlement without returning the amount received, being entitled to that amount in any event.—*Howard v. McMillen* (Iowa) 70 N. W. 623.

[d] (Iowa; 1897.)

Failure of a judgment debtor to disclose the fact that he had concealed a large amount of property is such fraud as will avoid a settlement of the judgment for less than its amount, where the debtor had avoided payment of the judgment, on which execution had been returned unsatisfied, had deposited his money in bank in another town, denied to the assessor and others that he had any property, and had generally so conducted his affairs as to cause his creditors to believe him to be insolvent.—*Howard v. McMillen* (Iowa) 70 N. W. 623.

[e] (Mich.; 1896.)

A settlement will be set aside where the evidence as to whether plaintiff entered into it is conflicting, and it admitted claims against plaintiff which he had always repudiated, and he at the time it was made was blind and unable to read it, and after it was made informed the trustee appointed to carry out the agreement that he would not be bound thereby.—*Shurte v. Fletcher* (Mich.) 69 N. W. 233.

[f] (Mich.; 1897.)

Where a settlement of a pending suit is obtained from plaintiff by duress, a tender back of the money received is in time if made before defendant has, by a proper plea, set up the settlement as a defense.—*Weiser v. Welch* (Mich.) 70 N. W. 433.

[g] (Neb.; 1896.)

Testimony of a party to a compromise of two claims against an insurance company, based on the same policy, that he was a German and did not "understand" that he was settling both claims, of itself was insufficient to avoid the settlement for fraud or mistake.—*Home Fire Ins. Co. v. Bredehoft* (Neb.) 68 N. W. 400.

§ 4. Scope.**(Iowa; 1897.)**

It will be presumed, in the absence of evidence to the contrary, that a note given in settlement of mutual accounts embraced all claims in controversy.—*Lindsey v. Moore* (Iowa) 70 N. W. 695.

§ 5. Operation and effect — Conclusiveness.**[a] (Iowa; 1896.)**

An action to recover damages for the construction of an embankment was settled by defendant's paying to plaintiff a stipulated sum, and orally agreeing to build an approach to such embankment. *Held*, that such settlement was a bar to the maintenance of an action by plaintiff to collect damages for injury to his property by reason of such approach, when built, its proper construction being conceded.—*Kelleher v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 66 N. W. 94.

[b] (Mich.; 1895.)

The settlement of an account for goods purchased without reserving a right of set-off for shortage or other reason precludes the debtor from subsequently claiming such set-off.—*Palst Brewing Co. v. Lueders* (Mich.) 64 N. W. 872.

[c] (Mich.; 1896.)

A contract stating that it is in full settlement of all actions and causes of action on account of all matters of any kind between the parties is conclusive as to any controversy existing, where there was no evidence of fraud or mutual mistake.—*Lauzon v. Bellehenmer* (Mich.) 66 N. W. 345.

[d] (Mich.; 1897.)

A settlement of a pending suit which a mother was caused to make by threats to prosecute her son was made under duress, and does not abate the suit.—*Weiser v. Welch* (Mich.) 70 N. W. 433.

[e] (Neb.; 1896.)

Where an insurance company refused to pay any part of the loss occurring under the policy, on the ground that insured had procured the policy through false representations as to his ownership of the insured property, and that the premises, at the time the policy was issued, were already covered by other insurance, there was a dispute existing between the parties, so that the compromise of the claim was binding.—*Home Fire Ins. Co. v. Bredehoft* (Neb.) 68 N. W. 400.

[f] (Wis.; 1896.)

Where a secured creditor, contemplating a compromise, disposed of part of the security, and applied the proceeds to his claim, and compromised the balance, the debtor could not thereafter object to the time at which, or the manner in which, the security was disposed of.—*Continental Nat. Bank v. McGeoch* (Wis.) 66 N. W. 606.

92 Wis. 286.

COMPUTATION.

Of interest, see "Interest," § 14.

Of time, see "Time," § 1.

CONCEALMENT.

Of facts in application for insurance, see "Insurance," § 31.

CONCURRENT JURISDICTION.

See "Courts," § 23.

CONCURRING CAUSE.

See "Negligence," § 11.

CONDEMNATION PROCEEDINGS.

See "Eminent Domain," §§ 10-24.

CONDITIONAL ACCEPTANCE.

Of order, see "Orders."

CONDITIONAL GUARANTY.

See "Guaranty," § 9.

CONDITIONAL SALES.

See "Sale," §§ 97-103.

CONDITIONS.

- In contract, see "Contracts," §§ 29, 30.
 In deed, see "Deed," § 20.
 In lease, see "Landlord and Tenant," § 20.
 In policy, see "Insurance," §§ 44-71.
 In will, see "Wills," § 48.
 Precedent to action against city, see "Municipal Corporations," § 197.
 — to action against county, see "Counties," § 56.
 — to action against sureties on bond, see "Principal and Sureties," §§ 20, 21.
 — to action against town, see "Towns," § 9.
 — to action between partners, see "Partnership," § 21.
 — to action on appeal bond, see "Appeal," § 303.
 — to action on policy, see "Insurance," §§ 108, 109.
 — to action to enforce statutory liability of stockholders, see "Corporations," § 81.
 — to attacking fraudulent conveyance, see "Fraudulent Conveyances," § 34.
 — to creditors' suit, see "Creditors' Bill," § 2.
 — to enforcing liability of guarantor, see "Guaranty," § 14.
 — to foreclosure, see "Mortgages," § 51.
 — to issuance of bonds by town, see "Towns," § 4.
 — to right to costs, see "Costs," § 10.

CONDONATION.

- See "Divorce," § 12.

CONDUCT OF TRIAL.

- See "Criminal Law," §§ 57-89; "Trial," §§ 1-8.

CONFESSION.

- As evidence, see "Criminal Law," § 109.
 Judgment by, see "Judgment," §§ 10, 11.

CONFESSION AND AVOIDANCE.

- Plea in, see "Pleading," § 4.
 Setting up matter in reply, see "Pleading," § 41.

CONFIDENTIAL RELATIONS.

- Abuse of relation as ground for cancellation of contracts, see "Equity," §§ 34, 35.
 Constructive trust, see "Trusts," § 15.
 Transactions between persons in, see "Fraudulent Conveyances," §§ 23, 24.

CONFIRMATION.

- Of appointment of state officer, see "States and State Officers," § 6.
 Of execution sale, see "Execution," § 23.
 Of foreclosure sale, see "Mortgages," § 77.
 Of judicial sale, see "Judicial Sales," § 7.

CONFLICT OF LAWS.

- I. IN GENERAL, §§ 1-5.
 II. CONTRACTS, §§ 6-10.

- Conflicting state and federal jurisdiction, see "Courts," § 27.

I. IN GENERAL.

§ 1. Penal laws.

- (S. D.: 1895.)
 The penal laws of a state have no extraterritorial force.—*Jones v. Fidelity Loan & Trust Co.* (S. D.) 63 N. W. 553.

§ 2. Master's liability for injuries to servant.

- (Mich.: 1897.)
 Where defendant was constructing a tunnel under the St. Clair river, and sent plaintiff, who was in its employ on the American side, to the Canadian side, to work at that entrance of the tunnel, the right of recovery of plaintiff for negligence of defendant in allowing him to enter on dangerous work there is governed by the laws of Canada.—*Turner v. St. Clair Tunnel Co.* (Mich.) 70 N. W. 146.

§ 3. Limitation of actions.

- (a) (Mich.: 1897.)
 An action brought in Michigan on a bond made in New Jersey is governed by the law of the forum relating to the statute of limitations.—*Home Life Ins. Co. v. Elwell* (Mich.) 70 N. W. 334.

- (b) (Neb.: 1895.)
 Under Code Civ. Proc. § 21, providing "that, when a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title," an action is barred in this state when the defendant has resided in another state for the full period of limitation under the laws of that state, though the cause of action arose here, and the defendant resided here when it arose.—*Webster v. Davies* (Neb.) 62 N. W. 484.
 44 Neb. 301.

§ 4. Assignment for benefit of creditors.

- (Iowa: 1895.)
 An assignment for the benefit of creditors, made in another state, under a statute providing that creditors shall receive no benefit under the assignment, nor any part of the debtor's estate, unless they first file a release of all claims other than such as may be paid under the assignment, will not be enforced in Iowa.—*Franzen v. Hutchinson* (Iowa) 62 N. W. 698.

§ 5. Interest in land in another state.

- (Iowa: 1894.)
 The courts of Iowa will determine the interest of parties to land located in another state according to the statutes of that state.—*Acker v. Priest* (Iowa) 61 N. W. 235.
 92 Iowa, 610.

II. CONTRACTS.

§ 6. Place of execution and performance.

- (Neb.: 1896.)
 Where a resident of Nebraska applied for a loan by letter to a resident of New York, and the latter accepted the proposition by letter, and directed the money to be paid over to the borrower by a bank in Nebraska, upon delivery to it of notes of the borrower secured by collateral, which was done, the contract was made in Nebraska.—*Bascom v. Zediker* (Neb.) 67 N. W. 148.
 48 Neb. 380.

§ 7. — Bills and notes.

- (a) (Neb.: 1895.)
 An indorsement of a note by a married woman in Missouri should be construed and governed by the laws of that state in an action on the indorsement in a court of Nebraska.—

Benton v. German-American Nat. Bank (Neb.) 64 N. W. 227, 45 Neb. 850.

[b] (S. D.; 1895.)

Where a note secured by mortgage on property in South Dakota is executed in that state, and made payable in another state, but contains the stipulation, "it is agreed that this note is executed and is to be construed under the laws" of South Dakota, it will be treated as payable there.—Jones v. Fidelity Loan & Trust Co. (S. D.) 63 N. W. 553.

§ 8. — Insurance.

[a] (Mich.; 1896.)

A contract between a resident of Michigan and a Minnesota mutual insurance company, whereby the former becomes a member of the company, and agrees to pay the annual premium and such further sums as the company shall assess, for losses and expenses, pursuant to its charter and by-laws, etc., is a Minnesota contract; and since, under the statutes of that state, as interpreted by its courts, an assessment for unearned premiums on simple cash policies is valid, the same rule will govern in an action on the premium note of such member in the courts of Michigan.—Warner v. Delbridge & Cameron Co. (Mich.) 68 N. W. 283.

[b] (Wis.; 1895.)

Brokers domiciled in Illinois solicited fire insurance from defendant, a Wisconsin corporation, which consented to take insurance on certain Iowa property in acceptable companies, whereupon the brokers requested plaintiff, by letter addressed to its home office in Wisconsin, to write a portion of the insurance. Plaintiff sent to the brokers a blank application and a blank premium note and a policy dated in Wisconsin, which recited that the application was a part of the policy, and was on file at its office, and the brokers sent the papers to defendant's office in Missouri. Defendant filled out the application and note and returned them to the brokers, who sent them to plaintiff. *Held*, that the contract of insurance was executed in Wisconsin.—Seamans v. Knapp, Stout & Co. Company, 61 N. W. 757, 89 Wis. 171.

[c] (Wis.; 1895.)

An insurance company may, within the state of its domicile, make valid contracts of insurance against fire on property situated in a sister state, without regard to the laws of the latter state.—Seamans v. Knapp, Stout & Co. Company, 61 N. W. 757, 89 Wis. 171.

§ 9. — Sale of liquors.

(Iowa; 1894.)

On trial for selling intoxicating liquor it appeared that defendant, as agent of a liquor dealer in Minnesota, had taken orders for liquor to be delivered in Iowa. The orders were transmitted to such dealer, and, if approved, the liquor was shipped, defendant collecting the price. Defendant had no place of business in Iowa, and had no interest in the business or in the liquor. *Held*, that the sales took place in Minnesota, and that the court properly directed a verdict for defendant.—State v. Colby (Iowa) 61 N. W. 187.

92 Iowa, 463.

§ 10. Mortgages and securities thereunder.

[a] (Neb.; 1895.)

In the absence of evidence explaining the transaction, it is presumed that the payment of the proceeds of the loan and the delivery of the note and mortgage were contemporaneous, and that the note is a contract of the state where the mortgage was executed, though it appears on its face to have been executed in another state 12 days previous to the making of the mortgage.—Stark v. Olsen (Neb.) 63 N. W. 37.

44 Neb. 646.

[b] (S. D.; 1895.)

A deed and a declaration of trust were executed in the state of Indiana, under the laws of which the transaction was void, and subsequently a new deed of the same property was executed in the state of Illinois, where such a transaction was legal, and, as found by the referee, was made for the purpose of enabling the grantee to give a good title to the land described in said deed, and "did not change the legal relation of the parties," but no new declaration of trust was executed. *Held*, that the transaction in the state of Illinois had the effect to legalize the entire transaction, and that the declaration of trust is to be regarded as though re-executed in the state of Illinois, and attached to, and constituting a part of, the Illinois transaction.—Commercial Bank v. Jackson (S. D.) 63 N. W. 548.

CONFUSION OF GOODS.

Mingling trust and private funds, following trust property, see "Trusts," § 29.
Mixing grain, rights of depositors in warehouse, see "Warehousemen," § 3.

[a] (Iowa; 1897.)

It is not a mingling of goods to put potatoes into one end of a trench where potatoes belonging to another person are stored, separated therefrom by a partition of hay.—Scott v. Schofield (Iowa) 69 N. W. 1127.

[b] (Minn.; 1895.)

Where the owner of two fields of wheat mortgaged one of them, and, after harvesting, placed all the wheat in one granary, in good faith, and sold a portion thereof, and it did not appear how much wheat was raised on either field, the mortgagee could not recover of the purchaser the value of all the wheat so sold, since it is presumed that the amount of wheat raised on each field per acre was the same.—D. M. Osborne & Co. v. Cargill Elevator Co. (Minn.) 64 N. W. 1135.

62 Minn. 400.

[c] (Wis.; 1895.)

Plaintiff sold defendant certain standing timber, retaining title until the payment of the purchase price. Defendant cut and manufactured the timber into lumber, mixing it with lumber manufactured by him from timber cut on other tracts, but of the same quality and value. *Held*, that replevin would lie to recover, out of the common mass, a less quantity of lumber than that contributed from plaintiff's timber.—Bent v. Hoxie, 64 N. W. 426, 90 Wis. 625.

CONNECTING LINES.

See "Carriers," §§ 20-25.

CONSIDERATION.

Of bills and notes, see "Negotiable Instruments," § 16, 17.
Of compromise, see "Compromise," § 2.
Of contract, see "Contracts," §§ 8-13.
Of deed, see "Deed," § 5.
Of guaranty, see "Guaranty," § 4.
Of mortgage, see "Chattel Mortgages," §§ 14, 15; "Mortgages," § 12.
Of release, see "Release and Discharge," § 2.
— of mortgage, see "Mortgages," § 41.
Of subscription, see "Subscriptions," § 1.
Of suretyship, see "Principal and Surety," § 3.

CONSOLIDATION.

Of actions, see "Action," §§ 8, 9.
Of highway districts, see "Highways," § 3.

Of motions, see "Practice in Civil Cases," § 16.
Of railroad companies, liability of consolidated roads, see "Railroad Companies," § 22.

CONSPIRACY.

Assignability of cause of action, see "Assignments," § 1.
Compelling testimony by party to action for, see "Witness," § 43.
Injunction against, see "Injunction," § 17.
Testimony as to declarations of co-conspirators, see "Criminal Law," § 117; "Evidence," § 31.
To produce abortion, see "Abortion."

§ 1. Criminal conspiracy.

(Mich.; 1897.)

An information charging defendants with having conspired to cheat and defraud a county by false pretenses states an offense.—*People v. Butler* (Mich.) 60 N. W. 734.

§ 2. Civil action.

[a] (Iowa; 1895.)

Where the contract between a railroad company and the proprietor of one of its eating houses does not require it to stop its trains at his hotel in order that passengers may take their meals there, it does not constitute an actionable conspiracy on the part of the company, against such proprietor, for it to induce another to start an eating house a short distance from him, by agreeing to stop its trains there for meals.—*Kelly v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 957.
93 Iowa, 436.

[b] (Iowa; 1897.)

McClain's Code, § 5451, provides that any corporation, partnership, or individual entering into a trust or combination with another to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, "or any other commodity or article whatever," is guilty of a conspiracy to defraud, etc. Held to apply to insurance companies and a compact to charge uniform rates.—*Beechley v. Mulville* (Iowa) 70 N. W. 107.

[c] (Iowa; 1897.)

Where a compact by insurance agents to fix rates provides, on breach of the agreement, for the taking of all agencies from the offending agent, a member cannot recover damages, on the ground of conspiracy to injure his business, against companies for which he was agent, under contracts permitting them to revoke the agencies at will, and their special agents, none of whom are members of the compact, because they, acting together to enforce the compact, revoked his agencies, etc., on his refusal to observe its terms, though the compact was unlawful, and its members were guilty of a conspiracy to defraud, under McClain's Code, § 5451.—*Beechley v. Mulville* (Iowa) 70 N. W. 107.

CONSTABLE.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

I. IN GENERAL, §§ 1-4.

II. DIVISION OF GOVERNMENTAL POWERS—WHO TO EXERCISE, §§ 5-15.

1. As Between Legislative and Judicial Departments, §§ 5-7.
2. As Between Judicial and Executive Departments, § 8.
3. Appointment to or Removal from Office, § 9.
4. Delegation of Legislative Powers, §§ 10-15.

III. LOCAL AND SPECIAL LAWS, § 16

1. In General, §§ 16-22.
2. Laying Special Burdens—Class Legislation, §§ 23, 24.
3. Right to Equal Protection of the Law, § 25.

IV. MONOPOLIES AND PRIVILEGES, § 26.

V. RETROSPECTIVE AND EX POST FACTO LAWS, §§ 27, 28.

VI. OBLIGATION OF CONTRACTS, §§ 29-31.

VII. VESTED RIGHTS, §§ 32-36.

VIII. JURY TRIAL, §§ 37-39.

IX. DUE PROCESS OF LAW, §§ 40-43.

X. POLICE POWER, §§ 44, 45.

XI. REGULATION OF COMMERCE, §§ 46-52.

XII. TAXATION, §§ 53-59.

XIII. IMPRISONMENT FOR DEBT, § 60.

XIV. MISCELLANEOUS CASES, §§ 61-76.

Common law as part of national jurisprudence, see "Common Law."

Constitutionality of election laws, see "Elections and Voters," § 2.

— of liquor laws, see "Intoxicating Liquors," § 1.

Giving full faith and credit to judicial proceedings of sister state, see "Judgment," § 76.

Providing compensation for land taken for public use, see "Eminent Domain," §§ 3, 4, 25-40.

Repeal of statute by constitution, see "Statutes," § 30.

Review of constitutional question, see "Appeal," §§ 178, 195.

Titles of acts, see "Statutes," §§ 10-12.

Uniform operation of general laws, see "Statutes," § 21.

I. IN GENERAL.

§ 1. Rights not guarantied by constitution.

(Minn.; 1896.)

The court cannot declare an act invalid because it is against public policy, contrary to the spirit of the constitution, and liable to become an engine of oppression and a vehicle for the corruption of justice.—*Lommen v. Minneapolis Gaslight Co.* (Minn.) 68 N. W. 53.

§ 2. Constitutional convention.

(N. D.; 1896.)

The will of the legislature that a particular proposition be submitted to the people to be voted on need not take the form of a law; hence a joint resolution of the legislature that the question whether a constitutional convention shall be held shall be submitted to the people is effective.—*State v. Dahl* (N. D.) 68 N. W. 418.

§ 3. Amendments.

(Minn.; 1895.)

The amendment of the constitution proposed by Gen. Laws 1881, c. 3, prohibiting special and private legislation on certain subjects, did not take effect before the official canvass of the vote thereon.—*City of Duluth v. Duluth St. Ry. Co.* (Minn.) 62 N. W. 267.
60 Minn. 178.

Injunction against submission of amendment, see "Injunction," § 4.

§ 4. — Certifying amendment to county auditors.

(S. D.; 1896.)

Under Laws 1891, c. 57, § 12, providing that "whenever any proposed constitution or constitutional amendment or other question is to be submitted to the people of the state for

popular vote, the secretary of state shall * * * certify the same to the auditor of each county in the state." It is the duty of the secretary to certify a question directed by the legislature as to whether a provision of the constitution shall be repealed, though an affirmative answer by the people would not affect the constitution.—*State v. Thorson* (S. D.) 68 N. W. 202.

II. DIVISION OF GOVERNMENTAL POWERS—WHO TO EXERCISE.

Conferring judicial power to remove officers, see post, § 9.

Legislative power over creation and organization of bank, necessity of submitting question to voters, see "Banks and Banking," § 3.

—over university, see "Colleges and Universities."

1. AS BETWEEN LEGISLATIVE AND JUDICIAL DEPARTMENTS.

Delegation of legislative power to judge or court, see post, § 15.

Divorce by legislature, see "Divorce," § 1.

§ 5. Exercise by courts of duties other than judicial.

(Minn.: 1896.)

Assuming the powers conferred on the probate judge by Gen. Laws 1895, c. 156, in relation to committing inebriates, to be merely ministerial, the act is nevertheless unconstitutional, since the legislature cannot assign to the judiciary duties other than judicial.—*Foreman v. Board of Com'rs of Hennepin County* (Minn.) 67 N. W. 207.

64 Minn. 371.

§ 6. — Exercise of legislative power.

[a] (Neb.: 1896.)

It is not within the power of a court to make such an arrangement for the business intercourse of common carriers as, in the opinion of such court, they ought to make for themselves, for such function is legislative, rather than judicial.—*State v. Sioux City, O. & W. R. Co.*, 65 N. W. 766, 46 Neb. 682.

[b] (S. D.: 1896.)

Courts have no jurisdiction to prevent the submission to the people, as directed by the legislature, of a question involving an amendment to the constitution, by enjoining the secretary of state from certifying the question to the county auditors, as such action would be an unwarranted interference with the legislative authority.—*State v. Thorson* (S. D.) 68 N. W. 202.

[c] (Wis.: 1896.)

Sanh. & B. Ann. St. §§ 854-866, authorizing territory of a town containing certain area and population to become incorporated as a town on certain steps being taken by the inhabitants thereof, and on certain determinations by the court and subsequent vote of the inhabitants in favor thereof, delegate legislative power to the court, in violation of Const. art. 4, §§ 1, 22, and Id. art. 11, § 3, in so far as they allow the court to determine whether the lands embraced in the petition "ought justly" to be included in the village, and whether the interest of the inhabitants will be promoted by such incorporation, and to enlarge or diminish the boundaries of the proposed village "as justice may require." Marshall, J., dissenting.—In re Village of North Milwaukee (Wis.) 67 N. W. 1033.

93 Wis. 616.

§ 7. Exercise of judicial power by legislature.

[a] (Minn.: 1895.)

Senate file No. 652, Sess. 1895, giving a right on appeal in habeas corpus proceedings to

a trial de novo in the supreme court, so far as applicable to decisions rendered prior to its passage, is unconstitutional.—*State v. Flint* (Minn.) 63 N. W. 1113.

61 Minn. 539.

[b] (S. D.: 1896.)

After an appeal had been taken from a judgment of the county court decreeing that the proceeds of a policy of insurance on the life of and payable to the estate of an insolvent, who had died intestate leaving a wife and minor children, were assets of his estate for the partial payment of debts, the legislature enacted (Laws 1895, c. 89) that the avails of any policy of insurance "heretofore or hereafter issued upon the life of any person," and payable to the estate of the insured, etc., shall, to an amount not exceeding \$5,000, inure to the separate use of the widow or husband or minor children, independently of the creditors of deceased. Held, that said act did not affect the rights of creditors under said judgment; to hold otherwise would deprive unreversed judgments of the element of conclusiveness, in trench upon the constitutional principle which separates the legislative and judicial powers, and in effect amount to a reversal of a judgment by the legislature.—*Skinner v. Holt* (S. D.) 69 N. W. 595.

2. AS BETWEEN JUDICIAL AND EXECUTIVE DEPARTMENTS.

§ 8. Power of courts over executive officers.

[a] (Minn.: 1897.)

The district court has jurisdiction of the state auditor as respects the control and disposition of a deposit made by an insurance company for the benefit of policy holders, and in which the state, as such, has no interest.—*Hayne v. Metropolitan Trust Co.* (Minn.) 69 N. W. 916.

[b] (Neb.: 1895.)

The power conferred on the governor by Comp. St. c. 40, § 11, to remove the superintendent of the hospital for the insane at Lincoln, being an administrative function, cannot be reviewed by the courts.—*State v. Hay* (Neb.) 63 N. W. 821.

45 Neb. 321.

3. APPOINTMENT TO OR REMOVAL FROM OFFICE.

§ 9. Power to remove.

(Wis.: 1895.)

The power to remove city officers for cause, conferred on the council by Superior City Charter (Laws 1891, c. 124) § 21, is merely administrative, and such section is not, therefore, unconstitutional, as a grant of judicial powers to a nonjudicial body.—*State v. Common Council of City of Superior* (Wis.) 64 N. W. 304, 90 Wis. 612.

4. DELEGATION OF LEGISLATIVE POWERS.

To board of health, see "Health," § 5.

§ 10. Delegation in general.

[a] (Minn.: 1896.)

Gen. St. 1894, § 493, known as the "Boiler Inspector's Act," is not, in providing that the act shall not apply to boilers inspected by insurance companies and certified by their authorized inspectors to be safe, an improper delegation of police power.—*State v. McMahon* (Minn.) 68 N. W. 77.

[b] (Minn.: 1895.)

Gen. Laws 1885, c. 170 (Gen. St. 1894, § 3513), providing for the dissolution of inde-

pendent school districts, is not invalid as a delegation of legislative power, since the legislature may confer a power without designing to enforce its exercise, and leave the question whether it shall be assumed to be determined by the electors of a particular district.—*State v. Cooley* (Minn.) 68 N. W. 66.

[*Id.* (Minn.; 1897.)]

Making the taking effect of an act, as to a city, contingent on a vote of the city council, is not a delegation of legislative power.—*State v. Sullivan* (Minn.) 69 N. W. 1094.

§ 11. To private person.

(*Neb.*; 1896.)

The preservation of fish in the streams of the state is a proper function of government, and cannot be surrendered by the legislature by granting to a private party the right to maintain a dam in a stream without constructing fishways around it.—*West Point Water Power & Land Imp. Co. v. State* (Neb.) 66 N. W. 6.

§ 12. To insurance commissioner.

[*Minn.*; 1895.]

Gen. Laws 1889, c. 217 (Gen. St. 1894, §§ 3200-3202), providing for the preparation by the insurance commissioner, and the adoption, of the "Minnesota standard policy," is unconstitutional, because it attempts to delegate legislative power to the insurance commissioner.—*Anderson v. Manchester Fire Assur. Co.* (Minn.) 63 N. W. 241.

59 Minn. 182.

[*Id.* (Wis.; 1896.)]

Laws 1891, c. 195, empowering the insurance commissioner to adopt a printed form, in blank, of a policy of fire insurance, together with such conditions as may be indorsed thereon, which, as near as the same can be made applicable, shall conform to the type and form of policy adopted by another state, is unconstitutional, as a delegation of legislative power.—*Dowling v. Lancashire Ins. Co.* (Wis.) 65 N. W. 738.

92 Wis. 63.

§ 13. To park commissioners.

(*Mich.*; 1895.)

An act establishing park commissioners, and giving them power to determine where and of what material sidewalks and roadbeds shall be constructed, is not a delegation of legislative power.—*Turner v. City of Detroit* (Mich.) 62 N. W. 405.

104 Mich. 323.

§ 14. To county boards.

(*N. D.*; 1895.)

Laws 1890, c. 55, authorizing the boards of county commissioners to fix the salary of state attorneys, is void under Const. § 173, requiring the legislature to fix the compensation of county, township, and district officers.—*Doherty v. Ransom County* (N. D.) 63 N. W. 148.

5 N. D. 1.

§ 15. To judge or court.

(*Minn.*; 1896.)

Gen. St. 1894, § 5970, providing that the court or judge allowing a writ of mandamus shall direct the manner of serving the same, does not delegate legislative powers to the court or judge.—*State v. Adams Exp. Co.* (Minn.) 68 N. W. 1085.

[*Id.* (Minn.; 1896.)]

That part of Gen. St. 1894, § 390 (providing for a summary proceeding against carriers which fail to obey the orders of the railroad and warehouse commission), which provides that the court may direct the manner in which notice may be given the carrier proceeded against, does not delegate legislative powers to the judiciary.—*State v. Adams Exp. Co.* (Minn.) 68 N. W. 1085.

III. LOCAL AND SPECIAL LAWS.

For assessment or collection of taxes, see post, § 54.

When amendment prohibiting takes effect, see ante, § 3.

1. IN GENERAL.

§ 16. Validity.

(*Mich.*; 1895.)

Local legislation is valid, in the absence of prohibition in the state constitution, it not being in any way prohibited by Const. U. S. Amend. 14.—*Messenger v. Teagan* (Mich.) 64 N. W. 499; *Engel v. Donovan*, *Id.*

§ 17. What are local or special laws.

[*Id.* (Minn.; 1895.)]

Laws 1895, c. 304, provides that all jurors in every county shall receive two dollars per day for attendance. *Held*, that the facts that, by laws in force prior to the passage of the act, that sum per day was allowed jurors in every county except Ramsey, wherein a special law governed, and that the act hence affected Ramsey county only, did not render the act special legislation.—*State v. Sullivan* (Minn.) 64 N. W. 813.

62 Minn. 283.

[*Id.* (S. D.; 1896.)]

The ferry law, since it was applicable to all the counties in which there are rivers requiring ferries, is not a local or special law, within the meaning of the act of congress of July 30, 1886, prohibiting territories from passing special or local laws chartering or licensing ferries.—*Nixon v. Reid* (S. D.) 67 N. W. 57.

[*Id.* (Wis.; 1896.)]

The provision of Laws 1895, c. 302 (which, by its terms, applies only to cities of the first class, and therefore only to Milwaukee), that no assessment for street paving shall be declared invalid on account of the contract therefor containing a provision requiring the contractor to keep the pavement in repair, is unconstitutional, as special legislation, in so far as it includes contracts already performed.—*Boyd v. City of Milwaukee* (Wis.) 66 N. W. 603.

92 Wis. 456.

§ 18. What acts are within constitutional prohibition.

[*Id.* (Iowa; 1896.)]

Const. art. 3, § 30, provides that the legislature shall not pass special laws in certain enumerated cases, and that "in all cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general throughout the state." *Held*, that the legislature was absolutely prohibited from passing special laws in the enumerated cases.—*State v. City of Des Moines* (Iowa) 65 N. W. 818.

[*Id.* (Neb.; 1896.)]

That part of Act 1873 (Gen. St. p. 207), relating to building and loan associations, which exempts such associations from some features of the general interest laws, does not violate Const. art. 3, § 15, prohibiting the passage of local or special laws regulating interest.—*Livingston Loan & Building Ass'n v. Drummond* (Neb.) 68 N. W. 375.

[*Id.* (S. D.; 1896.)]

The ferry law is not in conflict with the provisions of the constitution of South Dakota, prohibiting the legislature from enacting any private or special laws authorizing persons to keep ferries across streams wholly within the state.—*Nixon v. Reid* (S. D.) 67 N. W. 57.

[*Id.* (Wis.; 1896.)]

Laws 1895, c. 221, providing for the protection of fish, and making different regulations in regard thereto for the different waters of the state, not being included among the subjects in

regard to which the legislature is prohibited from passing special laws, is not unconstitutional as special legislation.—*Bittenhaus v. Johnston* (Wis.) 66 N. W. 805.
92 Wis. 588.

§ 19. — Acts affecting municipalities.

[a] (Iowa; 1896.)

Act 23d Gen. Assem. March 3, 1890, providing for the extension of the corporate limits of cities having a certain population by a past state census, which can be only applicable to one city, is special legislation.—*State v. City of Des Moines* (Iowa) 65 N. W. 818.

[b] (Iowa; 1896.)

A special act legalizing a levy of taxes for school purposes made by the directors of a particular district after the expiration of the time fixed by statute does not violate Const. art. 3, § 30, prohibiting the enactment of local or special laws where a general law can be made applicable, etc., though at the time such act was passed there were four other school districts in the state wherein the levies, made at different times from those sought to be validated, were invalid for like reasons.—*Chicago, R. I. & P. Ry. Co. v. Independent Dist. of Avoca* (Iowa) 68 N. W. 881; *Benjamin v. Same*, *Id.*

[c] (Minn.; 1895.)

The fact that, at the time of the passage of the village act of 1891, there was but one village having the population specified in the act to which the act could apply, did not render the act repugnant to Const. art. 4, § 33, as amended, and section 34, prohibiting special legislation.—*In re Norton*, 64 N. W. 190, 61 Minn. 542; *In re Northwestern Loan & Investment Co., Id.*; *State v. Judges of District Court of St. Louis County, Id.*

[d] (Minn.; 1896.)

Laws 1895, c. 228, granting charter powers to all cities of a certain class, to take effect in each city only on the adoption of the same by it, contravenes Const. art. 4, § 33, providing that the legislature shall not amend, extend, or modify any existing special law, since all the charter powers of cities of said class are contained in special laws, and are necessarily modified by said act.—*State v. Copeland* (Minn.) 69 N. W. 27.

[e] (Minn.; 1896.)

Laws 1895, c. 228, granting charter powers to all cities of a certain class, to take effect in each city only on the adoption of the same by it, contravenes Const. art. 4, §§ 33, 34, prohibiting special legislation as to cities, and requiring all laws as to the same to be uniform in operation throughout the state.—*State v. Copeland* (Minn.) 69 N. W. 27.

[f] (Minn.; 1897.)

Gen. Laws 1895, c. 229, establishing municipal courts, is not an act regulating the affairs of cities, within Const. art. 4, § 33, prohibiting special legislation.—*State v. Sullivan* (Minn.) 69 N. W. 1094.

[g] (Wis.; 1895.)

Laws regulating the sale of liquors are not a part of the system of town and county government, which Const. art. 4, § 23, requires to be "as nearly uniform as practicable"; and hence Laws 1887, c. 417, requiring each city or town in Rock county to pay \$50 for each liquor license granted by it into the county treasury, for the poor fund, is not invalid because other cities and towns are allowed to dispose of the license money without restriction.—*Rock County v. City of Edgerton* (Wis.) 63 N. W. 291.
90 Wis. 288.

[h] (Wis.; 1896.)

Laws 1893, c. 310, providing for assessments of the cost of repaving streets, which is made applicable to all cities having a population of 20,000 inhabitants, is not unconstitutional, as special legislation.—*Boyd v. City of Milwaukee* (Wis.) 66 N. W. 603.
92 Wis. 456.

§ 20. Conferring corporate powers and privileges.

[a] (Iowa; 1897.)

Act April 10, 1894, to legalize certain unexecuted grading contracts made by the city of Des Moines, which were invalid by reason of defects in the notice of proposals for bids, is a valid curative act, and does not contravene Const. art. 3, § 30, forbidding the passage of local or special laws for the incorporation of cities and towns.—*Windsor v. City of Des Moines* (Iowa) 70 N. W. 214.

[b] (Minn.; 1895.)

Sp. Laws 1885, c. 30, amending Sp. Laws 1881, c. 46, whereby additional territory was taken into the village of Wadena, is not repugnant to Const. art. 4, § 33, subds. 7, 9, as amended, prohibiting the enactment of special laws granting corporate powers or privileges, except to cities, or incorporating towns or villages.—*Village of Wadena v. Wiswell* (Minn.) 63 N. W. 1103.

61 Minn. 465.

[c] (Minn.; 1895.)

Sp. Laws 1891, c. 175, authorizing the village of Winnebago City to issue bonds for waterworks, was not a grant of "corporate powers or privileges," within the meaning of Const. Amend. 1881, subd. 7, forbidding a grant by special law of such privileges, except to cities.—*Brady v. Moulton* (Minn.) 63 N. W. 489.

61 Minn. 185.

§ 21. Provisions of city charter.

(Wis.; 1895.)

The charter of the city of Fond du Lac (Laws 1883, c. 152, subc. 18, § 1, as amended by Laws 1889, c. 435, § 3), requiring lot owners to keep sidewalks in repair, and making them liable, on certain conditions, for injuries caused by defects in the walks, is not void because limited to lot owners in such city, since, at the time it was enacted, the constitution did not require uniformity in city charters.—*McKibben v. Amory*, 62 N. W. 416, 89 Wis. 607.

§ 22. Compensation of officers.

(S. D.; 1895.)

Laws 1890, c. 81, § 10, providing that the compensation of clerks of courts in counties having a population of 10,000 or under shall be \$1,500, and in counties having a greater population shall be \$2,000, does not conflict with Const. art. 5, § 34, requiring laws relating to courts of the same class to be general and uniform, or Const. art. 9, § 6, requiring the legislature to provide by general law for county, township, and district officers, and to prescribe the duties and compensation of such officers.—*Minnehaha County v. Thorne* (S. D.) 61 N. W. 688.

6 S. D. 449.

2. LAYING SPECIAL BURDENS—CLASS LEGISLATION.

§ 23. Special burdens.

[a] (Mich.; 1895.)

The legislature may grant to the municipal authorities the power to take the lands of a particular cemetery association under the right of eminent domain by a special act which does not subject other similar associations to the same burden. *McGrath, C. J.*, dissenting.—*Woodmere Cemetery v. Roulo* (Mich.) 62 N. W. 1010.

104 Mich. 595.

[b] (Mich.; 1895.)

Const. art. 15, § 1, prohibiting the formation of corporations by special act, does not prevent the legislature from authorizing condemnation of the land of a certain cemetery corporation without so providing as to the land of all such corporations.—*Woodmere Cemetery v. Roulo* (Mich.) 62 N. W. 1010.

104 Mich. 595.

§ 24. Class legislation.

[a] (Mich.: 1895.)

Laws 1887, Act No. 50, authorizing the formation of building and loan associations, is not unconstitutional as class legislation. *People's Bldg. & Loan Ass'n of Saginaw County v. Billing* (Mich.) 62 N. W. 373.
104 Mich. 186.

[b] (Mich.: 1895.)

3 How. Ann. St. § 7717c, providing that in actions for lal or performed the court shall not order security for costs where the plaintiff shall make affidavit that he has a meritorious cause of action, and is unable to procure such security, is not unconstitutional, as giving special advantages to one class at the expense of another.—*Jones v. Shiawassee Circuit Judge* (Mich.) 63 N. W. 976.
105 Mich. 661.

[c] (Mich.: 1896.)

How. Ann. St. § 1690z1, requiring emery wheels to be provided with blowers, is not unconstitutional, as class legislation, since it applies to all operating such wheels.—*People v. Smith* (Mich.) 66 N. W. 382.

[d] (Minn.: 1896.)

Gen. St. 1894, §§ 2660, 2661, allowing plaintiff in ejectment for land taken by a railroad company, without compensation, for its right of way, reasonable attorney's fees, are constitutional.—*Cameron v. Chicago, M. & St. P. Ry. Co.* (Minn.) 65 N. W. 652.
63 Minn. 384.

[e] (Minn.: 1896.)

Gen. Laws 1893, c. 121, § 9, as amended by Gen. Laws 1895, c. 115, § 5, making it unlawful for any person to consign by common carrier to any commission merchant or sale market any elk, moose, caribou, or deer, or any part thereof except the head and skin, is not class legislation.—*State v. Chapel* (Minn.) 66 N. W. 205.
64 Minn. 130.

[f] (Minn.: 1896.)

Gen. St. 1894, § 493, known as the "Boiler Inspector's Act," provides that the "act shall not apply to railroad locomotives, nor shall engineers employed by railroad companies be required to procure licenses. Nor shall it apply to boilers inspected by insurance companies and certified by their authorized inspectors to be safe." *Held*, that the act exempts only locomotive engineers, and boilers inspected by insurance companies and certified to be safe, and is not unconstitutional, as being class legislation.—*State v. McMahon* (Minn.) 68 N. W. 77.

[g] (Minn.: 1896.)

Laws 1893, c. 64 (Gen. St. 1894, §§ 7724-7726), providing for the erection of public grain warehouses and grain elevators on or near the right of way of railroads by any person desirous of operating the same, and for the condemnation of a site therefor, is not unconstitutional as being class legislation, in that it limits the site to the right of way of a railroad company.—*Stewart v. Great Northern Ry. Co.* (Minn.) 68 N. W. 208.

[h] (Minn.: 1896.)

Gen. Laws 1895, c. 328, providing for struck juries, is not objectionable as being class legislation; the fact that only a limited number of persons can take advantage of its provisions, because of the expense necessary to the striking of a jury, not rendering it invalid.—*Lommen v. Minneapolis Gaslight Co.* (Minn.) 68 N. W. 53.

3. RIGHT TO EQUAL PROTECTION OF THE LAW.

§ 25. When infringed.

(Minn.: 1896.)

Laws 1895, c. 221, providing for the protection of fish, and making different regulations

in regard thereto for the different waters of the state, does not violate the provision of the federal constitution that no state shall make any law which shall deny to any person the equal protection of the laws.—*Wittenhaus v. Johnston* (Wis.) 66 N. W. 895.
92 Wis. 588.

IV. MONOPOLIES AND PRIVILEGES.

Right to privileges of citizens of other states, see post, § 61.
Grant by city, see "Municipal Corporations," § 57.

§ 26. Granting special privileges.

[a] (Neb.: 1895.)

Act 1895, amending Act 1887, incorporating cities of the metropolitan class, and providing for a board of fire and police commissioners composed of three members, at least one to be selected from each of the two political parties casting the largest number of votes, is not repugnant to Bill of Rights, art. 3, § 15, providing that the legislature shall not pass local or special laws granting any special or exclusive privilege, immunity, or franchise.—*State v. Bemis*, 64 N. W. 348, 45 Neb. 724.

[b] (Neb.: 1896.)

That part of Act 1873 (Gen. St. p. 207), relating to building and loan associations, which exempts such associations from some features of the general interest laws, does not violate Const. art. 3, § 15, prohibiting the legislative grant of any special privilege, immunity, or franchise.—*Livingston Loan & Building Ass'n v. Drummond* (Neb.) 68 N. W. 375.

[c] (N. D.: 1896.)

Comp. Laws, §§ 1361-1369, authorizing boards of county commissioners of the several counties of the state to grant exclusive ferry franchises for a period of years to the highest bidder therefor, is not repugnant to Const. § 20, which declares that no privileges or immunities shall be granted to any citizen or class of citizens which shall not be granted to all citizens on the same terms.—*Patterson v. Wollmann* (N. D.) 67 N. W. 1040.
5 N. D. 608.

[d] (S. D.: 1896.)

Comp. Laws, §§ 1361-1369, providing for granting ferry licenses, are not invalid, as being in conflict with section 1889 of the organic act of the territory of Dakota, which prohibits the territories from granting private charters or special privileges, said ferry law having been passed in 1860, and acquiesced in by congress for over 25 years.—*Nixon v. Reid* (S. D.) 67 N. W. 57.

V. RETROSPECTIVE AND EX POST FACTO LAWS.

Retrospective effect of statutes, see "Statutes," §§ 22, 23.

§ 27. Ratification and curative acts.

[a] (S. D.: 1896.)

Laws 1895, c. 89, declaring that the avails of a life policy "heretofore or hereafter" issued payable to the estate of insured, etc., shall, to the extent of \$5,000, inure to the separate use of the widow or husband or minor children, independently of the creditors of deceased, is void so far as it concerns antecedent transactions.—*Skinner v. Holt* (S. D.) 69 N. W. 595.

[b] (Wis.: 1895.)

The provision of Laws 1893, c. 276, validating all assignees' bonds previously filed by the court commissioners, was within the power of the legislature, though a previous statute required an indorsement by the commissioners of

their approval on such bonds.—*Johnson v. Hill* (Wis.) 62 N. W. 930.
90 Wis. 19.

[c] (Wis.: 1895.)

The provision of Laws 1893, c. 276, validating all assignees' bonds previously filed by the court commissioners, was within the power of the legislature. *Johnson v. Hill* (1895) 62 N. W. 930, followed.—*Freiberg v. Singer*, 63 N. W. 754, 90 Wis. 608.

§ 28. Ex post facto laws.

[a] (Mich.: 1896.)

Laws 1893, Act No. 118, § 33, provides that convicts who shall have no infractions of the rules of the prison against them shall be entitled to a reduction from their sentences according to a certain scale, with a proviso that a convict who shall be serving a second term in said prison shall be entitled to a less favorable reduction. *Held*, that such act is not ex post facto as to an offense committed after its passage by one who had completed a term in the prison before it took effect.—*In re Miller* (Mich.) 68 N. W. 990.

[b] (S. D.: 1896.)

Laws 1893, c. 24, changing the method of enforcing the liability of the father of a bastard, is not an ex post facto law as applied to a defendant whose intercourse with the complaining witness was had before the passage of the act. *State v. Bunker* (1895) 65 N. W. 33, followed.—*State v. Hughes*, 66 N. W. 1076.

VI. OBLIGATION OF CONTRACTS.

Estoppel to raise question, see "Estoppel," § 12.

§ 29. In general.

[a] (Mich.: 1895.)

Act No. 388, Local Acts 1889, providing for the construction of a boulevard, not exempting abutting landowners from liability for the construction of sidewalks thereon, Act No. 415, Local Laws 1893, providing for the construction of sidewalks at the expense of the abutting owners, does not impair the contract resulting from condemnation proceedings to acquire land for the boulevard.—*Turner v. City of Detroit* (Mich.) 62 N. W. 405.

[b] (Neb.: 1896.)

An ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city does not violate prior contract obligations.—*Chicago, B. & Q. R. Co. v. State* (Neb.) 66 N. W. 624.
47 Neb. 549.

§ 30. What contracts are protected.

[a] (Neb.: 1895.)

Act 1879 and leases of school lands made thereunder provide that five years from the date of the lease, and every five years thereafter, the land shall be appraised by three persons, one to be appointed by the county clerk, one by the lessee, and the third by the other two, and that the valuation so made shall be the basis of rental for the five years succeeding. *Held*, that Act 1883, attempting to deprive the lessee of the right of selecting an appraiser, is invalid as to then existing leases.—*State v. Thayer*, 64 N. W. 700, 46 Neb. 137.

[b] (Neb.: 1896.)

Assuming that Act 1891 (Comp. St. c. 16, §§ 148a-148r), prescribing conditions precedent to the transaction of business in Nebraska by foreign corporations, declares illegal contracts of noncomplying corporations, it is, as to agreements existing at the time of its enactment, unconstitutional, as impairing contractual obligations.—*American Building & Loan Ass'n v. Rainbolt* (Neb.) 67 N. W. 493.
48 Neb. 434.

[c] (Neb.: 1896.)

Act March 31, 1887 (Laws 1887, p. 29), amending Act March 1, 1879, § 69, so as to authorize a levy by cities, not exceeding seven mills, to pay for water supplied under contract, applies only to contracts thereafter made, since otherwise it would impair the obligation of contracts as to pre-existing contracts.—*State v. City of Kearney* (Neb.) 68 N. W. 533.

§ 31. Laws affecting remedies on contracts.

[a] (Iowa: 1896.)

The retroactive provision in a law giving exemptions cannot avail in a garnishment proceeding instituted before the passage of the law, being a violation of the constitutional provision that no state shall pass any law impairing the obligations of contracts.—*Willard v. Sturm* (Iowa) 65 N. W. 847.

[b] (Mich.: 1896.)

Pub. Acts 1889, No. 149, authorizing an attachment on a claim not due, does not contravene Const. art. 4, § 43, providing that the legislature shall pass no bill of attainder, ex post facto law, or law impairing the obligation of contracts.—*Mosher v. Bay Circuit Judge* (Mich.) 66 N. W. 384.

[c] (Mich.: 1897.)

The assessing of taxes, the creation of a lien, and its enforcement for delinquency, do not raise a contract relation between the state and the owner of the land; and, being in invitum, the law affecting the remedy is in such cases subject to amendment, even though the time fixed for the sale or redemption be shortened.—*Muirhead v. Sands* (Mich.) 69 N. W. 826.

[d] (Minn.: 1895.)

Prior to 1889, the homestead of the debtor, on his decease, became assets for the payment of his debts, subject only to the homestead rights of his widow and his minor children. *Held*, that Prob. Code 1889, providing that the homestead of a decedent shall descend to his heirs generally, free from all debts on the estate of decedent, is invalid as to contracts made before its enactment, as impairing the obligation of contracts.—*Dunn v. Stevens*, 64 N. W. 924, 62 Minn. 380; *Id.*, 65 N. W. 348, 62 Minn. 380.

VII. VESTED RIGHTS.

Of beneficiary in mutual policy, see "Insurance," § 163.

§ 32. Under contract with city.

(Mich.: 1896.)

Where a city council, by contract in writing, grants to an individual the right to lay a sewer (for which there is great need) in certain streets, and to connect the same with the premises of such adjoining lot owners as may contract with him therefor, the work to be done under the supervision of the city, but at the expense and for the profit of the grantee, the latter acquires a vested right, which cannot be revoked by the city.—*Stevens v. City of Muskegon* (Mich.) 69 N. W. 227.

§ 33. Of chattel mortgagee.

(N. D.: 1895.)

Laws 1890, c. 88, § 2, making the lien for labor or materials furnished in repairing a threshing engine superior to mortgage liens, prior in date and created after the passage of the act, if the lien is filed within the time prescribed, is constitutional.—*Garr v. Clements* (N. D.) 62 N. W. 646.
4 N. D. 559.

§ 34. Of garnishee plaintiff.

(Wis.: 1895.)

The fact that between the filing of the bond of an assignee for creditors, and the pas-

sage of Laws 1893, c. 276, curing defects therein, garnishee process was served on the assignee, gave the garnishee plaintiff no rights which the legislature could not abrogate.—*Freiberg v. Singer* (Wis.) 63 N. W. 754.
90 Wis. 608.

§ 35. Of creditor attaching property fraudulently transferred.

(N. D.; 1897.)

Where, at the time of a sale of personalty and attachment thereof as the vendor's property, the law made a sale, not accompanied by delivery and change of possession, conclusively fraudulent, the attaching creditor obtained a vested right, which was not taken away by a subsequent act pending attachment, converting such conclusive presumption into a rebuttable one.—*Conrad v. Smith* (N. D.) 70 N. W. 815.

§ 36. Minority representation in management of corporation—Rights of corporation.

(Mich.; 1897.)

How. Ann. St. § 4885a, providing for the representation of the minority stockholders in the directory of corporations, by authorizing the cumulation of their votes in the election of directors, is constitutional, as applied to a life insurance company organized under the general act of March 30, 1869 (How. Ann. St. p. 1072), though changing the method of election prescribed by its articles of association, the right to alter, amend, or repeal any law under which corporations may be formed being reserved to the legislature by the constitution of 1850, under which such statute was enacted, and the act in question not being one which operates to deprive the corporation of any substantial right.—*Attorney General v. Looker* (Mich.) 69 N. W. 929.

VIII. JURY TRIAL.

Right to demand or refuse jury trial, see "Jury," §§ 23-29.

§ 37. When right infringed.

[a] (Minn.; 1896.)

Laws 1895, c. 320, which provides that where a party was entitled on the trial to have a verdict directed in his favor, and duly moved for the same, the court may, on a motion for a new trial, or on an appeal in such motion, order judgment in his favor notwithstanding the verdict, is not unconstitutional as denying the right of trial by jury.—*Kernan v. St. Paul City Ry. Co.* (Minn.) 67 N. W. 71.
64 Minn. 312.

[b] (Minn.; 1896.)

Gen. Laws 1895, c. 328, providing for struck juries on application of either party, is not in conflict with the constitutional provision that the right to trial by jury shall be inviolate.—*Lommen v. Minneapolis Gaslight Co.* (Minn.) 68 N. W. 53.

§ 38. In contempt proceedings.

(N. D.; 1895.)

One charged with contempt of court under Laws 1890, c. 110, § 13, relating to liquor nuisances, and to contempts of court for violating injunctive orders in actions to abate the same, is not entitled to have the charge tried by a jury.—*State v. Markuson* (N. D.) 64 N. W. 934.
5 N. D. 147.

§ 39. In criminal cases.

(S. D.; 1896.)

The charter of the city of Watertown (sections 25, 27), authorizing a police justice to try certain cases for violation of ordinance without a jury, and allowing an appeal in such cases only when imprisonment exceeding 10 days or a

fine exceeding \$20 is imposed, violates Const. art. 6, § 5, declaring and extending the right of trial by jury to all cases at law irrespective of the amount in controversy, and section 7, declaring the right to trial by an impartial jury in all criminal prosecutions.—*Belatti v. Pierce* (S. D.) 66 N. W. 1088.

IX. DUE PROCESS OF LAW.

Collection or enforcement of taxes, see post, § 55.

§ 40. What constitutes.

(Neb.; 1896.)

"Due process of law" does not necessarily imply a hearing, by one whose property is taken for public use, according to the established practice in the courts, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose.—*Chicago, B. & Q. R. Co. v. State* (Neb.) 66 N. W. 624.
47 Neb. 549.

§ 41. Deprivation of property.

[a] (Mich.; 1895.)

How. St. § 2366, relating to limited partnerships, and providing that, if execution against the association is returned unsatisfied, execution may be issued against members to the extent of their unpaid subscriptions, provided "that no such execution shall issue against any member except upon an order of court or of a judge of the court in which action" has been instituted, "and the said court or judge may compel the production of the books of the association," and "ascertain the truth in regard thereto, and may order the execution to issue accordingly," does not violate Const. U. S. Amend. 14, and Const. Mich. art. 6, § 32, providing that no person shall be deprived of property without "due process of law."—*Rouse, Hazard & Co. v. Donovan* (Mich.) 62 N. W. 359.
104 Mich. 234.

[b] (Mich.; 1895.)

Act March 15, 1895, amending the Detroit city charter, providing that the city treasurer shall place a certain sum at the disposal of the board of health for the remainder of that year, to be replaced by liquor taxes as paid in, is not depriving the city of its property without due process of law, in violation of Const. U. S. art. 14, § 1.—*Davock v. Moore* (Mich.) 63 N. W. 424.
105 Mich. 120.

[c] (Minn.; 1895.)

Gen. St. 1894, § 5164, authorizing a father to maintain an action in his own name for injury to his minor child, does not, either as to the child or the defendant in an action, violate Const. U. S. Amend. 14, providing that property shall not be taken without due process of law.—*Lathrop v. Schutte* (Minn.) 63 N. W. 493.
61 Minn. 196.

[d] (Minn.; 1896.)

Gen. Laws 1893, c. 124, § 9, as amended by Gen. Laws 1895, c. 115, § 5, making it unlawful for any person to consign by common carrier to any commission merchant or sale market any elk, moose, caribou, or deer, or any part thereof except the head or skin, is not invalid as depriving persons of property without due process of law.—*State v. Chapel* (Minn.) 66 N. W. 205.
64 Minn. 130.

[e] (Minn.; 1896.)

Laws 1895, c. 249, providing for the location of section and quarter section corners by the county surveyor on the application of the resident owners of the section, is unconstitutional, for the reason that it deprives the landowners of their property without due process of law.—*Davis v. Board of Com'rs of St. Louis County* (Minn.) 67 N. W. 997.

[f] (Minn.: 1896.)

Gen. St. 1894, § 5164, authorizing a father to sue for injuries to his child, is not unconstitutional in failing to prescribe due process of law, on the ground that the infant, not being a party to the suit, is not bound by the judgment.—*Hess v. Adamant Manuf'g Co. of America* (Minn.) 68 N. W. 774.

[g] (Minn.: 1897.)

Gen. St. 1894, § 5165, providing that when a husband has deserted his family the wife may prosecute or defend in his name any action which he might have prosecuted or defended, does not deprive the husband of his property without due process of law.—*Allen v. Minnesota Loan & Trust Co.* (Minn.) 70 N. W. 800.

[h] (Neb.: 1895.)

Comp. St. c. 32, § 15, providing a penalty for the refusal of the mortgagee to discharge a chattel mortgage which has been paid, does not deprive the owner of his property without due process of law, within Const. art. 1, § 3.—*Clearwater Bank v. Kurkonski* (Neb.) 63 N. W. 133. 45 Neb. 1.

[i] (Neb.: 1895.)

Act March 26, 1895, relating to irrigation districts, provides that, when bonds are authorized by a vote, application may be made to the district court for an order affirming the proceedings relating thereto; that notice of the hearing shall be published; that any person interested may resist the application; and that the court may determine all questions as to the organization of the district and the issuance of bonds. *Held*, that the act does not contemplate the taking of property without due process of law by taxation of real estate in the district to pay bonds issued by it.—*Board of Directors of Alfalfa Irrigation Dist. v. Collins*, 64 N. W. 1086, 46 Neb. 411.

[j] (Neb.: 1896.)

Laws 1893, c. 11, requiring railroad companies without the right of judicial investigation to carry freights over longer lines for the same rates imposed by any railroad company for hauling the same freight between the same points by a shorter line, however great the disparity in the hauls, is in conflict with the fourteenth amendment of the federal constitution.—*State v. Sioux City, O. & W. R. Co.* (Neb.) 65 N. W. 766, 46 Neb. 682.

[k] (Neb.: 1896.)

Code Civ. Proc. §§ 985, 1017, denying appeals from judgments of justices of the peace where the amount claimed does not exceed \$20, do not violate Bill of Rights, § 3, prohibiting the taking of private property without due process of law.—*Chicago, B. & Q. R. Co. v. Headrick* (Neb.) 68 N. W. 489.

[l] (Neb.: 1897.)

An order of the state board of transportation, under Act March 31, 1887, requiring a railroad company to give a portion of its right of way for an elevator, contemplates the taking of property for private use without compensation, and is void under Const. U. S. Amend. 14.—*Chicago, B. & Q. R. Co. v. State* (Neb.) 69 N. W. 955.

[m] (S. D.: 1896.)

A special act authorizing a husband, as administrator of his wife's estate, to sell land which he and his children inherited from her, where there are no debts to be paid, or any benefit to the heirs to be derived therefrom, was invalid, as it permitted the taking of property without due process of law.—*Johnson v. Brauch* (S. D.) 68 N. W. 173.

[n] (Wis.: 1896.)

Laws 1895, c. 221, providing for the protection of fish, and authorizing the game wardens to seize and destroy any nets found in the waters of the state in violation of the law, is not unconstitutional as depriving the owner of the nets of his property without due process of law.—*4 N.W.DIG.*—11

law.—*Bittenhaus v. Johnston* (Wis.) 66 N. W. 805.

92 Wis. 588.

[o] (Wis.: 1896.)

The state has no power to arbitrarily destroy the rights of a riparian owner on a navigable lake without his consent, and without compensation and due process of law, for the sole purpose of benefiting some other riparian owner, or for any other merely private purpose; and hence Laws 1891, c. 202, conveying and relinquishing to one R., his heirs and assigns, all its right, title, and interest in and to all lands lying within the limits of Muskego Lake, and authorizing the drainage of such lake without the consent of riparian owners, is void.—*Priewe v. Wisconsin State Land & Improvement Co.* (Wis.) 67 N. W. 918. 93 Wis. 534.

§ 42. — Requirement of notice.**[a] (Minn.: 1895.)**

Though the log-lien law of 1876 (Gen. St. 1894, §§ 2451-2465) does not require notice of a suit to enforce a laborer's lien to be served on the owner of the logs when he is not the person primarily liable to the laborers, it is not unconstitutional, as depriving one of his property without due process of law, because such owner is given an opportunity to intervene; and, if he does not do so, the judgment establishing the lien is not conclusive against him in a subsequent action to recover the logs.—*Brown v. Markham* (Minn.) 62 N. W. 123. 60 Minn. 233.

[b] (Minn.: 1895.)

Gen. St. 1894, § 4749, in providing that, where a decree of distribution was made without notice, a party interested may have a new decree entered, assigning real estate to him, on published notice only, is unconstitutional as to persons residing in the state, notice by publication not being due process of law as to them.—*McNamara v. Casserly* (Minn.) 63 N. W. 880. 61 Minn. 335.

§ 43. Assessments for local improvements.**[a] (Iowa: 1897.)**

Code, § 478, authorizing a personal judgment against a property owner for the amount of a special assessment for street improvements, is not unconstitutional, as depriving him of his property without due process of law, though he is a nonresident of the state and had no actual notice of the proceedings.—*Dewey v. City of Des Moines* (Iowa) 70 N. W. 605.

[b] (Minn.: 1895.)

The provisions of the Duluth city charter relating to the confirmation of assessments and the rendition of judgments against property by the district court are not unconstitutional, on the ground that they do not constitute due process of law.—*City of Duluth v. Dibblee* (Minn.) 63 N. W. 1117. 62 Minn. 18.

[c] (Wis.: 1895.)

A statute preventing a property owner from contesting the validity of an assessment for a public improvement after the expiration of 40 days after proceedings therefor were commenced, based on constructive notice, is unconstitutional.—*Hayes v. Douglas County* (Wis.) 65 N. W. 482. 92 Wis. 429.

X. POLICE POWER.

See, also, post, § 47.

Delegation, see ante, §§ 10-15.
Preservation of public health, see "Health," § 7.
Regulations for protection of servants, see "Master and Servant," § 2.
— of intoxicating liquors, see "Intoxicating Liquors," § 8.

§ 44. Extent of power.**[a] (Mich.: 1895.)**

Regulation of pawnbrokers, junk dealers, and dealers in second-hand goods is within the police power. *City of Grand Rapids v. Braudy* (Mich.) 64 N. W. 29.

105 Mich. 670.

[b] (Wis.: 1897.)

Laws 1895, c. 203, providing for the treatment of habitual drunkards in private institutions at the expense of the counties in which they reside, on an order of the county court, when the patient "has not the means to pay for such treatment," is unconstitutional. It is not a legitimate exercise of the police powers of the state, but involves the imposition of a tax on a county, without its consent, for the benefit of private institutions and individuals not legitimate objects of public charity. *Wisconsin Keeley Institute Co. v. Milwaukee County* (Wis.) 70 N. W. 68.

§ 45. Regulations concerning fishing.**(Minn.: 1894.)**

Laws 1893, c. 124, § 15, prohibiting the taking of fish (with certain specified exceptions) in any other manner than by hook and line, is a reasonable regulation, and is valid. *State v. Mrozinski* (Minn.) 61 N. W. 560.

59 Minn. 465.

XI. REGULATION OF COMMERCE.**§ 46. Acts affecting carriers.****[a] (Iowa: 1895.)**

Const. U. S. art. 1, § 8, providing that congress shall have power to regulate interstate commerce, vests such power exclusively in congress; and therefore a state cannot authorize a recovery for overcharges for freight on an interstate shipment, involving an unjust discrimination. *Clatton v. Chicago, R. I. & P. Ry. Co.* (Iowa) 63 N. W. 589.

[b] (Iowa: 1895.)

Code, § 1308, providing that a railway corporation shall not exempt itself from its liabilities as a common carrier, is not a regulation of interstate commerce, as applied to negligence in the carriage of passengers. *Solan v. Chicago, M. & St. P. Ry. Co.* (Iowa) 63 N. W. 692.

§ 47. Sale of goods.**(Mich.: 1896.)**

Act 1893, No. 196, § 5, prohibiting the sale or possession for the purpose of sale of any kind of bird, game, or fish at any time when the taking, catching, or killing thereof is prohibited by law, and Act 1895, No. 223, prohibiting the sale of quail, are not unconstitutional, as interfering with interstate commerce, but are valid, as within the police power of the state. *People v. O'Neil* (Mich.) 68 N. W. 227.

§ 48. Shipping.**(Mich.: 1895.)**

Though a steamer is engaged in interstate commerce, and is equipped with all machinery and appliances required by the act of congress and the regulations adopted thereunder by the board of supervising inspectors, it is subject to Act No. 183, Pub. Acts 1881, requiring steamers using wood for fuel to be provided with spark arresters, and making the vessel's owner liable for loss by fire occasioned by neglect to comply with the act; such act not being in conflict with the federal legislation. *Burrows v. Delta Transp. Co.* (Mich.) 64 N. W. 591.

§ 49. Taxation of telegraph companies.**(Neb.: 1895.)**

A city ordinance imposing a tax on the business of a telegraph company exclusively within the state is not in violation of the interstate commerce clause of the federal consti-

tution. 58 N. W. 115 (1894), affirmed. *Postal Tel. Cable Co. v. City Council of Charleston* (1894) 14 S. Ct. 1091, followed. *Western Union Tel. Co. v. City of Fremont*, 61 N. W. 724, 43 Neb. 499.

§ 50. Licenses and privilege taxes — Hawkers and peddlers.**(Iowa: 1895.)**

Acts 18th Gen. Assem. c. 75, § 10, amended by Acts 19th Gen. Assem. c. 137, § 2, and 21st Gen. Assem. c. 83, § 3, imposing a license on all itinerant vendors of drugs, does not, as imposing a license on articles brought in original packages from another state, violate Const. U. S. art. 1 § 8, giving congress the power to regulate commerce among the several states. *State v. Wheelock* (Iowa) 64 N. W. 620.

§ 51. — Commercial travelers.**(N. D.: 1896.)**

Rev. Codes, §§ 1738-1743, are unconstitutional and void so far as they attempt to tax persons engaged in the occupation of offering for sale by samples in North Dakota goods to be shipped into it from another state, to fill the orders for goods so obtained, as unlawfully interfering with interstate commerce. *State v. O'Connor* (N. D.) 67 N. W. 824.

5 N. D. 629.

§ 52. — Foreign corporations.**(Mich.: 1895.)**

Pub. Acts 1893, No. 79, in providing that every foreign corporation which shall hereafter be permitted to transact business in this state shall pay a franchise fee, does not violate the provisions of Const. U. S. art. 1, § 8, subd. 3 relating "to the regulation of commerce among the several states." *Hopkins, J., dissenting. Moline Plow Co. v. Wilkinson* (Mich.) 62 N. W. 1119.

105 Mich. 57.

XII. TAXATION.

Interference with interstate commerce, see ante, §§ 49, 50-52.

§ 53. In general.**[a] (Mich.: 1895.)**

Act Feb. 27, 1895, creating a board of health for the city of Detroit, is not in conflict with that provision of the constitution forbidding the raising of the tax for local purposes without the consent of the city, as the preservation of the public health is not a local purpose. *Davock v. Moore* (Mich.) 63 N. W. 424.

105 Mich. 120.

[b] (Mich.: 1895.)

Pub. Acts 1889, No. 195, § 71, providing that lands bid off in the name of the state for taxes assessed in previous years should be sold at the time of the annual tax sales, on a bid of 25 per cent. of the amount due, the loss to be borne by each tax as classified pro rata, is not unconstitutional in that it places on the county a proportionate share of the loss. *Auditor General v. Board of Sup'rs of Bay County* (Mich.) 64 N. W. 570.

[c] (Minn.: 1896.)

That part of Gen. St. 1894, § 1526, which authorizes a person liable to taxation, when making up the amount of credits which he is required to list, to deduct from the gross amount thereof the amount of all his bona fide indebtedness, is not repugnant to Const. art. 9, §§ 1, 3, relating to taxation, in view of the construction placed on such provision during the entire period of statehood, by the legislative, executive, and judicial branches of the state government. *State v. Moffett* (Minn.) 67 N. W. 68.

64 Minn. 292.

§ 54. Special legislation.

[a] (Iowa: 1895.)

The fact that, under Code, §§ 818, 819, national banks are liable for taxes assessed against the stock only in case they hold dividends of the owner, and that under Acts 23d Gen. Assem. c. 39, § 1, state banks are liable for such taxes absolutely, does not render the latter unconstitutional, as in violation of Const. art. 3, § 30, prohibiting the passage of any special law for the assessment and collection of taxes.—*Pringhar State Bank v. Rerick* (Iowa) 64 N. W. 801.

[b] (Iowa: 1895.)

Acts 23d Gen. Assem. c. 39, § 1, providing that the capital stock of state banks shall be assessed to the banks and not to the individual shareholders, is a general law, within Const. art. 3, § 30, prohibiting the passage of any special law for the assessment and collection of taxes.—*Pringhar State Bank v. Rerick* (Iowa) 64 N. W. 801.

[c] (Iowa: 1895.)

Acts 23d Gen. Assem. c. 39, § 1, providing that the capital stock of state banks shall be assessed to the banks, and not to the individual shareholders, is in harmony with Const. art. 8, § 2, requiring all property to be equally burdened with taxation, and authorizing the legislature to adopt different methods of ascertaining values adapted to the various peculiarities of the property.—*Pringhar State Bank v. Rerick* (Iowa) 64 N. W. 801.

[d] (Wis.: 1895.)

Act May 1, 1893 (Laws 1893, c. 142), which repeals chapter 383, Laws 1889, a special law providing for the drainage of lands, and authorizes the levy of a tax to pay expenses incurred by drainage commissioners under it, is a special law, levying a tax, and therefore violates Const. art. 4, § 31, subd. 6, as amended in 1871, prohibiting the passage of any special law for the assessment or collection of taxes.—*State v. Bell*, 61 N. W. 845, 91 Wis. 271.

[e] (Wis.: 1897.)

Laws 1887, c. 270, restricting the amount to be raised by taxation, and expended in any year, in Forest county and its several towns, and subsequent amending acts, are repugnant to Const. art. 4, § 31, subd. 6, prohibiting the legislature from enacting any special law "for the assessment or collection of taxes."—*Chicago & N. W. Ry. Co. v. Forest County* (Wis.) 70 N. W. 77.

[f] (Wis.: 1897.)

The provisions of Const. art. 4, § 31, forbidding the enactment of special laws "for the assessment or collection of taxes," extend to all the proceedings requisite to raise money by taxation, and not merely to "assessment" and "collection" as part of such proceedings.—*Chicago & N. W. Ry. Co. v. Forest County* (Wis.) 70 N. W. 77.

§ 55. Due process of law.

[a] (Minn.: 1895.)

Gen. St. 1878, c. 11, § 58, as amended by Gen. Laws 1885, c. 2, § 5 (Gen. St. 1894, § 1567), which provides for issuing distress warrants for the collection of personal property taxes without prior notice, or opportunity to be heard, is constitutional, and not open to the objection that it is not due process of law.—*C. N. Nelson Lumber Co. v. McKinnon* (Minn.) 63 N. W. 630.

61 Minn. 219.

[b] (Minn.: 1896.)

In so far as Laws 1893, c. 150, undertook to confer jurisdiction upon the district court to proceed as against lands upon which the state had lost its lien for taxes, and had no color of right to enforce collection thereof, it was unconstitutional, because not due process of law.—*Kipp v. Elwell* (Minn.) 68 N. W. 105.

[c] (N. D.: 1896.)

Laws 1890, c. 132 (Revenue Law), § 70, directing an entire tract to be sold to the highest bidder for taxes delinquent thereon, is constitutional.—*Shattuck v. Smith* (N. D.) 69 N. W. 5.

§ 56. Notice to taxpayer.

(S. D.: 1896.)

Laws 1893, c. 3, purporting to legalize the assessment and taxation of all property within the county of Fall River in and for the years 1889 to 1894, inclusive, is unconstitutional, in so far as it attempts to dispense with statutory notice to the taxpayer by the board of equalization at the designated time and place, and in the manner required by Laws 1890, c. 37, art. 10.—*Evans v. Fall River County* (S. D.) 68 N. W. 195.

§ 57. Equality and uniformity.

[a] (Wis.: 1895.)

Milwaukee City Charter (sections 2, 6, 12, subc. 18, c. 184, Laws 1874), providing for the election of a city assessor by the mayor and common council on the recommendation of the tax commissioner, and making such assessor a member of the board of review, is not in conflict with Const. art. 8, § 1, providing that taxation shall be uniform, because it provides a means for the election of the assessor other than by a vote of the electors.—*State v. Anderson* (Wis.) 63 N. W. 746.

90 Wis. 550.

[b] (Wis.: 1896.)

Laws 1895, c. 138, which creates a state home for feeble-minded persons, of which the state has entire control, and authorizes counties to offer donations for its establishment, in competing with each other to secure its location, the donation of the successful county to be paid out of the county taxes, does not violate Const. art. 8, § 1, requiring uniformity of taxation, since the donation is a county tax.—*Lund v. Chippewa County* (Wis.) 67 N. W. 927.

93 Wis. 927.

§ 58. Exemptions.

(Minn.: 1895.)

Gen. St. 1894, §§ 2888, 2889, exempting all personal property of building and loan associations from taxation, except office furniture and fixtures, and providing for the tax of stock by taxing it in the hands of the holders thereof, are in violation of Const. art. 9, § 3, providing for the taxation of all personal property.—*State v. Pioneer Savings & Loan Co.* (Minn.) 65 N. W. 138.

63 Minn. 80.

§ 59. Taxation in territories.

(N. D.: 1894.)

Laws 1883, c. 99, known as the "Gross Earnings Law," and providing for the taxation of railroad companies upon a gross earnings basis, is void as being repugnant to Rev. St. U. S. § 1925, regulating taxation in Dakota territory.—*Northern Pac. R. Co. v. McGinnis* (N. D.) 61 N. W. 1032.

4 N. D. 494.

XIII. IMPRISONMENT FOR DEBT.

Execution against the person, see "Execution," §§ 45, 46.

§ 60. Scope of constitutional prohibition.

[a] (Mich.: 1895.)

2 How. Ann. St. c. 304, authorizing the imprisonment of a debtor who has assigned, or disposed of, or is about to dispose of, his property with intent to defraud his creditors, is not in conflict with Const. art. 6, § 33, providing that no person shall be imprisoned for debt founded on contract, except in cases of fraud.—*Dummer v. Nungesser* (Mich.) 65 N. W. 504.

[b] (*Minn.*, 1896.)

The imprisonment of a husband, who, though able to do so, refused to obey the court's order for payment of alimony, was not in violation of the constitutional provision forbidding imprisonment for debt.—*Hurd v. Hurd* (*Minn.*) 65 N. W. 728.

63 *Minn.* 443.

[c] (*S. D.*, 1896.)

A fine imposed in a civil case may be enforced by imprisonment; Bill of Rights, art. 6, § 15, merely prohibiting imprisonment for "debts arising out of or founded upon a contract."—*City of Deadwood v. Allen* (*S. D.*) 65 N. W. 333.

XIV. MISCELLANEOUS CASES.

§ 61. Right to privileges of citizens of other states.

(*Wis.*, 1896.)

Under the provision of Const. U. S. art. 4, § 2, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," a citizen of one state may maintain an action in the courts of another state whenever a citizen of the latter state might do so. The fact that the plaintiff and defendant are both nonresidents of the state where the action is brought, and are both citizens of the same state where the cause of action arose, will not authorize the court to refuse to entertain the action where jurisdiction of the defendant is obtained. *Cassoday, C. J.*, dissenting.—*Eingartner v. Illinois Steel Co.* (*Wis.*) 65 N. W. 664.

§ 62. Right to obtain justice freely and without purchase.

[a] (*Minn.*, 1896.)

Gen. Laws 1895, c. 328, providing for struck juries, does not violate the constitutional provision that every person ought to obtain justice freely and without purchase, since that provision does not mean that a litigant should have the right to conduct his suit in court without cost.—*Lommen v. Minneapolis Gaslight Co.* (*Minn.*) 68 N. W. 53.

[b] (*Neb.*, 1896.)

Code Civ. Proc. § 596, providing that, when a judgment shall be affirmed in the supreme court, that court shall render judgment against plaintiff in error for 5 per cent. of the amount due from him to defendant in error, unless the court enter upon its minutes that there was reasonable ground for the proceedings in error, is invalid, since a party may, as a matter of right, under Const. 1875, have a cause reviewed.—*Coburn v. Watson* (*Neb.*) 67 N. W. 171.

48 *Neb.* 257.

[c] (*Wis.*, 1896.)

Laws 1895, c. 221, providing for the protection of fish, and authorizing the game warden to seize and destroy any nets found in the waters of the state in violation of the law, does not violate the provisions of the state constitution that every person is entitled to a certain remedy in the laws for all injuries, and that no distinction shall be made between citizens and aliens, in reference to the possession and enjoyment of property.—*Bittenhaus v. Johnston* (*Wis.*) 68 N. W. 805.

92 *Wis.* 588.

[d] (*Wis.*, 1897.)

Laws 1883, c. 278, requires, as a condition precedent to an action to recover land conveyed to the state by any county holding a tax title thereto, and afterwards sold by the state, that plaintiff shall pay into the county treasury all taxes thereon from the date of sale by the state, together with costs and interest, which money shall be retained to abide the event of the suit, and shall be returned to plaintiff if he fail in his action; otherwise, the county shall

retain so much as covers the taxes, interest, etc., and pay the remainder to the purchaser. *Held* not in conflict with Const. art. 1, § 9, providing that every person is entitled to a certain remedy in the laws for all injuries, recovered freely and without purchase.—*Lombard v. McMillan* (*Wis.*) 70 N. W. 673.

§ 63. Invasion of right of local self-government.

(*Mich.*, 1895.)

The legislature has the power to abolish the office of supervisor in cities, though it is filled by an officer of the city government, or to transfer its function to another city official, and the exercise of such power is not an interference with the right of local self-government.—*State v. Cogshall* (*Mich.*) 65 N. W. 2.

§ 64. Duty of legislature to enact laws.

(*S. D.*, 1895.)

Const. art. 3, § 5, providing that the legislature shall provide by law for the enumeration of the inhabitants of the state in the year 1895, and shall apportion the number of senators and representatives accordingly, is mandatory, but, since there is no power that can compel a legislature to take affirmative action in enacting laws, its action under the constitutional provision depends solely on its own volition, guided by its sense of public duty and responsibility.—*In re State Census* (*S. D.*) 62 N. W. 129.

6 *S. D.* 540.

§ 65. Exemption laws.

(*Minn.*, 1895.)

So far as Gen. Laws 1885, c. 184, § 17, attempts to exempt insurance moneys from the creditors of the beneficiary, when such moneys are a gift to such beneficiary, for which she parted with no consideration, and by reason of which her creditors are not injured, said section is constitutional.—*How v. How* (*Minn.*) 63 N. W. 627.

61 *Minn.* 217.

§ 66. Restricting right to sue.

(*Wis.*, 1895.)

City Charter of Fond du Lac (Laws 1883, c. 152, subc. 18, § 1, as amended by Laws 1889, c. 455, § 3) requires lot owners to keep their sidewalks in repair, and makes them liable to persons injured by defects therein, provided action is commenced within a year, and notice in writing by the person injured is given to such owner within 30 days. *Held*, that the conditions specified were within the legislative discretion.—*McKibben v. Amory* (*Wis.*) 62 N. W. 416, 89 *Wis.* 607.

§ 67. Regulating right of appeal.

(*Neb.*, 1895.)

The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise (Const. art. 1, § 24), does not prohibit reasonable regulations for the review of a cause by appeal, such as requiring a bond to be given.—*School Dist. No. 6, Cass County, v. Traver*, 61 N. W. 720, 43 *Neb.* 524.

§ 68. Acts affecting city officers.

(*Mich.*, 1895.)

The legislature may provide that the ordinary duties of a constable in a city shall be performed by the duly-appointed members of the police of the city as well as by the constables.—*White v. Board of Snprs of Manistee County* (*Mich.*) 63 N. W. 653.

105 *Mich.* 608.

§ 69. Allowance of attorney's fees.

(*Neb.*, 1895.)

Comp. St. 1893, c. 43, § 45, relating to the allowance of attorney's fees in actions on insurance policies, is not special legislation, within the prohibition of Const. art. 3, § 15.—*Insurance Co.*

of North America v. Bachler (Neb.) 62 N. W. 911.

44 Neb. 549.

§ 70. Right to recover penalties.

(Neb.; 1895.)

Comp. St. c. 32, § 15, giving the mortgagor of chattels a right of action to recover the sum therein prescribed as liquidated damages for a failure of the mortgagee or his assignee to enter satisfaction of record of a mortgage which has been paid within 10 days after being thereto requested, is not in conflict with Const. art. 8, § 5, providing that license moneys and penalties shall be paid to the county for the support of common schools.—Clearwater Bank v. Kurkonski (Neb.) 63 N. W. 133.

45 Neb. 1.

§ 71. Constitutional rights of persons accused or convicted of crime.

[a] (Mich.; 1895.)

2 How. Ann. St. § 9421, providing that the indictment may merely allege the embezzlement of money, under which a conviction may be had for the embezzlement of a check, draft, etc., is not unconstitutional in that the indictment does not advise defendant of the charge against him, defendant having the right to have the charge made certain by examination or bill of particulars.—People v. Hanaw (Mich.) 65 N. W. 231.

[b] (S. D.; 1896.)

Laws 1895, c. 64, authorizing the several courts of the state "to hear, try and determine prosecutions upon information, for crimes, misdemeanors and offenses" theretofore triable on indictment only, is within Const. art. 6, § 10, which provides that "the grand jury may be modified or abolished by law."—State v. Ayers (S. D.) 67 N. W. 611.

§ 72. — Fair and impartial trial.

(Wis.; 1896.)

Rev. St. § 4700, providing for an inquisition where there is a probability that the accused is, at the time of his trial, insane, and thereby incapacitated to act for himself, to determine whether he is so insane, which is in affirmance of a power of the court at common law, is in aid of, and not in derogation of, Const. art. 1, § 7, securing to accused a fair and impartial trial, the result of the inquisition having no legal effect on the main issue.—French v. State (Wis.) 67 N. W. 706.

93 Wis. 325.

§ 73. — Presence of accused during trial.

[a] (Iowa; 1895.)

Error involved in allowing the jury to return their verdict into court in defendant's absence is cured by the return of the jury with the verdict to the jury room, by order of court, and the subsequent return and reading of the verdict in defendant's presence.—State v. Hutchison (Iowa) 64 N. W. 610.

[b] (Mich.; 1895.)

A verdict in a felony case is not invalid because rendered in the absence of accused, notwithstanding How. Ann. St. § 9568, providing that no person indicted for a felony shall be tried unless personally present during the trial; he being out on bail, and verdict being rendered during court hours.—Frey v. Calhoun Circuit Judge (Mich.) 64 N. W. 1047.

§ 74. — Compulsory process to obtain witnesses.

(Iowa; 1896.)

Const. art. 1, § 10, providing that in all criminal trials the accused shall have the right to have compulsory process for his witnesses, does not apply to witnesses beyond the reach of compulsory process of the court.—State v. Yetzer (Iowa) 66 N. W. 737.

§ 75. — Right to be confronted by witnesses.

(Mich.; 1895.)

Where the defendant in a criminal case was confronted, on the preliminary examination, with a witness for the people, and cross-examined him, the constitutional provision that a defendant shall be confronted by the witnesses against him is not violated by permitting the people, on examination of such witness upon the trial, to question him as to the testimony given by him on the examination.—People v. Case (Mich.) 62 N. W. 1017.

105 Mich. 92.

§ 76. — Cruel, unequal, unusual, or excessive fines or punishments.

[a] (Iowa; 1895.)

A sentence of four years for breaking and entering with intent to commit larceny will not be held excessive, in the absence of anything in the record showing age, character, or reputation of defendant, or mitigating circumstances.—State v. Conners (Iowa) 64 N. W. 295.

[b] (Iowa; 1896.)

Code, § 3979, fixing the punishment for willfully obstructing any highway at imprisonment in the penitentiary not to exceed five years, or by fine not exceeding \$500 and imprisonment in the county jail not exceeding one year, the minimum punishment not being fixed, is not unconstitutional as imposing excessive fines or unusual punishment.—State v. Teeters (Iowa) 66 N. W. 754.

[c] (Mich.; 1895.)

Pub. Acts 1889, No. 207, in providing as a punishment for the first offense of selling liquors unlawfully a fine of not less than \$50 or more than \$200, and costs, or imprisonment in the county jail not less than twenty days or more than six months, and for every subsequent offense a fine of not less than \$100 nor more than \$500, and imprisonment in the state's prison for not less than six months or more than two years, is not in conflict with Const. art. 6, § 31, as imposing excessive fines or unusual and cruel punishment.—People v. Whitney (Mich.) 63 N. W. 765.

[d] (Mich.; 1895.)

2 How. Ann. St. c. 304, authorizing the imprisonment of a debtor who has assigned, or disposed of, or is about to dispose of, his property with intent to defraud his creditors, is not in conflict with Const. art. 6, § 31, prohibiting cruel and unusual punishment, as the act provides for the debtor's release on payment of the debt, or giving security for its payment, or security that he will apply for an assignment of all his property, which, under chapter 306 will entitle him to a discharge.—Dummer v. Nungesser (Mich.) 65 N. W. 564.

[e] (Mich.; 1895.)

Pub. Acts 1895, Act No. 200, for the protection of fish in Saginaw river and its tributaries, does not, by failing to fix a maximum fine for its violation, contravene Const. art. 6, § 31, prohibiting the imposition of excessive fines.—In re Yell (Mich.) 65 N. W. 97.

[f] (Wis.; 1895.)

Rev. St. § 4449, making the willful conversion of floating logs larceny, and fixing the minimum punishment, is not void for failure to fix the maximum punishment, and the minimum punishment may be inflicted thereunder.—State v. Fackler, 64 N. W. 1029, 91 Wis. 418.

CONSTRUCTION.

Of contract, see "Contracts," §§ 26-36.

Of judgment, see "Judgment," § 36.

Of ordinance, see "Municipal Corporations," § 25.

Of pleading, see "Pleading," §§ 1-4.

Of railroad, see "Railroad Companies," §§ 7-12.

Of statute, see "Statutes," §§ 13-23.
 Of stipulation, see "Practice in Civil Cases," §§ 23, 24.
 Of verdict, see "Trial," § 99.
 Of will, see "Wills," §§ 33-33.

CONSTRUCTIVE ASSIGNMENT.

See "Assignment for Benefit of Creditors," § 4.

CONSTRUCTIVE NOTICE.

See "Notice."

Of defects in streets or sidewalks, see "Municipal Corporations," § 87.

CONSTRUCTIVE POSSESSION.

See "Adverse Possession," § 29.

CONSTRUCTIVE TRUSTS.

See "Trusts," §§ 12-15.

CONTEMPT.

I. WHAT CONSTITUTES, §§ 1-7.

II. PROCEDURE, §§ 8-18.

III. PUNISHMENT, §§ 19, 20.

In violation of injunction, see "Injunction," § 31.

Release from imprisonment on habeas corpus, see "Habeas Corpus," § 1.

I. WHAT CONSTITUTES.

Nonpayment of alimony, see "Divorce," § 35.
 Refusal to obey order in supplementary proceeding, see "Execution," § 44.

§ 1. Criticism of court or judge.

[a] (Mich.; 1896.)

A letter criticising a decree, and charging the judge with unfairness or improper conduct, is an attack upon the official conduct of the judge, constituting a contempt, for which the writer is liable.—*In re Chadwick* (Mich.) 67 N. W. 1071.

[b] (Mich.; 1896.)

In a proceeding for contempt for writing a letter criticising the action of the court in rendering a certain decree, it is no defense that the case was not pending when the letter was written, the decree being still open to modification, rehearing, or appeal.—*In re Chadwick* (Mich.) 67 N. W. 1071.

[c] (N. D.; 1896.)

Language not uttered in the courthouse, nor in the immediate view and presence of the court or any of its branches, nor within the sight or hearing of the judge, cannot constitute a contempt.—*State v. Root* (N. D.) 67 N. W. 590.

5 N. D. 487.

§ 2. Newspaper articles.

[a] (Mich.; 1896.)

2 How. Ann. St. § 7234, subd. 6, giving courts power to punish as a contempt the publication of a false or grossly inaccurate report of the court proceedings, does not limit the power to causes still pending in the court, but extends to the criticism of past decrees.—*In re Chadwick* (Mich.) 67 N. W. 1071.

[b] (Neb.)

One who published the following: "Justice without equity. Sentence adjusted to fit the man. One party to a crime gets a five-years sentence in the penitentiary while another gets the benefit of a pull. Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking example of what it is to be possessed of a pull. These same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth," but who denied, in his verified answer to the rule entered against him to show cause, that the language was susceptible of a contemptuous interpretation, or that he intended to bring the court into contempt, was erroneously committed.—(1895) *Perceval v. State*, 64 N. W. 221, 45 Neb. 741; (1896) *Rosewater v. Same*, 66 N. W. 640, 47 Neb. 630.

§ 3. By attorney.

(Neb.; 1895.)

An attorney who refused a retainer which would require his appearance before a particular judge, for the reason, respectfully stated to the court, that such judge treated him unfairly, was not guilty of contempt.—*Hawes v. State*, 64 N. W. 699, 46 Neb. 149.

§ 4. By witness.

(Neb.; 1895.)

The record of a conviction for contempt in refusing to be sworn as a witness must show that the prisoner also refused to be affirmed.—*Wilcox v. State*, 64 N. W. 1072, 46 Neb. 402.

§ 5. By clerk of court.

(Neb.; 1894.)

Where a county clerk refuses to place the name of a certain candidate for office on the official ballots under the order of the district judge, he may be punished as for contempt of court.—*McAleese v. State* (Neb.) 61 N. W. 88, 42 Neb. 886.

§ 6. Refusal to obey order, judgment, or decree.

[a] (S. D.; 1896.)

One who, knowing of an order of court and its contents, intentionally does an act which constitutes a violation of the order, is guilty of contempt.—*Freeman v. City of Huron* (S. D.) 66 N. W. 928.

[b] (S. D.; 1896.)

Where a court exceeds its jurisdiction in the issuance of a peremptory writ of mandamus, a commitment for a refusal to comply with the mandate is a nullity.—*In re McCain* (S. D.) 68 N. W. 163.

[c] (Wis.; 1895.)

Under Rev. St. § 3478, providing that any misconduct committed in the immediate view and presence of the court may be punished summarily by fine or imprisonment or by both, the court may commit a judgment debtor who disobeys the oral direction of the court given in open court in his presence, requiring him to answer questions as to his property asked in a creditors' action, under Rev. St. § 3029.—*In re Rosenberg* (Wis.) 63 N. W. 1065, 90 Wis. 581.

§ 7. Defenses.

[a] (Mich.; 1896.)

A disavowal of the intent to charge improper conduct on the part of the judge will purge the defendant of a contempt when the language used admits of two interpretations; but when only one interpretation is possible, such disavowal is of no avail.—*In re Chadwick* (Mich.) 67 N. W. 1071.

[b] (Neb.; 1895.)

A defendant in a civil action, who failed to comply with an order directing him to pay money alleged to be in his hands on a judgment

against him, is not liable to punishment for contempt in not paying the money, where his disobedience was solely on account of his being insolvent.—*Hawthorne v. State* (Neb.) 64 N. W. 359, 45 Neb. 871.

II. PROCEDURE.

Right to jury trial, see "Constitutional Law," § 38.

§ 8. Nature of contempt proceedings.

(N. D.: 1896.)

Where defendant, on a series of affidavits, was charged with using language which it was claimed constituted a criminal contempt, and under Rev. Codes, § 5936, was cited before the district court by an order to show cause, not only why he should not be punished as for a contempt, but also why he should not be disbarred as an attorney, and was subsequently tried for contempt under chapter 34, art. 3, and found guilty thereof, and sentenced to suffer the maximum penalties prescribed by section 5933, and in the same judgment it was adjudged that he should be suspended from practicing law in the court indefinitely, and until the further order of court, the entire proceedings were void, since the proceeding for contempt and that for disbarment are entirely distinct.—*State v. Root* (N. D.) 67 N. W. 590.

5 N. D. 487.

§ 9. Objections to jurisdiction.

[a] (N. D.: 1896.)

Where defendant, on an order to show cause why he should not be punished for contempt, and be disbarred from practicing as an attorney, came into court, and, before pleading to the facts, attempted to except to the jurisdiction of the court, but was refused permission to do so, and was required to plead at once to the facts, by admitting or denying the facts set out in the affidavits on which the order to show cause was based, it was prejudicial error.—*State v. Root* (N. D.) 67 N. W. 590.

5 N. D. 487.

[b] (N. D.: 1896.)

Where defendant appeared in response to an order to show cause why he should not be punished for contempt and be disbarred from practicing as an attorney, the objection that the court had no jurisdiction of the proceeding could be raised by a preliminary motion to quash, despite the fact that the statute regulating contempt proceedings does not in terms authorize that motion or any preliminary motion.—*State v. Root* (N. D.) 67 N. W. 590.

5 N. D. 487.

§ 10. Who may conduct proceedings.

(S. D.: 1896.)

Other than the state's attorney may conduct the prosecution of a contempt proceeding.—*Freeman v. City of Huron* (S. D.) 66 N. W. 928.

§ 11. Entitling proceedings.

(S. D.: 1896.)

A contempt proceeding for violating an order in an action may properly be entitled as in that action.—*Freeman v. City of Huron* (S. D.) 66 N. W. 928.

§ 12. Affidavit or complaint.

[a] (Neb.: 1894.)

Proceedings for the trial and punishment of a county clerk for a refusal to obey an order of court may be had on an affidavit sworn to before a notary public.—*McAleese v. State*, 61 N. W. 88, 42 Neb. 886.

[b] (Neb.: 1895.)

The affidavit on which is based a proceeding to punish an alleged contempt not com-

mitted in the presence of the court is jurisdictional.—*Hawthorne v. State* (Neb.) 64 N. W. 359, 45 Neb. 871.

[c] (Neb.: 1896.)

A complaint which fails to state the facts constituting the alleged offense, and fails to show that the act of the accused amounts to a fraud on the court, or tends to hinder it in the administration of justice, is insufficient as a foundation of proceedings for constructive contempt.—*Cooley v. State* (Neb.) 65 N. W. 739, 46 Neb. 603.

[d] (N. D.: 1896.)

An affidavit charging a contempt, which fails to allege that the alleged contemptuous language was spoken in the immediate view and presence of the court, is insufficient to charge the offense, either at common law or under the statute, though it alleges that the language was used in the court room during a trial.—*State v. Root* (N. D.) 67 N. W. 590.

5 N. D. 487.

[e] (N. D.: 1896.)

An affidavit in a summary proceeding charging a criminal contempt is to be tested by the rules of criminal pleading applicable to indictments and informations, whether the prosecution is under the statute or at common law.—*State v. Root* (N. D.) 67 N. W. 590.

5 N. D. 487.

[f] (S. D.: 1896.)

An affidavit alleging material facts on information and belief does not give a court jurisdiction of a contempt proceeding.—*Freeman v. City of Huron* (S. D.) 66 N. W. 928.

§ 13. Warrant of attachment.

(Neb.: 1895.)

Formal defects in an information and warrant or order of arrest in contempt proceedings must be taken advantage of by objections made before trial.—*Zimmerman v. State* (Neb.) 64 N. W. 375, 46 Neb. 13.

§ 14. Right to trial or hearing.

[a] (Mich.: 1896.)

When the court was in possession of the facts, and the defense was simply a question of law, and no request was made to have interrogatories framed, or for a reference, the court could dispose of the contempt proceedings without framing interrogatories and taking proof.—*Smith v. Waalkes* (Mich.) 66 N. W. 679.

[b] (Minn.: 1895.)

One proceeded against for a contempt not committed in the immediate presence of the court is entitled, as a matter of right, to a hearing and to examine witnesses in his defense.—*State v. District Court, Fourteenth Judicial District, Polk County* (Minn.) 62 N. W. 831; *Same v. Ives*, Id. 60 Minn. 478.

[c] (Minn.: 1895.)

Relator in an action for a divorce, on motion of defendant therein, was required to show cause why a peremptory order should not be made directing the payment of alimony, as previously ordered, within a time to be fixed, and, in the event of his failure to comply with such order, he be punished for contempt of court. The court, on the hearing, made its order granting the motion, and fixing the punishment, in the event the relator failed to comply with the order, but the court further convicted and punished him for a criminal contempt for his past disobedience of its orders. *Held*, that so much of the order as convicted him for a criminal contempt was not responsive to the motion; that he could not be so convicted except on a proper charge made, with notice and opportunity to answer it.—*State v. Willis* (Minn.) 63 N. W. 169.

61 Minn. 120.

[d] (Neb.: 1896.)

In support of an application for change of venue because of prejudice, the attorney presented, in a respectful manner, a libelous article

published by him concerning the judge to whom the application was made. *Held*, that the attorney could not be summarily convicted of contempt, without an information and trial, because of matter contained in such article.—*Le Hane v. State* (Neb.) 66 N. W. 1017.

48 Neb. 105.

[c] (Neb.; 1896.)

Where, although the alleged contemptuous acts are committed in facie curiæ, and therefore punishable summarily, without the formality of a trial or hearing, witnesses are by the court called and examined touching the transaction involved, the prosecution will, for the purpose of review on error, particularly where the record is ambiguous, be construed as one for a constructive contempt, in which the accused is entitled to be heard in his own defense.—*Beckett v. State* (Neb.) 68 N. W. 473.

§ 15. Evidence—Sufficiency.

[a] (Minn.; 1895.)

Neither the facts within the knowledge of the judge, nor the affidavit on which the arrest was made, are sufficient to support a conviction of constructive contempt.—*State v. District Court, Fourteenth Judicial District, Polk County* (Minn.) 62 N. W. 831; *Same v. Ives*, *Id.*

60 Minn. 478.

[b] (S. D.; 1896.)

In a proceeding for contempt, in taking from the alleged possession of a receiver of insolvents a locomotive on which insolvents claimed a lien for repairs, the evidence showed that the locomotive, after being repaired, was left in the railroad company's yard. *Held*, that in the absence of evidence of an agreement by which the statutory lien was perpetuated notwithstanding the apparent restoration of the property repaired to its owner, a conviction could not be sustained.—*Burdick v. Marshall* (S. D.) 66 N. W. 462; *In re Spaulding*, *Id.*

§ 16. Judgment.

(S. D.; 1896.)

The court, having pronounced its sentence in the presence of accused, in a contempt proceeding, may sign and file a formal judgment in accordance with the sentence, in the absence of them and their attorney.—*Freeman v. City of Huron* (S. D.) 66 N. W. 928.

§ 17. Appeal, error, and certiorari.

[a] (Mich.; 1895.)

Where complainants, who had filed a creditors' bill against defendant, procured an order that he show cause why he should not be punished for contempt for using money in his possession to pay other debts, in violation of an injunction, no appeal lay from the order of court declaring defendant not guilty of contempt.—*Rasch v. Sheppard* (Mich.) 63 N. W. 968.

105 Mich. 667.

[b] (Minn.; 1895.)

Where in contempt proceedings the penalty imposed is for the benefit of a party, the order is appealable, and certiorari will not lie to review it; but, where the punishment is for a criminal contempt (one where the penalty is imposed solely to vindicate the authority of the court), the order is not appealable, and it can be reviewed by certiorari. *State v. Leftwich* (1889) 42 N. W. 308, 41 Minn. 42, followed.—*State v. Willis*, 63 N. W. 169, 61 Minn. 120.

[c] (N. D.; 1896.)

Where defendant, on appearing in response to an order to show cause why he should not be punished as for a contempt, was denied permission to except to the jurisdiction of the court, and was required to reply at once to the facts alleged, he is entitled on appeal to receive the benefit of all preliminary motions which he could have properly made in the court below, had the right to do so been accorded

him there.—*State v. Root* (N. D.) 67 N. W. 599.

5 N. D. 487.

§ 18. — Review.

[a] (Minn.; 1896.)

Where it could be fairly inferred from the affidavit on which the proceeding was based, that defendant attempted to influence a juror with reference to a cause then on trial, and that defendant knew the person approached was a juror, it was sufficient as against an objection first urged on appeal.—*State v. District Court of Hennepin County* (Minn.) 67 N. W. 796.

[b] (Neb.; 1895.)

Alleged errors committed on a trial of a proceeding for contempt must be submitted to the court by motion for new trial before a review thereof can be obtained.—*Zimmerman v. State*, 64 N. W. 375, 46 Neb. 13.

[c] (Neb.; 1897.)

A finding without a judgment in a summary prosecution for contempt of court will not be reviewed by means of proceedings in error.—*Blodgett v. State* (Neb.) 69 N. W. 751.

[d] (Wis.; 1895.)

On a habeas corpus proceeding by one committed for contempt in refusing to answer questions seeking to discover his property subject to execution, the questions whether the petitioner's answers were so untruthful and evasive as to amount to a refusal to answer, or whether he was able to answer, and whether his conduct was contumacious, are not subject to review.—*In re Rosenberg* (Wis.) 63 N. W. 1065.

90 Wis. 581.

III. PUNISHMENT.

§ 19. Order of commitment.

(Neb.; 1895.)

When a witness is committed for contempt for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment.—*Wilcox v. State*, 64 N. W. 1072, 46 Neb. 402.

§ 20. Term of imprisonment.

[a] (Wis.; 1895.)

Under Rev. St. § 3491, providing that in case of contempt, when the misconduct consists of an omission to perform some act which is yet in the power of defendant to perform, he shall be imprisoned only until he shall have performed such act, and that the order shall specify the act to be performed, the term of commitment under an order in strict compliance with this section is not rendered indefinite by the addition of the words, "or until the further order of the court."—*In re Rosenberg* (Wis.) 63 N. W. 1065.

90 Wis. 581.

[b] (Wis.; 1895.)

Under Rev. St. § 3478, providing that any misconduct committed in the immediate presence of the court may be punished summarily by fine or imprisonment or both, a judgment debtor who disobeys the oral direction of the court requiring him to answer questions as to his property in a creditor's action may be committed by the court until he performs the required act. 63 N. W. 1065 (1895) affirmed.—*In re Rosenberg*, 64 N. W. 299, 90 Wis. 581.

CONTEST.

Of election, see "Elections and Voters," §§ 25–32.

Of land entry, see "Public Lands," § 17.

Of office, see "Office and Officer," § 9.

Of selection of official paper, see "Newspapers," § 2.

Of will, see "Wills," §§ 19–32.

CONTINGENT CLAIMS.

Against decedent's estate, see "Executors and Administrators," § 15.

CONTINGENT LIABILITIES.

Garnishment of, see "Garnishment," § 8.

CONTINGENT LIFE ESTATE.

Creation by deed, see "Deed," § 18.

CONTINUANCE.

See, also, "Criminal Law," §§ 47-52.

Adjournment by justice, see "Justices of the Peace," §§ 22, 23.

— of condemnation proceedings, see "Eminent Domain," § 16.

Appealable order, see "Appeal," § 32.

Discretion of court, see "Appeal," § 203.

§ 1. In general.

[a] (Neb.; 1895.)

Where a cause was regularly reached for trial, and one of the attorneys for the defendant orally announced that the attorney for the defendant was absent from the state, but would attend to the trial of the case if it should be continued for a short time, it was no abuse of discretion for the presiding judge to insist that the case must be dismissed, tried, or continued generally.—Corbett v. National Bank of Commerce (Neb.) 62 N. W. 445.
44 Neb. 230.

[b] (Neb.; 1895.)

A continuance will not be granted to enable a party, by proceedings for contempt in the courts of another state, to compel a witness to testify therein by deposition.—Stratton v. Dole (Neb.) 63 N. W. 875.
45 Neb. 472.

§ 2. Surprise—By amendment of pleading.

(Wis.; 1895.)

An amended answer filed by consent of the parties, after the notice of trial has been served, entitles the plaintiff to a continuance.—Whitefoot v. Leffingwell (Wis.) 63 N. W. 82.
90 Wis. 182.

§ 3. Absence of witness or evidence.

[a] (Iowa; 1895.)

Where, in an action on a guardian's bond, one of the sureties defends on the ground that his signature was a forgery, it is within the discretion of the court to refuse a continuance, on account of the absence of such surety, to the other surety, who did not set up as a defense the forgery of the former surety's name until four years after his answer was filed; plaintiff admitting that the absent surety would testify that his name was a forgery.—Reed v. Lane (Iowa) 63 N. W. 380.

[b] (Minn.; 1896.)

It was no ground for continuing the cause over the term that a witness who was subpoenaed two days before, and who was not shown to be without the court's jurisdiction, did not appear.—West v. Hennessey (Minn.) 65 N. W. 639.
63 Minn. 378.

[c] (Neb.; 1894.)

A continuance is properly denied when there is no showing of unavoidable absence of the witness, nor that, if a continuance be granted, his attendance or testimony would be se-

cured.—Home Fire Ins. Co. of Omaha v. Galley, 61 N. W. 84, 43 Neb. 71.

[d] (Neb.; 1895.)

It was proper to refuse to continue on account of an absent witness, where the adverse party admitted the facts sought to be proved by such witness, except what were cumulative.—Smith v. First Nat. Bank (Neb.) 63 N. W. 796.

45 Neb. 441.

[e] (Neb.; 1896.)

A motion and the affidavit filed in support thereof, which did not show that if a continuance was granted the evidence of the absent witness or his personal attendance could or would be obtained, were insufficient.—McClelland v. Scroggin (Neb.) 66 N. W. 1123.
48 Neb. 441.

§ 4. — Diligence.

[a] (Minn.; 1896.)

It was no ground for continuance that a party had by reason of prior engagements been compelled to go out of the state.—West v. Hennessey (Minn.) 65 N. W. 639.
63 Minn. 378.

[b] (Minn.; 1896.)

It was not error to refuse a continuance for defendant's enforced absence from a second trial of the cause, where defendant's attorneys had tried the cause before, and plaintiff's attorneys agreed to let defendant's evidence given at the former trial be read and considered as actually given.—Conrad v. Dobmeier (Minn.) 67 N. W. 5.
64 Minn. 284.

[c] (Neb.; 1894.)

Since either party to a suit may commence taking testimony by deposition at any time after service on defendant (Code Civ. Proc. § 373), a continuance, on the ground of the absence from the state of a witness, should be denied where the witness did not reside within the jurisdiction when the suit was brought, and defendant had made no effort to procure his deposition.—Kansas City, W. & N. W. R. Co. v. Conlee, 61 N. W. 111, 43 Neb. 121.

[d] (Neb.; 1896.)

It was no ground for continuance that a party to the cause was absent, where his absence was not unexpected, and he had made no provision for the taking of his deposition to be used on the trial, and it did not appear that he would ever return.—Keens v. Robertson (Neb.) 65 N. W. 897, 46 Neb. 837.

§ 5. Absence or death of counsel.

[a] (Iowa; 1896.)

Refusal of continuance on account of the death of defendant's chief attorney was proper, where the cause had been several times continued at defendant's instance, and the illness of the attorney such that his presence at the trial could not be expected.—Geiger v. Payne (Iowa) 69 N. W. 554.

[b] (Minn.; 1896.)

It was no ground for continuance that a party's assistant counsel was absent.—West v. Hennessey (Minn.) 65 N. W. 639.
63 Minn. 378.

[c] (Minn.; 1896.)

Ordinarily, the fact that an attorney is professionally engaged elsewhere in the trial of an action does not give an absolute right to the postponement of the cause.—Adamek v. Plano Manuf'g Co. (Minn.) 66 N. W. 981.
64 Minn. 304.

CONTINUING GUARANTY.

See "Guaranty," § 8.

CONTRACTS.

I. NATURE AND REQUISITES, §§ 1-4.

II. VALIDITY, §§ 5-22.

1. In General, §§ 5-7.
2. Consideration, §§ 8-13.
3. Public Policy, §§ 14-22.

III. PARTIES, §§ 23-25.

IV. INTERPRETATION, §§ 26-36.

V. PERFORMANCE, §§ 37-50.

VI. ALTERATION, MODIFICATION, AND MERGER, §§ 51-54.

VII. RESCISSION, §§ 55-60.

VIII. ACTIONS ON CONTRACTS, §§ 61-74.

See, also, "Accord and Satisfaction"; "Agistment"; "Arbitration and Award"; "Assignment"; "Assignment for Benefit of Creditors"; "Assumpsit"; "Bailment"; "Bonds"; "Breach of Marriage Promise"; "Chattel Mortgages"; "Compositions with Creditors"; "Compromise"; "Conflict of Laws"; "Covenants"; "Deed"; "Exchange of Property"; "Factors and Brokers"; "Frauds, Statute of"; "Fraudulent Conveyances"; "Good Will"; "Guaranty"; "Indemnity"; "Insurance"; "Interest"; "Marriage"; "Master and Servant"; "Mortgages"; "Negotiable Instruments"; "Novation"; "Partnership"; "Payment"; "Pledge"; "Principal and Agent"; "Principal and Surety"; "Release and Discharge"; "Sale"; "Specific Performance"; "Subscription"; "Usury"; "Vendor and Purchaser."

Affecting homestead, see "Homestead," §§ 17-22.

Agreements not to be performed in a year, see "Frauds, Statute of," §§ 24-26.

— to answer for debt or default of another, see "Frauds, Statute of," §§ 7-11.

— to submit to arbitration, see "Arbitration and Award," § 1.

Antenuptial contracts, see "Husband and Wife," § 23.

As to boundaries, see "Boundaries," § 7.

Attachment in actions arising on contract, see "Attachment," § 1.

Between husband and wife, see "Husband and Wife," §§ 21-27.

Change in obligation, release of surety, see "Principal and Surety," §§ 12, 13.

Conflict of laws, see "Conflict of Laws," §§ 6-10.

Enforceable in equity, see "Specific Performance," §§ 2-6.

Estoppel by, see "Estoppel," §§ 13, 14.

For compensation, see "Attorney and Client," § 16.

For leases, see "Landlord and Tenant," § 16.

For maintenance of inmates of reformatory, see "Reformatories."

For sale of logs, see "Logs and Logging," § 1.

— or use of patents, see "Patents for Inventions."

For state printing, see "States and State Officers," § 11.

For storage, see "Warehouses," § 1.

For through transportation, see "Carriers," § 21.

Injunctions pertaining to, see "Injunction," §§ 11-13.

Laws affecting remedies on, see "Constitutional Law," § 31.

— impairing obligation, see "Constitutional Law," §§ 29-31.

Marriage settlements, see "Husband and Wife," § 23.

Measure of damages for breach, see "Damages," §§ 10-22.

Of carriage, see "Carriers," §§ 33-37.

Of city, see "Municipal Corporations," §§ 56-70.

Of corporation, see "Corporations," §§ 24-37.

Of county, see "Counties," §§ 33-42.

Of employment, see "Master and Servant," § 3.

— of attorney, see "Attorney and Client," § 4.

Of infant, see "Infancy," §§ 1-3.

Of insane person, see "Insanity," §§ 5-7.

Of insurance, see "Insurance," §§ 3-18.

Of married woman, see "Husband and Wife," §§ 7-10.

Of railroad company, see "Railroad Companies," §§ 13-15.

Of school district, see "Schools and School Districts," §§ 18-23.

Of state, see "States and State Officers," §§ 10-11.

Of subscription to stock, see "Corporations," § 41.

Power of agent to execute, see "Principal and Agent," §§ 5-14.

— of trustees, see "Trusts," §§ 18, 19.

Providing for liquidated damages, see "Damages," § 8.

Rights under building contract, when subject to execution, see "Execution," § 10.

Set off of claims arising out of contracts, see "Set-Off and Counterclaim," § 4.

To make will, see "Wills," § 64.

To marry, see "Breach of Marriage Promise."

Vested rights under contract with city, see "Constitutional Law," § 32.

I. NATURE AND REQUISITES.

Certainty, requisites for specific performance, see "Specific Performance," § 3.

Delivery of bills and notes, see "Negotiable Instruments," §§ 2-4.

— of mortgage, see "Chattel Mortgages," § 17.

— of pledge, see "Pledge," § 3.

Incapacity of party as ground for rescission in equity, see "Equity," § 21.

Signing in blank, see "Alteration of Instruments," § 4.

§ 1. Offer and acceptance of proposition.

[a] (Iowa; 1894.)

A request by defendant, in one of his letters, for permission to build a cookroom to the farmhouse in case the lease was made, does not constitute a condition which must be accepted by plaintiff before the contract of lease would be complete.—*Culton v. Gilchrist* (Iowa) 61 N. W. 381.

92 Iowa, 718.

[b] (Mich.; 1891.)

Where the owner of land writes a person in a distant city that he will take for the land a certain net sum, and such person answers that he accepts the offer, and requests the owner to send a deed to parties named, in such city, to whom he will pay the money on receipt of the deed, there is no completed contract, the offer implying payment at the owner's residence.—*De Jonge v. Hunt* (Mich.) 61 N. W. 341. 103 Mich. 94.

[c] (Minn.; 1896.)

Plaintiff having written defendant elevator company asking on what terms he could dispose of his wheat to it without storage, and with the right to take the price when ready to sell, defendant offered to handle the wheat at 13 cents off the cash price day of sale, or to put it in a special bin, and deliver it on board car, for a certain price per bushel. Without replying, plaintiff delivered his wheat to the company, accepting the ordinary storage checks. Held, that there was no contract by defendant to pay the cash price, less 13 cents, without storage.—*Wemple v. Northern Dakota Elevator Co.* (Minn.) 69 N. W. 478.

See, also, "Sale," §§ 1-3; "Vendor and Purchaser," § 2.

§ 2. Meeting of minds.

[a] (Iowa; 1895.)

A contract for sale of land made by the agent of T. with F., providing for security of deferred payments, "with interest thereon at 7 per cent.; * * * if rate of interest is not satisfactory to T., F. to have privilege to make 8 per cent. rate, or pay cash,"—is not binding,

there being no meeting of the minds on the question of deferred payments.—*Furst v. Tweed* (Iowa) 61 N. W. 857.

93 Iowa, 300.

[b] (Mich.; 1896.)

Negotiations for the formation of a partnership between plaintiff and defendant's son resulted in the drafting of a written agreement by defendant, which was signed by the parties, and under which defendant agreed to contribute the cash capital for his son. Afterwards defendant sent a modified contract to plaintiff, for his signature, which plaintiff signed and returned as requested, at the same time suggesting a further modification, which was approved by defendant, but never embodied in the writing. Neither defendant nor his son did anything towards carrying out the partnership. *Held*, that both parties had assented to the writing as signed, and it constituted a contract, and that plaintiff was entitled to recover thereon from defendant for proper expenditures made in furtherance of its object.—*Farrow v. Bresler* (Mich.) 66 N. W. 492.

§ 3. Mutuality.

[a] (Minn.; 1896.)

A contract whereby plaintiff was employed by the defendant corporation on a stated yearly salary, payable in monthly installments, for such time as the business of the corporation should continue, provided plaintiff efficiently discharged his duties, and for only so long as he should own and hold in his own name 50 shares of capital stock in the corporation, was not void for lack of mutuality.—*McMullan v. Dickinson Co.* (Minn.) 65 N. W. 661.

63 Minn. 405.

[b] (Minn.; 1896.)

Plaintiff, by one entire contract, purchased of defendants a certain quantity of logs at an agreed price, and also another quantity at a certain price, but reserved the right to refuse to accept the latter unless they arrived in the boom at a certain time. *Held*, that the option was not void for lack of mutuality.—*Staples v. O'Neal* (Minn.) 65 N. W. 1083.

64 Minn. 27.

[c] (Neb.; 1896.)

A contract whereby the board of public lands and buildings appointed one nominally a contractor to lease the convict labor, and to disburse funds appropriated for the support of the penitentiary, and gave to him the control of that institution, in consideration of his agreement to pay over money received as such appointee in behalf of the state to the chairman of the board of public lands and buildings, was void for want of mutuality, since the state treasurer, and not the chairman, is entitled to receive and disburse such funds.—*State v. Holcomb* (Neb.) 65 N. W. 873, 46 Neb. 612.

[d] (Neb.; 1896.)

A contract whereby one, in consideration of the release of a claim of damages against him, agrees to employ claimant at certain wages so long as the works of the first are kept running, or until the other shall see fit to quit, is not void for lack of mutuality.—*Carter White-Lead Co. v. Kinlin* (Neb.) 66 N. W. 536, 47 Neb. 409.

§ 4. Implied contract.

[a] (Mich.; 1896.)

Plaintiff filed a claim against the estate of her father-in-law, which included items for board, for washing, and for room, light, fuel, and attendance. It appeared that the deceased had lived with his son, plaintiff's husband, as a member of the family, for several years, paying, by agreement, three dollars per week board. There was no evidence of any agreement to make any other or further payments. *Held* that, in view of the express agreement to pay board, an agreement to pay a further amount for washing, rooms, etc., could not be implied.—*Boughton v. Francis* (Mich.) 69 N. W. 94.

[b] (Neb.; 1897.)

A bank succeeded a firm which at the time had a good financial reputation. The firm turned over to the bank a large part of its assets, including its building, but retained sufficient to pay all its debts, and continued to pay them as presented for more than a year. Though some of the firm debts were paid by the bank on presentation in the absence of members of the firm, the latter repaid the bank. *Held*, that the bank did not assume the debts of the firm.—*Teemseh Nat. Bank v. Saunders* (Neb.) 70 N. W. 42; *Same v. Head, Id.*; *Same v. Smith, Id.*; *Same v. Brown, Id.*; *Same v. Hull, Id.*; *Same v. Young, Id.*; *Same v. Kershaw, Id.*; *Same v. Turner, Id.*; *Same v. Corson, Id.*

[c] (Wis.; 1896.)

The purchaser of the property of a railway company in the hands of its receiver, by using car wheels stored in the car barn, knowing that the receiver had but an option to buy them, impliedly promises to pay for them.—*Northwestern Wheel & Foundry Co. v. Milwaukee Electric St. Ry. Co.* (Wis.) 69 N. W. 371.

Action on implied promise, see "Assumpsit," § 2.

Recovery on quantum meruit in case of specific contract, see "Assumpsit," § 5.

To pay rent, see "Landlord and Tenant," § 44.

II. VALIDITY.

Contracts relating to intoxicating liquors, see "Intoxicating Liquors," § 67.

Duress, see "Duress."

Effect of usury, see "Usury," §§ 11, 12.

Gambling contracts, see "Gaming," § 3.

Sunday contracts, see "Sunday."

1. IN GENERAL.

§ 5. Certainty and definiteness of terms.

[a] (Iowa; 1895.)

A contract by a physician: "Received of C. \$262 for my share of office fixtures, and proceeds of practice for month of March, and good will of business in town of W., and agree not to practice therein,"—is sufficiently definite to be enforced.—*Cole v. Edwards* (Iowa) 61 N. W. 940.

93 Iowa, 477.

[b] (Mich.; 1894.)

An agreement to pay an attorney for his services an amount equal to that paid another attorney connected with the same action is valid.—*Lungerhausen v. Crittenden* (Mich.) 61 N. W. 270.

103 Mich. 173.

[c] (Mich.; 1896.)

A contract for work, payment to be made by a "good and sufficient note," is not void for uncertainty.—*Armstrong v. Andrews* (Mich.) 67 N. W. 567.

[d] (Mich.; 1896.)

A contract for services whereby the employer agreed to give the employé \$15 a month and the cottage where he then lived for her services, was not void for uncertainty, it appearing that a lot with a cottage on it was bought by the promisor several years after he purchased the adjoining land, and there being evidence that he always referred to this purchase as the "Cottage."—*Rhea v. Meyers' Estate* (Mich.) 69 N. W. 239.

[e] (Mich.; 1896.)

An agreement for the exchange of a stock of goods for other property, by which an inventory of the goods was to be made, the undamaged goods at cost price, and "the damaged goods at prices agreed upon," no provision being made as to who was to determine what were damaged goods or fix their price, is too indefinite to constitute an enforceable contract.—*Dayton v. Stone* (Mich.) 69 N. W. 515.

[f] (Mich.; 1897.)

The objection that a contract for the sale of a mortgage does not sufficiently describe the mortgage is untenable, where the vendee admits the agreement, and that he owns the mortgage, which the proofs identify.—*Loveridge v. Shurtz* (Mich.) 70 N. W. 132.

[g] (Neb.; 1896.)

A contract whereby one, in consideration of the release of a claim for damages against him, agrees to employ the claimant at certain wages so long as the works of the first are kept running, or until the other shall see fit to quit, is not void for uncertainty.—*Carter White-Lead Co. v. Kinlin* (Neb.) 66 N. W. 536.

17 Neb. 409.

[h] (Neb.; 1896.)

The fact that a contract for the sinking of a tubular well did not provide that any specific quantity of water should be obtained as a condition precedent to a recovery by the contractor did not invalidate the contract. —*Omaha Consol. Vinegar Co. v. Burns* (Neb.) 68 N. W. 492.

[i] (Neb.; 1897.)

A contract for the exchange of property is not void for indefiniteness of description if, by the aid of evidence aliunde, the property may be identified.—*Woods v. Hart* (Neb.) 70 N. W. 53.

[j] (Wis.; 1896.)

Plaintiff had been manufacturing tin cans for defendant for some time at an agreed price, when defendant wrote to plaintiff that he would take his entire output of cans if he would agree not to sell to a certain other person, and directing plaintiff to enter his order for a certain number of cans "as heretofore." Plaintiff accepted the proposition, and shipped cans, which were paid for at the price theretofore agreed upon. *Held*, that the contract was not invalid for failure to definitely fix the price to be paid for the cans.—*Walsh v. Myers* (Wis.) 66 N. W. 250.

92 Wis. 397.

[k] (Wis.; 1896.)

A provision in a deed "that the said [grantor] and wife, M., for their heirs," etc., "do covenant, grant, bargain, and agree to and with the said [grantee], his heirs and assigns, that the above-bargained premises in the quiet and peaceable possession of the said [grantee], his heirs and assigns, against all and every person or persons lawfully claiming the whole or any part thereof, by, through, or under ——— and no other ——— will forever warrant and defend," is too uncertain to be enforced.—*Mississippi River Logging Co. v. Wheelihan* (Wis.) 68 N. W. 878.

§ 6. Signing in ignorance of contents.

[a] (Mich.; 1894.)

Where the copy of the contract of purchase, left with the buyer, stipulated that the title should remain in the seller until the price was paid, and the notes and mortgage subsequently given to secure its payment contained the same stipulation, the fact that the seller, in reading the contract to the buyer, on account of the latter being unable to read without his glasses, omitted to read such stipulation, does not avoid it.—*Pettyplace v. Groton Bridge & Manuf'g Co.* (Mich.) 61 N. W. 266.

103 Mich. 155.

[b] (Neb.; 1897.)

The doctrine that the negligence of a party in signing a writing estops him from afterwards urging that it does not contain the true agreement of the parties is not applicable in a suit between the original parties thereto or their privies, where the party seeking enforcement practiced fraud or deception in order to induce the other to sign without reading.—*Woodbridge v. De Witt* (Neb.) 70 N. W. 506.

Rescission of contract in equity, see "Equity," § 16.

§ 7. Fraud.

(Mich.; 1895.)

An agreement whereby defendant, if he would buy at auction land owned by plaintiff and her minor child, was to have plaintiff's share in the land, regardless of what he bid, was not in fraud of the child.—*Gardner v. Gardner* (Mich.) 63 N. W. 988.

2. CONSIDERATION.

See, also, "Fraudulent Conveyances," §§ 13-16.

Failure of consideration as ground for rescission, see "Equity," § 36.

Of bills and notes, see "Negotiable Instruments," §§ 16, 17.

Of compromise, see "Compromise," § 2.

Of deed, see "Deed," § 5.

Of guaranty, see "Guaranty," § 4.

Of mortgage, see "Chattel Mortgages," §§ 14, 15; "Mortgages," § 12.

Of release, see "Release and Discharge," § 2.

— of judgment, see "Judgment," § 86.

— of mortgage, see "Mortgages," § 41.

Of rescission of sale, see "Sale," § 40.

Of subscription, see "Subscriptions," § 1.

Of suretyship, see "Principal and Surety," § 3.

Parol evidence to explain consideration, see "Evidence," § 97.

Restoring consideration on rescission in equity, see "Equity," § 38.

§ 8. Sufficiency.

[a] (Iowa; 1894.)

A promise by a third mortgagee to forbear foreclosing is sufficient to support a promise by a second mortgagee to keep the interest on all senior mortgages paid.—*Burke v. Dilin* (Iowa) 61 N. W. 370.

92 Iowa, 557.

[b] (Mich.; 1897.)

A contract to pay a broker a commission on any acceptable sale procured by him will support a recovery for such commission, though it does not bind the broker to make any effort to sell.—*Brooks v. Leathers* (Mich.) 70 N. W. 1099.

[c] (Minn.; 1895.)

Where the vendor agreed to finish a house on the land sold, it was a sufficient consideration for his giving a bond to indemnify the purchaser against mechanics' liens on the property that the purchaser agreed to pay the price sooner than it was payable by the contract of sale.—*Reed v. McGregor* (Minn.) 64 N. W. 88.

62 Minn. 94.

[d] (Minn.; 1896.)

A building contractor having defaulted before completion of the work, and having permitted liens to accrue against the property in violation of his bond, the contract was assigned to his sureties, and the balance of the price paid to them, on their agreement to finish the contract and discharge all liens to an amount not to exceed the amount of the bond plus the amount paid them on the contract. *Held*, that the agreement was supported by a sufficient consideration.—*McHenry v. Brown* (Minn.) 68 N. W. 847.

[e] (Neb.; 1895.)

An agreement by the creditor of an insolvent bank, with the stockholders and officers thereof, to discount their claims against the bank 10 per cent., to throw off all interest after a certain date, and to extend the time of payment of the claims a definite period, is a sufficient consideration for a bond given to a trustee of such creditors by such stockholders and officers to secure payment of the bank's indebtedness.—*Mullen v. Morris* (Neb.) 62 N. W. 74, 43 Neb. 596.

[f] (Neb.; 1895.)

A contract whereby a landlord agreed to pay his tenant's moving expenses if the latter

would deliver immediate possession of the premises, so as to save the landlord from paying an increase of premium for insurance of the building, imposed on account of the character of the tenant's business, was not without consideration.—*Creighton v. Finlayson* (Neb.) 64 N. W. 1103, 46 Neb. 457.

[g] (Neb.; 1896.)

A past consideration is sufficient to support a promise when the consideration was performed in pursuance of a previous request.—*Stuht v. Sweesy* (Neb.) 67 N. W. 748. 48 Neb. 767.

[h] (Neb.; 1897.)

The signing by a wife of a mortgage upon the homestead of herself and husband, the legal title to which is in him, to raise money with which to pay his debt, is such a valuable consideration as will support a sale of personal property of the husband to the wife.—*Sloan v. Van Buskirk* (Neb.) 70 N. W. 948.

[i] (N. D.; 1895.)

The release of the vendee from the obligations of a contract for the purchase of land was a sufficient consideration for the vendee's surrender of the contract.—*Kvello v. Taylor* (N. D.) 63 N. W. 889. 5 N. D. 76.

§ 9. Moral duty.

(Iowa; 1895.)

Where land is conveyed in consideration of the promise of the grantee to sell it, and pay the proceeds to the grantor, and the grantee sells the land, a promise by the grantee, after the sale, to pay the same to the grantor, is an admission of the trust, and the trust is a consideration for the promise.—*Harris v. Clark* (Iowa) 62 N. W. 854.

§ 10. Promise to perform legal obligation.

[a] (Iowa; 1895.)

The renewal of an unexpired lease, without the passing of a new consideration, is not binding.—*Kelly v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 957. 93 Iowa, 436.

[b] (Minn.; 1895.)

Where a subcontractor relet the contract to defendant, and defaulted in the payments agreed to be made to defendant, by reason of which defendant refused further to perform his contract, a promise made by the original contractor to defendant, to give extra compensation if defendant would complete his contract, was supported by sufficient consideration.—*Grant v. Duluth, M. & N. P. Ry. Co.* (Minn.) 63 N. W. 1026. 61 Minn. 395.

[c] (Minn.; 1895.)

Where one party to a contract so delayed the other that the latter was not legally bound to complete the contract within the stipulated time, a promise by the former to pay the latter additional compensation to complete the contract within such time is supported by a valuable consideration.—*King v. Duluth, M. & N. Ry. Co.* (Minn.) 63 N. W. 1105. 61 Minn. 482.

§ 11. Forbearance to sue and extension of payment.

[a] (Minn.; 1895.)

An agreement to extend the time for payment of a mortgage note is a sufficient consideration for a note for payment of interest during the time of extension.—*Hubbard v. Fletcher* (Minn.) 63 N. W. 612. 61 Minn. 148.

[b] (Minn.; 1895.)

An agreement to extend the time of payment of a debt is a sufficient consideration for a note given for the debt by a third party.—

Germania Bank v. Michaud (Minn.) 65 N. W. 70.

62 Minn. 459.

[c] (Neb.; 1896.)

Where the maker of a note died before its maturity, and gave by will the major portion of his estate to his two sons, subject to payment of his debts, the cancellation of the note and the extension of time for payment of the debt evidenced thereby constituted a sufficient consideration for the execution by the sons of a note for the debt.—*McCormal v. Redden*, 65 N. W. 881, 46 Neb. 776.

§ 12. Nudum pactum.

[a] (Iowa; 1895.)

Defendant, acting for his client, requested plaintiffs to render services for the client, and, after they were rendered, promised to pay therefor out of money then held by him for his client, if the latter did not sue him. *Held*, that the promise was without consideration.—*Walker v. Irwin* (Iowa) 62 N. W. 785.

[b] (Iowa; 1897.)

A note given to an heir by a devisee for a quitclaim to lands of a testator, in which the heir claimed an interest, is not without consideration because the will was afterwards construed in favor of the maker of the note.—*Rowe v. Barnes* (Iowa) 70 N. W. 197.

[c] (Mich.; 1896.)

Where, in an exchange of lands, one party agrees to reduce a mortgage on the land conveyed by him, payable to a third person, a written contract evidencing such agreement, executed after the conveyances, is not without consideration.—*Bennett v. Knowles* (Mich.) 69 N. W. 491.

[d] (Minn.; 1895.)

A promise by one party to a contract to the other to pay additional compensation, if the latter will refrain from an intended breach of the contract, is without consideration.—*King v. Duluth, M. & N. Ry. Co.* (Minn.) 63 N. W. 1105. 61 Minn. 482.

[e] (N. D.; 1896.)

A. purchased machinery of B. by written contract, in which he agreed to execute certain notes therefor. After receiving the machinery, he refused to execute the notes unless the vendor would agree to do certain things about the machinery not embraced in the original contract. This the vendor promised to do. *Held*, that such promise was without consideration, and hence collection of the notes could be enforced without showing compliance therewith.—*Gaar, Scott & Co. v. Green* (N. D.) 68 N. W. 318.

§ 13. Illegality—Effect on contract.

(Minn.; 1895.)

Where, before a receiver's sale of property was confirmed, defendants executed a bond conditioned to pay the receiver the price of the property if, after the sale was confirmed, he would deliver the property to the purchaser on credit, the receiver, on delivering the property as specified, could enforce the bond, though the delivery of the property before payment of the price was in violation of the order of sale.—*O'Gorman v. Sabin* (Minn.) 64 N. W. 84. 62 Minn. 46.

3. PUBLIC POLICY.

Enjoining enforcement of agreement, see "Injunction," § 12.

Validity of contract exempting carrier from liability, see "Carriers," § 33.

§ 14. In general.

[a] (Mich.; 1896.)

A contract whereby one party, for certain commissions, is to attend meetings of persons

solicited to buy real estate from the other party, and permit them to become purchasers, represented by him as a purchaser by substitution for lots, which the owner is to take off his hands if he does not wish to retain them, conceding from the intending buyers his arrangement with such owner, is against public policy, and cannot be enforced.—*McDonnell v. Rigney* (Mich.) 66 N. W. 52.

[1b] (Neb.; 1897.)

A stipulation in a contract giving one the exclusive agency to sell another's goods for an indefinite period does not render the contract void as against public policy.—*Woods v. Hart* (Neb.) 70 N. W. 53.

[1c] (Neb.; 1897.)

A contract for commission sales of intoxicating liquors in this state by one as agent of another, neither of whom has been licensed as required by the statute, is void, as against public policy.—*Rocco v. Frapoli* (Neb.) 70 N. W. 236.

[1d] (Wis.; 1895.)

Public policy does not forbid joining of claims due to several in a note payable to one.—*Sommers v. Hamburger* (Wis.) 64 N. W. 880. 91 Wis. 107.

[1e] (Wis.; 1897.)

Private by-laws of a masons' and builders' association, the membership in which includes 60 out of 70 or 75 mason contractors in a city, which require the members to pay to the association 6 per cent. on all contracts taken by them, and to submit all bids for work first to the association, and provide that the lowest bidder shall add 6 per cent. to his bid before it is submitted to the owner or his architect, are contrary to public policy, and void.—*Milwaukee Masons' & Builders' Ass'n v. Niezerowski* (Wis.) 70 N. W. 166.

[1f] (Wis.; 1897.)

A note given by a building contractor to an association of such contractors, of which he was a member, for a percentage on a contract for building, required to be paid to the association by a private by-law which was contrary to public policy, and void, will not be enforced.—*Milwaukee Masons' & Builders' Ass'n v. Niezerowski* (Wis.) 70 N. W. 166.

§ 15. Violation of statute.

(Iowa; 1895.)

A stipulation, in a certificate of membership in a benefit association organized by a railroad company, to which it contributes, and the expenses of which are paid by it, that, in case suit is brought against the railroad company by the member or by his representatives to recover for injuries or death, and it is prosecuted to judgment or compromised, recovery under the certificate shall be precluded, is not invalid, in that it "restricts the liabilities of railroads" for the negligence of their employés. Code, § 1307.—*Donald v. Chicago, B. & Q. Ry. Co.* (Iowa) 61 N. W. 971. 93 Iowa, 284.

§ 16. Contract to control corporations.

(N. D.; 1895.)

A contract to allow another to control the voting of stock, based in part on a promise of the one who is to control such stock to secure for the owner thereof an office in the corporation, is wholly void, though the consideration therefor, other than the illegal promise, is valid.—*Gage v. Fisher* (N. D.) 65 N. W. 809. 5 N. D. 297.

§ 17. Fidelity insurance contract.

(Minn.; 1895.)

A contract between a fidelity insurance company and an elevator company, guaranteeing the honesty of the latter's employés, is not against public policy on the ground that it makes it a matter of indifference to the elevator com-

pany whether honest employés are obtained. *Fidelity & Casualty Co. of New York v. Eickhoff* (Minn.) 65 N. W. 351. 63 Minn. 170.

§ 18. Contracts relating to administration of justice.

[1a] (Iowa; 1896.)

An agreement by defendant not to appeal from a judgment against him, in consideration of a reduction thereof by plaintiff, and an agreement by plaintiff not to appeal, is not contrary to public policy.—*Landon v. Waddick* (Iowa) 67 N. W. 385.

[1b] (Minn.; 1895.)

An agreement between a fidelity insurance company and the employé whose honesty is guaranteed that the voucher showing payment by the company to the employer of loss occasioned through the employé's dishonesty should be conclusive evidence against the employé as to the fact and extent of his liability to the company, was void as against public policy.—*Fidelity & Casualty Co. of New York v. Eickhoff* (Minn.) 65 N. W. 351. 63 Minn. 170.

[1c] (Minn.; 1896.)

A provision in an unambiguous, valid contract that "the same is made and shall be construed without reference to any other instrument or agreement whatsoever," is not invalid as an attempt to limit the power of the court in case of litigation.—*White Sewing-Mach. Co. v. Miller* (Minn.) 68 N. W. 851.

§ 19. Contract not to practice medicine.

(Iowa; 1895.)

A contract whereby a physician agrees not to practice medicine within a certain town or vicinity is not void as against public policy.—*Cole v. Edwards* (Iowa) 61 N. W. 940. 93 Iowa, 477.

§ 20. Contract not to sue.

[1a] (Iowa; 1895.)

A stipulation, in a certificate of membership in a benefit association organized by a railroad company, to which it contributes, and the expenses of which are paid by it, that, in case suit is brought against the railroad company by the member or by his representatives to recover for injuries or death, and it is prosecuted to judgment or compromised, recovery under the certificate shall be precluded, is not against public policy.—*Donald v. Chicago, B. & Q. Ry. Co.* (Iowa) 61 N. W. 971. 93 Iowa, 284.

[1b] (Neb.; 1895.)

A contract by which a railroad employé agreed, on becoming a member of the relief department of the company, that the acceptance of relief from such department on being injured should bar his right to sue the railroad company for the injury, is not one against public policy.—*Chicago, B. & Q. R. Co. v. Bell* (Neb.) 62 N. W. 314. 44 Neb. 41.

§ 21. Compounding felony.

(Mich.; 1895.)

An agreement to pay money in consideration that the obligee will conceal from the public and from the obligor's wife the fact of the obligor's criminal intimacy with a certain woman is void.—*Case v. Smith* (Mich.) 65 N. W. 279.

§ 22. Contract to control legislative or official action.

[1a] (Mich.; 1895.)

It is against public policy for a sheriff to recover for services rendered in furnishing information concerning offenses committed in his county.—*Foley v. Platt* (Mich.) 63 N. W. 520. 105 Mich. 635.

[b] (Minn.: 1895.)

A contract by which one agreed to procure the passage of a bill by congress declaring certain railroad lands forfeited to the government, so that the other party to the contract might hold a part of such lands as a bona fide settler under the homestead laws, is void, as against public policy.—*Houlton v. Dunn* (Minn.) 61 N. W. 898.

60 Minn. 26.

[c] (Wis.: 1896.)

Plaintiff, a person of large experience in regard to federal public lands, because satisfied that a certain class of lands, that had been kept out of the market on account of a supposed claim under certain railroad grants, could be legally thrown open to settlement, entered into an agreement with defendant, who was desirous of acquiring such lands, to instruct the latter in regard to the manner of procuring the same, and to do all that was necessary to have such lands thrown open to settlement, in consideration of a certain proportion of the value of the land acquired by defendant. *Held*, that the contract was not per se invalid, as against public policy, as a lobbying contract.—*Houlton v. Nichol* (Wis.) 67 N. W. 715.

93 Wis. 393.

III. PARTIES.

To action on contract, see post, § 63.
Parol evidence as to parties, see "Evidence," § 98.
To bills and notes, see "Negotiable Instruments," § 16.

To deeds, see "Deed," §§ 1, 3.

To sales, see "Sale," § 10.

§ 23. Persons not privies to contract.

[a] (Iowa: 1895.)

Plaintiff agreed to purchase defendant's farm, in part payment whereof he was to convey to the latter a Kansas farm then belonging to F., and at the same time he made with F. an agreement (to which defendant was not a party) to deed him certain city property in exchange for the Kansas farm. Thereupon, plaintiff conveyed his city property to F., and the latter deeded the Kansas farm directly to defendant. A part of defendant's farm being a homestead, and his wife not having signed the contract with plaintiff, defendant was unable to perform his agreement. *Held*, that defendant was not liable for the value of the city property conveyed to F., and plaintiff was entitled to recover the Kansas farm only.—*Jewel v. Norris* (Iowa) 62 N. W. 740.

[b] (S. D.: 1895.)

An employe's wages being payable partly in board, the employer agreed with the proprietor of an hotel to pay the employe's board. Thereafter plaintiff bought the hotel, and, without notifying the employer of the change, furnished board to the employe for more than two months. *Held* that, in the absence of evidence that the employer knew that plaintiff was boarding the employe, or that he would be called on to pay such board, he was not liable therefor in assumpsit.—*Dempsey v. Billingham* (S. D.) 64 N. W. 1124.

§ 24. Contract for benefit of third person.

[a] (Iowa: 1894.)

An agreement by a firm with a customer to honor drafts drawn on it by the customer in favor of a person furnishing the customer with money to purchase cattle to be consigned to it, renders it liable on such a draft to the person furnishing money for such purpose.—*First Nat. Bank v. Rowley* (Iowa) 61 N. W. 195.

92 Iowa, 530.

[b] (Iowa: 1895.)

A provision in a building contract that the owner shall hold a certain percentage of the

contract price till the completion of the work is for the benefit of the owner, and does not afford a ground of personal liability by the owner to a subcontractor.—*Steele v. McBurney* (Iowa) 65 N. W. 332.

[c] (Neb.: 1896.)

Where a contractor for the erection of a building executes a bond with sureties conditioned that he will pay for all labor and material furnished him in completing the contract, a laborer or material man has, on his default, a right of action directly against the sureties.—*Kauffmann v. Cooper*, 65 N. W. 796, 46 Neb. 644.

[d] (Neb.: 1896.)

Where a contract with a state for the erection of a public building at a stipulated sum requires that the contractor shall pay for all labor performed or material furnished, and the contractor furnishes a bond for the faithful performance of the contract, an unpaid subcontractor may enforce payment of his claim of the sureties.—*Fitzgerald v. McClay* (Neb.) 66 N. W. 828.

47 Neb. 816.

§ 25. Joint and several liability.

[a] (Mich.: 1896.)

Where, in a building contract, "the parties of the first part herewith promise and agree for themselves, their heirs, executors, administrators, to pay," etc., they are individually liable, though the contract recite that it is "by and between the trustees and building committee," of a church and the party of the second part.—*Landyskowski v. Lark* (Mich.) 66 N. W. 371.

[b] (Wis.: 1896.)

Where two persons jointly agree to sell corporate stock and to assign certain patents applied for, and that, if the patents applied for be disallowed in substance, the sellers will refund to the buyer a certain portion of the purchase money, and one of the sellers authorizes the buyer to pay the purchase money directly to the corporation, the surviving promisor, on the disallowance of the patents, is liable to the buyer for such portion of the purchase money; and this without a rescission of the contract, or return of the stock.—*Murphy v. Weil* (Wis.) 66 N. W. 532.

92 Wis. 467.

IV. INTERPRETATION.

See, also, "Vendor and Purchaser," § 3.

Construction of assignment, see "Assignment for Benefit of Creditors," § 18.

— of assignment of lease, see "Landlord and Tenant," § 33.

— of bills and notes, see "Negotiable Instruments," §§ 5, 6.

— of contract of indemnity, see "Indemnity," § 5.

— of covenant against incumbrance, see "Covenants," § 1.

— of deed, see "Deed," §§ 6-9, 18-20.

— of gas contract, see "Municipal Corporations," § 62.

— of guaranty, see "Guaranty," §§ 2, 7.

— of mortgage, see "Mortgages," §§ 15, 16.

— of policy, see "Insurance," §§ 8, 9.

— of sewer contract, see "Municipal Corporations," § 61.

— of subscription, see "Subscriptions," § 2.

Evidence of custom, see "Custom and Usage," § 3.

Explanation or modification by parol, see "Evidence," §§ 86-102.

§ 26. Construction in general.

[a] (Mich.: 1896.)

The patentee of a process for the manufacture of furniture agreed with a company to assign to it full title of certain patents cov-

ering his process, in consideration of the company's agreement to manufacture and market furniture under said patents. The agreement further provided that at the first of each year an inventory should be taken, "and of the profits and losses over and above all expenses which may have accrued during the year" the patentee should receive or pay 25 per cent. *Held*, that under the agreement "expenses" did not include a pro rata charge for rent, superintendence, office expenses, use of machinery, and insurance, but only the labor and material which went into the furniture business.—*Van Norman v. Grand Rapids Piano Case Co. (Mich.)* 68 N. W. 238.

[1b] (Minn.: 1897.)

But such contract gave B. no lien on, or right to, the proceeds of notes transferred by D. to A. as collateral before the contract was made.—*Plymouth Cordage Co. v. Seymour (Minn.)* 69 N. W. 1079.

[1c] (Minn.: 1897.)

Corporations A. and B., each holding past-due claims against D., a third corporation, agreed that, if B. would extend the time of payment, its claim should be preferred and paid in full before any payment on A.'s claim; the agreement being made at D.'s solicitation and for its benefit. *Held*, that B., having complied with the agreement, was entitled, on the subsequent insolvency of D., to be paid the dividends on A.'s claim until its own claim was paid in full.—*Plymouth Cordage Co. v. Seymour (Minn.)* 69 N. W. 1079.

[1d] (Neb.: 1895.)

Where a subscription contract provides for the payment of a certain amount on the completion of an opera house on a certain lot within the limits of a city ordinance, prescribing the thickness of walls, etc., of buildings therein, such ordinance becomes a part of the contract.—*Gerner v. Church*, 62 N. W. 51, 43 Neb. 630.

[1e] (Neb.: 1897.)

If a written contract is to be construed with reference to its terms alone, the court must interpret it; but, if the construction or application depends on other and extrinsic facts, the contract, in connection with these questions of fact, should be submitted to the jury, under proper instructions.—*Rosenthal v. Ogden (Neb.)* 69 N. W. 779.

[1f] (Neb.: 1897.)

Where a contract contains two descriptions of the property intended to be referred to, one correct and the other false, the latter will be rejected as surplusage.—*Woods v. Hart (Neb.)* 70 N. W. 53.

[1g] (Wis.: 1895.)

Defendant sold to plaintiff an undivided half interest in certain timber lands, and at the same time contracted to deliver to plaintiff, at a specified place, 25,000,000 feet of pine timber of a certain quality, to be taken from the lands held by them jointly, the remaining pine timber on the lands to belong to defendant. Defendant cut 36,000,000 feet of the required kind, one-half only of which he delivered to plaintiff, selling the rest; claiming that the amount agreed to be delivered to plaintiff was based on a mistaken estimate of the quantity of such timber upon the land. *Held*, that the defendant's obligation to deliver 25,000,000 feet, if such quantity of timber of the required quality was found on the land, was absolute, and the defendant was liable for damages for breach of contract.—*McMillen v. Pratt*, 62 N. W. 588, 89 Wis. 612.

§ 27. Particular words and phrases.

[1a] (Iowa: 1895.)

An agreement to furnish gas to plaintiff at his residence "for ordinary purposes," for 20 years, entitles him to gas for a gas cook stove subsequently acquired, though, at the time of making the contract, such stoves were not in

use.—*Graves v. Key City Gas Co. (Iowa)* 61 N. W. 324.

53 Iowa, 470.

[1b] (S. D.: 1897.)

The phrase "bankable paper," as used in a contract providing that notes to be given, due in 6, 12, and 18 months, respectively, and drawing 7 per cent. interest, should be bankable paper, means not discountable paper necessarily, but paper of such high credit that, if the time of payment was reasonable and the banks had loanable funds, it could be discounted. *Edward P. Allis Co. v. Madison Electric Light, Heat & Power Co. (S. D.)* 70 N. W. 650.

[1c] (Wis.: 1895.)

Such contract also provided that plaintiff's assignor should have the privilege of taking such equipment bonds, amounting to \$100,000, on prepayment to the person or persons who had advanced money on them, and 6 per cent. interest from date of the advances to date of prepayment. *Held*, that defendants could not set off against the indebtedness on the first mortgage in excess of \$17,000 per mile the amount of unissued, but authorized, equipment bonds.—*Chicago, M. & St. P. Ry. Co. v. Hoyt (Wis.)* 62 N. W. 189, 89 Wis. 314.

[1d] (Wis.: 1895.)

A contract by which defendants agreed to sell to plaintiff's assignor a controlling interest in the stock of certain railroad companies contained a clause by which defendants agreed that the capital stock of such companies was "subject only to a first mortgage of \$17,000 per mile, issued or to be issued," on an aggregate mileage of 362¼ miles of main line completed railway, and an equipment mortgage of \$400,000, issued or to be issued, and that, with the exception of such indebtedness, such companies had no other indebtedness. *Held*, that defendants agreed that the indebtedness of such companies should not exceed \$17,000 per mile of the main line of completed road.—*Chicago, M. & St. P. Ry. Co. v. Hoyt*, 62 N. W. 189, 89 Wis. 314.

[1e] (Wis.: 1895.)

In a contract providing for delivery by defendant to plaintiff of 25,000,000 feet of timber to be taken from lands owned by them jointly, and fixing the price for cutting, hauling, and rafting such timber, there was a provision for future joint purchases by them of standing timber near the line of defendant's railroad, and certain stipulations relative to the price to be paid defendant for loading and hauling such timber as they "shall or may own jointly," and for such timber as might be transported over such road from lands hereafter to be purchased by plaintiff and defendant "on joint account." *Held*, that these stipulations relative to prices for loading and transportation did not apply to the 25,000,000 feet.—*McMillen v. Pratt (Wis.)* 62 N. W. 588, 89 Wis. 612.

§ 28. Provisions as to payment.

(Neb.: 1895.)

By the reservation, in a building contract, of an option to make payments by assuming lumber bills, the owner does not assume payment of lumber bills of which he had no knowledge at the time.—*O'Rourke v. Burke (Neb.)* 63 N. W. 17.

44 Neb. 821.

§ 29. Conditions.

[1a] (Mich.: 1895.)

Where a contract between a contractor and a subcontractor, expressly providing that the latter was to furnish labor, but not materials, was silent as to who should furnish them, the contractor was bound to see that materials were on hand.—*Perine v. Standfield (Mich.)* 65 N. W. 541.

[b] (S. D.; 1896.)

Where a note has been sold, and the payment of part of the purchase consideration is made contingent on the payment in full of the note, and there is no agreement not to further transfer the note, its transfer to a subsequent purchaser for full value is not such a payment as will satisfy the contingency.—*Kirby v. Scanlan* (S. D.) 67 N. W. 828.

§ 30. — Precedent.**[a] (Mich.; 1896.)**

Under a contract for paving a driveway, payment of which was to be computed according to the area paved, to be made by a note "at 60 days upon completion of the work," the giving of a note is not a condition precedent to the right to demand a performance of the contract.—*Armstrong v. Andrews* (Mich.) 67 N. W. 567.

[b] (Wis.; 1895.)

In an action to recover rent under a lease, the term of which was to begin upon the completion, in accordance with certain specifications, of a building on the property demised, the jury should have been required to find whether there had been substantial compliance with the specifications where they applied, and, where they did not, whether the building was constructed in a reasonably safe and workmanlike manner, of reasonably safe and proper material for the known purposes for which the building was to be used.—*Coleclough v. Carpeles* (Wis.) 61 N. W. 836, 89 Wis. 239.

[c] (Wis.; 1896.)

Plaintiff having contracted to make certain machinery, and put it into defendant's barge, by a certain time, on penalty of a forfeiture of a certain amount per day, the work to be done at a certain place, to which place, it is conceded, though the contract was silent on the point, defendant was to take the barge, it will not only be assumed that it was defendant's duty to deliver it within a reasonable time, but it appearing that defendant, at the same time, made a contract, of which plaintiff had knowledge, by which another person, who had the only dry dock at the place where plaintiff's work was to be done, was to do wood work on the barge and dry dock it, and that plaintiff's contract provided that part of his work should be done, so that part of the wood work could be completed 15 days before the completion of his work, it will be also assumed that it was defendant's duty to place it in a reasonably suitable situation or condition to enable plaintiff to perform his contract.—*Manistee Iron-Works Co. v. Shores Lumber Co.* (Wis.) 65 N. W. 863.

§ 31. Description of subject-matter.**[a] (Minn.; 1895.)**

A contract "to cut, grub, and remove or burn" timber as "directed" by defendant's general manager, did not confer on the contractor an unqualified right to burn all material without regard to circumstances, nor authorize the manager to arbitrarily order that all timber be removed.—*Newton v. Highland Imp. Co.* (Minn.) 64 N. W. 1146.

62 Minn. 436.

[b] (Wis.; 1896.)

A contract relating to the assignment of certain patents provided that, if the patents applied for on the invention for "thermostat and automatic machine" be disallowed in substance, the sellers would refund to the purchaser \$12,500 of the money paid under the contract. In an action for the balance of the purchase money, in which defendant filed a counterclaim to recover back the \$12,500, it appeared that when the contract was made there were pending six applications for patents for thermostats, or improvements in thermostats, and one application for a clockwork device to be used in connection with a thermostat. *Held*, that the words "automatic machine," in such contract, referred to such clockwork device, and that, a patent on such device being disallowed in substance, de-

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fendant was entitled to recover.—*Murphey v. Weil* (Wis.) 66 N. W. 532.
92 Wis. 467.

§ 32. Time.**[a] (Minn.; 1897.)**

Defendant took an employé, who had been seriously injured, to plaintiff's hospital, and upon its promise to pay for his care plaintiff accepted him as a patient for an indefinite period. While the patient was still incapable of being removed or discharged without great danger, defendant gave notice that thereafter it would not be responsible for his care or treatment. *Held*, that, under the circumstances, it was an implied condition of the contract that defendant could only terminate it by removing the patient or when he could be dismissed by the plaintiff without serious danger to his life or health.—*St. Barnabas Hospital v. Minneapolis International Electric Co.* (Minn.) 70 N. W. 1126.

[b] (Wis.; 1896.)

A contract recited that defendant, being the owner of a certain addition, agrees to pay plaintiff "the following prices" for grading the streets, alleys, and blocks of said addition, and for depositing gravel on the streets of the same (a certain amount per yard for excavating, and another amount per yard for gravel); the work to be done according to the profiles and plans of defendant, and the instructions of its engineers; the excavation to be deposited where directed, and 3,000 yards of it, if so desired, to be deposited at a certain place without extra charge; "the amount of the excavation from blocks, alleys, and streets of said addition to be determined by" defendant; the gravel to be deposited "wherever" defendant "directs," in such quantities "as may be directed"; work to be commenced on or before a certain date, and completed on or before another date; payments to be made on estimates of engineer each month for work done the previous month, less 15 per cent. *Held*, that the contract did not entitle plaintiff to do all the work shown by the profiles and plans, but that defendant could at any time put an end to the work.—*Beers v. North Milwaukee Town-Site Co. No. 2* (Wis.) 67 N. W. 936.

93 Wis. 569.

§ 33. Building and construction contracts.**[a] (Iowa; 1895.)**

A provision in a building contract that the contractor, under the direction of the architect, acting as "agents" of the owner, shall provide all materials, does not render the owner liable, as the contractor's principal, for material ordered by the contractor, it appearing that the use of the plural of agent was a clerical error.—*Steele v. McBurney* (Iowa) 65 N. W. 332.

[b] (Iowa; 1896.)

In an action by a terra-cotta company against the owner of a building it appeared that plaintiff agreed to make and deliver all of the terra-cotta work for the building "in accordance with and agreeable to the drawings made for same, as corrected, with reduced bond, for the sum of \$2,790." There was added to the contract, "In consideration of additional reduction in bond, where practicable, being hereby agreed to by [the owner and contractor], the said company hereby agrees to make a reduction of \$140," etc. *Held*, that the addenda permitted a reduction of the bond of depth only so far as practicable under the drawings submitted to plaintiff.—*Indianapolis Terra-Cotta Co. v. Murphy* (Iowa) 68 N. W. 898.

[c] (Iowa; 1896.)

A contract for a monument, after giving the exact dimensions of various parts, provided for a "cap, the same as cap on the T. monument," which was of larger dimensions than the one called for by such contract. *Held*, that the contract did not call for a cap of the precise

dimensions of that on the T. monument, but one substantially the same as that in material, design, style, and workmanship, and of dimensions suited to the monument.—*Prior v. Schmeiser* (Iowa) 69 N. W. 525.

[d] (Neb.; 1896.)

Under a contract for the sinking of a tubular well of prescribed dimensions until a flow of 2,000 gallons per hour was obtained, the well was in no event to extend beyond a depth at which the employer should give the contractor notice to quit. A petition by the contractor declared on a completed contract, and it appeared that during the progress of the work the employer notified the contractor to stop further work, which was done. *Held*, that the contractor could recover the contract price for the number of feet of the well then completed as to dimensions, etc., in accordance with the contract, but not for a further number of feet not so completed. —*Omaha Consol. Vinegar Co. v. Burns* (Neb.) 68 N. W. 492.

[e] (Neb.; 1896.)

A contract to sink a tubular well, "and continue sinking the same until you get a water supply of 2,000 gallons" per hour, "unless sooner stopped by us, you to furnish all pipe," etc., "necessary to construct and complete the well in a first-class manner to the surface of the ground; and, on completion of the work, we agree to settle for the same at the rate of five dollars per foot. * * * In no case shall the well be sunk deeper than 500 feet deep at this price,"—required the sinking of a well until a flow of 2,000 gallons per hour was obtained, not to extend, however, beyond a depth of 500 feet at any fixed compensation for a further extension, and not in any event to extend beyond a depth at which the employer should give the contractor notice to quit.—*Omaha Consol. Vinegar Co. v. Burns* (Neb.) 68 N. W. 492.

[f] (Wis.; 1896.)

A contract by defendant with a builder for the erection of a house, the material and labor to be supplied by the builder, provided that defendant should make certain payments for material and labor and pay the balance to the builder. Lumber ordered by the builder was, without authority, charged to defendant. *Held*, that defendant was liable for the lumber only to the amount stipulated to be paid by her in the contract.—*West Shore Lumber Co. v. Northrop* (Wis.) 69 N. W. 338.

§ 34. Putting in heating apparatus.

[a] (Iowa; 1897.)

A contract for the furnishing of a heating plant for a greenhouse must be construed in view of the known purpose for which such buildings are used.—*Kramer v. Messner* (Iowa) 69 N. W. 1142.

[b] (Neb.; 1895.)

A contract to construct a furnace in a workmanlike manner, *held* to require the furnace to be so constructed as not to expose the building to danger from fire, when the furnace was used by a person of ordinary prudence in the usual manner.—*Uhlir v. Barnum* (Neb.) 61 N. W. 749, 43 Neb. 584.

§ 35. Construction by parties.

[a] (Iowa; 1895.)

Under Code, § 3652, which provides that, "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other party understood it," where a contract provided that the architect should decide whether alterations asked for by the owner were within its terms, and the contractor, knowing that the owner understood them to be so, made the alterations without securing a decision from the architect, he cannot recover therefor.—*Evans v. McConnell* (Iowa) 63 N. W. 570; *McConnell v. Evans*, *Id.*

[b] (Iowa; 1896.)

Under Code, § 3652, which provides that, "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other party understood it," where a contract provided that the architect should decide whether alterations asked for by the owner were within its terms, and the contractor, knowing that the owner understood them to be so, made the alterations without securing a decision from the architect, he cannot recover therefor. —*Evans v. McConnell*, 68 N. W. 730.

[c] (Neb.; 1896.)

Where a contract is ambiguous, a practical construction placed upon it by the parties thereto should prevail over any mere technical interpretation.—*Davis v. Ravenna Creamery Co.* (Neb.) 67 N. W. 436, 48 Neb. 471.

§ 36. Province of court and jury.

[a] (Mich.; 1894.)

A contract providing that payment for cutting timber is to be according to a scale which is to exclude "dead culls" is not ambiguous and its construction is for the court.—*Brigham v. Martin* (Mich.) 61 N. W. 276, 103 Mich. 150.

[b] (Mich.; 1894.)

What was intended by "a first-class long raft line," as used in a towing contract, is for the jury.—*Stevenson v. Michigan Log-Towing Co.* (Mich.) 61 N. W. 536, 103 Mich. 412.

[c] (Minn.; 1897.)

The construction of a plain and unambiguous agreement, appointing one a sales agent for a certain district, was for the court, and not the jury.—*Tarbox v. Cruzen* (Minn.) 70 N. W. 860.

[d] (Wis.; 1894.)

It is for the jury to determine in what sense several terms having no accepted legal signification were used by the parties in an oral agreement for a sale.—*Becker v. Holm* (Wis.) 61 N. W. 307, 89 Wis. 86.

[e] (Wis.; 1895.)

Where a contract consisted partly of correspondence, and one of the letters was lost, and many of the details of the contract were left to implication or inference, it was for the jury to say whether the contract was an independent one, or was supplementary to another contract, previously made between the same persons.—*Holm v. Colman*, 61 N. W. 767, 89 Wis. 233.

[f] (Wis.; 1896.)

Plaintiff agreed to compound the low-pressure engine in defendant's boat, by constructing the high-pressure parts, and attaching them above and to the low-pressure machinery, and "to make new valve stems and necessary connections to work high-pressure valves, refit old link and eccentric rods, necessary drain cocks and pipes for cylinders, new high-pressure exhaust pipe, refit present steam pipe * * * in all pipes from boiler to engine that have to be changed on account of new boiler and engine, and one exhaust shifter." *Held*, that it was a question for the jury, depending on evidence of machinists and experts, whether plaintiff's contract to put in "necessary connections to work high-pressure valves" required him to put in a new "valve-stem guide," which, though a necessary device in working the high-pressure engine, was part of the low-pressure engine, and connected with the valve-stem rod of the high-pressure engine by a block or link near the connection of the old with the new engine.—*Manistee Iron-Works Co. v. Shores Lumber Co.* (Wis.) 65 N. W. 863, 92 Wis. 21.

[g] (Wis.; 1896.)

A contract relating to the assignment of certain patents provided that, if the patents ap-

plied for on the invention for "thermostat and automatic machine" be disallowed in substance, the sellers would refund to the purchaser \$12,500 of the money paid under the contract. *Held* that, as the word "thermostat" has a definite meaning, its use did not render such contract ambiguous, so as to make admissible extrinsic evidence for the purpose of explaining it, and make the meaning of the words "thermostat and automatic machine," as used in the contract, a question for the jury, and not for the court.—*Murphey v. Weil*, 66 N. W. 532, 92 Wis. 467.

[h] (Wis.; 1897.)

When an oral contract sued on is detailed by plaintiff, and no other testimony is given concerning it, and it is clear in terms, it is the duty of the court to construe it.—*James v. Carson* (Wis.) 69 N. W. 1004.

V. PERFORMANCE.

Conditions as to performance of extra work, see post, § 53.

Proof of, see post, § 71.

By complainant, right to specific performance, see "Specific Performance," §§ 7, 8.

Of condition in bond, see "Bonds," § 4.

Of contract to make will, see "Wills," § 64.

Parol evidence as to. see "Evidence," § 99.

Place of execution and performance, see "Conflict of Laws," §§ 6-9.

§ 37. Specifying mode of performance.

(Iowa; 1896.)

Plaintiff's guaranty to furnish a certain quantity of water per day, from wells to be constructed for defendant, was not controlled by defendant's specifications, containing statements as to the distance and depth of the water-bearing strata, and a requirement that the wells should be sunk to a certain average depth,—such statements being merely for the information of bidders, and not meaning that any number of wells would produce the specified quantity,—where it also appeared that plaintiff, after abandoning the work, acknowledged its obligation to furnish said quantity, and there was evidence that, if the wells had been properly constructed to said average depth, the said quantity would have been obtained.—*Eagle Iron Works v. Town of Guthrie Center* (Iowa) 66 N. W. 81.

§ 38. Tender of performance.

(Mich.; 1896.)

A contract recited that in consideration of \$2,000, to be paid by plaintiff, defendant sold him certain property. It also recited that plaintiff agreed to buy certain other property of defendant. Provision was made that the \$2,000 should be paid in notes, and that the contract should take effect, and possession be delivered, on a certain day. *Held*, that the plaintiff's testimony that at such time he showed the notes to defendant, and told him that there were the papers he agreed to give, and that he was ready to take possession according to the contract, was sufficient evidence of an offer by plaintiff to perform his part of the contract, including payment for the other property which plaintiff agreed to buy.—*Slesinger v. Bresler* (Mich.) 68 N. W. 128.

§ 39. Risks of work until completion.

(Iowa; 1895.)

A contractor, who agrees to furnish a good well, supplying sufficient water for watering stock, or to forfeit pay for his work, assumes all risks to the well from the commencement until the completion of a test, showing that the well complies with the contract.—*Wiseman v. Thompson* (Iowa) 63 N. W. 346.

§ 40. What constitutes breach.

[a] (Minn.; 1895.)

Plaintiff built blind ditches on defendant's land, under a warranty that they would

carry off all surplus waters, agreeing that if they did not fulfill the warranty he would dig open ditches in their place. The blind ditches failed to carry off the water, and were worthless, and plaintiff left the state, and the open ditches were not dug. *Held*, that a note given by defendant to plaintiff on the completion of the blind ditches was wholly without consideration.—*Slater v. Foster* (Minn.) 64 N. W. 160.

62 Minn. 150.

[b] (Wis.; 1896.)

A contract relating to the assignment of certain patents applied for provided that, if the patents applied for on the invention for thermostat and automatic machine were disallowed in substance, the sellers would refund to the buyer \$12,500 of the money paid under the contract. *Held*, that it was not necessary that all the patents applied for be disallowed, to entitle the buyer to the return of the \$12,500, but the disallowance of a patent for the automatic machine was sufficient.—*Murphey v. Weil* (Wis.) 66 N. W. 532.

92 Wis. 467.

§ 41. Time of performance.

(Mich.; 1895.)

Where a contract to cut logs fails to state the time within which it is to be performed, the party is entitled to a reasonable time for its performance.—*Greenwood v. Davis* (Mich.) 64 N. W. 26.

§ 42. Matters excusing delay.

(Wis.; 1896.)

Plaintiff, who contracted to do certain work on a barge by a certain time, on penalty of a certain amount per day, will not be liable for delay caused by defendant's failure to deliver the barge, in accordance with his implied contract, within a reasonable time, and place it in a reasonably suitable condition or situation, to enable plaintiff to perform his contract.—*Manistee Iron-Works Co. v. Shores Lumber Co.*, 65 N. W. 863, 92 Wis. 21.

§ 43. Matters excusing nonperformance.

[a] (S. D.; 1896.)

An injunction restraining a person from performing a contract with a school board for the removal of a schoolhouse will excuse such person from performing his contract, in the absence of a showing that the injunction was dissolved within such time as made it necessary for him to resume work.—*Burkhardt v. Georgia School Tp.* (S. D.) 69 N. W. 16.

[b] (Wis.; 1896.)

After notice from defendant to plaintiff of its refusal to receive cans, to be manufactured by plaintiff from material to be furnished by defendant, and after defendant has made a contract with another person to receive cans from him only, plaintiff is not required to further attempt to complete its part of the contract for the manufacture of the cans to enable it to recover from defendant for breach thereof.—*Walsh v. Myers* (Wis.) 66 N. W. 250.

92 Wis. 397.

§ 44. Sufficiency of performance.

[a] (Iowa; 1894.)

One who contracts to drive a well which will furnish plenty of water cannot recover therefor when sufficient water is not obtained.—*Jackson v. Creswell* (Iowa) 61 N. W. 383.

[b] (Minn.; 1897.)

A building contractor's right to recover the contract price was not defeated by the fact that the bricks purchased by him, in good faith, and used in the building, were made of inferior clay, the defect not being discoverable by careful inspection, nor until developed by exposure to the weather after the building was completed.—*Wisconsin Red Pressed Brick Co. v. Hood* (Minn.) 69 N. W. 1091.

[c] (Neb.; 1896.)

Where one who had constructed a water-works system for a city agreed to pay a third party \$500 as soon as he (the contractor) should receive \$8,916, as provided by the contract with the city, he was not liable to the third party upon compromising his claim under the contract for \$6,500. — *Birshy v. Warren* (Neb.) 66 N. W. 409, 47 Neb. 275.

§ 45. Substantial performance.

[a] (Minn.; 1895.)

A contract by which plaintiff agreed, in consideration of \$10 per year paid by defendant, to maintain bins for storage of farm produce pending shipment, etc., *held* not substantially performed by furnishing a building, away from the railroad station, and without any shipping facilities. — *Taylor v. Marcum* (Minn.) 62 N. W. 330.

60 Minn. 292.

[b] (Neb.; 1895.)

One who claims a lien on land on the alleged performance by him of a written contract to sink a well thereon must show a substantial compliance with each requirement thereof, where there has been neither a waiver nor acceptance of benefits thereunder by the other contracting party. — *Omaha Consolidated Vinegar Co. v. Burns* (Neb.) 62 N. W. 301.

41 Neb. 21.

§ 46. Acceptance and waiver.

[a] (Mich.; 1894.)

Where a railroad company, in settlement of injuries to an employé, agrees to employ him at a specified salary or more, during life, the acceptance by him of a much smaller salary for 15 years, without objection, is a waiver of his right to the larger salary, in the absence of any explanation of such transaction. — *Brighton v. Lake Shore & M. S. Ry. Co.* (Mich.) 61 N. W. 550.

103 Mich. 420.

[b] (Mich.; 1895.)

Plaintiff contracted to furnish gravel to defendant railway company on cars to be furnished by the latter. After beginning work under the contract, plaintiff's gravel shovel became out of repair, and for a time delayed defendant in moving the gravel trains, but the parties continued in the performance of the contract. *Held*, that such temporary breach of the contract, not having been availed of by defendant at the time, did not bar plaintiff's right of recovery upon the contract. — *Robinson v. Lake Shore & M. S. Ry. Co.* (Mich.) 61 N. W. 1014.

103 Mich. 607.

[c] (Mich.; 1896.)

That the owner of a building under construction visited it and called the contractor's attention to certain defects therein, and, on being asked if there was anything else wrong, failed to say anything, does not constitute a waiver on his part of defects consisting of the use of doors of one-eighth of an inch less in thickness than required by the contract, inferior grade of tin and boards for roofing, and other defects not apparent. — *Eaton v. Gladwell* (Mich.) 66 N. W. 593.

[d] (Mich.; 1896.)

Where the building contractor substantially performs his contract, the owner, by accepting the building without objection, and expressing his satisfaction with the work, is estopped to assert a noncompliance with the contract. — *Strome v. Lyon* (Mich.) 68 N. W. 983.

§ 47. Decisions of architects or superintendents.

[a] (Iowa; 1896.)

A contract to make the excavation for a building under the instructions of an architect is performed, if the work is done as required by the architect, and to his approval, whether in conformity to the drawings made or not. —

Smith v. Farmers' Trust Co. (Iowa) 66 N. W. 84.

[b] (Mich.; 1896.)

Where a building contract provided that if any discrepancies should be found to exist between the plans, working drawings, and specifications, the decision of the architects as to their meaning should be final, the fact that the architects drew the plans and specifications, and were to receive as their compensation 5 per cent. of the total cost of the building, does not warrant an inference of fraud in their decision as to discrepancies found to exist. — *Kelly v. Public Schools of City of Muskegon* (Mich.) 68 N. W. 282.

[c] (Mich.; 1896.)

Where the plans and specifications for a building were accessible to the builder before he made the contract, and an examination of them would have shown that there were apparent discrepancies in them, he is bound by a provision of the contract that if any discrepancies shall be found to exist between the plans, working drawings, and specifications, the decision of the architects as to their true intent and meaning shall be final. — *Guthat v. Gow* (1893) 55 N. W. 442, 95 Mich. 527, followed. — *Kelly v. Public Schools of City of Muskegon*, 68 N. W. 282.

[d] (Minn.; 1895.)

Plaintiff contracted to furnish stone to a contractor for the erection of a federal building, which was to be paid for when accepted by the superintendent in charge. *Held*, that the fact that his contract also required the stone to be cut according to the plans and specifications of the contract for the erection of the building, and that that contract required the contractor to furnish stone in every way acceptable to the supervising architect of the building, did not make the price of the stone furnished by plaintiff payable only on the stone being accepted by the supervising architect. — *Nevin v. Craig* (Minn.) 65 N. W. 86.

63 Minn. 20.

§ 48. Payment on estimates.

(Minn.; 1895.)

A contract whereby one agreed to remove timber from land for a certain sum per acre, providing that payments should be made on estimates as the work progressed, reserving a certain per cent. until the work was completed, implied that the estimates should be made at reasonable intervals as the work progressed, at the contractor's request, so that, on the landowner's refusal to make the same in that manner after demand, and to make payments, the contractor was warranted in refusing to complete the contract. — *Newton v. Highland Imp. Co.* (Minn.) 64 N. W. 1146.

62 Minn. 436.

§ 49. Recovery for part performance.

[a] (Mich.; 1896.)

Where the last partial payment for work to be done by plaintiffs on a yacht was not to be made under the contract until the work was completed and accepted, plaintiffs could not recover said installment before the yacht was finished, though an overdue note, including the first installment, had not been paid. — *Sarmien v. The Catherine C.* (Mich.) 67 N. W. 1085.

[b] (S. D.; 1896.)

When there has not been a substantial compliance on the part of the contractor with the building contract, nor an acceptance of the building, the contractor cannot recover, in an action on the specific contract, the contract price, less allowances for the defects. — *Hulst v. Benevolent Hall Ass'n* (S. D.) 68 N. W. 200.

§ 50. Question for jury.

(Mich.; 1895.)

In an action on a contract to cut logs it appeared that defendants, the owners of the timber, operated a sawmill, and relied on the

logs to supply it with work during the summer. Plaintiff commenced work December 8th and, after hauling all the logs he had cut, stopped work February 28th, owing to the depth of the snow, defendants, at the time, offering him an additional price to continue the work. On the 1st of the next October, plaintiff for the first time asked for a statement of his account, and offered to again go to work under the contract, but was told by defendant that he wished to have nothing more to do with him, as he had failed to keep his agreement. Prior to October, defendant had sent his own men to cut the lumber. The evidence showed that September 1st was a good time to commence cutting timber, so as to be ready to haul the logs when snow came, the only profitable way of hauling the same. *Held*, that the questions whether plaintiff offered to perform the contract within a reasonable time, and whether he had abandoned the contract, were for the jury.—*Greenwood v. Davis* (Mich.) 64 N. W. 26.

VI. ALTERATION, MODIFICATION, AND MERGER.

Authority of agent, see "Principal and Agent," § 5.

Modification of lease, see "Landlord and Tenant," § 19.

Reformation in equity, see "Equity," §§ 5-13.

§ 51. Right to alter.

(Minn.; 1895.)

Though a building contract provides that no claims should be made for additional work, unless authorized by the architect, the original parties to the contract may provide for additional work in removing obstacles unknown to them when the contract was made.—*Michaud v. McGregor* (Minn.) 63 N. W. 479. 61 Minn. 198.

§ 52. Scope and effect of modification.

(Wis.; 1896.)

A contract, by which plaintiffs agreed to find a purchaser for defendant's property at \$65,000, for a commission of \$5,000, provided for the payment of a smaller sum to plaintiffs in case defendant effected a sale without their assistance. After considerable correspondence, defendant wrote: "Inasmuch as our former contract is practically annulled, I make you the following proposition: You sell the property for \$40,000, your commission being four per cent.," and then followed the terms of payment by the purchaser, etc., making a complete contract in itself, without aid from the former agreement, and this plaintiffs accepted without objecting to the statement that the old contract was annulled. *Held*, that the former agreement was abrogated, and, the sale having been finally effected by defendant himself, plaintiffs could recover nothing.—*Hutchinson v. Holmes Sanitarium* (Wis.) 66 N. W. 700. 93 Wis. 23.

§ 53. Allowance for extra work.

(Mich.; 1896.)

Defendant had a contract with the United States for the erection of a lighthouse, and sublet the masonwork to plaintiff's assignor; the agreement between them providing that said assignor should make such alterations as were required, the valuation of such work to be made by the government engineer, or some competent person appointed by him,—and that no claims for such alterations should be valid, unless founded upon the written agreement. There was evidence that defendant, who was present only part of the time, told plaintiff's assignor to do whatever the inspector appointed by the government engineer told him to do; that additional work was done by said assignor, under directions given by the inspector, in ac-

cordance with the terms of the contract; that plaintiff's assignor requested said inspector to estimate the value of the work done, but that said inspector refused to do so. *Held*, that if extras were furnished, and plaintiff's assignor applied to said inspector for an estimate, and he neglected or refused to make the same, plaintiff was entitled to maintain an action for the extras so furnished. *Hooker and Montgomery, J.J.*, dissenting on the ground that it did not appear that said inspector was the person contemplated by the contract to make such estimate.—*Moran v. Schmitt* (Mich.) 67 N. W. 323.

§ 54. Merger.

[a] (Iowa; 1895.)

Where one enters into negotiations with a railroad company, looking to the erection and maintenance by him of an eating house at a certain point on the railroad,—the company to make certain concessions to him, by way of reduced freight, transportation, and other items,—and afterwards a contract is entered into, whereby the company merely leases him certain realty on which to erect his buildings, though under the original agreement he was to receive the fee thereof, which lease recites that it is in consideration of a rental of one dollar per annum, and of "the stipulations and agreements herein contained," and requires the lessee to maintain on the premises an hotel, while the only obligation therein imposed upon the railroad company is to give the lessee the use of the ground during the term, there being no words to indicate that the parties intended anything further in the way of performance by the company than what the lease itself contained, it will be construed as having merged in it all prior oral agreements.—*Kelly v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 957. 93 Iowa, 436.

[b] (Neb.; 1895.)

A new contract with reference to the subject-matter of a former one does not supersede the former, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts that the parties intended it as supplementary thereto.—*Uhlig v. Barnum*, 61 N. W. 749, 43 Neb. 584.

VII. RESCISSION.

In equity, see "Equity," §§ 14-20.

Nonperformance as ground for rescission in equity, see "Equity," § 36.

Of assignment of mortgage, see "Mortgages," § 33.

Of certificate to stock, see "Corporations," §§ 54, 55.

Of compromise or settlement, see "Compromise," § 3.

Of contract employing attorney, see "Attorney and Client," § 4.

—to convey, see "Vendor and Purchaser," §§ 29-31.

—of sale, see "Sale," §§ 50-56, 85-88.

Survival of cause of action for rescission, see "Abatement and Revival," § 9.

§ 55. What constitutes.

(Neb.; 1896.)

An abandonment of a contract may be effected by acts of one of the parties inconsistent with its existence and acquiesced in by the other.—*Hall v. Eccles* (Neb.) 65 N. W. 1058, 46 Neb. 880.

§ 56. Right to rescind.

(Wis.; 1897.)

A debtor gave a bill of sale to sureties on a bond to his creditor, and turned over to them certain property. They agreed to dispose of the same, and, after paying expenses, pay the creditor, and pay any balance to such debtor. *Held*,

that after the sureties had paid part of the sum realized from such property, the debtor could not rescind the contract and revert the title in him by demanding a return of the property, because the sureties refused to pay the balance of the proceeds to such creditor.—*Miller v. Palmer* (Wis.) 70 N. W. 659.

§ 57. Fraud.

(Wis.; 1897.)

A refusal to instruct that defendant cannot rescind the contract sued on for false representations, if, by reasonable diligence, he could have discovered their falsity when made, or if he failed to rescind within a reasonable time after discovering such falsity, is not error, where the court instructs that a party must always exercise due diligence to protect himself from fraud; that, if due diligence requires him to make an effort to find out if he is defrauded, he must make that effort; and that a party desiring to rescind for fraud must notify the other party within a reasonable time after discovering the fraud.—*South Milwaukee Boulevard Heights Co. v. Harte* (Wis.) 70 N. W. 821.

§ 58. Partial rescission.

(Neb.; 1896.)

A contract cannot be rescinded in part on account of fraud, and ratified in part.—*Baum Iron Co. v. Berg* (Neb.) 66 N. W. 8.
47 Neb. 21.

§ 59. Evidence of rescission.

(Iowa; 1895.)

In an action for commissions for procuring a loan agreed to be paid in case defendant failed to show good title to the land offered as security, the defense was on the ground that the contract was rescinded. The court instructed that the burden of proving a rescission was on defendant, and that, to constitute a rescission, there must have been a mutual agreement to such effect. *Held*, that a verdict for defendant would not be disturbed, as not being supported by the evidence, because there was no evidence that the contract was in express terms rescinded, where there was evidence that plaintiff had trouble in procuring the money, and that, a disagreement having arisen between him and defendant as to the existence of a lien on the land, his actions, at the time he refused to make the loan without the cancellation of the lien, were such that defendant might have understood plaintiff to mean that he dismissed the transaction, defendant in fact proceeding to procure the loan elsewhere.—*Steckel v. Pile* (Iowa) 62 N. W. 676.

§ 60. Effect of rescission.

(S. D.; 1895.)

Where, on breach of a contract, one of the parties thereto treated the same as rescinded, and sued for the value of services rendered and material furnished thereunder, he could not show what profits he would have made under the contract had he been permitted to complete the same.—*Davis v. Tubbs* (S. D.) 64 N. W. 534.

VIII. ACTIONS ON CONTRACTS.

Action by seller for breach, see "Sale," § 42.
— for breach of contract to exchange property, see "Exchange of Property," § 2.
Form of action, tort or contract, see "Action," § 4.
Jurisdiction of equity, remedy at law, see "Equity," § 2.

§ 61. When action lies.

(Neb.; 1895.)

Where one promised that he would, at a certain price, purchase certain notes, if the promisee would obtain them, and the promisee obtained the notes in exchange for other prop-

erty, the promisor was liable for damages resulting to the promisee by a breach of the promise.—*Stratton v. Meredith* (Neb.) 63 N. W. 927.

45 Neb. 622.

§ 62. When right of action accrues.

(Ia.; 1896.)

In an action brought October 23, 1891, on a contract in which plaintiff undertook to set up a furnace, furnishing all the material and doing all the work to make it ready for use, and defendant agreed to pay 50 per cent. when the system was finished, and the balance January 1, 1895, the petition alleged that plaintiff put into the building the necessary pipes, etc.; that it manufactured the furnace, and delivered the same, and offered to do the work in setting it up; and that defendant refused to allow plaintiff to complete the work, and by reason thereof plaintiff was damaged \$300, for which judgment was demanded. *Held*, that the petition showed the action was premature.—*Litchfield Manufg Co. v. Gallagher* (Iowa) 67 N. W. 371.

(Minn.; 1895.)

Where a corporation is dissolved, and a receiver appointed, under Gen. St. 1878, c. 21, §§ 415-420 (Gen. St. 1894, §§ 3430-3435), during the term of a lease, it is disabled from performing under the lease, and a cause of action at once accrues to the landlord for the recovery of all damages sustained thereby.—*Kalkhoff v. Nelson* (Minn.) 62 N. W. 332.

60 Minn. 284.

(Ic.) (Neb.; 1895.)

The cause of action for breach of a contract to furnish plaintiff a herd of cattle on a certain day, to be cared for during the ensuing season, accrued on the failure to furnish the herd on that day.—*Hamilton v. Goff* (Neb.) 63 N. W. 807.

45 Neb. 239.

§ 63. Parties.

(Iowa; 1896.)

A contract between insurance agents to share equally in the aggregate earnings of all is no defense to an action by one against his company to recover for services rendered by him.—*Gray v. Farmers' Mut. Live-Stock Ins. Ass'n* (Iowa) 66 N. W. 98.

§ 64. Defenses.

(Mich.; 1895.)

It is no defense to assumpsit by a subcontractor against the contractor for breach of an implied agreement by defendant to keep materials on hand for the work, arising from an express contract between the parties, which provided that plaintiff should not furnish materials, but which did not state who should furnish them, that, by contract between defendant and the owner, the latter was to furnish the material.—*Perine v. Standfield* (Mich.) 65 N. W. 541.

§ 65. Pleading—Complaint.

(Ia.; 1894.)

A complaint setting out a contract, and stating that defendant thereby agreed to pay a certain sum for the use of plaintiff's mare, which was to be bred to defendant's stallion, and that defendant had the use of the mare as contemplated by the contract, but had failed to pay the sum agreed on, and now owed it, is sufficient if the allegations are consistent with a fair and rational interpretation of the contract.—*Wallace v. Ryan* (Iowa) 61 N. W. 395.
93 Iowa, 115.

(Ib.) (Minn.; 1894.)

In an action for breach of a contract by which defendant is alleged to have agreed to deliver to plaintiff certain garbage during a certain period, where the duration of the contract sued on can be ascertained from other contracts referred to therein, and made a part of the com-

plaint, the complaint is sufficient as to the duration of the contract sued on.—*Ryberg v. Goodnow* (Minn.) 61 N. W. 453.

59 Minn. 413.

[c] (Minn.: 1897.)

Where a party agrees to pay on the happening of a contingency, its happening must be alleged in the complaint in an action for the recovery of the money.—*Root v. Childs* (Minn.) 70 N. W. 1087.

[d] (Minn.: 1897.)

Where the obligation of defendant to pay money was not to arise if a certain contingency happened, it is not necessary to allege in the complaint the nonhappening of the contingency.—*Root v. Childs* (Minn.) 70 N. W. 1087.

[e] (Neb.: 1897.)

The petition of a creditor of a bank, disclosing that defendant, as successor of the bank, for a sufficient consideration, assumed its liabilities, including plaintiff's unpaid claim, states a cause of action.—*Tecumseh Nat. Bank v. Best* (Neb.) 70 N. W. 41.

[f] (Wis.: 1895.)

To show a modification of a written contract subsequent to its execution, such modification must be pleaded.—*Ninman v. Suhr* (Wis.) 64 N. W. 1035, 91 Wis. 392.

[g] (Wis.: 1897.)

A complaint seeking to recover on a contract for grading, by the terms of which payment was to be made on the certificate of an engineer, must allege that such certificate was furnished.—*Boden v. Maher* (Wis.) 69 N. W. 980.

§ 66. — Answer.

[a] (Iowa: 1896.)

Defendants claimed that it was attempted, in the contract in suit, to reduce an oral agreement to writing; that, by fraud of the plaintiff, defendants were induced to sign the writing, which did not represent the real agreement; that they obtained nothing under it; and that they tried to rescind it when they discovered the fraud. *Held* to set up a sufficient defense, as, if their claim was true, the contract was absolutely void, and need not be reformed.—*Burlington Lumber Co. v. Evans Lumber Co.* (Iowa) 69 N. W. 558.

[b] (N. D.: 1895.)

In an action to recover on a contract for plastering a house with plastering of a certain quality, an answer alleging that the plastering was not that required by the contract, and that, by reason of its inferiority and the unskillful workmanship of the plasterers, the plastering was worthless and of no benefit to defendant whatever, stated a defense.—*Nollman v. Evenson* (N. D.) 65 N. W. 686.

5 N. D. 344.

§ 67. Pleading and proof.

[a] (Iowa: 1896.)

In an action against a county for damages for a rescission of a contract, defendant answered alleging that it had contracted to employ plaintiff as superintendent of county bridges; that, by the contract, plaintiff agreed to give his best skill and ability for the benefit of the county; that, shortly after, defendant called upon plaintiff to aid in considering bids for bridge material and iron bridges; that plaintiff confederated with some of the bidders to defraud the county, in consequence of which defendant, as authorized by the provisions of the contract, rescinded it. Plaintiff claimed that at the time he was not acting under the contract; that his term of service was not to begin until several weeks thereafter; that he was merely present to assist the board of supervisors, and not as an employé of the county under his contract. The contract itself was silent as to when it took effect. *Held* that, upon the issues thus presented, it was error to exclude from the jury evidence tending to show whether the term of service,

under the contract, had begun at the time claimed by defendant.—*Daniels v. Decatur County* (Iowa) 68 N. W. 718.

[b] (Mich.: 1896.)

Where the complaint in an action on a contract does not allege that it was in writing, or set it out verbatim, the failure of defendant to deny the execution of the contract does not prevent him from proving that the contract was executed by him as agent, and, therefore, that he was not personally bound thereby.—*Armstrong v. Andrews* (Mich.) 67 N. W. 567.

[c] (Minn.: 1896.)

Where the subject-matter of the contract was stated in the declaration in general terms, evidence of a subsequent modification thereof was admissible.—*Swank v. Barnum* (Minn.) 65 N. W. 722.

63 Minn. 447.

[d] (Neb.: 1895.)

Under a complaint for the recovery of wages under a special contract, damages for breach of the contract cannot be proved.—*Culbertson Irrigating & Water-Power Co. v. Wildman* (Neb.) 63 N. W. 947.

45 Neb. 663.

[e] (Wis.: 1897.)

Certificates of an engineer as to the amount of work done by a plaintiff under a contract, though a condition precedent to the right to payment under its terms, are not admissible in evidence, unless the fact that they were furnished is pleaded.—*Boden v. Maher* (Wis.) 69 N. W. 980.

§ 68. — Illegality of contract.

(Neb.: 1895.)

The illegality of an agreement, unless disclosed by the pleadings or proofs of the party claiming through it, must, in order to be available to the adverse party, be specially pleaded.—*Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.) 62 N. W. 899.

44 Neb. 463.

§ 69. — Allegation of full performance.

(S. D.: 1895.)

Under a complaint alleging full compliance with the terms of an express contract, there can be no recovery on a quantum meruit for part performance.—*Morrow v. Board of Education of City of Chamberlain* (S. D.) 64 N. W. 1126.

§ 70. Evidence.

[a] (Mich.: 1894.)

To show a contract between decedent and claimant, evidence of negotiations by letter between the counsel for the parties, and of the conduct of the parties thereafter, is admissible.—*Dayton v. Dakin's Estate* (Mich.) 61 N. W. 349.

103 Mich. 65.

[b] (Mich.: 1896.)

In an action to recover the contract price for the construction of a building, on the theory of a substantial performance, wherein there was no evidence of an acceptance of the building by defendant, evidence of its value was inadmissible.—*Eaton v. Gladwell* (Mich.) 66 N. W. 598.

[c] (Minn.: 1895.)

Defendant agreed to pay plaintiff \$7,000 for corporate stock providing the profits of the corporation exceeded \$1,500, but, if they did not, defendant was to have a credit of \$4.66 on the \$7,000 for every dollar of difference between \$1,500 and the profits as determined by an expert bookkeeper. *Held* that, where the profits were to be determined for the year ending May 30th, the report of the expert for the year ending May 31st was not admissible in an action on the contract.—*Blew v. Collins* (Minn.) 63 N. W. 1031.

61 Minn. 418.

[d] (Minn.; 1896.)

Where one promised to pay a bill for work performed after having received a report in regard to the work from his own engineer, the report was admissible in an action for the services, as tending to show that defendant acted understandingly when he made the promise.—Swank v. Barnum (Minn.) 65 N. W. 722, 63 Minn. 447.

1c1 (Neb.; 1895.)

Where hay was sold with the understanding that 420 cubic feet were to be computed as a ton, evidence that the actual weight of such a volume of hay was less than a ton was immaterial.—Smith v. Brown (Neb.) 61 N. W. 714, 46 Neb. 230.

[f] (Neb.; 1896.)

When, in an action for the agreed price of services, there is a conflict as to the amount agreed upon, evidence of the value, at the time of the contract, of the work performed, is admissible.—Spurck v. Dean (Neb.) 68 N. W. 375.

1e1 (S. D.; 1895.)

Where the complaint alleged that defendants agreed to pay plaintiff the reasonable value of his services in quarrying stone, and the evidence showed that what defendants agreed to pay was to be measured by the amount due on a contract for quarrying the stone between defendants and the proprietor of the quarry, and the case was tried on the theory of the evidence, it was error to exclude defendants' evidence of what the contract was, and how much was due on it.—Zeimet v. Phillips (S. D.) 65 N. W. 418.

§ 71. — Proof of performance.

(Iowa; 1895.)

In an action on a contract containing a condition precedent to plaintiff's right of recovery, where plaintiff fails to allege performance of such condition, and defendant fails to take advantage of the defect by demurrer or motion in arrest, plaintiff need not prove the performance of such condition to entitle him to recover.—Clark v. Ross (Iowa) 65 N. W. 340; Eschminger v. Same, *Id.*

§ 72. — Weight and sufficiency.

(Minn.; 1895.)

In an action for the contract price for the construction of retaining walls, where the evidence shows that the walls were not constructed according to the plans, and that defendant on several occasions insisted that the defects should be remedied, *held*, that a finding for plaintiff is erroneous.—Lynes v. Holl (Minn.) 63 N. W. 108, 60 Minn. 532.

§ 73. Instructions.

[a] (Iowa; 1897.)

A complaint alleged a contract to cut and deliver to defendant all the wood on certain land, and that defendant refused to let plaintiff complete the contract. The answer admitted the making of a contract substantially as alleged, except that the wood was "to be cut and delivered as defendant might direct." *Held* that, as no issue was made as to this latter clause, an instruction that the contract was admitted was not erroneous.—Mounce v. Kurtz (Iowa) 70 N. W. 119.

1b1 (Neb.; 1895.)

Where there was evidence, in an action for breach of contract to deliver goods in payment of services, that defendant tendered the goods, and plaintiff testified that he refused them because they were not of a kind agreed to be delivered, an instruction that, if defendant failed to pay plaintiff in goods, plaintiff could recover the value thereof, was not applicable.—Mayer v. Ver Bryck, 64 N. W. 691, 46 Neb. 221.

1c1 (Neb.; 1897.)

In an action to recover damages sustained by a city by failure of a contractor to furnish a stipulated number of gallons of water within a limited space of time, an instruction directing the jury, if they found for plaintiff, to return a verdict for the sum of such payments as had been made to the contractor for supplying boilers, an engine, pipe line, and machinery upon estimates as the work progressed, was erroneous, where by the terms of the contract there had been recognized no such contingency as the return of such payments to the city, in any case.—Goffrey v. City of Beatrice (Neb.) 70 N. W. 914.

§ 74. Questions for jury.

1a1 (Iowa; 1896.)

Where the making of an executory contract with one since deceased is averred, the performance of which by the other party was to operate as payment of a note executed by him to the decedent, and, though there is no direct proof of the making of the contract, there is evidence of things done by both parties which would, if the contract was made, be in execution of it, including the execution by the decedent of a release reciting payment of the debt, such evidence tends to prove the making of the contract, and entitles the party to have the issue submitted to the jury.—Kuen v. Upmire (Iowa) 67 N. W. 374.

1b1 (Wis.; 1895.)

In an action for breach of a contract to furnish unskimmed and unstrained milk for the manufacture of cheese, the evidence that part of the milk furnished by defendant had been strained to conceal the fact that it was lumpy was contradicted. The only evidence that any milk furnished by him was lumpy was that cheese made from that kind of milk is bloated, and that some of the cheese made from milk a part of which was furnished by defendant was so bloated. *Held*, that the refusal of the court to submit to the jury the question whether defendant had strained any of the milk furnished, and, if so, whether plaintiff was thereby damaged, was not error.—Bilgrien v. Dowe (Wis.) 64 N. W. 1025, 91 Wis. 393.

CONTRIBUTION.

Between indorsers, see "Negotiable Instruments," § 41.

—sureties, see "Principal and Surety," §§ 23, 26, 27.

—tenants in common, see "Tenancy in Common," § 2.

(Neb.; 1895.)

In an action for contribution by one joint wrongdoer against another, the test of recovery is whether plaintiff, at the time of the commission of the act for which he has been compelled to respond, knew that such act was wrongful; and, if he did, he cannot recover.—Torpy v. Johnson, 62 N. W. 253, 43 Neb. 882.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," §§ 24–28.

CONVENTION.

Constitutional conventions, see "Constitutional Law," § 2.

For nominating candidates for office, see "Elections and Voters," § 6.

CONVERSION.

Wrongful conversion, see "Trove and Conversion."

CONVEYANCES.

See "Chattel Mortgages"; "Deed"; "Fraudulent Conveyances"; "Mortgages"; "Sale"; "Vendor and Purchaser."

CONVICTS.

See, also, "Pardons."

Compensation of jailer for maintenance of convicts, see "Jail and Jailer."

Reduction of sentences, ex post facto legislation, see "Constitutional Law," § 28.

(Neb.: 1896.)

The power conferred on the board of public lands and buildings by Act Feb. 13, 1877, to lease the convict labor of the state for a period not exceeding 10 years, was exhausted by a single user.—*State v. Holcomb* (Neb.) 65 N. W. 873, 46 Neb. 612.

COPARCENERS.

See "Tenancy in Common."

CORONER.

(Minn.: 1896.)

Where the coroner on the same day makes two separate examinations of two different dead bodies, or holds an inquest on one body, and makes an examination of the other, he is not, under Gen. St. 1894, § 5554, entitled to a fee of five dollars for each examination and each inquest, or to anything more than five dollars per day "for the time actually spent."—*Kistler v. Board of Com'rs of Hennepin County* (Minn.) 68 N. W. 26.

CORPORATIONS.

I. INCORPORATION AND POWERS, §§ 1-5.

II. CORPORATIONS DE FACTO, §§ 6, 7.

III. CORPORATE EXISTENCE, §§ 8-10.

IV. FAILURE TO EFFECT INCORPORATION—LIABILITY AS PARTNERS, § 11.

V. OFFICERS AND AGENTS, §§ 12-23.

VI. CONTRACTS, §§ 24-37.

VII. LIABILITY FOR TORTS, § 38.

VIII. ACTIONS, §§ 39-43.

IX. STOCK, §§ 44-62.

1. In General, §§ 44-50.

2. Liability on Subscription to Stock—Enforcement, §§ 51-57.

3. Transfer, §§ 58-62.

X. MEMBERS AND STOCKHOLDERS, §§ 63-87.

1. Rights in General, §§ 63-68.

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XI. INSOLVENCY AND RECEIVERS, §§ 88-97.

XII. DISSOLUTION AND FORFEITURE OF FRANCHISE, §§ 98-104.

XIII. FOREIGN CORPORATIONS, §§ 105-108.

See, also, "Banks and Banking"; "Benevolent Societies"; "Building and Loan Associations"; "Carriers"; "Horse and Street Railroads"; "Insurance"; "Municipal Corporations"; "Railroad Companies"; "Religious Societies"; "Telegraph Companies"; "Turnpikes and Toll Roads"; "Water Companies."

Assignability of dividends, see "Assignment, § 1. Contracts to control, public policy, see "Contracts," § 16.

Estoppel to question tax assessment, see "Estoppel," § 6.

Foreign insurance companies, see "Insurance," §§ 186-188.

Insurance companies, see "Insurance," §§ 185-188.

Irrigation companies, see "Irrigation."

Mandamus to, see "Mandamus," §§ 21, 22.

Special laws conferring corporate privileges, see "Constitutional Law," § 20.

Taxation of corporate stock or property, see "Taxation," §§ 11, 32, 33.

I. INCORPORATION AND POWERS.

Forfeiture of franchise, see post, §§ 98-104.

Power to increase stock, see post, § 46.

Surrender of franchise, see post, § 10.

Franchise of mutual benefit company, see "Insurance," § 151.

Reorganization of national bank, see "Banks and Banking," § 2.

Usurpation of powers, remedy by quo warranto, see "Quo Warranto," § 1.

§ 1. Charter and franchises.

[a] (Neb.: 1895.)

In Nebraska, all corporations are formed under general laws, and which, with the articles of incorporation, constitute the charter.—*Lincoln Shoe Manuf'g Co. v. Sheldon* (Neb.) 62 N. W. 480.

44 Neb. 279.

[b] (Wis.: 1897.)

A street-railroad franchise to construct and maintain tracks in the streets of a city is transferable by sale (Laws 1883, c. 221, as amended by Laws 1891, c. 127), or under the power given a corporation to mortgage its franchises by Rev. St. 1878, § 1748, subd. 7.—*Wright v. Milwaukee Electric Railway & Light Co.* (Wis.) 69 N. W. 791.

§ 2. Acts of corporators and promoters.

[a] (Minn.: 1895.)

Where persons associated to form a banking corporation: elected directors, who transacted the association's business, and kept a record of its doings; appointed a committee from among themselves to contract for the furnishing of fixtures; and at the meeting at which the committee's report awarding the contract to plaintiff was adopted, defendant, who was not a promoter, was elected a director, and thereafter attended meetings of the directors for several months and until the association abandoned the attempt to incorporate,—defendant was liable to plaintiff on the contract.—*Roberts Manuf'g Co. v. Schlick* (Minn.) 64 N. W. 826.

62 Minn. 332.

[b] (S. D.: 1896.)

Under Comp. Laws, § 2905, providing that upon the filing of articles of incorporation the secretary of state shall issue a certificate reciting that the articles containing the required statement of facts have been filed, and that thereupon the persons signing such articles shall be a body corporate, it is not necessary that any of the capital stock of such corporation shall have been actually subscribed or paid in at the time the articles were filed, and the failure to subscribe or pay in such capital stock is not a fraud on the part of the incorporators for which they can be held liable.—*Singer Manuf'g Co. v. Peek* (S. D.) 67 N. W. 947.

§ 3. Acting as trustee.

(Mich.: 1897.)

A corporation with legal capacity to hold property may take and hold it in trust in the same manner and to the same extent as private

individuals may do. *White v. Rice* (Mich.) 70 N. W. 1021.

§ 4. Purchasing and holding corporate stock.

[a] (Iowa; 1895.)

Under articles authorizing a corporation to "loan money on real-estate, chattel, or personal security; to buy, hold, sell, and transfer notes, bonds, mortgages, and other securities and evidences of indebtedness; * * * to make contracts; to acquire and transfer property, possessing the same power in such respects as private individuals now enjoy,"—it may accept stock in another company as collateral security for signing a note for the latter on which money was obtained for the latter's use.—*Calumet Paper Co. v. Stotts Inv. Co.* (Iowa) 61 N. W. 782.

[b] (Iowa; 1897.)

A mercantile corporation may, in course of business, accept stock of another corporation in exchange for goods which it is authorized to sell.—*White v. G. W. Marquardt & Son* (Iowa) 70 N. W. 193.

[c] (Iowa; 1897.)

A mercantile corporation which obtains stock of another corporation by exchange, and sells it and retains the proceeds, cannot avoid liability as a former owner of the stock on the ground that it was beyond its powers to acquire stock of another corporation.—*White v. G. W. Marquardt & Son* (Iowa) 70 N. W. 193.

[d] (Minn.; 1896.)

An agreement by which a purchaser of stock could, at the end of a certain time, at his option, return the stock, and receive back the price, is in the nature of a conditional sale, with an option to the purchaser to rescind, and, the rights of creditors not interfering, is not void as being a contract of the corporation to purchase its own stock.—*Vent v. Duluth Coffee & Spice Co.* (Minn.) 67 N. W. 70. 64 Minn. 307.

§ 5. Exclusive right to use name.

[a] (Iowa; 1896.)

In a suit brought to restrain defendants from using the name "Grand Lodge of the Ancient Order of United Workmen," abbreviated "G. L. A. O. U. W. of Iowa," and to restrain them from doing a life insurance business under that name, it appeared that the Supreme Lodge A. O. U. W. issued a charter in 1873 authorizing the "G. L. A. O. U. W. of Iowa"; that thereupon lodges were organized subordinate to the grand and supreme lodges, and that the business of the order was transacted under the name in question till the beginning of plaintiff's suit in 1893; that in 1882 a schism took place, and a part of the membership of the grand lodge (plaintiff) seceded from the supreme lodge; that in 1884 they incorporated themselves as the "G. L. A. O. U. W. of Iowa"; that the other part (defendants) continued loyal to the supreme lodge, and continued to use the name in question as before; that plaintiff claimed the right to the exclusive use of the name by reason of its incorporation. *Held*, that the name had a well-defined and recognized meaning at the time it was adopted by plaintiff, and that it could not, therefore, be appropriated to its exclusive use.—*Grand Lodge A. O. U. W. of Iowa v. Graham* (Iowa) 65 N. W. 837.

[b] (Iowa; 1896.)

In such action it further appeared that the state auditor issued to plaintiff a certificate authorizing it to do business under the name "G. L. A. O. U. W. of Iowa," and plaintiff contended that it thereby acquired an exclusive right to the use of the name, under McClain's Code, § 1763, providing that "no corporation * * * organized under this act shall take any name in use by any other organization." *Held*, that defendants, not having been advised of any attempt to deprive them of the use of the name,

were not bound by the determination of the auditor. *Grand Lodge A. O. U. W. of Iowa v. Graham* (Iowa) 65 N. W. 837.

Foreign corporation using name of domestic company, see post, § 105.

II. CORPORATIONS DE FACTO.

Collateral attack for purpose of enforcing partnership liability, see post, § 11.

Estoppel to assert partnership liability, see post, § 11.

§ 6. Capacity to hold property—Presumption.

(Wis.; 1895.)

Where a de facto corporation owned property as a corporation for a considerable length of time, it will be presumed, in favor of its capacity to hold such property, that the formal requirements necessary to its creation as a corporation have been satisfied.—*Ricketson v. Galligan*, 62 N. W. 87, 89 Wis. 394.

§ 7. Collateral attack.

[a] (Neb.; 1895.)

The validity of the incorporation of a de facto company cannot be attacked collaterally by one who has dealt with it as a de jure corporation.—*Kleckner v. Turk* (Neb.) 63 N. W. 469.

45 Neb. 176.

[b] (Wis.; 1896.)

There being a law under which an association can be incorporated, and the existence de facto of the corporation being established by a colorable compliance with the law, and an exercise of the rights claimed under it, a private person cannot maintain suit to enjoin it or its officers and agents from carrying on its business on the ground that its incorporation is illegal, or that its franchises have been forfeited, or that it is dissolved, till it has been so adjudged in proceedings by the state for that purpose.—*Supreme Court of Independent Order of Foresters of Canada v. Supreme Court of United Order of Foresters* (Wis.) 68 N. W. 1011.

III. CORPORATE EXISTENCE.

Burden of proving, see post, § 43.

Collateral attack on existence of de facto corporation, see ante, § 7.

Contracts before incorporation or organization, see post, § 28.

Sufficiency of denial of existence, see post, §§ 41, 42.

§ 8. When effected.

(Wis.; 1897.)

Rev. St. §§ 1772, 1773, provide that no corporation shall, until its articles of organization are duly recorded, have legal existence; that, until the directors are elected, the signers of the articles shall have direction of the corporation. *Held*, that a corporation becomes such when its articles are filed for record, and not when the subscribers subsequently meet to organize it.—*Badger Paper Co. v. Rose* (Wis.) 70 N. W. 302.

§ 9. Estoppel to deny.

[a] (Minn.; 1897.)

One who recognized, dealt with, and became a stockholder in a de facto corporation is estopped to assert, in an action on his subscription, that it never was legally organized.—*Hause v. Mannheim* (Minn.) 69 N. W. 810.

[b] (Neb.; 1896.)

Comp. St. c. 16, § 144, providing that no person sued on a contract made with a body of men acting as a corporation may set up want of legal organization in defense, precludes a de-

fense based on the claim that the articles of association of plaintiff were not signed by a sufficient number of incorporators.—*Livingston Loan & Building Ass'n v. Drummond* (Neb.) 68 N. W. 375.

See, also, post, § 11.

§ 10. Termination of existence by surrender of franchises.

[a] (Wis.; 1896.)

Where a railroad corporation has property, and is not indebted, and has the usual board of directors and officers, an acceptance by the state of the surrender of its privileges is necessary in order to terminate the corporate existence by surrender.—*Mylrea v. Superior & St. C. Ry. Co.* (Wis.) 67 N. W. 1138. 93 Wis. 604.

[b] (Wis.; 1897.)

An ordinance granting a corporation the right to lay tracks and operate a street railroad in certain streets in a city, when accepted and acted on, not only constitutes a contract between the city and the railroad corporation, but operates also as the grant of a franchise by the state, which cannot be surrendered by such grantee without the consent of the state, given either expressly or presumptively.—*Wright v. Milwaukee Electric Railway & Light Co.* (Wis.) 69 N. W. 791.

Suit against corporation after surrender, see post, § 39.

IV. FAILURE TO EFFECT INCORPORATION — LIABILITY AS PARTNERS.

Penalties imposed on stockholders in case of defective incorporation, see post, § 79.

§ 11. Defective incorporation or organization.

[a] (Mich.; 1895.)

A stockholder who has paid for his stock is not personally liable to the creditors of the corporation because it carried on business before its capital stock had been subscribed for, where he had no notice that such stock had not been subscribed for, or of any intent to carry on an illegal corporation.—*American Mirror & Glass-Beveling Co. v. Bulkley* (Mich.) 65 N. W. 291.

[b] (Mich.; 1896.)

Where an association was recognized by the public authorities as a duly-organized corporation, and did business and filed its annual reports as such, a creditor who dealt with it as a corporation cannot attack its corporate existence, and hold its stockholders liable as partners. *Glass-Beveling Co. v. Bulkley* (1895) 65 N. W. 291, followed.—*Gow v. Collin & Parker Lumber Co.*, 66 N. W. 676.

[c] (Neb.; 1896.)

Where a corporation has had a de facto existence for a considerable time, its corporate character cannot be collaterally assailed by persons contracting with it in such capacity, relying upon the corporate credit, in order to hold stockholders thereof individually liable on account of the failure to observe the statutory requirements essential to constitute a technical de jure corporation.—*Hogue v. Capital Nat. Bank* (Neb.) 66 N. W. 1036. 47 Neb. 929.

[d] (Neb.; 1896.)

When a party contracts with, and sues and obtains judgment against, an imperfectly organized corporation, he is estopped from denying its corporate existence, and recovering from its members individually, as partners, upon the same indebtedness.—*Nebraska Nat. Bank v. Ferguson* (Neb.) 68 N. W. 370.

V. OFFICERS AND AGENTS.

Authority to make contracts for corporation, see post, §§ 30-36.

Embezzlement by, see "Embezzlement," § 3.
Garnishment of officer in action against company, see "Garnishment," § 1.
Testing right to office, see "Quo Warranto," § 2.

§ 12. Contract of employment.

(Mich.; 1894.)

An employé of a corporation, who was employed at a yearly salary, was subsequently made secretary of the corporation, his salary being increased from \$3,500 to \$5,000, without any specific contract being made, and he continued to perform the same services as before, his duties as secretary being merely nominal. *Held*, that a finding that his contract of employment was a yearly one, distinct from his official relationship to the corporation, was warranted.—*Chamberlain v. Detroit Stove Works* (Mich.) 61 N. W. 532. 103 Mich. 124.

§ 13. Meetings.

(Minn.; 1897.)

A finding that the board of directors of a railroad company had adopted, by a two-thirds vote of their whole number, a resolution to change the line of the road, is supported by the record of the meeting at which the resolution was presented, showing that a quorum was present, and stating that the resolution, which could be carried only by a two-thirds vote, was carried; and the testimony of a director that, to his knowledge, all the nine directors (an admitted two-thirds) present at the meeting voted for the resolution, except that he did not hear the chairman so vote; and that the chairman declared the resolution carried, and certified to the map showing the change.—*Fletcher v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 1085.

§ 14. Dealings with corporation.

(Iowa; 1896.)

An officer of a corporation, who, as one of its agents authorized to make a specified contract, inserts therein unauthorized provisions, cannot base a right of recovery against the corporation on such provisions, where the corporation, as soon as it discovered the unauthorized provisions, repudiated them.—*Hart v. Mt. Pleasant Park Stock Co.* (Iowa) 66 N. W. 190.

§ 15. Term of office.

(Wis.; 1896.)

Rev. St. § 1776, providing that directors of a corporation shall be elected annually, does not limit the term of office of an attorney, appointed by the directors, to one year, it being also provided, in such section, that the terms of other officers may be prescribed by the articles of incorporation or the by-laws.—*Germania Spar & Ban Verein v. Flynn* (Wis.) 66 N. W. 109. 92 Wis. 201.

§ 16. Apparent authority.

(Neb.; 1895.)

Since a person dealing with the agent of a business corporation in a matter relating solely to its business, and not involving its corporate functions, is not chargeable with notice of its by-laws, the apparent authority of the agent cannot be extended or restricted by the by-laws in the absence of actual notice thereof by such person.—*Johnson v. Milwaukee & W. Inv. Co.*, 64 N. W. 1100, 46 Neb. 480.

§ 17. Power to purchase corporate property.

(Mich.; 1897.)

Directors of a corporation may, as against other stockholders, purchase the corporate property at a foreclosure sale.—*Lucas v. Friant* (Mich.) 69 N. W. 735.

§ 18. Authority to verify claim for lien. (Neb.; 1895.)

A treasurer and bookkeeper of a corporation under whose articles of incorporation every officer is required to be a stockholder may verify the claim for a mechanic's lien.—*Chapman v. Brewer*, 62 N. W. 320, 43 Neb. 890.

§ 19. Confession of judgment. (Wis.; 1896.)

The president of a corporation, given by the articles of incorporation power to generally represent it in matters of more than ordinary importance, who, with the secretary and another, constituted the board of directors, and to whom and the secretary, by general consent of the directors, the entire control and management of the corporation was intrusted, will be held to have had power to execute a power of attorney to confess judgment against the corporation; all the directors having knowledge thereof at the time, and making no objection.—*Ford v. Hill* (Wis.) 66 N. W. 115, 92 Wis. 188.

§ 20. Liability to corporate creditors. (Minn.; 1895.)

Under Gen. St. 1894, § 2600, subd. 3 (Gen. St. 1878, c. 34, § 9, subd. 3), providing that any officer, director, or member of a corporation is liable for corporate debts when guilty of any fraud, unfaithfulness, or dishonesty in the discharge of any official duty, one who is induced to become a creditor of an insolvent corporation by the fraud of an inferior and the negligence of a superior officer of the corporation, and was thereby defrauded of his claim or a portion thereof, could sue the superior officer personally at law for the amount of his claim, irrespective of the amount of his loss.—*First Nat. Bank v. Harper*, 63 N. W. 1079, 61 Minn. 375; *National New Haven Bank v. Northwestern Guaranty Loan Co.*, Id.

§ 21. — Duty as to reports.

[a] (Mich.; 1894.)

Under 3 How. St. § 4161b1, providing that, if "any" of the directors of a manufacturing corporation "shall willfully neglect or refuse to make the report required by this section, they shall each be liable for all the debts of said corporation and subject to a penalty," etc., only such members of any board of directors as do so willfully neglect or refuse to make the report are liable for the debts or subject to the penalty.—*Gennert v. Ives* (Mich.) 61 N. W. 9, 102 Mich. 547.

[b] (Mich.; 1894.)

The failure by the board of directors of any manufacturing corporation to file a report of its financial condition with the secretary of state, as required by 3 How. St. § 4161b1, is presumptively willful.—*Gennert v. Ives* (Mich.) 61 N. W. 9, 102 Mich. 547.

[c] (Mich.; 1894.)

In an action against a director of a manufacturing corporation to charge him with the debts thereof, under 3 How. St. § 4161b1, for willfully neglecting to file a report of its condition with the secretary of state, defendant's testimony was undisputed that he left the management of the business to the president, was not aware that a report should be filed, did not think of his office of director during the time the report was due, and that there was no purpose in holding it back as far as he was concerned. *Held*, that defendant was not liable.—*Gennert v. Ives* (Mich.) 61 N. W. 9, 102 Mich. 547.

[d] (Mich.; 1897.)

Pub. Acts 1885, No. 232, § 12, requiring corporations to make annual reports, and making directors, for willful neglect thereof, liable for "all the debts of such corporation, and sub-

ject to a penalty * * * for each * * * day * * * during the pendency of such neglect," renders them liable for debts contracted after and pending the default.—*Bank of Saginaw v. Peirson* (Mich.) 70 N. W. 901.

[e] (Mich.; 1897.)

Liability of directors for debts under Pub. Acts 1885, No. 232, § 12, requiring corporations to make annual reports, and providing that for willful neglect thereof the directors shall be liable for debts of the corporation, and also liable for a per diem penalty during pendency of the default, is not repealed by St. 1895, changing date for depositing reports, and giving the public penalty to the state instead of the county, as under Acts 1885.—*Bank of Saginaw v. Peirson* (Mich.) 70 N. W. 901.

§§ 22, 23. Action between shareholder and officers. (Minn.; 1896.)

The business of the defendant corporation was a failure, and was indefinitely discontinued to save further loss. It was in debt, but its plant was not salable for money at a fair valuation. Thereupon the directors, with the approval of all of the shareholders except the plaintiff, in good faith, in the exercise of reasonable business prudence, exchanged a part of the plant for paid-up shares of the capital stock of another corporation, which was a going concern. The articles of incorporation of the defendant company did not authorize such exchange, but the plaintiff was fully advised of the transaction at the time, but not before it was completed, and he in no way dissented or objected to the exchange for more than two years. In the meantime the directors took no steps to rescind the sale, but sold the balance of the plant and paid the debts of the corporation. *Held*, that plaintiff, as such shareholder, could not maintain an action to recover from the directors and the corporation his proportionate share of the property so exchanged.—*Pinkus v. Minneapolis Linen Mills* (Minn.) 67 N. W. 643.

VI. CONTRACTS.

Measure of damages for breach of contract to redeem stock, see "Damages," § 22.
Power of railroad officers as to contracts, see "Railroad Companies," §§ 13, 14.

§ 24. In general.

[a] (Neb.; 1895.)

The president of a loan company, consenting that deeds be made to him as trustee, does not thereby gain a right to use such designation to the injury of his company, the contemplated beneficiary in such deeds.—*Tulleys v. Keller* (Neb.) 63 N. W. 388, 45 Neb. 220.

[b] (Neb.; 1896.)

The purchase of part of the assets of a partnership by a corporation organized by the members of the partnership does not raise a conclusive presumption, against the corporation, that by its purchase it assumed or became liable for the debts of the partnership, notwithstanding the corporation engaged in, and continued to carry on, the business in which the partnership had been engaged.—*Campbell v. Farmers' & Merchants' Bank* (Neb.) 68 N. W. 344.

[c] (Neb.; 1896.)

A petition seeking to charge a newly-organized corporation for the debts of a bank to whose business and property it had succeeded, which did not allege a contractual liability, or that the corporation did not in good faith, in the usual course of business, purchase and pay for the rights and property of the bank, but showed merely that the corporation, by some undisclosed means, acquired the assets, business, and good will of the bank, and that the

bank's business was at one time conducted in the room occupied by the corporation, and by men who had been officers and stockholders of the bank, and who became stockholders and officers of the corporation, was insufficient.—*Austin v. Tecumseh Nat. Bank* (Neb.) 68 N. W. 628.

[d] (S. D.: 1895.)

A corporation, as such, is without power to create a debt by borrowing money with which to purchase its own stock.—*Adams & Westlake Co. v. Deyette* (S. D.) 65 N. W. 471.

§ 25. Delivery.

(S. D.: 1895.)

An unconditional delivery, at the principal office of the corporation, of notes and a collateral mortgage, to its president, acting for the corporation named therein as payee and mortgagee, constitutes a delivery to the corporation, and not to a third person in escrow.—*Merrill v. Hurley* (S. D.) 62 N. W. 958.
6 S. D. 592.

§ 26. Name of corporation.

(Wis.: 1895.)

An assignment by a corporation under a new name which it had adopted by a resolution which it failed to record, as required by Rev. St. § 1774, is valid as against attaching creditors.—*Woodrough & Hanchett Co. v. Witte* 62 N. W. 518, 89 Wis. 537.

§ 27. Use of seal.

[a] (Mich.: 1895.)

Pub. Acts 1893, No. 162, providing that corporations "may have a common seal," does not require a corporate seal; and an appeal bond executed by a corporation, with the usual scroll, is sufficient.—*Sarmiento v. Davis Boat & Oar Co.* (Mich.) 63 N. W. 205.
105 Mich. 300.

[b] (Minn.: 1896.)

The presence of a corporate seal on a deed of assignment executed by a corporation raises the presumption that it was affixed by the proper authority.—*Yanish v. Pioneer Fuel Co.* (Minn.) 66 N. W. 198.
64 Minn. 175.

[c] (Neb.: 1895.)

Since corporations have, as an incident to their general powers, authority to adopt and use a common seal, bonds issued by an irrigation district, under Act March 26, 1895, were not invalid for the reason that, while they are required by the act to be attested by a seal, the act makes no provision for a seal for such districts.—*Board of Directors of Alfalfa Irrigation Dist. v. Collins*, 64 N. W. 1086, 46 Neb. 411.

[d] (Wis.: 1896.)

The seal of a corporation is not essential to the validity of a power of attorney to confess judgment against a corporation.—*Ford v. Hill* (Wis.) 66 N. W. 115.
92 Wis. 188.

§ 28. Contracts before incorporation or organization.

[a] (Iowa: 1895.)

On a showing that, after an ineffective attempt to incorporate, the de facto organization purchased of plaintiff certain merchandise, for the purchase price of which plaintiff was finally compelled to bring suit, and that subsequently new articles were taken out in the same name, and the organization of a de jure corporation effected, it will be presumed that plaintiff's judgment was obtained against the de jure organization.—*Calumet Paper Co. v. Stotts Inv. Co.* (Iowa) 64 N. W. 782.

[b] (Neb.: 1895.)

Where the members of an insolvent partnership incorporated and transferred the assets and business of the firm to the corporation, and the corporation continued the business, the corporation, in the absence of evi-

dence to the contrary, assumed the partnership debts.—*Reed Bros. Co. v. First Nat. Bank* 64 N. W. 701, 46 Neb. 168.

[c] (Neb.: 1896.)

A corporation is not liable on a contract of its subscribers, made by them as such, and by which they bound themselves personally, for the erection of a plant which they proposed to operate after incorporation.—*Davis v. Ravenna Creamery Co.* (Neb.) 67 N. W. 436, 48 Neb. 471.

[d] (Wis.: 1895.)

The fact that a managing officer of a corporation was personally a party to a contract made before its organization does not preclude him from transferring such contract to the corporation, and ratifying it in its behalf after organization.—*Pratt v. Oshkosh Match Co.* 62 N. W. 84, 89 Wis. 406.

[e] (Wis.: 1895.)

A contract made by a promoter is binding on the corporation, if adopted by it after its organization.—*Pratt v. Oshkosh Match Co.* 62 N. W. 84, 89 Wis. 406.

[f] (Wis.: 1895.)

An agent of a corporation may ratify in its behalf a contract made by him while acting as promoter, if the contract is within the scope of the corporate powers.—*Pratt v. Oshkosh Match Co.* 62 N. W. 84, 89 Wis. 406.

[g] (Wis.: 1897.)

After the articles of organization of a corporation were filed for record under the statute, but before the subscribers to its stock met to organize, the signers of the articles could contract for the purchase of material for the use of such corporation in conducting its business.—*Badger Paper Co. v. Rose* (Wis.) 70 N. W. 302.

[h] (Wis.: 1897.)

Even if such contract became that of the corporation by ratification after the subscribers met and organized, the ratification related back to the date of the contract.—*Badger Paper Co. v. Rose* (Wis.) 70 N. W. 302.

§ 29. Ultra vires.

[a] (Iowa: 1896.)

Bonds issued in excess of the limit of indebtedness fixed by the articles of incorporation are valid to the extent of the consideration received for them.—*Peatman v. Centerville Light, Heat & Power Co.* (Iowa) 69 N. W. 541.

[b] (Minn.: 1895.)

One dealing with a corporation is chargeable with notice of its corporate powers, as disclosed by its charter; and where a corporate officer borrowed money in the corporate name, and embezzled the same so that the corporation received no benefit therefrom, the lender can recover of the corporation only to the amount that the corporation could, by its charter, create indebtedness.—*Kraniger v. People's Bldg. Soc.* (Minn.) 61 N. W. 904.
60 Minn. 94.

[c] (Minn.: 1896.)

Debts contracted in excess of the limit provided by the corporation's charter are valid up to the limit, and invalid only as to the excess.—*Oswald v. Minneapolis Times Co.* (Minn.) 68 N. W. 15.

[d] (Neb.: 1894.)

The right of a corporation to hold title to land, or to purchase and hold a tax lien thereon, can only be attacked in a direct proceeding for the purpose, as such purchase and holding are not void, but only voidable.—*Watts v. Gantt*, 61 N. W. 104, 42 Neb. 863.

[e] (Neb.: 1895.)

A mortgage given to a bank could not be attacked by a third person on the ground that it was ultra vires of the bank to take such security, or that the loan made by the bank, which the mortgage secured, was more than 10 per

cent. of the bank's capital. *Smith v. First Nat. Bank* (Neb.) 63 N. W. 796.
45 Neb. 414.

[1] (Neb.; 1896.)

A corporation is liable on a note which it issues in compromise of a doubtful claim based on a policy of insurance which it has issued, and for which it has collected the premium, though it had no power to accept the risk covered by the policy, and the doubt as to the validity of the claim arose in regard to that fact. — *Farmers' Mut. Ins. Co. v. Meese* (Neb.) 69 N. W. 113.

[2] (Wis.; 1897.)

The defendant in an action for damages sustained by reason of an alleged conspiracy to defraud a corporation and others, whose claims it had purchased, cannot object that the purchase of such claims by the corporation was *ultra vires*. — *John V. Farwell Co. v. Wolf* (Wis.) 70 N. W. 283.

Acts of national banks, see "Banks and Banking," § 41.

§ 30. Authority of officers and agents.

[a] (Iowa; 1896.)

A written contract for the sale of a machine, containing a warranty, also provided that "no one has any authority to add to, abridge, or change this warranty in any manner." *Held*, that such provision, if literally construed, would be unreasonable and void, not permitting even the parties by mutual consent to change or waive any of its conditions, but that, under a reasonable construction, the seller being a corporation which could act only through its officers and agents, an agent who had authority to make the contract, sell and start the machine, see that it worked properly, and, if not, to receive it back and return the buyer's notes, would also have authority to waive its formal provisions and agree to a rescission of the sale. — *Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.* (Iowa) 66 N. W. 96.

[b] (Minn.; 1896.)

The president of a railroad corporation has no implied authority to agree with a subcontractor, on the default of the contractor for the construction of a branch of the road, that, if the subcontractor will complete his contract, the corporation will reimburse him for the difference between what the work costs him and his contract price. — *Grant v. Duluth, M. & N. Ry. Co.* (Minn.) 69 N. W. 23.

[c] (Neb.; 1895.)

A railroad company delivered to a construction company its bonds, which had been earned by the latter in building certain lines of road. Afterwards the directors of the construction company, a majority of whom were officers of the railroad company, or controlled by it, voted to sell said bonds, then worth their face, to the stockholders of the construction company, pro rata according to the number of shares held by each, at a discount of 10 per cent. The minority stockholders not being able to pay for the amounts thereof allotted to them, said bonds were, by a subsequent resolution, disposed of at the same rate to the directors interested in the railroad company. No part of the proceeds of said bonds was returned to the last-named company, nor did it profit in any way by the transaction. *Held*, in an action by a minority stockholder of the construction company against the railroad company for an accounting, that the action of the directors named in disposing of said bonds at a discount was not within the scope of their authority as officers of the last-named corporation, and that said company is not liable for the loss thereby occasioned. — *Pitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.) 62 N. W. 899.

44 Neb. 463.

[d] (S. D.; 1897.)

The corporate powers of a corporation being vested in its board of directors by the stat-

ute (Comp. Laws, § 2926), its officers have no power to bind it by contracts not authorized by the directors. — *Des Moines Manufacturing & Supply Co. v. Tilford Milling Co.* (S. D.) 70 N. W. 839.

[e] (S. D.; 1897.)

One contracting with the officers of a corporation, acting in its name, is chargeable with notice of the limit of their powers and authority to bind the corporation. — *Des Moines Manufacturing & Supply Co. v. Tilford Milling Co.* (S. D.) 70 N. W. 839.

§ 31. — Presumption.

[a] (S. D.; 1895.)

In the absence of evidence to the contrary, it is presumed that the managing president of a corporation engaged in loaning money and buying and selling securities has authority as such to transfer a note payable to such corporation. — *Merrill v. Hurley* (S. D.) 62 N. W. 958.
6 S. D. 592.

[b] (S. D.; 1896.)

In the absence of evidence to the contrary, the authority of a managing agent of a nonresident corporation to execute, in the name of his principal, a release and discharge of a chattel mortgage, will be presumed. — *Hilton v. Advance Thresher Co.* (S. D.) 66 N. W. 816.

§ 32. — Contracts of employment.

[a] (Mich.; 1894.)

Where a railroad company paid money pursuant to a contract of settlement with an employé for injuries, it is proper to permit a jury to find that the officers who made the settlement had authority at the same time to agree to employ him in the future at a specified salary. — *Brighton v. Lake Shore & M. S. Ry. Co.* (Mich.) 61 N. W. 550.
103 Mich. 429.

[b] (Mich.; 1896.)

The authority of the superintendent and general manager of an electric light corporation, who is also a director, to bind the company by employing a nurse for a person injured in its service, is a question for the jury. — *Hodges v. Detroit Electric Light & Power Co.* (Mich.) 67 N. W. 564.

§ 33. — Borrowing money and giving notes.

[a] (Iowa; 1896.)

By-laws requiring the president to sign all corporate contracts, and the secretary to issue and countersign all orders on the treasury, do not require the secretary to sign a note made by the corporation, and signed by the president. — *Peatman v. Centerville Light, Heat & Power Co.* (Iowa) 69 N. W. 541.

[b] (Minn.; 1895.)

Where the secretary of a corporation had for years managed the corporate business, borrowed money in its name, executed and issued notes previously signed in blank by the president, and paid them with corporate drafts on the treasurer, it justifies the jury in finding that the secretary had authority to borrow money for the corporation, and execute notes therefor in its name. — *Kraniger v. People's Bldg. Soc.* (Minn.) 61 N. W. 904.
60 Minn. 94.

[c] (Minn.; 1895.)

A president and general manager of a corporation, having full control of the management of its business, and authority to handle and disburse its funds, has implied authority to borrow or provide funds with which to pay debts of the corporation maturing in the due course of business, without express authorization by the by-laws or by resolution of directors. — *Rosemond v. Northwestern Antographic Register Co.* (Minn.) 64 N. W. 925.
62 Minn. 374.

[d] (Minn.; 1897.)

A bona fide purchaser for value of accommodation paper of a corporation which has general power to deal in mercantile paper in the course of its business, made by an officer having apparent power to issue it, may recover thereon.—In re Jacoby-Mickolas Co. (Minn.) 70 N. W. 1085; American Trust & Savings Bank v. Gluck, 1d.

[e] (N. D.; 1895.)

A resolution of the directors of a corporation indebted to its secretary and treasurer, whereby notes payable to the corporation were delivered to said officer to secure his claim, did not authorize the officer to indorse the papers in the name of the corporation for his individual use.—Security Bank v. Kingsland (N. D.) 65 N. W. 697.

5 N. D. 263.

§ 34. — Authority to execute mortgage.**[a] (Mich.; 1895.)**

A chattel mortgage executed by the president and secretary of an insolvent corporation, with the knowledge and consent of all the stockholders, is valid.—Kalamazoo Spring & Axle Co. v. Winans, Pratt & Co. (Mich.) 64 N. W. 23.

[b] (Neb.; 1895.)

Where a mortgage of a corporation contained a copy of resolutions adopted by the directors, showing authority for the making of such mortgage, no further proof is necessary to a prima facie showing of authorization by the directors.—Hayden v. Lincoln City Electric Ry. Co., 62 N. W. 73, 43 Neb. 680.

§ 35. — Execution of appeal bond.**(Mich.; 1895.)**

One who has the general management of the affairs of a corporation is authorized to execute an appeal bond for it.—Sarmiento v. Davis Boat & Oar Co. (Mich.) 63 N. W. 205.

105 Mich. 300.

§ 36. — Ratification.**[a] (Iowa; 1895.)**

The possession by a corporation of a written contract signed by its secretary, and the payment of money thereunder by such corporation, is a ratification of the contract.—Wright v. Farmers' Mut. Live-Stock Ins. Ass'n (Iowa) 65 N. W. 308.

[b] (Iowa; 1897.)

The ratification of an unauthorized purchase in behalf of a corporation is not affected by the corporation's subsequently seeking to avoid a liability resulting from the ratification, on the ground that such a purchase is ultra vires.—White v. G. W. Marquardt & Son (Iowa) 70 N. W. 193.

[c] (Mich.; 1896.)

Where a corporation obtains and keeps the proceeds of an unauthorized contract made by one of its officers, it is estopped to repudiate the contract.—Clement, Bane & Co. v. Michigan Clothing Co. (Mich.) 68 N. W. 224.

[d] (Neb.; 1896.)

A note executed by stockholders of a corporation in the corporate name, without authority of the directors, becomes a corporate liability, if ratified by the corporation by permitting judgment to go against it on the note.—Nebraska Nat. Bank v. Ferguson (Neb.) 68 N. W. 370.

[e] (Neb.; 1896.)

Absence of evidence of authorization by the directors of the making by a corporation of the contract under which defendant claimed, or of power delegated to the president, who executed the contract in behalf of the corporation, to execute the same, did not preclude a recovery on the contract against the corporation, where it did not appear that the corporation was one having a seal, and the contract was

not required to be sealed, and the services to be performed under the contract were suitable in the business in which the corporation was engaged, and the corporation permitted work to be done thereunder for several months, when it notified the contractor to quit in accordance with the contract, and on the trial claimed relief under the contract.—Omaha Consol. Vinegar Co. v. Burns (Neb.) 68 N. W. 492.

Ratification of contract made before organization, see ante, § 28.

§ 37. Officer acting for both parties.**(Neb.; 1895.)**

Persons who are directors of two corporations have no implied authority to bind either by contracts with respect to subjects in which their interests are adverse; and all such agreements, unless subsequently ratified, may be avoided at the suit of nonconsenting stockholders.—Fitzgerald v. Fitzgerald & Mallory Const. Co. (Neb.) 62 N. W. 809.

44 Neb. 463.

VII. LIABILITY FOR TORTS.**§ 38. False representations.****(Minn.; 1894.)**

Where the president of a bank purchased increase capital stock by the use of funds of a city of which he was treasurer, the bank is not responsible for his false representations to a third person purchasing the stock of him.—Dunn v. State Bank (Minn.) 61 N. W. 27.

59 Minn. 221.

VIII. ACTIONS.

By or against foreign corporation, see post, §§ 106, 107.

By stockholders in behalf of corporation, see post, § 68.

On subscription to stock, see post, §§ 52, 53.

To compel delivery of stock, see post, § 45.

To dissolve or to forfeit franchise, see post, §§ 101-103.

Service of process, see "Writs and Notice of Snits," §§ 3-14.

§ 39. After surrender of charter.**(Wis.; 1895.)**

A corporation which has surrendered its charter cannot be sued.—Combes v. Milwaukee & M. R. Co., 62 N. W. 89, 89 Wis. 297.

§ 40. Suggestion of dissolution—Who may make.**(Wis.; 1895.)**

When, in a suit against a corporation, one who had been secretary thereof intervenes, and shows that the charter has been surrendered, and accepted by the state, an order authorizing service of summons on the corporation, and the service itself, will be set aside.—Combes v. Milwaukee & M. R. Co. (Wis.) 62 N. W. 89, 89 Wis. 297.

§ 41. Pleading.**(S. D.; 1897.)**

Where plaintiff alleges that it is a corporation, its corporate existence is not put in issue, under Comp. Laws, § 2908, by defendant's averring "that he has no knowledge or information sufficient to enable him to form a belief" as to the truth of the allegation, "and therefore he denies it."—Northwestern Cordage Co. v. Galbraith (S. D.) 70 N. W. 1048.

§ 42. — Verification.**(Neb.; 1895.)**

Under Code Civ. Proc. § 120, subd. 5, providing that the verification of a pleading for a corporation "may be made by the attorney, or

any officer or agent upon whom a summons could be legally served," such verification may be made by the corporation's attorney at law, irrespective of his right to accept service of summons for the company.—*Beatrice Rapid-Transit & Power Co. v. German Nat. Bank* (Neb.) 63 N. W. 374.

45 Neb. 147.

§ 43. Burden of proving corporate existence.

(Neb.; 1897.)

The plaintiff sued as a corporation. The defendants, in their answer, specifically denied its corporate existence. *Held*, that the answer cast upon the plaintiff the burden of proving such existence.—*Davis v. Nebraska Nat. Bank* (Neb.) 70 N. W. 963.

IX. STOCK.

Liability of subscribers to creditors, see post, §§ 73, 74.

Power of corporation to purchase stock in other companies, see ante, § 4.

Conversion of certificates, see "Trove and Conversion," § 8.

Garnishing certificates of stock in foreign company, see "Garnishment," § 4.

In bank, see "Banks and Banking," § 1.

Taxation, see "Taxation," § 11.

1. IN GENERAL.

§ 44. Contract of subscription.

[a] (Minn.; 1895.)

Subscribers who had paid for their stock in order to induce subscribers who had repudiated their subscriptions to take the stock subscribed for, agreed with one of the latter, without the knowledge of the others, that if he would take the stock subscribed for by him they would take the stock and give him a note for the price thereof. *Held*, that the agreement was not in fraud of the other repudiating subscribers, and the note given such subscriber was, hence, valid.—*Traphagen v. Sager* (Minn.) 65 N. W. 633.

63 Minn. 317.

[b] (Neb.; 1895.)

Defendant signed an instrument in writing reciting: "For value received, we, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our respective names in the L. S. M. Co., at fifty dollars per share; one-fourth of the amount so subscribed * * * to be paid when the foundation of the building is laid, one-fourth when the building is under roof, and the balance on call of the directors." *Held*, that defendant did not become a purchaser of stock, but merely a subscriber to the capital stock.—*Lincoln Shoe Manuf'g Co. v. Sheldon* (Neb.) 62 N. W. 480.

44 Neb. 279.

[c] (S. D.; 1897.)

The condition of a stock subscription contract that 500 shares should be taken "under the terms hereof" is not performed by the taking of subscriptions aggregating 500 shares, some of which were under different terms.—*Johnson v. Schar* (S. D.) 70 N. W. 838.

[d] (S. D.; 1897.)

The condition is not, as a matter of law, waived by paying part of the subscription and giving a note for the balance, without knowledge that the full amount had not been subscribed.—*Johnson v. Schar* (S. D.) 70 N. W. 838.

§ 45. Issuance and delivery.

[a] (Minn.; 1896.)

On the refusal of a corporation to issue a certificate for stock to one entitled thereto, the person so entitled may recover the value of

the stock. *Minor v. Home Savings & Loan Ass'n* (Minn.) 67 N. W. 346.

61 Minn. 509.

[b] (Minn.; 1897.)

Gen. St. 1894, § 3115, providing that corporations shall not issue shares for less than the "par value of the shares first issued," renders void an agreement between the subscribers that, for each share paid, a certificate for two or more shares shall be given.—*Rogers v. Gross* (Minn.) 69 N. W. 891.

[c] (Wis.; 1895.)

A stockholder's right of action to compel delivery of his stock does not accrue till it denies his right to them.—*Wells v. Green Bay & M. Canal Co.* (Wis.) 64 N. W. 69.

90 Wis. 442.

[d] (Wis.; 1895.)

In an action to compel a corporation to deliver shares of stock, the directors, though not necessary, are proper parties.—*Wells v. Green Bay & M. Canal Co.* (Wis.) 64 N. W. 69.

90 Wis. 442.

§ 46. Increase of capital stock.

[a] (Mich.; 1896.)

An incorporated chamber of commerce may amend its articles of association, increasing its capital stock, by filing the amended articles with the secretary of state, as provided for by How. Ann. St. § 4866.—*Detroit Chamber of Commerce v. Secretary of State* (Mich.) 67 N. W. 897.

[b] (Mich.; 1896.)

A chamber of commerce incorporated under Pub. Acts 1863, No. 166, and authorized to take and hold property not to exceed a certain amount, which was increased by Act 1893, is authorized to increase its capital stock and issue certificates of stock.—*Detroit Chamber of Commerce v. Secretary of State* (Mich.) 67 N. W. 897.

[c] (Mich.; 1896.)

A going corporation, authorized to increase its capital stock, may, in order to raise money, made necessary by its financial embarrassment, as an inducement to persons to purchase its mortgage bonds at their face value, give bonus stock with the bonds, without affecting the validity of the bonds as against existing or subsequent creditors of the corporation.—*Dummer v. Smedley* (Mich.) 68 N. W. 260.

[d] (Minn.; 1897.)

Gen. St. 1894, § 2498, provides that no increase of stock by a corporation shall be valid "until the whole amount of the increase proposed is paid in." A bank, under authority of its charter, increased its capital stock, part of the new stock being purchased by the president with misappropriated city funds, of which he was custodian, and transferred to third parties. *Held*, that the issue was voidable only, and not void.—*Olson v. State Bank* (Minn.) 69 N. W. 904.

§ 47. Payment for.

[a] (Wis.; 1895.)

Stock of a corporation will be held full paid where the statute under which it was incorporated provided that the purchasers of certain property might become a corporation by filing a certificate declaring the amount of its capital stock and the number of shares into which it should be divided, and the corporators executed a certificate stating their respective contributions to the purchase of the property conveyed to the corporation, the amount of the capital stock, and the number of shares, and the number of shares to which each was entitled, which was that proportion of all the shares which his contribution bore to the entire contribution, and there was no intimation there or elsewhere that more was to be paid on them.—*Wells v. Green Bay & M. Canal Co.* (Wis.) 64 N. W. 69.

90 Wis. 442.

[b] (Wis.: 1895.)

As between a corporation and its stockholders, it cannot be claimed that the property which they conveyed to it was not sufficient consideration for issue of the stock.—*Wells v. Green Bay & M. Canal Co.* (Wis.) 64 N. W. 69. 90 Wis. 442.

Effect of payment on liability for debts of corporation, see post, § 78.

§ 48. Lien of corporation—Priorities.**[a] (Iowa: 1896.)**

Code, § 1059, subd. 7, authorizes corporations to establish by-laws, and make all necessary regulations. Section 1076 provides that a copy of the by-laws, with the names of the officers attached, must be posted in the principal places of business. Section 1078 provides that the transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company. *Held*, that where an officer of a bank and holder of a certificate of stock which recited that it was "subject to its by-laws and articles of incorporation," and that it was transferable only on the books of the bank, transferred such stock by assignment only, when he was indebted to the bank, and before the bank had posted any copy of its by-laws, and the transferee had no actual knowledge of a by-law providing that the bank should have a lien on all stock as security for any indebtedness to the bank, such transferee took the stock free of any lien for the indebtedness of the stockholder.—*Des Moines Nat. Bank v. Warren County Bank* (Iowa) 66 N. W. 154.

[b] (Iowa: 1896.)

Where the holder of stock assigned the same to defendant as collateral, the corporation being notified thereof, but no actual transfer being made on the corporation books, and afterwards the stock was assigned to the corporation as security for the registered holders' indebtedness, the corporation having had actual notice of the transfer to defendant cannot maintain a superior claim to the stock, on the ground that no transfer was formally made on the books as required by a by-law providing that no transfer shall be valid unless so made.—*Des Moines Loan & Trust Co. v. Des Moines Nat. Bank* (Iowa) 66 N. W. 914.

[c] (Iowa: 1896.)

In an action by a corporation to enforce a lien on shares of its capital stock under a by-law providing that no transfer of stock should be made when the registered holder is indebted to the company, defendant testified that he told officers of the plaintiff company that he was about to make a loan on certain stock, and asked information as to its value, and that no claim of lien was then made. Plaintiff's officers testified that they had no recollection of any such disclosure. The holder of the stock testified that he told an officer of plaintiff that he was about to pledge the stock, and that no lien was asserted at that time. The stock so transferred was presented to plaintiff as notice of the transfer, and an indorsement made on the stubs in the stock book stating that the stock was held by defendant as collateral. *Held*, that plaintiff was estopped from now claiming any lien under the by-law.—*Des Moines Loan & Trust Co. v. Des Moines Nat. Bank* (Iowa) 66 N. W. 914.

[d] (Minn.: 1897.)

A corporation knowing of the transfer of stock, though it is not made on the books, cannot claim a lien on the stock for a subsequent indebtedness of the transferor to the corporation.—*Prince Inv. Co. v. St. Paul & S. C. Land Co.* (Minn.) 70 N. W. 1079.

Lien of bank on stock, see "Banks and Banking," § 1.

§ 49. Right to new certificate—Indemnity.**(Minn.: 1894.)**

Where plaintiff's certificate of corporate stock has been lost more than 12 years, dur-

ing which time no other claimant for the stock or the dividends on it has appeared, *held*, that plaintiff is entitled to a new certificate without giving the bond of indemnity demanded by defendant.—*Guilford v. Western Union Tel. Co.* (Minn.) 61 N. W. 324.

59 Minn. 332.

Compelling issuance by foreign corporation, see post, § 107.

§ 50. Assessments.**[a] (Wis.: 1895.)**

Directors cannot make valid calls or assessments on the common stock of a corporation, where the statute under which it was incorporated gave no authority to raise any capital other than that originally bought and contributed by the corporators, except by preferred or special stock, and no such special authority was given by the stockholders, either in the certificate of incorporation, by means of which the statute authorized them to incorporate, or otherwise.—*Wells v. Green Bay & M. Canal Co.* (Wis.) 64 N. W. 69.

90 Wis. 442.

[b] (Wis.: 1896.)

Under Rev. St. § 1754, providing that, unless otherwise expressly provided by law or the articles of organization, the directors of any corporation may call in the subscriptions to the capital stock by installments by giving such notice thereof as the by-laws shall prescribe, to render a call for an installment of stock enforceable, in the absence of any provision of law or of the articles of association fixing the time for its payment, a notice to be given must be prescribed by a by-law, or resolution or regulation having the effect of a by-law, as to such call, uniform as to all stockholders.—*Germania Iron Min. Co. v. King* (Wis.) 69 N. W. 181.

Liability of transferee, see post, § 59.

2. LIABILITY ON SUBSCRIPTION TO STOCK—ENFORCEMENT.**§ 51. Estoppel to deny validity of organization.****(Iowa: 1894.)**

A subscriber to a corporation's capital stock, and promoter of the corporation, cannot set up defects in the organization of the corporation in defense to an action for the unpaid balance of his subscription.—*State Bank Building Co. v. Peirce* (Iowa) 61 N. W. 426.

92 Iowa, 668.

§ 52. Actions on subscriptions.**[a] (Neb.: 1895.)**

It is no defense to an action on a contract of subscription to the capital stock of a manufacturing corporation, that all the stock authorized by the articles of incorporation had not been subscribed.—*Lincoln Shoe Manuf'g Co. v. Sheldon* (Neb.) 62 N. W. 480.

44 Neb. 279.

[b] (Wis.: 1896.)

A corporation (creditors not being interested) cannot recover on a subscription for stock, where, after it was made, the corporation, with the consent of the subscriber, sold out its entire authorized stock, including that subscribed for by him, and received full pay therefor.—*Level Land Co. No. 3 v. Hayward* (Wis.) 69 N. W. 567.

§ 53. — Pleading.**[a] (Minn.: 1896.)**

A complaint in an action to enforce payment of a subscription for stock which, though it fails to allege that all the shares were subscribed, avers that the corporation was duly organized; that defendant paid the required admission fee on each share, and a certain number of monthly installments thereon; and that he received and retained a duly-executed stock cer-

agents, and was credited with a dividend on its shares, sets forth a cause of action.—*Duluth Inv. Co. v. Witt* (Minn.) 65 N. W. 456.
63 Minn. 528.

[b] (Neb.; 1896.)

When defendant, in an action on a subscription to corporate stock, alleges by way of counterclaim that he was induced to make a subscription for the benefit of the corporation on the faith of a contemporaneous oral promise that an amount of capital stock equal to the subscription would be issued to him, he must aver the payment or a legal tender of the amount of such subscription to entitle him to recover for the failure to issue the stock.—*Nebraska Exposition Ass'n v. Townley* (Neb.) 65 N. W. 1062, 46 Neb. 893.

§ 54. Rescission, cancellation, or release.

[a] (Minn.; 1896.)

Where a person agreed to take a certain amount of stock in a corporation just formed, to be paid for as called by the directors, and the shareholders other than such person immediately commenced business, but ignored the subscription for over two years before they put the corporation in position to demand payment thereof, the subscriber was released by reason of the delay.—*Carter, Rittenberg & Hainlin Co. v. Hazzard* (Minn.) 68 N. W. 74.

[b] (Neb.; 1896.)

The mere mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed for by him.—*Hards v. Platte Val. Imp. Co.*, 65 N. W. 781, 46 Neb. 709.

[c] (Neb.; 1896.)

The plaintiff, a subscriber to the stock of a foreign building and loan association, sued to recover money paid for such stock, alleging a rescission of his contract of subscription on account of the false and fraudulent representations of the defendant's agent. *Held*, in the absence of evidence to the contrary, that said stock is presumed to be of some value, and its surrender is a condition precedent to the right to rescind.—*Building & Loan Ass'n v. Cameron* (Neb.) 66 N. W. 1169.

[d] (Neb.; 1896.)

Breach of a covenant of a foreign building and loan association to maintain at the home of a stockholder a local board of directors would not entitle the stockholder to rescind his subscription, since the stipulation was collateral to the main consideration for the subscription.—*American Building & Loan Ass'n v. Rainbolt* (Neb.) 67 N. W. 493.
48 Neb. 424.

[e] (Neb.; 1897.)

The right to rescind an issue of bank stock for fraud is waived by the bank's acceptance of a surrender of the certificate by a pledgee of the stock, and issue of a new one in its place to the pledgee.—*Tecumseh Nat. Bank v. Russell* (Neb.) 69 N. W. 763.

§ 55. — Subscription obtained by misrepresentation or fraud.

[a] (Mich.; 1895.)

Defendant united with others to form a corporation, a preliminary subscription being obtained by a committee, all of the members of which became stockholders. The subscriptions were followed by the adoption and signing of articles of association. *Held*, that defendant could not defend an action by the corporation for his stock subscription by showing fraudulent representations by the committee, whereby he was induced to make the subscription and become an incorporator.—*St. Johns Manuf'g Co. v. Menger* (Mich.) 64 N. W. 3.

[b] (Neb.; 1896.)

A stockholder who has for three years acted as a director of a corporation, taking an active part in its management, with notice of its business methods and financial condition,

cannot thereafter, in an action against such corporation, recover the money originally paid for his stock on the ground that his subscription therefor was procured by means of the fraudulent representation of the defendant's agents.—*American Building & Loan Ass'n v. Itainbolt* (Neb.) 67 N. W. 493.
48 Neb. 431.

[c] (Neb.; 1896.)

The fact that a building and loan association, in order to induce plaintiff to subscribe to its stock, represented that its affairs should be supervised by an advisory board, consisting of well-known citizens; that its representations were false and fraudulent, and known by it to be such; and that plaintiff subscribed for the stock in reliance on the same,—did not give plaintiff a right to rescind his subscription, where the functions of the advisory board were undefined by the charter or by-laws, and it would be answerable to no one for its actions, since no damage thereby resulted to the stockholder.—*American Building & Loan Ass'n v. Bear* (Neb.) 67 N. W. 500.
48 Neb. 455.

§ 56. Enforcement in equity—Remedy at law.

(Iowa; 1896.)

That stock was issued to the corporation's secretary at his instance, for which he has paid but 25 per cent. of the par value, is not a ground for equitable relief, the company and its creditors having an ample remedy to recover the balance due.—*Peatman v. Centerville Light, Heat & Power Co.* (Iowa) 69 N. W. 541.

§ 57. Forfeiture of shares.

(Minn.; 1895.)

Under Gen. St. 1894, §§ 3412, 3413, relating to the forfeiture of corporate stock, a building and loan association organized under Gen. St. 1894, §§ 2794–2912, cannot, by virtue of its by-laws or contract with its members, forfeit absolutely to its own use the shares of a member who makes default in the payment of installments and dues on his shares; but it must sell such shares, and, after indemnifying itself from the proceeds of sale, pay the balance, if any, to such member.—*Henkel v. Pioneer Savings & Loan Co. of Minneapolis* (Minn.) 63 N. W. 243.
61 Minn. 35.

3. TRANSFER.

Effect on stockholders' liabilities for debts, see post, § 77.

§ 58. Entry on books.

[a] (Minn.; 1897.)

A transfer of stock is not invalid because not entered on the corporate books.—*Prince Inv. Co. v. St. Paul & S. C. Land Co.* (Minn.) 70 N. W. 1079.

[b] (Minn.; 1897.)

Gen. St. 1894, § 2799, providing that the stock of a manufacturing corporation shall be transferable only on the corporate books, is solely for the protection of the corporation, and does not invalidate a transfer which is not entered on the books.—*Prince Inv. Co. v. St. Paul & S. C. Land Co.* (Minn.) 70 N. W. 1079.

[c] (Minn.; 1897.)

Where a corporation has no lien on the stock of a member for debts due to it, the transfer of stock, though not made on the books, is so far effectual that a complete transfer on the books may be compelled by the transferee.—*Prince Inv. Co. v. St. Paul & S. C. Land Co.* (Minn.) 70 N. W. 1079.

§ 59. Liability of transferee.

(Minn.; 1895.)

The plaintiff corporation did not keep the stock book required by Gen. St. 1894, §§ 2599,

2796, 2799, but kept a book of certificates, on the stubs of which were entered the names of the certificate holders, and the date and amount of each certificate, and also kept a stock account in the ledger with each stockholder. The certificate in suit was bought at an execution sale by defendant, who notified plaintiff that the same should be transferred to him. Plaintiff refused to make the transfer because of an unpaid call due on the stock from the execution debtor, but subsequently collected the call, and entered in the stock account with such debtor that the stock was sold under execution sale to defendant. Defendant was not notified either of the collection of the call or of the entry. Subsequently a call was made, and a special stockholders' meeting held, of both of which defendant was notified, and defendant took part in the meeting. *Held*, that defendant was liable for subsequent calls on said stock made by a subsequently appointed receiver of the corporation.—*Basting v. Northern Trust Co.* (Minn.) 63 N. W. 721.

61 Minn. 307.

§ 60. Effect of transfer.

(Mich.; 1895.)

Defendants, the organizers of a corporation, issued to themselves the stock as fully paid, and guarantied to subsequent holders that the stock should be "nonassessable." Stockholders were, by statute, liable for the corporate debts, in addition to their stock, to an amount equal to their stock. *Held*, that defendants were liable to a subsequent owner of the stock on account of payments made by him to satisfy the extra statutory liability, as well as those made on the stock itself.—*Omo v. Bernart* (Mich.) 65 N. W. 622.

§ 61. — Equitable pledge.

(Wis.; 1895.)

An equitable pledge of stock may be made by a delivery of it indorsed in blank by its owner, as collateral security, without an entry of a transfer of the legal title thereto upon the books of the corporation, as prescribed by Rev. St. § 1751.—*Plankinton v. Hildebrand*, 61 N. W. 839, 89 Wis. 209.

§ 62. Bona fide purchasers.

[a] (Neb.; 1897.)

One who has agreed to transfer certain property in consideration of the receipt by him of a stock certificate is not a purchaser of the certificate for value until he has made the transfer.—*Tecumseh Nat. Bank v. Russell* (Neb.) 69 N. W. 763.

[b] (Neb.; 1897.)

One purchasing stock knew at the time that it was pledged to a third person, and he received title to the stock by means of an assignment to a third person, who assigned it to him, both assignments reciting that the pledgee still held it; nor was the certificate produced. *Held*, that the purchaser was not an innocent one as against one whose funds were wrongfully used by the vendor to pay off the pledgee.—*Tecumseh Nat. Bank v. Russell* (Neb.) 69 N. W. 763.

X. MEMBERS AND STOCKHOLDERS.

Action between shareholder and officers, see ante, §§ 22, 23.

1. RIGHTS IN GENERAL.

§ 63. Who are members or stockholders.

[a] (Minn.; 1896.)

A person may be a stockholder in a corporation, though certificates for stock have never been issued to him, and no formal action was taken at a directors' or stockholders' meet-

ing whereby he became a stockholder.—*Holland v. Duluth Iron-Mining & Development Co.* (Minn.) 68 N. W. 50.

[b] (Neb.; 1896.)

The mere mismanagement of the affairs of a corporation by its officers or agents does not warrant the withdrawal therefrom of stockholders, or the repudiation of the obligations assumed by them as such.—*American Building & Loan Ass'n v. Rainbolt* (Neb.) 67 N. W. 493.

48 Neb. 434.

[c] (Wis.; 1897.)

One who subscribes to stock is not a stockholder until the subscription is presented to and accepted by the corporation.—*Badger Paper Co. v. Rose* (Wis.) 70 N. W. 302.

§ 64. Evidence of membership.

(Minn.; 1896.)

When the name of an individual appears on the stock book of a corporation as a stockholder, though the book has not been kept in any particular manner and does not contain the entries prescribed by statute, the presumption is that he is the owner of the stock, so that the burden is upon him to show otherwise, if he claims it.—*Holland v. Duluth Iron-Mining & Development Co.* (Minn.) 68 N. W. 50.

§ 65. Meetings—Judicial review of proceedings.

(Mich.; 1896.)

Where the election by a corporation of directors is attacked, and a re-election is sought to be enforced in accordance with the minority law of 1885 (How. Ann. St. § 4885a), the directors, in whom is vested the duty to call meetings for the election of officers, and whose right to the office is attacked, are the proper parties defendants, and not the president and secretary of the corporation.—*Dusenbury v. Looker* (Mich.) 67 N. W. 986.

§ 66. Rights of minority of stockholders.

[a] (Iowa; 1896.)

The policy of a corporation cannot be dictated by a minority of the stockholders.—*Peatman v. Centerville Light, Heat & Power Co.* (Iowa) 69 N. W. 541.

[b] (Iowa; 1897.)

The minority stockholders of a corporation cannot dictate its policy, and no interference with its management in their behalf is justified unless absolutely necessary to obtain justice.—*Wallace v. Pierce-Wallace Pub. Co.* (Iowa) 70 N. W. 216.

[c] (N. D.; 1895.)

Where a contract to give a minority stockholder the right to control the stock of another, and vote it at a stockholders' meeting, is entered into to secure control of the corporation, and in reliance thereon the promisee suffers to pass beyond his control stock which, in connection with stock owned by him, would give him control of the corporation, and thereafter the promisor, by threatening to sell his stock to the opposing faction, and thus give it control of the corporation, compels the promisee, in order to secure such stock, to purchase it at a price in excess of its market value, the contract of purchase cannot be rescinded by the promisee.—*Gage v. Fisher* (N. D.) 65 N. W. 809.

5 N. D. 297.

Minority representation in management, vested rights of corporation, see "Constitutional Law," § 36.

§ 67. Right to inspect books and papers.

[a] (Iowa; 1895.)

To entitle a stockholder of a corporation to examine the original papers and vouchers, other than those which he is entitled by statute to inspect, he must show that some property

right is involved, or that some interest is in question, to settle which an inspection of such papers is essential.—*Ellsworth v. Dorwart* (Iowa) 63 N. W. 588.

[b] (Iowa; 1895.)

A stockholder is entitled to have his attorney and a stenographer accompany and aid him when he decides to examine the books of the corporation.—*Ellsworth v. Dorwart* (Iowa) 63 N. W. 588.

[c] (Iowa; 1895.)

Under Code, § 1279, providing that any person may inspect certain books of a corporation, the refusal of the court of all relief, in mandamus proceedings by a stockholder to compel the officers to permit him to examine such books, merely because petitioner is unfriendly towards the president of the corporation, is an abuse of discretion.—*Ellsworth v. Dorwart* (Iowa) 63 N. W. 588.

[d] (Iowa; 1895.)

The fact that a stockholder, in demanding permission to inspect the books of the corporation, asks to see some that he is not entitled to see, does not justify a refusal to permit him to inspect any of the books.—*Ellsworth v. Dorwart* (Iowa) 63 N. W. 588.

§ 68. Suing in behalf of corporation.

[a] (Mich.; 1897.)

That one has become the sole owner of the stock of a private corporation does not entitle him to sue in his own name on a claim belonging to the corporation.—*Randall v. Dudley* (Mich.) 69 N. W. 729.

[b] (S. D.; 1896.)

In an action by stockholders in behalf of the corporation to cancel contracts entered into by the corporation by its board of directors, a complaint which shows that the defendants charged with wrongdoing in entering into the contract, or some of them, constitute a majority of the directors at the commencement of the suit, or that a majority of the directors are under the control of the wrongdoing defendants, so that a refusal of the directors, if requested to bring suit for the corporation to cancel the contract, may be inferred with reasonable certainty, sufficiently shows the stockholders entitled to maintain the action, without averring notice, demand, or express refusal.—*Loftus v. Farmers' Shipping Ass'n* (S. D.) 65 N. W. 1076.

2. LIABILITY FOR CORPORATE DEBTS —ENFORCEMENT.

Authority of receiver, see post, § 88.

Liability as partners, see ante, § 11.

Enforcing liability of stockholders in bank, see "Banks and Banking," §§ 31, 39.

§ 69. Rights and liabilities.

[a] (Minn.; 1897.)

In an action to enforce the double liability of stockholders, those who have received unpaid certificates under a void agreement that, for each share paid, five shares shall be issued, have no equitable rights as against stockholders who have paid for their stock, but have not received nor applied for certificates.—*Rogers v. Gross* (Minn.) 69 N. W. 894.

[b] (Minn.; 1897.)

In a suit to enforce the double liability of the stockholders of an insolvent corporation who had entered into an illegal agreement that, for each share of stock paid, the stockholder should receive a certificate for five shares, a stockholder who has not acted on the agreement by taking the certificate is liable only for the par value of the shares actually subscribed and paid for by him, and not for five times that amount.—*Rogers v. Gross* (Minn.) 69 N. W. 894.

§ 70. Debts to which liability extends.

(Wis.; 1896.)

Rev. St. § 1769, providing that the stockholders of every corporation, other than railroad corporations, shall be personally liable for all debts that may be due and owing to laborers for services performed for such corporation, is not restricted in its operation to services performed in the state of Wisconsin.—*Glockus v. Hollister Min. Co.* (Wis.) 66 N. W. 398.

92 Wis. 325.

§ 71. Constitutional and statutory provisions.

[a] (Minn.; 1895.)

The only remedy for enforcing the constitutional or double liability of stockholders of a corporation is that provided by Gen. St. 1878, c. 76 (Gen. St. 1891, §§ 5889-5911).—*Winnipeg Paper Mills v. Northwestern Printing & Publishing Co.* (Minn.) 63 N. W. 1024.

61 Minn. 373.

[b] (Minn.; 1895.)

Gen. St. 1894, § 2600, subd. 2 (Gen. St. 1878, c. 34, § 9, subd. 2), providing that private property of stockholders of a corporation organized under that chapter shall be liable for corporate debts, on a failure by the corporation to comply substantially with the provision as to organization and publicity, refers only to a violation of Gen. St. 1894, §§ 2593, 2594 (Gen. St. 1878, c. 34, §§ 3, 4), relating to filing and publishing the articles of incorporation.—*First Nat. Bank v. Harper* (Minn.) 63 N. W. 1079; *National New Haven Bank v. Northwestern Guaranty Loan Co.*, Id.

61 Minn. 375.

[c] (Minn.; 1896.)

So far as Gen. St. 1894, § 2829, attempts to exempt from the liability imposed by Const. art. 10, § 3, providing that a stockholder of a corporation, except one organized to carry on a mechanical or manufacturing business, shall be liable to the amount of stock held by him, the stockholders of a corporation organized for the purpose of "buying, selling, * * * and dealing in mineral lands," as provided by section 2827, it is unconstitutional.—*Anderson v. Anderson Iron Co.* (Minn.) 68 N. W. 49.

[d] (Neb.; 1897.)

Gen. St. 1873, c. 11, §§ 136, 139, relating to the liability of corporate stockholders, was repealed by Act April 6, 1891.—*Kleckner v. Turk* (Neb.) 63 N. W. 469.

45 Neb. 176.

[e] (Neb.; 1896.)

The liability imposed by Comp. St. c. 16, § 139, as originally enacted, upon stockholders of corporations imperfectly formed, was penal in character; and rights of action thereunder, not reduced to judgment, abated with the repeal of said section, without a saving clause, by Laws 1891, c. 13.—*Hogue v. Capital Nat. Bank* (Neb.) 66 N. W. 1036.

47 Neb. 929.

§ 72. Corporations engaged in manufacturing or in mechanical business.

[a] (Minn.; 1895.)

A corporation formed for the purpose of printing and publishing newspapers, conducting a job and book printing business, lithographing, electrotyping, stereotyping, and book binding, is not an exclusively manufacturing corporation, so as to exempt its stockholders from liability to creditors on their paid-up stock.—*Oswald v. St. Paul Globe Pub. Co.* (Minn.) 61 N. W. 902.

60 Minn. 82.

[b] (Minn.; 1895.)

The stockholders of a corporation incorporated to acquire and operate electric plants, supplies, and appliances, as well as to manufacture them, are liable to the amount of their

stock for corporate debts.—Anchor Inv. Co. v. Columbia Electric Co. (Minn.) 63 N. W. 1109.
61 Minn. 510.

[c] (Minn.: 1895.)

A corporation organized for the buying of grain and the manufacturing and distilling of the same into liquor, the buying and selling and dealing in liquor, and the conducting of one or more distilleries for that purpose, was not in the manufacturing business exclusively, and its stockholders were hence liable for its debts to the amount of their stock.—St. Paul Barrel Co. v. Minneapolis Distilling Co. (Minn.) 64 N. W. 1143.

62 Minn. 448.

[d] (Minn.: 1896.)

The general nature of the business of the defendant corporation, as declared by its articles of incorporation, is the manufacture or brewing of lager beer, and selling and disposing of the same, together with such other business as may be incidental thereto. *Held*, that it is exclusively a manufacturing corporation, and its stockholders are not liable for its debts beyond the amount due on their stock subscriptions.—Hastings Malting Co. v. Iron Range Brewing Co. (Minn.) 67 N. W. 652.

[e] (Minn.: 1896.)

A corporation engaged in the mining of iron ore is engaged in a "mechanical business," within Const. art. 10, § 3, providing that stockholders of corporations, excepting those organized for carrying on a manufacturing or mechanical business, shall be liable to the amount of stock held by them.—Cowling v. Zenith Iron Co. (Minn.) 68 N. W. 48.

[f] (Minn.: 1896.)

Gen. St. 1894, § 2834, providing that any corporation organized under the act of which it forms a part may hold stock in any other corporation, does not preclude a corporation organized under that act from being one whose stockholders are exempt from the liability imposed by Const. art. 10, § 3, which provides that stockholders shall be liable to the amount of stock held by them, except when the corporation is organized for carrying on a manufacturing or mechanical business, if the corporation never takes the benefit of said section.—Cowling v. Zenith Iron Co. (Minn.) 68 N. W. 48.

[g] (Minn.: 1896.)

A corporation organized to carry on the business of "mining, smelting, reducing, refining, and working in copper and other minerals, working stone quarries, and marketing the material from all the same; also, buying, selling, leasing, and dealing in mineral lands for the above purposes,"—is not exclusively engaged in a mechanical business, within Const. art. 10, § 3, providing that a stockholder of any corporation, except one organized to carry on a manufacturing or mechanical business, shall be liable to the amount of the stock held by him.—Anderson v. Anderson Iron Co. (Minn.) 68 N. W. 49.

[h] (Minn.: 1896.)

A corporation organized, according to its articles, "to manufacture and deal in azotine and other fertilizing materials, grease and stearin," is not a manufacturing corporation exclusively, within Const. art. 10, § 3, providing that each stockholder in any corporation, excepting those organized for the purpose of carrying on a manufacturing business, is liable to the amount of his stock.—Commercial Bank of St. Paul v. Azotine Manuf'g Co. (Minn.) 69 N. W. 217.

§ 73. Liability on subscription to stock. (Minn.: 1896.)

It was no defense, to an action by an assignee for creditors of a corporation to recover from a stockholder and former director of the corporation the amount of his unpaid subscription, that the real purpose of the corporation was to foster gambling and the selling of pools on horse racing, and that the subscription was

secured to further such purpose.—Angir v. Ryan (Minn.) 65 N. W. 640.
63 Minn. 373.

§ 74. — Stock issued for insufficient consideration.

[a] (Minn.: 1896.)

Where a corporation, in consideration of the transfer to it of \$18,000 worth of property, issued and delivered \$30,000 in paid-up shares to the sellers of the property, and subsequently became insolvent, the holders of said shares will be charged, in favor of subsequent creditors of the corporation without notice of the transaction, with the difference between the real value of the property transferred and the par value of their stock.—Hastings Malting Co. v. Iron Range Brewing Co. (Minn.) 67 N. W. 652.

[b] (Neb.: 1895.)

Where property conveyed to a corporation by a stockholder in payment for stock was purposely overvalued by both parties, a creditor of the corporation could enforce against such stockholder a liability, as for an unpaid subscription, to the amount of the difference between the true value of the property at the time it was conveyed and the fictitious value at which it was received.—Gilkie & Anson Co. v. Dawson Town & Gas Co., 64 N. W. 978, 1097, 46 Neb. 333.

[c] (Neb.: 1895.)

One about to extend credit to a corporation is not chargeable with notice of the contents of the corporation's books, nor with the duty of examining the books, so that his failure to make an examination before extending credit did not preclude him from attacking as fraudulent the manner in which stockholders paid for their stock as shown by the books.—Gilkie & Anson Co. v. Dawson Town & Gas Co. (Neb.) 64 N. W. 978, 1097, 46 Neb. 333.

§ 75. Who entitled to enforce liability.

[a] (Minn.: 1896.)

The constitutional individual liability of stockholders for corporate debts extends to debts due creditors who are also stockholders.—Oswald v. Minneapolis Times Co. (Minn.) 68 N. W. 15.

[b] (Minn.: 1896.)

Where a corporation, not a "moneyed corporation," within Gen. St. 1894, c. 76, § 12, makes an assignment under the insolvent law of all its assets for the benefit of creditors, a simple contract creditor may sue to enforce the liability of stockholders for corporate debts remaining unsatisfied after the assets have been administered under the assignment.—Minneapolis Paper Co. v. Swinburne Co. (Minn.) 69 N. W. 144.

[c] (Minn.: 1896.)

Where the assets of a corporation not a moneyed corporation have been sequestered by an assignment under the insolvency law, a simple contract creditor may sue on behalf of himself and all other creditors, under Gen. St. 1894, c. 76, to enforce the constitutional liability of the stockholders.—Sturtevant-Larrabee Co. v. Mast, Buford & Burwell Co. (Minn.) 69 N. W. 324.

§ 76. Who are liable.

[a] (Iowa: 1895.)

It having been shown that defendant held unpaid stock in an insolvent corporation as collateral security for a loan, it is not necessary that a subscription by it for such stock should be shown, to enforce its liability under Code, §§ 1082-1084.—Calumet Paper Co. v. Stotts Inv. Co. (Iowa) 64 N. W. 782.

[b] (Iowa: 1895.)

It matters not that one against whom a stockholder's liability is sought to be enforced acquired his stock after plaintiff became one of the corporate creditors, if it is shown that defendant was a stockholder at the time plain-

tiff's action was instituted.—Culmet Paper Co. v. Stotts Inv. Co. (Iowa) 61 N. W. 782.

[1c] (Mich.; 1895.)

3 How. Ann. St. § 4161, c. 8, making stockholders of manufacturing corporations "individually liable for all labor performed for such corporations," which liability may be enforced against any stockholder at any time after execution against the corporation is returned unsatisfied, does not make a stockholder liable for labor performed before he became a stockholder.—Kamp v. Wintermute (Mich.) 65 N. W. 570.

[1d] (Mich.; 1895.)

One who was a stockholder at the time labor was performed for a corporation is liable therefor.—Macomber v. Wright (Mich.) 65 N. W. 610.

§ 77. — Effect of transfer of stock.

[1a] (Iowa; 1896.)

In an action against a stockholder of an insolvent corporation, it appeared that, upon the organization of the corporation, the stock was issued to the promoters for about 36 per cent. of its par value. Defendant purchased the holding of one of the original stockholders, paying, as alleged, full value therefor. He testified that his vendor told him at the time that the stock was fully paid, and that he had relied on such representations. It appeared, however, that the certificates of stock recited that the stock was fully paid, but was subject to assessments for the principal and interest of a mortgage incumbrance on the lands and personal property of the company, the amount of which was \$40,000. It also appeared that the defendant knew the land was owned by the company, which was its only property, and knew its value; that the value of the land above the incumbrance was only about \$20,000, the capital stock of the company being \$200,000. *Held*, that the facts justified a finding that defendant was chargeable with notice of the character of his stock, rendering him liable as a stockholder for the unpaid percentage thereon.—Wishard v. Hansen (Iowa) 68 N. W. 691.

[1b] (Iowa; 1897.)

McClain's Code, § 1628, providing that a transfer of stock shall not exempt the person making it from any liability of the corporation created prior thereto, applies to the liability to the corporate creditors after the corporate property is exhausted, to the amount remaining unpaid on the stock; and bonds issued by the corporation previous to such transfer, though not matured at that time, constitute a "liability," within the statute.—White v. Greene (Iowa) 70 N. W. 182.

[1c] (Minn.; 1896.)

A defendant, in an action to enforce the stockholders' liability, who was a former stockholder, transferred his stock before any time at which it appears that any indebtedness had been incurred by the corporation, or it had become insolvent; but it is alleged in the complaint, among other things, that the transfer was made for the purpose of avoiding the stockholders' liability, was not bona fide, no consideration was paid therefor, and that he is still the beneficial owner and holder of the stock. *Held*, on demurrer, that the complaint alleges a cause of action against him.—Pioneer Fuel Co. v. St. Peter Street Imp. Co. (Minn.) 67 N. W. 217.

64 Minn. 386.

[1d] (Minn.; 1896.)

The plaintiff corporation did not keep the stock book required by Gen. St. 1894, §§ 2599, 2796, 2799, but kept a book of certificates, on the stubs of which were entered the names of the certificate holders, and the date and amount of each certificate, and also kept a stock account in the ledger with each stockholder. The certificate in suit was bought at an execution sale by defendant, who notified plaintiff

that the same should be transferred to him. Plaintiff refused to make the transfer because of an unpaid call due on the stock from the execution debtor, but subsequently collected the call, and entered in the stock account with such debtor that the stock was sold under execution sale to defendant. Defendant was not notified either of the collection of the call or of the entry. Subsequently a call was made, and a special stockholders' meeting held, of both of which defendant was notified, and defendant took part in the meeting. *Held*, that defendant was liable for subsequent calls on said stock made by a subsequently appointed receiver of the corporation.—Oswald v. Minneapolis Times Co. (Minn.) 68 N. W. 15.

[1e] (Minn.)

After commencement of a suit under Gen. St. 1894, c. 76, to enforce the stockholders' liability, a stockholder who had been served with summons died, leaving no property within the jurisdiction. *Held*, that her transferee should, on the first assessment on the judgment against the stockholders, be required to contribute on the indebtedness existing at the time of the transfer.—(1896) Harper v. Carroll, 69 N. W. 610; (1897) *Id.*, 69 N. W. 1069.

§ 78. Payment for stock.

(Mich.; 1895.)

Where \$2,500 in stock is issued to one as paid-up stock, in consideration of his recommending the corporation's product, and using his influence with others to buy it, such services not taking any time from his customary business, he is liable to creditors for the amount of his subscription.—Peninsular Sav. Bank v. Black Flag Stove Polish Co. (Mich.) 63 N. W. 514.

105 Mich. 335.

§ 79. Nature of liability—Penalty.

[Neb.; 1895.]

Gen. St. 1873, c. 11, § 139, imposing on corporate stockholders a special liability in case of the omission of certain acts required for incorporation, the liability not being measured by the damages occasioned by such omission, is a penal statute.—Kleckner v. Turk (Neb.) 63 N. W. 469.

45 Neb. 176.

§ 80. Actions to enforce liability.

[1a] (Minn.; 1896.)

A creditor of an insolvent foreign corporation may maintain in Minnesota, against stockholders of whom the court has jurisdiction, an action in the nature of a creditors' bill to obtain payment of his claim against the corporation from the unpaid balances of subscription; the remedy provided by Gen. St. 1894, §§ 2600-2602, not being applicable when it is sought to reach unpaid subscriptions to stock of a foreign corporation.—Rule v. Omega Stove & Grate Co. (Minn.) 67 N. W. 60.

64 Minn. 326.

[1b] (Minn.)

Four days before the trial, plaintiff discovered that nonresident stockholders, over whom the court could not acquire jurisdiction, had property within the state. On the trial, defendant stockholders objected to entry of judgment until the court should acquire jurisdiction over this property by attachment. *Held*, that defendants were not entitled to delay the proceedings to make this property contribute to the payment of the corporate debts; but the court might, in its discretion, compel the creditors to attach and condemn the property, and, if condemned too late to contribute directly, its proceeds might, after the creditors were paid in full, be applied to reimburse stockholders who had paid more than their share.—(1896) Harper v. Carroll, 69 N. W. 610; (1897) *Id.*, 69 N. W. 1069.

§ 81. — Conditions precedent.

[a] (Minn.; 1895.)

Before a creditor of an insolvent foreign corporation can maintain in Minnesota, against stockholders of whom the court has jurisdiction, an action in the nature of a creditors' bill to obtain payment of his claim against the corporation from the unpaid balances of the stockholders' subscriptions, he must obtain judgment against the corporation, and have an execution thereon returned unsatisfied in Minnesota, or show that it was and is impossible so to do.—*Rule v. Omega Stove & Grate Co.* (Minn.) 67 N. W. 60.
61 Minn. 326.

[b] (Minn.; 1896.)

When a complaint in an action by a creditor of an insolvent foreign corporation, brought in Minnesota, against stockholders of whom the court has jurisdiction, to obtain payment of a claim against the corporation from the unpaid balances of subscriptions of the stockholders, alleges that plaintiff is a creditor of an Ohio corporation; that he has obtained judgment against it in a court of that state, on which execution has been returned wholly unsatisfied; and that the corporation has ceased to do business, and has disposed of its assets, and is without property,—it shows that it is practically impossible to obtain a personal judgment against the corporation in Minnesota, and the recovery of such a judgment in said state by the creditor as a prerequisite to the maintenance of his suit is hence excused.—*Rule v. Omega Stove & Grate Co.* (Minn.) 67 N. W. 60.
61 Minn. 326.

[c] (Neb.; 1895.)

An action to enforce the statutory liability of a stockholder arising from a corporation's failure to publish the required annual notice of its indebtedness cannot be maintained before judgment on the cause has been rendered against the corporation.—*Ball v. Wicks* (Neb.) 63 N. W. 806.
45 Neb. 367.

§ 82. — Defenses.

(Minn.; 1896.)

Evidence that, at the time of the signing of the articles of association, and during the negotiations which resulted in their execution, it was verbally agreed among the signers that they should not be individually liable for corporate debts, was inadmissible, in an action to enforce the stockholders' liability, as tending to vary the terms, implied by law, of the articles themselves.—*Oswald v. Minneapolis Times Co.* (Minn.) 68 N. W. 15.

§ 83. — Pleading.

(Minn.; 1895.)

A complaint in an action under Gen. St. 1894, § 5897, to sequester corporate assets, and to enforce the constitutional liability of stockholders, which alleged, as to the stockholders, "that defendants now are or heretofore have been owners or holders of the shares of the stock of said company, and constitute and comprise all of the stockholders of said company," did not state a cause of action as against any stockholder separately demurring, since it did not show that any one defendant was a stockholder when the corporate debt in suit was contracted, or at any subsequent time.—*International Trust Co. v. American Loan & Trust Co.* (Minn.) 65 N. W. 632.
62 Minn. 501.

§ 84. — Joining proceedings against corporation.

[a] (Minn.; 1895.)

Under Gen. St. 1894, c. 76 (Gen. St. 1878, c. 76), providing for the sequestration of a corporation's property, a creditor may join in his complaint setting forth his claim against

the corporation, whereby he becomes a party to the action pursuant to the order of court, a further claim to have stockholders made parties to the action, and their liability enforced for the benefit of all the creditors, though the complaint of the creditor who instituted the action did not demand such relief, and though the time limited by the court for creditors to exhibit their claims had not expired.—*National German-American Bank v. St. Anthony Park North Real-Estate Co.* (Minn.) 63 N. W. 1068.
61 Minn. 359.

[b] (Minn.; 1897.)

After assignment by an insolvent corporation for the benefit of its creditors, a judgment creditor sued under Gen. St. 1894, c. 76, to enforce the stockholders' individual liability. Another creditor, by leave of court, intervened, and filed a cross complaint, alleging a fraudulent issue of stock to a certain defendant, and an acceptance thereof for an inadequate consideration, and prayed judgment for the sum equitably due. *Held*, that the uniting of the two causes of action was authorized by said chapter 76.—*Northwestern Railroader v. Prior* (Minn.) 70 N. W. 869.

§ 85. — Findings and judgment.

[a] (Mich.; 1895.)

Judgment in an action to enforce against a stockholder a judgment against the corporation not having included the costs in the case against the corporation, defendant cannot complain that the return to the execution in the case against the corporation did not show that the sheriff could not collect such costs.—*Macomber v. Wright* (Mich.) 65 N. W. 610.

[b] (Minn.; 1896.)

In an action to enforce the stockholders' constitutional liability, findings as to the amount of stock held by nonresidents, over whom the court has acquired no jurisdiction, are unnecessary.—*Commercial Bank of St. Paul v. Azotine Manufacturing Co.* (Minn.) 69 N. W. 217.

[c] (Minn.)

Where a stockholder of an insolvent corporation is also a creditor, it is proper to render judgment against him for his statutory liability, and to declare it a lien on the amount due him.—(1896) *Harper v. Carroll*, 69 N. W. 610; (1897) *Id.*, 69 N. W. 1069.

[d] (Minn.)

In a judgment against stockholders of an insolvent corporation, it is proper to provide that after the receiver has collected in full, or has exhausted all collectible liability, a judgment of contribution may be entered between the stockholders.—(1896) *Harper v. Carroll*, 69 N. W. 610; (1897) *Id.*, 69 N. W. 1069.

[e] (Minn.)

A judgment against part of the stockholders of an insolvent corporation, within the jurisdiction of the court, does not release the others; their liability being several, and not joint.—(1896) *Harper v. Carroll*, 69 N. W. 610; (1897) *Id.*, 69 N. W. 1069.

§ 86. Effect as against stockholder of judgment against corporation.

(Minn.; 1896.)

The stockholders in a corporation, in an action against them to enforce their personal liability under the constitution or statute, are, upon the question of corporate indebtedness, concluded by a judgment previously obtained by plaintiff against the corporation, though it was entered by default.—*Holland v. Duluth Iron-Mining & Development Co.* (Minn.) 68 N. W. 50.

§ 87. Insolvency or dissolution of corporation.

(Minn.; 1895.)

An action may be maintained by the creditors of a corporation, under Gen. St. 1894, § 5897, though the corporation, before the com-

mentement thereof, assigned for the benefit of its creditors, and the assignee was in possession, administering the estate; since the personal liability of the stockholders cannot be enforced under the assignment proceedings.—*International Trust Co. v. American Loan & Trust Co.* (Minn.) 65 N. W. 78.
62 Minn. 501.

XI. INSOLVENCY AND RECEIVERS.

Effect of insolvency on right to enforce stockholders' liabilities, see ante, § 87.

Payments by insolvent bank with intent to create preferences, see "Banks and Banking," § 32.

§ 88. In general.

[a] (Mich.; 1897.)

A corporation which purchases property known by the promoters and stockholders to be all the property of another corporation, issuing therefor its stock to the stockholders of the other corporation, holds it subject to payment of the debts of the other corporation, including a judgment for negligence, recovered after the sale.—*Grenell v. Detroit Gas Co.* (Mich.) 70 N. W. 413.

[b] (Minn.; 1896.)

The insolvent law of 1881 is applicable to private corporations.—*Yanish v. Pioneer Fuel Co.* (Minn.) 66 N. W. 198.

64 Minn. 175.

[c] (Minn.; 1896.)

The receiver of an insolvent corporation, appointed in proceedings under Gen. St. 1894, § 5897, may maintain an independent action to enforce the collection of the amount of a call on unpaid subscriptions made by the board of directors in accordance with the by-laws, and due and payable prior to the commencement of the proceedings which resulted in the appointment of the receiver.—*Basting v. Ankeny* (Minn.) 66 N. W. 266.

64 Minn. 133.

[d] (Minn.; 1896.)

In an action by a judgment creditor under Gen. St. 1894, c. 76, for the sequestration of the assets of a corporation and the appointment of a receiver, the judgment against the corporation upon which the action is predicated is conclusive upon the stockholders as well as the corporation, unless impeached for fraud by a direct proceeding.—*Oswald v. Minneapolis Times Co.* (Minn.) 68 N. W. 15.

[e] (Minn.; 1896.)

Where a claim on notes of a corporation by an indorsee is contested by the corporation's receiver, because of the fact that claimant has converted stock held by him as collateral without applying the proceeds on the notes, the burden is on the receiver to show that the corporation had some interest in the stock; the certificates thereof showing that third persons not parties to the notes owned the same, and that they consented to its disposal by claimant.—*McKusick v. O'Gorman* (Minn.) 69 N. W. 317.

[f] (Minn.; 1896.)

A receiver appointed in an action for the sequestration of the assets of an insolvent corporation, under Gen. St. 1894, c. 76, has no authority, except where it is otherwise provided by statute, to enforce the individual liability of the stockholders.—*Minneapolis Baseball Co. v. City Bank* (Minn.) 69 N. W. 331.

[g] (Minn.; 1897.)

As against creditors of a bank whose rights have become vested by its insolvency, purchasers of stock issued and transferred to them several months before, and voidable in the first instance because paid for by the subscriber with misappropriated city funds, of which he was custodian, cannot rescind the purchase and claim as creditors, where they have made no effort to investigate the condition

of the bank, and an examination of its books would have disclosed that it was in fact insolvent when the stock was issued, and a large part of the corporate indebtedness has been since incurred.—*Olson v. State Bank* (Minn.) 69 N. W. 904.

[h] (Neb.; 1897.)

Comp. St. 1895, c. 8, § 35, so far as it attempts to authorize actions by the receiver of an insolvent bank to recover unpaid stock subscriptions before the corporate debts have been judicially ascertained and the corporate property exhausted, is void, under Const. art. 11, § 4, making stockholders liable to the extent of their unpaid subscriptions only after the corporate debts have been ascertained and the corporate property exhausted.—*State v. German Sav. Bank* (Neb.) 70 N. W. 221.

§ 89. What constitutes insolvency.

(Iowa; 1897.)

A corporation with a capital stock of \$50,000, having assets which, at a fair valuation, exceed its liabilities, exclusive of its capital stock, by \$27,000, and which is doing a steady business, and is able to satisfy its creditors making demands upon it, is not insolvent.—*In re Bloomfield Woolen Mills* (Iowa) 70 N. W. 115; *Allender v. State Bank of Bloomfield*, Id.

§ 90. Appointment of receiver.

[a] (Iowa; 1896.)

The contract of a noncapitalized religious association with an auxiliary stock company provided that the company should take title to certain land, and its stock be a lien on the land, and that the association might at any time reimburse the company "for all money expended by them," and require it to convey back the land. Held that the land having increased from \$2,800 to \$15,000 in value, a reconveyance of the land to the association, subject to the lien for stock and liability incurred by the company, did not, as being prejudicial to a stockholder, authorize the appointment of a receiver.—*Hart v. Mt. Pleasant Park Stock Co.* (Iowa) 66 N. W. 190.

[b] (Iowa; 1896.)

A petition by stockholders for a receiver on the ground that the president fraudulently allowed a default judgment against the corporation, though authorized to defend the suit, must show that a defense would have been successful.—*Peatman v. Centerville Light, Heat & Power Co.* (Iowa) 69 N. W. 541.

[c] (Iowa; 1897.)

Where two members of a corporation own the entire stock, and the corporation is indebted to each, but the indebtedness has not been reduced to judgment, and the corporation is solvent, neither of such members has a right, as a creditor, to the appointment of a receiver.—*Wallace v. Pierce-Wallace Pub. Co.* (Iowa) 70 N. W. 216.

[d] (Minn.; 1895.)

A receiver cannot be appointed for a corporation, other than a banking or insurance corporation, on the application of a near creditor, who has not first exhausted his legal remedies by judgment and execution, or by action against stockholders, as provided by Gen. St. 1878, c. 76, §§ 9, 17 (Gen. St. 1894, §§ 5897, 5905).—*Klee v. E. H. Steele Co.* (Minn.) 62 N. W. 399.
60 Minn. 355.

[e] (Minn.; 1895.)

Where a general assignment of all corporate assets for the benefit of creditors has been made either under the assignment law of 1876 or the insolvency law of 1881, creditors suing under Gen. St. 1894, § 5897, to sequester such assets, are not entitled, as a matter of right, to have a receiver appointed to supersede the assignee.—*International Trust Co. v. American Loan & Trust Co.* (Minn.) 65 N. W. 78.

62 Minn. 501.

§ 91. — Effect.**[a] (Minn.; 1895.)**

An action to set aside a fraudulent transfer of corporate assets, begun by a stockholder, and in which a receiver was appointed, cannot be pleaded in bar or abatement of an action under Gen. St. 1878, c. 76 (Gen. St. 1894, §§ 5889-5911), by a creditor of said corporation, in favor of himself and all other creditors, and against the corporation (then insolvent) and all its stockholders, and for the appointment of a receiver.—*Oswald v. St. Paul Globe Pub. Co.* (Minn.) 61 N. W. 902.
60 Minn. 82.

[b] (Minn.; 1896.)

The regularity, propriety, and validity of the appointment of a receiver of an insolvent corporation can be questioned only in a direct proceeding.—*Basting v. Ankeny* (Minn.) 66 N. W. 266.
64 Minn. 133.

§ 92. Preferences.**[a] (Iowa; 1897.)**

Where the cashier of a bank holding the notes of a manufacturing corporation advised their renewal and indorsement by the directors, and that the directors take security from the corporation, offering, if so arranged, to carry the indebtedness indefinitely, the bank cannot attack the validity of a mortgage given by the corporation to the directors to protect them on their indorsement of the notes on the ground that it was an illegal preference of officers of the corporation.—*In re Bloomfield Woolen Mills* (Iowa) 70 N. W. 115; *Allender v. State Bank of Bloomfield, Id.*

[b] (Mich.; 1897.)

A mortgage by an insolvent corporation to secure a debt is not invalid, as against a director voting in favor thereof, because it inures to the benefit of other directors, who were secondarily liable for the debt, and whose votes were necessary to the passage of the resolution authorizing the mortgage.—*Lucas v. Friant* (Mich.) 69 N. W. 735.

[c] (Neb.; 1897.)

Whether a disposition by an insolvent corporation of its property is fraudulent is a question of fact.—*Shaw v. Robinson & Stokes Co.* (Neb.) 69 N. W. 947.

[d] (Neb.; 1897.)

An insolvent corporation may transfer or encumber its property in good faith for proper purposes.—*Shaw v. Robinson & Stokes Co.* (Neb.) 69 N. W. 947.

[e] (Neb.; 1897.)

An insolvent corporation may, in absence of actual fraud, prefer one or more of its creditors.—*Wallachs v. Robinson & Stokes Co.* (Neb.) 70 N. W. 52.

[f] (S. D.; 1895.)

An insolvent corporation cannot prefer its creditors.—*Adams & Westlake Co. v. Deyette* (S. D.) 65 N. W. 471.

[g] (Wis.; 1896.)

The mere insolvency of a corporation does not convert its property into a trust fund, so as to prevent preferences.—*Ford v. Hill* (Wis.) 66 N. W. 115.
92 Wis. 188.

[h] (Wis.; 1897.)

In an action by a creditor of a corporation to impeach a mortgage made by its directors to secure their claims, plaintiff must show that the corporation was insolvent when the mortgage was executed, or that the directors knew that suspension was impending.—*Hinz v. Van Dusen* (Wis.) 70 N. W. 657.

§ 93. — Waiver of objections.**(Minn.; 1895.)**

Where a sale of corporate property made by the directors was set aside at the suit of stockholders, and the receiver directed to issue

and sell certificates to create a fund with which to repay the purchase money received, a creditor who, without objection to the decree, appeared and participated in the distribution of the proceeds of the sale, by the receiver, of the corporate property pursuant thereto, cannot raise the objection that the directors had used the money received by them on their sale, to refund which the receiver's certificates were issued, in making preferential payments to certain creditors, in violation of the insolvency law.—*St. Paul Trust Co. v. St. Paul Globe Pub. Co.* (Minn.) 61 N. W. 813.
60 Minn. 105.

§ 94. Priorities of claims—Wages.**[a] (Iowa; 1895.)**

The costs which, by Acts 23d Gen. Assm. c. 48, relating to laborers' claims against corporations in the hands of receivers, are to be paid before such claims, include fees of the receiver of the corporation and his attorney, but not compensation to a trustee and his attorney for services growing out of the foreclosure of a trust deed on property of the corporation.—*St. Paul Title-Insurance & Trust Co. v. Diagonal Coal Co.* (Iowa) 64 N. W. 606.

[b] (Iowa; 1895.)

Acts 23d Gen. Assm. c. 48, provides that when the property of any corporation, etc., shall be seized on process, or be put in the hands of a receiver, debts owing to laborers for labor performed within 90 days next preceding the seizure or transfer of the property shall be preferred, and that any laborer desiring to enforce his claim shall present to the officer, person, or court charged with such property a statement under oath within 10 days after the seizure, or within 30 days after the same may have been placed in the hands of the receiver. *Held*, that where the levy of an attachment on the property of a corporation is abandoned, and a receiver appointed, the laborers need not file their claims with the sheriff who levied the attachment, but may file them with the receiver.—*St. Paul Title-Insurance & Trust Co. v. Diagonal Coal Co.* (Iowa) 64 N. W. 606.

§ 95. Payment and distribution.**(Minn.; 1896.)**

In an action against a corporation to wind up its affairs, under Gen. St. 1894, c. 76, where the court prescribed a basis for allowing claims, and a creditor became a party, and submitted his claim for allowance, the only question for review on appeal by the creditor from an order of disallowance was whether the claim was adjusted on the basis prescribed.—*Freeman v. Children's Endowment Soc.* (Minn.) 65 N. W. 626.
63 Minn. 393.

§ 96. Rights of attaching creditors.**[a] (Neb.; 1895.)**

A mortgage given by an insolvent corporation to secure a debt for which its directors were sureties is void as against an attaching creditor.—*Tillson v. Downing* (Neb.) 63 N. W. 836.
45 Neb. 549.

[b] (Wis.; 1895.)

Under Rev. St. § 2729, which provides for attachment of the property of a debtor, "whether a natural person or corporation," a creditor of an insolvent corporation, who attaches its property, with knowledge of its insolvency, in an honest effort to collect his debt, acquires a valid lien, which will be protected in a subsequent sequestration action under Rev. St. § 3216.—*Ballin v. Merchants' Exch. Bank* 61 N. W. 1118, 89 Wis. 278.

§ 97. Remedies of creditors.**(Mich.; 1896.)**

Where complainant is proceeding as a judgment creditor, he cannot invoke the action of a court of equity for relief against a corpora-

tion under How. Ann. St. c. 281, providing for sequestering corporate assets, till execution has been issued and returned unsatisfied on his judgment at law, as required by section 8153.—*Grenell v. Ferry* (Mich.) 68 N. W. 144.

XII. DISSOLUTION AND FORFEITURE OF FRANCHISE.

Suggestion of dissolution in action against corporation, see ante, § 40.

§ 98. Equity jurisdiction.

[a] (Iowa: 1897.)

Equity has no jurisdiction to dissolve a corporation or wind up its affairs in the absence of statute.—*Wallace v. Pierce-Wallace Pub. Co.* (Iowa) 70 N. W. 216.

[b] (Iowa: 1897.)

Code, § 2903, providing for the appointment of receivers in civil actions, does not authorize the dissolution of a corporation by a court of equity, nor the placing of its property in the hands of a receiver.—*Wallace v. Pierce-Wallace Pub. Co.* (Iowa) 70 N. W. 216.

§ 99. Causes and grounds.

[a] (Mich.: 1895.)

Where the stockholders of a turnpike company by resolution abandon a portion of its road which is out of order, an action will immediately lie to forfeit its charter for failure to keep the same in repair.—*People v. Plainfield Ave. Gravel-Road Co.* (Mich.) 62 N. W. 998, 105 Mich. 9.

[b] (Mich.: 1895.)

Inability of a corporation to perform its public duties on account of its financial condition is no defense to an action to forfeit its charter for such failure.—*People v. Plainfield Ave. Gravel-Road Co.* (Mich.) 62 N. W. 998, 105 Mich. 9.

[c] (Minn.: 1896.)

Whenever a corporation violates the provisions of its acts of incorporation, or any other law binding on it, and so misuses its franchises in matters which concern the essence of the contract between it and the state so that it no longer fulfills the purpose for which it was created, the state has an interest in restraining the further exercise of its corporate rights, and may, by the attorney general, under Gen. St. 1894, § 5900, maintain an action to so restrain the corporation, and for a receiver for its property.—*State v. American Savings & Loan Ass'n* (Minn.) 67 N. W. 1, 64 Minn. 349.

[d] (Minn.: 1896.)

An order dissolving a corporation is justified by findings that it has failed for a long time to complete the work for which it was created; that all its members have ceased to have an interest in the management of its business or the completion of the work; and that a judicious sale of its property would greatly advance the work already done.—*State v. Cannon River Manuf'g Ass'n* (Minn.) 69 N. W. 621.

[e] (Neb.: 1897.)

That one person becomes the owner of all of the shares of stock of a corporation does not dissolve the corporation or destroy its identity as a business concern.—*Harrington v. Connor* (Neb.) 70 N. W. 911.

[f] (Wis.: 1896.)

Under Rev. St. § 1763, which provides that, where a corporation shall have suspended its ordinary and lawful business for one whole year, it shall be deemed to have surrendered its rights and franchises, "and shall be adjudged to be dissolved," such suspension does not ipso facto dissolve the corporation, but furnishes a cause for its dissolution by the judgment of a

competent court.—*Mylrea v. Superior & St. C. Ry. Co.* (Wis.) 67 N. W. 1138.

93 Wis. 601.

[g] (Wis.: 1896.)

A corporation is not dissolved by mere nonuser of its franchises.—*Mylrea v. Superior & St. C. Ry. Co.* (Wis.) 67 N. W. 1138, 93 Wis. 601.

§ 100. Presumption as to dissolution.

(Wis.: 1895.)

Where a railroad corporation has been divested by judicial sale of all its property, and for 26 years has neither owned property in the state nor done business therein, and has not elected officers or kept any officer therein, a surrender and acceptance by the state of its charter will be presumed.—*Combes v. Milwaukee & M. R. Co.*, 62 N. W. 89, 89 Wis. 297.

§ 101. Proceedings for dissolution.

[a] (Minn.: 1896.)

The attorney general may, in his discretion, under Gen. St. 1894, § 5900, bring an action on behalf of the state to restrain a corporation having the power to make loans on pledges from exercising any of its corporate rights whenever it violates the provisions of its acts of incorporation or any other law binding on it, though the public examiner has not filed with him a statement showing a violation of the law by the corporation, as provided by section 2874.—*State v. American Savings & Loan Ass'n* (Minn.) 67 N. W. 1, 64 Minn. 349.

[b] (Wis.: 1897.)

A city cannot sue to enjoin a street-railway company from laying its tracks upon a street, on the ground that the nonuser by the company for five years of its franchise to lay tracks constituted a forfeiture of such right, as such a suit would be, in effect, for the forfeiture of a franchise, which can only be brought in the name of the state.—*Milwaukee Electric Railway & Light Co. v. City of Milwaukee* (Wis.) 63 N. W. 794.

§ 102. — Parties.

[a] (Mich.: 1895.)

3 How. Ann. St. c. 124a, providing for the winding up of mining and manufacturing corporations, is not unconstitutional as not making all stockholders necessary parties to the bill, as the proceeding is in behalf of all stockholders and provision for the joinder of all interested parties is made.—*Brown v. Mesnard Min. Co.* (Mich.) 63 N. W. 1000; *Same v. Pontiac Min. Co.*, 1d.; *Same v. Houghton Circuit Judge*, 1d. 105 Mich. 653.

[b] (S. D.: 1895.)

Under Comp. Laws, § 5346, authorizing a civil action in the name of the state to vacate a corporate charter, the action must be in the name of the state alone as the real party in interest, and the corporation is the only proper party defendant.—*State v. Union Inv. Co.* (S. D.) 63 N. W. 252.

§ 103. — Waiver of right.

[a] (Wis.: 1896.)

On application by the attorney general for leave to bring proceedings to forfeit the franchise of a city water company for failure to keep an account of the cost of the construction of its plant, so as to enable the city to exercise its option to purchase the plant, as required by the city ordinance granting the company the franchise, the acts of the city should be considered in determining whether the right to bring such a proceeding has been waived.—*State v. Janesville Water-Power Co.* (Wis.) 66 N. W. 512, 92 Wis. 496.

[b] (Wis.: 1896.)

On such an application, it appeared that the city, with full knowledge of the grounds relied on for forfeiture, for a considerable time

had compelled the company to improve its plant at great expense; that at present its stockholders and officers had attempted in good faith to show the cost of the construction of the works; and that the alleged failure to keep the proper account occurred before the present stockholders were interested in the company. *Held*, that the court, in the exercise of its discretion, would refuse the application, on the ground that the right to bring such proceedings had been waived.—*State v. Janesville Water-Power Co.* (Wis.) 66 N. W. 512.

92 Wis. 496.

§ 104. Recovery by third person for breach of contract.

(Minn.; 1895.)

Where, by the dissolution of a corporation and the appointment of a receiver, under Gen. St. 1878, c. 34, §§ 415-420 (Gen. St. 1894, §§ 3430-3435), a lease of the corporation is broken, the landlord can prove his claim for damages against the receiver, and share ratably in the assets.—*Kalkhoff v. Nelson* (Minn.) 62 N. W. 332.

60 Minn. 284.

XIII. FOREIGN CORPORATIONS.

Act requiring franchise fee, interference with interstate commerce, see "Constitutional Law," § 52.

Regulation of foreign companies, act impairing obligation of contracts, see "Constitutional Law," § 30.

Right of foreign company to mechanic's lien, see "Mechanics' Liens," § 16.

Service of process on, see "Writs and Notice of Suits," § 16.

§ 105. Special statutory provisions.

[a] (Mich.; 1895.)

3 How. Ann. St. § 4161d6, added to the general act providing for incorporation of domestic manufacturing companies, provides that foreign corporations organized for any of the purposes contemplated by the act referred to, on recording copies of their charter, and filing a resolution authorizing an agent to acknowledge service of process for the company, and appointing such an agent, may carry on business in the state, and enjoy all the rights, and be subject to all the restrictions, of corporations existing under said act. *Held*, that this did not prohibit foreign corporations from doing business in the state, or make their contracts within the state illegal, but merely imposed conditions in case they desired the benefit of the law applicable to domestic corporations of similar character. *McGrath, J.*, dissenting.—*People v. Hawkins* (Mich.) 64 N. W. 736.

[b] (Mich.; 1897.)

A corporation of another state, though permitted to do business in Michigan, is not an "organization of this state," within How. Ann. St. § 3960d3, providing that Michigan corporations shall not take any name in use by any other "organization of this state."—*People v. Home Life Assur. Co.* (Mich.) 69 N. W. 653.

§ 106. Effect of failure to comply with statute.

[a] (Mich.; 1895.)

A foreign mutual fire insurance company, which has not been authorized to transact business in Michigan, as required by How. Ann. St. § 4231 et seq., cannot maintain an action for an assessment on a policy insuring property in the state, though the contract was completed by mail in another state, and was enforceable there, as How. Ann. St. § 8136, forbids any action by a corporation on anything done without express authority of law, and because the doctrine of state comity will not be applied to an action on a

contract at variance with the policy of this state.—*Seamans v. Temple Co.* (Mich.) 63 N. W. 408. 105 Mich. 400.

[b] (S. D.; 1895.)

An action in attachment may be maintained by a foreign corporation, though it does not appear that it has filed its articles of incorporation with the secretary of state, or appointed a resident agent.—*Pech Manufg Co. v. Groves* (S. D.) 62 N. W. 109.

6 S. D. 504.

[c] (S. D.; 1896.)

Under Laws 1895, c. 47, providing that no nonresident corporation may transact business, acquire property, institute or maintain actions unless it shall first file a copy of its charter, and appoint a resident agent, etc., an attachment levied at the suit of a nonresident corporation which has not complied with such provision will be dissolved on motion.—*Bradley, Metcalf & Co. v. Armstrong* (S. D.) 68 N. W. 733.

§ 107. Actions against.

(Minn.; 1894.)

An action may be maintained in the courts of Minnesota by a stockholder against a foreign corporation to compel it to issue to him a new or duplicate certificate of stock in place of one which has been lost or destroyed.—*Guilford v. Western Union Tel. Co.* (Minn.) 61 N. W. 324.

59 Minn. 332.

§ 108. Creditors' bill against.

(Wis.; 1895.)

Rev. St. §§ 3216-3228, providing for proceedings against insolvent corporations, incorporated under the laws of this state, do not give jurisdiction of a creditors' bill against a foreign corporation doing business in the state.—*Northwestern Iron Co. v. West Superior Iron & Steel Co.* (Wis.) 63 N. W. 752.

90 Wis. 570.

CORPUS DELICTI.

Proof of, see "Homicide," § 1.

CORRECTION.

Of deposition, see "Deposition," § 7.

Of judgment, see "Judgment," § 89.

Of record, see "Records," § 2.

—on appeal, see "Appeal," § 153.

Of statute, see "Statutes," § 17.

Of tax assessment, see "Taxation," § 37.

Of verdict, see "Trial," § 101.

CORROBORATION.

Of accomplice testimony, see "Criminal Law," §§ 115, 116.

Of prosecutrix, see "Rape," §§ 11, 16; "Seduction," § 6.

Of witness, see "Witness," § 72.

COSTS.

I. RIGHT TO COSTS, §§ 1-11.

II. WHO LIABLE, §§ 12-15.

III. SECURITY FOR COSTS, §§ 16-19.

IV. TAXATION, §§ 20-26.

V. COSTS ON APPEAL, §§ 27-32.

VI. COSTS IN CRIMINAL CASES, §§ 33-40.

Appealable orders, see "Appeal," § 37.

As damages, see "Damages," § 1.

In action for conversion, see "Trove and Conversion," § 17.

In action for wrongful attachment, see "Attachment," § 61.
 — to abate liquor nuisance, see "Intoxicating Liquors," § 51.
 — to quiet title, see "Quieting Title—Removal of Cloud," § 10.
 In condemnation proceedings, see "Eminent Domain," § 20.
 In divorce cases, see "Divorce," §§ 20-40.
 In garnishment, see "Garnishment," § 27.
 In partition, see "Partition," § 8.
 In replevin, see "Replevin," § 32.
 Liability of attorney on agreement to pay, see "Attorney and Client," § 8.
 Lien on deposit in court for costs, see "Deposit in Court."
 Of private sale on mortgage foreclosure, see "Chattel Mortgages," § 51.
 Of will contest, see "Wills," § 31.
 On certiorari, see "Certiorari," § 9.
 On foreclosure under power, see "Mortgages," § 91.
 Payment after voluntary nonsuit or dismissal, see "Practice in Civil Cases," § 5.
 — as condition of obtaining new trial, see "New Trial," § 4.
 Provision in judgment, see "Judgment," § 34.
 — in note, effect on negotiability, see "Negotiable Instruments," § 11.

I. RIGHT TO COSTS.

On appeal, see post, § 27.

§ 1. Nature of right and persons entitled to costs.

[a] (Mich.; 1895.)

Allowance for expenses will be made complainant in a suit for an accounting where it appears that, after the decree determining complainant's right to an accounting, defendant, for the purpose of harassing complainant and depriving him of his just share, has instituted various suits, compelling complainant to make large expenditures.—*Petrie v. Torrent* (Mich.) 65 N. W. 557.

[b] (Mich.; 1896.)

2 How. Ann. St. § 8964, authorizes recovery of costs by plaintiffs successful in replevin and certain other actions where the court has exclusive or concurrent jurisdiction. Section 8967 declares that in actions in which plaintiff, if successful, would be entitled to costs, defendant shall recover costs if plaintiff fails, or recovers a sum too small to entitle him to costs. *Held*, that judgment for defendant for costs in replevin commenced in the circuit court was proper on a verdict for plaintiff for less than \$100, which is within the exclusive original jurisdiction of a justice court.—*Berodt v. Ionia Circuit Judge* (Mich.) 69 N. W. 661.

[c] (Neb.; 1897.)

The right of a litigant to recover costs is a statutory, not a common-law, right.—*City of Hastings v. Mills* (Neb.) 70 N. W. 381.

[d] (Neb.; 1897.)

Code Civ. Proc. § 621, prohibiting plaintiff's recovery of costs in an action in which a justice of the peace has jurisdiction, though brought in another court, applies when the judgment rendered is within the jurisdiction of a justice, though the amount sued for is beyond that jurisdiction.—*City of Hastings v. Mills* (Neb.) 70 N. W. 381.

[e] (S. D.; 1897.)

Comp. Laws, § 6108, providing that if plaintiff does not accept an offer for judgment made before trial, and fails to recover a sum equal to the offer, he cannot recover costs, applied to an action by S. and others, in which leave was granted S. on his motion, to strike out the names of all the other plaintiffs after the offer was made, and the case proceeded in the

name of S. as plaintiff.—*Shearer v. Hutchinson County* (S. D.) 70 N. W. 1051.

[f] (Wis.; 1894.)

On foreclosure, judgment for plaintiff as prayed for in the complaint, except that the amount found due is less than that claimed, entitles plaintiff to costs.—*Nash v. Meggett* 61 N. W. 283, 89 Wis. 486.

[g] (Wis.; 1897.)

A statute authorizing costs in "actions" does not authorize them in proceedings by one judgment creditor to have the proceeds of executions issued by another judgment creditor applied first to the payment of movant's judgment.—*Marks v. Auerbach* (Wis.) 69 N. W. 1001.

§ 2. Discretion of court.

[a] (Minn.; 1896.)

The awarding of costs on a motion to set aside a judgment is in the discretion of the court.—*Olmstead v. Firth* (Minn.) 66 N. W. 988. 64 Minn. 243.

[b] (Neb.; 1897.)

In the absence of statutory provision, the award and taxation of costs rests in the discretion of the trial court.—*Baird v. Woodard* 61 N. W. 612, 43 Neb. 310.

See, also, post, § 4.

§ 3. Amount recovered in suit.

[a] (Mich.; 1896.)

Where plaintiff properly sues a city in a circuit court, he is entitled to costs where he obtains a judgment for 6 cents damages.—*Mason v. City of Muskegon* (Mich.) 67 N. W. 692.

[b] (Neb.; 1894.)

Where plaintiff in the district court obtained a judgment for \$200, which was within the jurisdiction of a justice of the peace, he was not entitled to costs.—*Shields v. Gamble* (Neb.) 61 N. W. 101, 42 Neb. 850.

§ 4. Prevailing party.

[a] (Mich.; 1896.)

The application of How. Ann. St. § 9004, giving the prevailing party a term fee for every term at which a cause is regularly on the calendar, and not reached, or is postponed, is not affected by the fact that the court's business was such that it was apparent that the cause could not be reached.—*Martin v. Lillibridge* (Mich.) 69 N. W. 75.

[b] (Minn.; 1895.)

Where defendant, after offering to submit to judgment with costs and disbursements, set up new matter, which the reply denied, and the issue thereby raised was voluntarily litigated by plaintiff, and resulted in favor of defendant, it was error to enter judgment against defendant for plaintiff's costs and disbursements.—*Harbo v. Board of Com'rs of Blue Earth County* (Minn.) 65 N. W. 457. 63 Minn. 238.

[c] (Wis.; 1897.)

The rule that the prevailing party is prima facie entitled to full costs must control the discretion given to the court (Rev. St. § 2918) in the allowance of costs in equitable actions, unless justice requires a departure from such rule.—*Spengler v. Hahn* (Wis.) 70 N. W. 466.

§ 5. On dismissal.

(Minn.; 1895.)

Where there are a trial, findings of fact, and conclusions of law, on which judgment of dismissal is entered for defendant, there is a judgment on the merits, within Gen. St. 1894, § 5498, subsec. 4, so as to entitle defendant to \$10 costs.—*Winnebago Paper Mills v. Northwestern Printing & Publishing Co.* (Minn.) 63 N. W. 1024.

61 Minn. 373.

§ 6. Effect of reversal.

(Iowa; 1896.)

Where a judgment for defendant is reversed on appeal, and on second trial judgment is again rendered for defendant, the trial court may properly tax the costs of the first trial against plaintiff.—*Palmer v. Palmer* (Iowa) 66 N. W. 734.

§ 7. Trial of appeal to determine.

(Minn.; 1895.)

Where the costs incurred are trifling, an appeal will not be tried on its merits for the purpose of determining the right to such costs.—*Thomas v. Craig* (Minn.) 62 N. W. 1133.

60 Minn. 501.

§ 8. Actions involving title to land.

(Mich.; 1895.)

In trespass quare clausum under a general denial, the "title" (How. St. § 8964, subd. 2) is not put in issue, so as to entitle plaintiff to judgment for costs on recovery of nominal damages.—*Ostrom v. Potter* (Mich.) 62 N. W. 170.

104 Mich. 115.

§ 9. Wrongful cutting of timber.

(Wis.; 1895.)

A plaintiff in an action for the value of timber wrongfully cut is not entitled to costs as a matter of right.—*Everett v. Gores* (Wis.) 62 N. W. 82, 89 Wis. 421.

§ 10. Conditions precedent—Perfecting judgment.

(Wis.; 1897.)

Under Sanh. & B. Ann. St. § 2894a, requiring the successful party to perfect the judgment within 60 days after verdict, unless there shall be a stay, in which case he shall have 30 days after the stay expires, and providing that in case of his failure the judgment shall be entered by the clerk, but without costs to either party, the pendency of a motion for new trial does not operate as such stay unless so ordered by the court, the clerk being required by Rev. St. § 2861, on receiving a verdict, to make an entry on his minutes specifying the verdict, "and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration," and that, "if a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict." *Steinhofel v. Railway Co.* (1896) 65 N. W. 852, 92 Wis. 123, overruled.—*Milwaukee Masons' & Builders' Ass'n v. Niezerowski*, 70 N. W. 166.

§ 11. Effect of tender of part of debt.

(Mich.; 1896.)

Tender and payment into court of a part of the debt will not prevent plaintiff from being entitled to costs in the circuit court.—*Emerson v. Kinne* (Mich.) 68 N. W. 982.

II. WHO LIABLE.

§ 12. In general.

[a] (Iowa; 1897.)

Where, in replevin, plaintiff admits that defendants are in possession under a mortgage to secure notes, but contends that there was no consideration for the notes, he is chargeable with all the costs; it being found that something was due defendants, though only one-half what they claimed, and it not being found that any note was wholly without consideration.—*Harvey v. Pinkerton* (Iowa) 70 N. W. 192.

[b] (Mich.; 1897.)

On a bill for an accounting between partners, where defendant obtained affirmative relief by reformation of the contract of partnership, and the interests of the parties cannot be definitely ascertained until the commissioner has

made his report, costs should await the final decree.—*Feige v. Babcock* (Mich.) 70 N. W. 7; *Babcock v. Feige*, Id.

[c] (Minn.; 1896.)

In the absence of special directions, costs go with an irregular judgment which is not void for want of jurisdiction.—*McRoberts v. McArthur* (Minn.) 68 N. W. 770.

[d] (Neb.; 1896.)

Code Civ. Proc. § 565, providing that, if a defendant's offer to allow judgment to be taken against him for a certain sum be rejected, plaintiff shall, if he fail to obtain judgment for a greater sum, pay defendant's costs from the time of the offer, requires, when there is but one defendant, that all costs of plaintiff as well as defendant from the time the rejected offer was made be taxed against plaintiff.—*Wachsmuth v. Orient Ins. Co.* (Neb.) 68 N. W. 935.

[e] (Wis.; 1895.)

Under Rev. St. §§ 3128, 3129, providing for the determination of the claims of a creditor who is party to an action for partition, and holds a lien upon an undivided interest in the premises sold, and further directing that questions of fact may be referred to a jury, and "tried as in other cases, and the cost of such trial shall be paid by the party failing," costs may be so taxed where the trial is by the court.—*Van Osdel v. Champion*, 62 N. W. 539, 89 Wis. 661.

[f] (Wis.; 1896.)

When a vendor in a contract for the sale of lands sues for the price, he may, on a decree in his favor, be charged with the entire costs, if it appears that, had he faithfully performed the contract, the suit would have been unnecessary.—*Gates v. Parmlly* (Wis.) 67 N. W. 739.

93 Wis. 294.

§ 13. Public officers.

(Iowa; 1896.)

Public officers impleaded in their representative capacity are not liable personally for costs.—*Farmers' Loan & Trust Co. v. City of Newton* (Iowa) 66 N. W. 784.

§ 14. Dismissal as to one appellant—Effect on others.

(Neb.; 1895.)

Where the appeal of a party against whom the judgment rendered is dismissed, the remaining appellants may be relieved by the court from the payment of costs.—*Scott v. Cornish* (Neb.) 62 N. W. 1065.

44 Neb. 376.

§ 15. Apportionment.

(Iowa; 1894.)

Code, § 2934, providing that where there are several defendants the costs shall be apportioned according to the several judgments rendered, does not apply, in case several persons are sued in tort and they defend jointly, and judgment is rendered in favor of plaintiff against all but one defendant, so as to prevent judgment from being rendered against the other defendants for all the costs.—*Johnson v. Miller* (Iowa) 61 N. W. 422.

93 Iowa, 165.

III. SECURITY FOR COSTS.

§ 16. Notice of application.

(Wis.; 1894.)

Under Rev. St. § 2945, providing that on proof, by affidavit, entitling defendant thereto, the court shall order plaintiff to file security for costs, plaintiff is not entitled to notice of the application for the order.—*Felton v. Hopkins*, 61 N. W. 77, 89 Wis. 143.

§ 17. Time of filing.

(Wis.; 1894.)

Under Rev. St. § 2831, providing that the court may on motion and "good cause

shown, in discretion and upon such facts as may be justly allow a proceeding in an action to be taken after the time limited therefor, by order, has expired, and Court Rule No. 11, §§ 1, 2, providing for a hearing, showing the propriety of granting such relief, a plaintiff who has failed to file security for costs within the time allowed by an order, on which failure section 2346 provides the court may, on motion of defendant, dismiss the complaint, should not be allowed to file such security, notwithstanding defendant's motion to dismiss, without any showing excusing default.—*Felton v. Hopkins*, 61 N. W. 77, 89 Wis. 113.

§ 18. Nonresidence.

(Mich.; 1895.)

3 How. Ann. St. § 7717c, provides that in any suit to recover for the personal labor of plaintiff security for costs shall not be ordered if the plaintiff file an affidavit that he has a meritorious cause of action, and is unable to give such security. 2 How. Ann. St. § 6821, provides that "in all cases plaintiffs who are not residents of the county in which suit is brought shall give security for costs before process shall issue." *Held*, that a nonresident plaintiff is required to give security for costs, in an action to recover for personal labor.—*Osowicki v. Ferriek* (Mich.) 63 N. W. 981.

§ 19. Action by next friend.

(Mich.; 1896.)

Under 3 How. Ann. St. § 8989, providing that, where suit has been brought in the name of an infant whose next friend has not given security for costs, the court may require such security to be given, the question whether such security shall be required is within the discretion of the court.—*Radison v. Muskegon Circuit Judge* (Mich.) 68 N. W. 147.

IV. TAXATION.

In criminal cases, see post, § 33.

Against party opposing motion to amend, see "Pleading," § 69.

§ 20. Taxation in general.

[a] (S. D.; 1896.)

A prosecution by a city for keeping a tippling shop in violation of a city ordinance, brought to the supreme court by writ of error, is, as affects the question of taxation of costs, to be considered a criminal case.—*City of Yankton v. Douglass* (S. D.) 67 N. W. 630.

[b] (Wis.; 1895.)

On reversal of an order refusing to set aside a service of summons on a defunct corporation, costs cannot be awarded in its favor.—*Combes v. Milwaukee & M. R. Co.* (Wis.) 62 N. W. 89, 89 Wis. 297.

[c] (Wis.; 1895.)

The court cannot limit the amount of costs to be recovered by the party to whom it awards them.—*Hayes v. Douglas County* (Wis.) 65 N. W. 482.

92 Wis. 429.

[d] (Wis.; 1896.)

Sanb. & B. Ann. St. § 2894a, provides that, if a successful party fails to enter and perfect his judgment within 60 days after verdict, he waives his right to costs, unless there is a stay of proceedings after verdict. *Held*, that a pending motion for new trial operates as such a stay.—*Steinhofel v. Chicago, M. & St. P. Ry Co.*, 65 N. W. 852, 92 Wis. 123.

[e] (Wis.; 1896.)

In actions on contract, costs, exclusive of disbursements, are limited, under Rev. St. § 2921, to \$25.—*Casgrain v. Hamilton* (Wis.) 66 N. W. 118.

92 Wis. 179.

§ 21. Items taxable.

[a] (Minn.; 1896.)

After a verdict has been set aside, a further jury fee must be paid when the case is called for a second trial before a jury can be sworn, under Gen. St. 1894, § 5368, providing that, before the jury is sworn, plaintiff shall pay the clerk three dollars as a jury fee, which shall be immediately paid by the clerk to the county treasurer.—*Schultz v. Bower* (Minn.) 68 N. W. 1080.

[b] (Neb.; 1897.)

The right given defendant, in an action on a usurious contract, by Comp. St. c. 44, § 5, to recover costs upon establishing the usury, extends to costs incurred in suing out an attachment in the case.—*Montgomery v. Albion Nat. Bank* (Neb.) 70 N. W. 239.

[c] (Wis.; 1895.)

Where leave to amend is granted defendant as a favor to him, in the taxation of costs, judgment having been rendered for defendant, he cannot be allowed fees for drawing the amended answers, for the motion for leave to amend, nor for drawing the affidavit on which the motion was made.—*Keith Bros. & Co. v. Stiles* (Wis.) 64 N. W. 860.

92 Wis. 15.

[d] (Wis.; 1895.)

Where defendant successfully defends an action on the ground of former recovery, the cost of the exemplification of the foreign judgment is properly taxed against plaintiff.—*Keith Bros. & Co. v. Stiles* (Wis.) 64 N. W. 860.

92 Wis. 15.

[e] (Wis.; 1895.)

The suit tax of one dollar is not recoverable by the successful party, and therefore should not be taxed against the losing party.—*Keith Bros. & Co. v. Stiles* (Wis.) 64 N. W. 860.

92 Wis. 15.

See, also, post, §§ 28, 29.

§ 22. — Witness fees.

[a] (Iowa; 1897.)

In an action of slander, for accusing plaintiff of stealing cattle, defendant pleaded in mitigation that such was plaintiff's reputation, and that he did steal cattle. There was a verdict for plaintiff for \$1. *Held*, that under Code, § 2933, providing that costs shall be recovered by the successful party, plaintiff was not liable for the costs of witnesses called solely to the matter in mitigation; and that section 2934, providing that, where there are several causes of action or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant upon the issues determined in his favor, did not apply, though, in a sense, the plea in mitigation raised an issue which was determined in defendant's favor.—*McGuire v. Montrose* (Iowa) 70 N. W. 743.

[b] (Iowa; 1897.)

In an action of slander, one count charged the speaking of the defamatory words to H. on July 21st. Another count charged the speaking of the same words to W. on July 18th. Plaintiff recovered on one count only. *Held* that, though the testimony of certain witnesses applied to each of said causes of action, where it was not possible to say what part of it applied to one and what to the other, defendant was not entitled to have half the costs of such witnesses taxed to plaintiff, under Code, § 2934, providing that, where there are several causes of action in the same petition, each party shall recover costs on the issues determined in his favor.—*McGuire v. Montrose* (Iowa) 70 N. W. 743.

[c] (Wis.; 1895.)

Witness fees of a mere nominal party to a suit are properly taxed against the losing party.—*Keith Bros. & Co. v. Stiles* (Wis.) 64 N. W. 860.

92 Wis. 15.

§ 23. Notice of taxation.**[a] (Mich.; 1896.)**

A notice of taxation of costs is not invalid because served before the judgment was entered on the verdict, the early service being a mere irregularity.—*Murphy v. Mulvena* (Mich.) 66 N. W. 224.

[b] (Minn.; 1896.)

The fact that costs were taxed and inserted in the judgment on insufficient notice did not render the taxation absolutely void.—*Lindholm v. Itasca Lumber Co.* (Minn.) 65 N. W. 931.

64 Minn. 46.

§ 24. Awarding separate bill to each defendant.**(Mich.; 1895.)**

How. St. §§ 8964, 8967-8969, contemplate but one bill of costs in favor of defendants in ejectment, where the cause has gone to trial, and all the defendants are acquitted.—*Black v. Carpenter* (Mich.) 62 N. W. 369.

104 Mich. 286.

§ 25. Remedies for erroneous taxation—Motion to retax.**[a] (Iowa; 1895.)**

A motion to retax costs in a suit to foreclose a mortgage, which was filed in a subsequent suit to set aside the decree of foreclosure, was properly stricken.—*Jackson v. Gould* (Iowa) 65 N. W. 406.

[b] (Wis.; 1894.)

Where a motion to review a taxation of costs does not point out in what respect the person objecting claims to have been aggrieved (Cir. Ct. Rule 33), the action of the trial court in affirming the taxation will not be disturbed on appeal.—*Turner v. Oberhen* (Wis.) 61 N. W. 280, 89 Wis. 1.

§ 26. — Review on appeal.**[a] (Neb.; 1894.)**

In order to review the taxation of costs, a motion to retax must be filed in the trial court, and a ruling obtained thereon.—*Shields v. Gamble*, 61 N. W. 101, 42 Neb. 850.

[b] (Neb.; 1896.)

In order to review the question of taxation of costs, a motion to retax must be made in the trial court, and a ruling obtained thereon by that court. *Real v. Honey* (1894) 58 N. W. 136, 39 Neb. 516, followed.—*Yankton, N. & S. W. Ry. Co. v. State*, 68 N. W. 487.

[c] (S. D.; 1896.)

In an action for trespass to real estate, an allegation that plaintiff is entitled to possession of the property, and a denial of the same, raises a question of title, which would deprive a justice of jurisdiction of the action, under Comp. Laws, § 6042; and, on recovery in the circuit court, plaintiff is entitled to costs, under Comp. Laws, § 5191.—*Grosso v. City of Lead* (S. D.) 68 N. W. 310.

V. COSTS ON APPEAL.**§ 27. Right to costs.****(Mich.; 1895.)**

Where appellee files no brief, on affirmation neither party is entitled to costs.—*Sawtells v. Howard* (Mich.) 62 N. W. 156.

104 Mich. 54.

§ 28. Items taxable.**[a] (Iowa; 1896.)**

Appellant is liable for costs for unnecessary notices of appeal served.—*Farmers' Loan & Trust Co. v. City of Newton* (Iowa) 66 N. W. 784.

[b] (Mich.; 1895.)

When various causes are heard together, and but one brief is presented by the winning

party, only one attorney's fee will be allowed.—*Hannah & Lay Mercantile Co. v. Mosser* (Mich.) 62 N. W. 1120.

105 Mich. 18.

[c] (Mich.; 1896.)

Pub. Acts 1895, No. 266, relating to bonds, and the acceptance of surety companies as sureties thereon, does not authorize the taxation as costs of a charge paid by a litigant to a surety company for becoming surety on an appeal bond, where the litigant does not occupy the relation of a fiduciary.—*Somerville v. Wabash R. Co.* (Mich.) 69 N. W. 90.

[d] (S. D.; 1895.)

For argument on rehearing the prevailing party is entitled, as costs, to a sum equal to the amount allowed for the original argument.—*Kirby v. Western Union Tel. Co.* (S. D.) 65 N. W. 482.

§ 29. — On appeal from board of equalization.**(Iowa; 1896.)**

Where the district court, on appeal from a board of equalization, has, in its discretion, allowed pleadings to be filed, copy fees therefor may be included in taxing costs.—*Farmers' Loan & Trust Co. v. City of Newton* (Iowa) 66 N. W. 784.

§ 30. From justice's court.**(Mich.; 1896.)**

The discretion of the circuit court, on appeal from justices of the peace and court commissioners, under How. Ann. St. §§ 7026, 8307, 9004, to allow costs, including term fees, cannot be overcome by a rule of court not to allow them in certain cases.—*Voigt Brewing Co. v. Hosmer* (Mich.) 66 N. W. 217.

§ 31. Expense of record, transcript, abstracts, etc.**[a] (Iowa; 1895.)**

Where the additional abstract on appeal contained about 7 pages, and the amendment thereto 19, and no sufficient cause was shown for the failure to incorporate in the additional abstract, when prepared and served at first, all the matter set out in the amendment, costs will not be allowed for the amendment.—*Bowman v. Western Fur Manufg Co.* (Iowa) 64 N. W. 775.

[b] (Iowa; 1896.)

Fees for the reporter's transcript, paid by plaintiff, appealing from a judgment for defendant which was reversed, may, after a judgment for defendant on second trial, be properly taxed against defendant, under McClain's Code, § 4152, providing that the clerk may tax as costs any sum for any matter which "the court may have awarded as costs in the progress of the case, or may deem just to be taxed," and are not governed by section 5029, providing that, when a transcript is desired in a civil case, "the fees therefor shall be paid by the party desiring the same."—*Palmer v. Palmer* (Iowa) 66 N. W. 734.

[c] (Iowa; 1896.)

Where an additional abstract, of no merit in determining the appeal, is not served on appellant till more than nine months after the original abstract was served, and but a short time before the case is to be submitted, no costs for it will be allowed to the appellee, when no excuse for delay is shown.—*Guthrieless v. Ripley* (Iowa) 67 N. W. 109.

[d] (Iowa; 1896.)

Since it is the usual practice to argue a motion submitted with the main case on appeal, in print, along with the arguments on the main case, costs of preparing printed arguments on motion to dismiss the appeal will, on affirmation, be charged against appellants.—*Arts v. Ruckstien* (Iowa) 67 N. W. 409.

[c] (S. D.; 1896.)

Under the rules, the supreme court will not examine the bill of exceptions except to settle a disagreement between abstracts; and an objection by an appellee, on reversal, to the taxation of costs for the printing of so much of appellant's abstract as contains the evidence, on the ground that the bill of exceptions contains no specification of errors relating thereto, occurring at the trial, and excepted to, cannot be considered unless the fact relied on is shown by the abstract.—*Peart v. Chicago, M. & St. P. Ry. Co.* (S. D.) 67 N. W. 537.

[f] (S. D.; 1896.)

An appellee successful on appeal is entitled to have included, in costs allowed him, the amount paid by him to the official stenographer for a transcript of the evidence on the trial, which, by reason of the insufficiency of appellant's bill of exceptions, was required to perfect the record on appeal.—*Novotny v. Danforth* (S. D.) 69 N. W. 585.

In criminal cases, see post, § 36.

§ 32. Bringing up unnecessary matter.

[a] (Iowa; 1895.)

That matter in a single page of appellee's additional abstract was improperly inserted is not ground for taxing the whole costs against appellee.—*Reed v. Lane* (Iowa) 65 N. W. 380.

[b] (Iowa; 1896.)

Where the appellant files a transcript of the record, not required by the denials of the appellee, and therefore unnecessary, its cost should not be taxed to the appellee.—*Bucknell v. Deering* (Iowa) 68 N. W. 825.

[c] (S. D.; 1895.)

A recovery for disbursements for unnecessary printing in the brief portions of the written abstract and lengthy quotations from text-books and reported cases conveniently within the reach of the supreme court will not be allowed.—*Kirby v. Western Union Tel. Co.* (S. D.) 65 N. W. 482.

VI. COSTS IN CRIMINAL CASES.

§ 33. Taxation.

(Mich.; 1895.)

Costs in a criminal case in connection with a fine, and commitment until payment, need not be taxed by the clerk after giving notice of the proceedings therefor, but the court may summarily determine and state in its judgment the amount of the costs to be paid by the accused.—*In re Johnson* (Mich.) 62 N. W. 407. 104 Mich. 343.

§ 34. Liability of defendant.

[a] (Iowa; 1896.)

An attorney's fee of \$60, allowed by the court in a criminal case, under McClain's Code, § 2388, authorizing "a reasonable attorney's fee to be assessed by the court," will not, on appeal, be held excessive in the absence of any evidence.—*State v. Arnold* (Iowa) 67 N. W. 252.

[b] (Neb.; 1896.)

An attorney's fee cannot be taxed against a defendant, under Comp. St. c. 50, § 22, in a case prosecuted by the county attorney, though another attorney examined the witnesses.—*Hornberger v. State* (Neb.) 66 N. W. 23. 47 Neb. 40.

§ 35. — Costs of appeal.

(S. D.; 1896.)

On affirmance on error to review a conviction of a crime, costs of the appeal are not to be taxed, in the absence of statute, against defendant.—*City of Yankton v. Douglass* (S. D.) 67 N. W. 630.

§ 36. Liability of county.

(Iowa; 1895.)

The advisability of ordering a transcript on appeal by defendant in a criminal case to be made at the expense of the county, as provided by Code, § 3777, rests in the discretion of the trial court.—*State v. Waddle* (Iowa) 64 N. W. 276.

§ 37. Liability of state—Costs in unorganized counties.

[a] (S. D.; 1896.)

Laws 1891, c. 15, requires the county assessor of Brule county to assess for state and judicial purposes the property in the unorganized counties of Lyman and Presho, which were attached to Brule county for judicial purposes. Chapter 16, amending chapter 15, provides that the compensation of the assessor for making the assessment in the unorganized counties "shall be paid by the state treasurer from the taxes collected on such assessment." *Held*, that the fund for state and judicial purposes, collected in such unorganized counties, is required to be paid into the state treasury, and becomes a state fund for the payment of the expenses of criminal prosecutions arising in such counties.—*Morgan v. State* (S. D.) 65 N. W. 538.

[b] (S. D.; 1896.)

Comp. Laws, § 425, provides that the civil and criminal jurisdiction of justices of the peace in a judicial subdivision containing one or more unorganized counties shall extend over all such unorganized counties, and that the expenses of all criminal prosecutions arising in such unorganized counties shall be audited and paid out of the state treasury, when the same is certified and allowed in the manner prescribed therein. *Held*, that such statute applies to unorganized counties which were a part of the Great Sioux Indian reservation at the time the statute was enacted.—*Morgan v. State* (S. D.) 68 N. W. 538.

[c] (S. D.; 1896.)

Laws 1881, c. 84, § 15, amended by Laws 1891, c. 4, making the state liable for the costs of prosecutions arising, or having arisen, in unorganized counties, applies where a prosecution arose in a county then unorganized, though it was organized shortly after, and the case was removed there for trial.—*Lyman County v. State* (S. D.) 69 N. W. 601.

[d] (S. D.; 1896.)

The certification by the state's attorney, and allowance by the court, of costs in a criminal prosecution arising in an unorganized county, required by the statute, is a condition precedent to their payment by the state auditor, but not to the maintenance of an action against the state thereon, after refusal of their payment by the auditor.—*Lyman County v. State*, (S. D.) 69 N. W. 601.

[e] (S. D.; 1896.)

When a criminal prosecution arose in an unorganized county, and the costs were payable by the state, the issuance by the county after its organization of its warrants for such costs is unauthorized; but, where such warrants have been issued in good faith, they will be treated as advances made on the claims, and entitle the county to be subrogated to the rights of the claimants against the state.—*Lyman County v. State* (S. D.) 69 N. W. 601.

§ 38. Surety to keep the peace.

(Iowa; 1895.)

Where one has been bound over to keep the peace and to abide the orders of the district court, under Code, § 4126, providing that "if it is made to appear in the court that the proceeding was instituted without probable cause the court may render judgment against the complainant for such costs," where the complainant does not appear it is error not to allow defendant to introduce evidence to show want of probable cause.—*State v. Steinkopf* (Iowa) 62 N. W. 787.

§ 39. Attorney appointed to defend.

(Neb.; 1895.)

Where the district court appoints counsel under Crim. Code, § 437, to defend an indigent prisoner, the claim of such attorney for services in the trial court, and on appeal, must be presented for allowance in the district court, rather than in the supreme court.—*Edmonds v. State*, 62 N. W. 199, 43 Neb. 742.

§ 40. Appeal from taxation.

(Neb.; 1896.)

The right of appeal from the county to the district court in a criminal prosecution does not lie in favor of the complaining witness, against whom a judgment for costs has been rendered under Cr. Code, § 322.—*Ochander v. Hanson* (Neb.) 67 N. W. 604, 48 Neb. 485.

CO-TENANCY.

See "Joint Tenancy"; "Tenancy in Common."

COUNCIL.

See "Municipal Corporations."

COUNSEL.

See "Attorney and Client."

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTERFEITING.

See "Forgery."

COUNTIES.**I. IN GENERAL, §§ 1-10.****II. COUNTY SEAT, §§ 11-16.****III. OFFICERS, §§ 17-25.****IV. COUNTY BOARD, §§ 26-32.****V. CONTRACTS, §§ 33-42.****VI. LIABILITIES IMPOSED BY STATUTE, § 43.****VII. LIABILITY FOR TORTS, §§ 44, 45.****VIII. PRESENTATION, ALLOWANCE, AND ENFORCEMENT OF CLAIMS, §§ 46-53.****IX. ACTIONS, §§ 54-57.**

See, also, "Bridges"; "Municipal Corporations."

Act requiring support of habitual drunkards, police power, see "Constitutional Law," § 44.

Certifying constitutional amendment to county auditors, see "Constitutional Law," § 4.

Concurrent jurisdiction with city to improve street, see "Municipal Corporations," § 111.

Depositories of county funds, see "Depositories," § 3, 4.

Division into school districts, see "Schools and School Districts," § 2.

Grant of ferry franchise, see "Ferry."

In what county arrest may be made, see "Arrest," § 4.

Judicial notice of situation of city in county, see "Evidence," § 1.

Jurisdiction of county court in bastardy cases, see "Bastardy," § 3.

Liability for defects in bridges, see "Bridges," § 4, 5.

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Liability for interfering with flow of surface water, see "Surface Water," § 5.

— for support of poor, see "Poor and Poor Laws," § 4.

— of state for costs of criminal cases in unorganized counties, see "Costs," § 37.

— to subcontractors for work done on public building, see "Mechanics' Liens," § 20.

Reimbursement of taxes to purchaser of void tax deed, see "Taxation," § 119.

Tax accounts between county and state, see "Taxation," § 3.

— between county and city, see "Taxation," § 4.

I. IN GENERAL.**§ 1. Nature of corporation.**

(Wis.; 1896.)

A county is a municipality, within Laws 1895, c. 138, which creates a state home for feeble-minded persons, and (section 2) authorizes "municipalities" of the state to make donations therein mentioned for its establishment.—*Lund v. Chippewa County* (Wis.) 67 N. W. 927, 93 Wis. 927.

§ 2. Annexation of territory.

(Minn.; 1897.)

The presumptions in favor of the finding of a commission acting under Laws 1895, c. 298, that petitions annexing territory to a county are conformable to law, when followed by the governor's proclamation annexing such territory, may be rebutted by competent evidence.—*State v. Board of Com'rs of Crow Wing County* (Minn.) 69 N. W. 925.

Ousting county from annexed territory, see "Quo Warranto," § 3.

§ 3. Change of boundaries—Submitting question to voters.

[a] (Minn.; 1896.)

The mere existence of an act of the legislature declaring organized a previously established county, and providing for the appointment of county officers, does not of itself make an organized county; and accordingly, whenever, for any cause, a county in fact organized under such an act becomes depopulated, its organization is lost; hence Laws 1872, c. 87, detaching from Wilkin county, which, though once organized, had become in fact disorganized by reason of its depopulation as a result of the Indian massacre of 1862, certain townships which it attached to Otter Tail county, did not violate Const. art. 11, § 1, requiring laws changing lines of organized counties to be submitted to the electors of the counties affected, for adoption.—*In re Section No. Six, Township One Hundred and Thirty-Four* (Minn.) 68 N. W. 323; *State v. Honerud*, Id.

[b] (Minn.; 1896.)

Since the amendments of 1881 and 1892, to the constitution (art. 4, §§ 33, 34), relating to special laws, repealed by implication and completely abrogated all that part of art. 11, § 1, requiring laws for changing the lines of organized counties to be submitted to the electors before taking effect, Laws 1893, c. 143, § 4, as amended by Laws 1895, c. 124, § 2, is not unconstitutional. *State v. Board of Com'rs Crow Wing County* (1896) 68 N. W. 767, followed.—*State v. Pioneer Press Co.*, 68 N. W. 769.

§ 4. Division—Petition for creation of new county.

[a] (Minn.; 1897.)

Under Laws 1893, c. 143, an elector may legally sign two or more noncompeting petitions for the creation of a new county.—*State v. Board of Com'rs of Red Lake County* (Minn.) 69 N. W. 1083.

[b] (Minn.; 1897.)

Under Laws 1893, c. 143, all propositions for the creation of the new county must be

submitted to the electors; but only one of the competing propositions can be adopted. *State v. Board of Com'rs of Red Lake County (Minn.)* 69 N. W. 1083.

§ 5. — Method of voting.

(Minn.; 1896.)

Where several distinct propositions to create new counties are submitted at the same election to the electors of the same county, under Laws 1893, c. 143, § 4, as amended by Laws 1895, c. 124, § 2, no elector can vote for or against more than one of the propositions, and, if he does, his ballot cannot be counted for or against any of such propositions. *State v. Pioneer Press Co. (Minn.)* 68 N. W. 769.

§ 6. — Votes necessary to carry proposition.

(Minn.; 1897.)

Under Laws 1893, c. 143, on an election between competing propositions for the organization of a new county, such a proposition, to be adopted, must receive a majority of all the votes cast thereon, and a plurality of the votes cast on the propositions with which it is competing. *State v. Board of Com'rs of Red Lake County (Minn.)* 69 N. W. 1083.

§ 7. — Settlement of accounts.

[a] (Wis.; 1895.)

Where a new county is created out of part of an old one, the latter will be liable to the former for the depreciation in the value of tax certificates assigned to the new one in a settlement of the accounts between them, when the depreciation is caused by the action of the old county in selling certificates junior to them while holding them in trust after the settlement. *Forest County v. Langlade County (Wis.)* 63 N. W. 760.

91 Wis. 543.

[b] (Wis.; 1895.)

On a settlement of accounts between an old county and a new one created out of part of its territory, the new one must accept at their depreciated value tax certificates, where the depreciation in value was caused by a sale of certificates junior to them before the division took place. *Forest County v. Langlade County (Wis.)* 63 N. W. 760.

91 Wis. 543.

[c] (Wis.; 1895.)

Where, previous to the creation of a new county from part of an old one, delinquent taxes returned by towns in the part comprising the new county as uncollectible, because invalid, were compromised by the old county by remitting a portion, the portion remitted cannot, on settlement of the accounts between the two counties after the division, be debited against the new county. *Forest County v. Langlade County (Wis.)* 63 N. W. 760.

91 Wis. 543.

[d] (Wis.; 1895.)

Act April 15, 1893 (Laws 1893, c. 150), which created V. county out of territory included in O. county, by section 7 provides that V. county shall be liable for its proportion of the debt of O. county, and shall be entitled to its proportion of the assets of O. county, to be determined by a commission; and by section 8 provides that delinquent taxes collected before the sale of 1893 on lands situated within V. county, and the proceeds of all tax certificates of the tax sale of 1893 on such lands bid in at the sale, shall be paid over to the treasurer of V. county by the treasurer of O. county. *Held*, that an award of commissioners acting under section 7 of the above act cannot be pleaded in bar of mandamus proceedings previously commenced to compel the payment to V. county by O. county of moneys due it under section 8. *State v. Holland (Wis.)* 65 N. W. 370. 91 Wis. 646.

[e] (Wis.; 1895.)

Act April 15, 1893 (Laws 1893, c. 150), which created V. county out of territory included in O. county, by section 7 provides that V. county shall be liable for its proportion of the debt of O. county, and shall be entitled to its proportion of the assets of O. county, to be determined by a commission; and by section 8 provides that delinquent taxes collected before the sale of 1893 on lands situated within V. county, and the proceeds of all tax certificates of the tax sale of 1893 on such lands bid in at the sale, shall be paid over to the treasurer of V. county by the treasurer of O. county. *Held*, that the provisions of section 8 are mandatory, and the payment to V. county of delinquent taxes and proceeds of sales of tax certificates, therein provided for, must be made without reference to the accounting provided for in section 7. *State v. Holland (Wis.)* 65 N. W. 370, 91 Wis. 646.

§ 8. Apportionment of assets and liabilities.

[a] (Neb.; 1897.)

In an action for the recovery of a proper proportion of the value of real property retained and used by a county from the territory of which the territory of another county has been segregated, it is no defense to show that said real property was originally conveyed by a deed with conditions, when thereafter the said property was dedicated as county property by a plat duly recorded by the grantor, and as such was accepted by the county, and, at great expense, improved by the erection thereon of county buildings. *Brown County v. Rock County (Neb.)* 70 N. W. 943.

[b] (Wis.; 1895.)

Where a new county is created out of part of an old one, sums due by the old one to towns, part of whose territory is detached to form the new county, should not, in a settlement of accounts between the two counties after the division, be credited to the new county, if it appears that a large portion of the territory of these towns remains in the old county, and it does not appear that these sums represent money actually received from the territory comprising these towns. *Forest County v. Langlade County (Wis.)* 63 N. W. 760.

91 Wis. 543.

§ 9. — Method of paying debts of old county.

(S. D.; 1895.)

Where an act creating a new county of territory taken from a county having an indebtedness, both bonded and floating, and provided that the new county should assume its proportion of all of such indebtedness, and issue bonds therefor to the original county, corresponding in respect to time of maturity, rate of interest, and place of payment with that county's existing obligations, *held*, that provisions for issuing bonds by the new county did not apply to floating indebtedness represented by past-due warrants, and that the new county was required to make payment of such floating indebtedness in the usual manner of paying matured indebtedness. *Lawrence County v. Meade County (S. D.)* 62 N. W. 131.

6 S. D. 528.

§ 10. Disorganization.

[a] (Minn.; 1896.)

Special Laws 1876, c. 208, disorganizing Cass county and attaching it to Crow Wing county, is constitutional. *State v. McFadden* (1876) 23 Minn. 40, followed. *State v. Board of Com'rs Crow Wing County*, 68 N. W. 767.

[b] (Minn.; 1896.)

The petitions for detaching part of an unorganized county for the purpose of attaching it to an organized county, which are required to be signed by Laws 1895, c. 298, by a certain percentage of the voters of the districts affected

"as shown by the returns of the last preceding general election," need not show on their face or by affidavits attached the number of votes cast at such election.—*State v. Board of Com'rs Crow Wing County (Minn.)* 68 N. W. 767.

II. COUNTY SEAT.

Keeping office of register at county seat, see "Register of Deeds."
Mandamus to determine validity of county seat election, see "Mandamus," § 4.

§ 11. Petition for change of location.

[a] (Minn.; 1897.)

Where a valid petition for a change of a county seat is presented and not withdrawn, no competing petition can be received until five years after election on the first petition.—*Streissguth v. Geib (Minn.)* 69 N. W. 1097.

[b] (N. D.; 1896.)

After a county-seat election has been ordered and held, and a sufficient vote is cast in favor of some one place to work a relocation of the county seat, the question whether the petition presented to the board of county commissioners praying that such an election be held was signed by a sufficient number of voters is not open to judicial investigation, when the board has found that it was so signed.—*State v. Langlie (N. D.)* 67 N. W. 958.
5 N. D. 594.

§ 12. — Withdrawal of signatures.

[a] (Minn.; 1894.)

A signer of a petition for the removal of a county seat under Gen. Laws 1889, c. 174, may withdraw his name from the petition at any time before the board of county commissioners completes its action thereon.—*Slingerland v. Norton (Minn.)* 61 N. W. 322.
59 Minn. 351.

[b] (Minn.; 1894.)

Where a petition under Gen. Laws 1889, c. 174, for the removal of a county seat, is sufficient when presented, the auditor is bound to make the order and give the notices requisite to bring it before the county commissioners, though some of the petitioners subsequently withdraw their names.—*Slingerland v. Norton (Minn.)* 61 N. W. 322.
59 Minn. 351.

[c] (Minn.; 1896.)

Electors who have signed a petition for the removal of a county seat may demand the removal of their names therefrom only from the county board at a session thereof called to consider the petition, and not from the county auditor.—*Slingerland v. Norton (Minn.)* 61 N. W. 322.
59 Minn. 351, followed.—*State v. Geib*, 68 N. W. 1081.

[d] (Minn.; 1896.)

Where a withdrawal by an elector of his name from a petition for the removal of a county seat was presented by his attorney in fact to the county board, but before any action thereon was taken a recall of the withdrawal and a revocation of the attorney's authority were presented to the board, the board could not remove the name.—*State v. Geib (Minn.)* 68 N. W. 1081.

§ 13. Election to fix or change location.

[a] (Minn.; 1896.)

In determining the result of a county seat election, under Gen. St. 1894, § 647 et seq., all the ballots cast, unintelligible as well as intelligible, must be considered in ascertaining the required 55 per cent. of votes.—*Smith v. Board of Com'rs of Renville Co. (Minn.)* 65 N. W. 956.
64 Minn. 16.

[b] (Neb.; 1896.)

Under the provisions of the act for the relocation of county seats, there being no requirement that abortive ballots shall be certified

to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a place other than the existing county seat must receive three-fifths to be entitled to the relocation of the county seat, merely because, in the certified return of the county election board, such ballots were referred to as "ballots not reported or accounted for," or as "rejected" or "blank" ballots.—*Harrison, J., and Ragan, C., dissenting.—State v. Roper (Neb.)* 66 N. W. 539.
47 Neb. 417.

[c] (S. D.; 1896.)

Const. art. 9, § 2, provides that in counties already organized, where the county seat has not been located by a majority vote, it shall be the duty of the county board to submit the location of the county seat to the county electors at a general election, and that the place receiving the majority of all votes cast will be the county seat. *Held*, that Laws 1890, c. 64, § 1, in so far as it requires the presentment of a petition to the board of county commissioners in cases where the county seats have not been located by a majority vote, in order to entitle or require such board to act, is in conflict with such constitutional provision.—*State v. Lien (S. D.)* 68 N. W. 748.

§ 14. — Notice.

(N. D.; 1896.)

Comp. Laws, § 565, relating to elections for relocation of county seats, provided that, if an election was ordered, it should be the duty of the board of county commissioners, in the notices for the next general election, to notify the voters of the county to designate upon their ballots at such election the place of their choice. The notice actually given was that an election would be held for the purpose, among others, "of voting upon the question of relocating the county seat of Traill county." At the election 1,882 votes were cast on this question, and the highest number of ballots cast at such election was 1,960. *Held*, that the notice was sufficient, and that, even if insufficient, the election was not void, it appearing that the voters were not misled by the defect in it.—*State v. Langlie (N. D.)* 67 N. W. 958.
5 N. D. 594.

§ 15. — Contest of election.

(Neb.; 1896.)

Proceedings for contesting a county-seat election, provided for by Comp. St. 1893, c. 26, cannot be maintained by one elector of a county in his own name and on his own behalf.—*Sebering v. Bastedo (Neb.)* 67 N. W. 148.
48 Neb. 358.

§ 16. — Votes required to carry proposition.

[a] (Neb.; 1895.)

Comp. St. 1893, c. 17, art. 3, § 1, provides that, where an election is held for the purpose of relocating a county seat, "any place receiving three-fifths of all the votes cast shall become and remain the county seat of said county." *Held* that, to remove a county seat, the proposed plan of relocation must have received the vote of three-fifths of all the voters in the county; three-fifths of the votes actually cast on the proposition not being sufficient.—*State v. Roper (Neb.)* 61 N. W. 753.
46 Neb. 724.

[b] (N. D.; 1896.)

Comp. Laws, § 565, made it necessary that some one place should have "two-thirds of the votes polled" to work a change of the county seat to such place. *Held*, that this meant two-thirds of the votes polled on that particular question, and not two-thirds of the highest number of votes polled on some other question at the same election.—*State v. Langlie (N. D.)* 67 N. W. 958.
5 N. D. 594.

III. OFFICERS.

See, also, "District and Prosecuting Attorneys." Action on county treasurer's bond, see post, § 56. Personal liability for torts, see post, § 45. Deposit of county funds by treasurer, see "Depositories," §§ 3, 4. Right of treasurer to acquire tax title, see "Taxation," § 101.

§ 17. Appointment of county assessor.

(Minn.; 1897.)

Sp. Laws 1875, c. 90, § 1, authorized the appointment of a county assessor for Ramsey county by a board consisting of the chairman of the board of county commissioners, the county auditor, and the president of the common council of the city of St. Paul. That portion of the St. Paul city charter which created the office of president of the common council, and provided for his election annually (Sp. Laws 1874, c. 1, subc. 3, § 3), was repealed by implication by an amendment to the charter (Sp. Laws 1891, c. 6), and that office was abolished. *Held*, that since such amendment of the St. Paul city charter, the assessor of Ramsey county must be appointed by the chairman of the board of county commissioners and the county auditor.—*State v. Johnstone* (Minn.) 63 N. W. 176, 61 Minn. 50.

§ 18. Treasurer.

[a] (Mich.; 1897.)

A county treasurer, required under Pub. Acts 1895, No. 154, § 87, to make a statement, quarterly, of the account between the county and the several townships, and pay all moneys shown by it to be due the township to the proper receiving officer, has no right to retain, out of money due a city, a sum equal to the delinquent personal taxes due the county, for collection of which he has issued his warrant to the city treasurer whose duty it is to collect them.—*City of Muskegon v. Soderberg* (Mich.) 69 N. W. 1116.

[b] (Neb.; 1897.)

The authority of a county treasurer to deposit for safe-keeping in bank the funds entrusted to his care cannot be questioned in a strictly collateral proceeding.—*Western Wheel- ed Scraper Co. v. Sadilek* (Neb.) 69 N. W. 765.

§ 19. — Bond.

[a] (Neb.; 1896.)

The same consideration supports an additional bond furnished by a county treasurer under Comp. St. 1889, c. 10, § 21, as supports an original bond given by that officer.—*Stoner v. Keith County* (Neb.) 67 N. W. 311.

48 Neb. 279.

[b] (S. D.; 1895.)

The official bond of a county treasurer is not rendered invalid by the fact that it runs to county commissioners and their successors in office, instead of to the county.—*Custer County v. Allen* (S. D.) 64 N. W. 533.

§ 20. — Liabilities.

(Neb.; 1896.)

An outgoing county treasurer turned over to his successor a certificate evidencing the deposit of county funds in a bank for safe-keeping, and the same was received by the incoming treasurer as a payment to him, to its amount, of such funds. The certificate of deposit was, by the new treasurer, delivered to the bank which had issued it, and was canceled, and the treasurer received in lieu thereof a certificate of deposit for a like sum, payable to him as county treasurer. *Held*, that the incoming treasurer and his bondsmen were chargeable on his bond for the amount of such payment.—*Bush v. Johnson county* (Neb.) 66 N. W. 1023.

48 Neb. 1.

§ 21. Surveyor.

(Minn.; 1896.)

Gen. St. 1891, § 831, which provides that the county surveyor shall execute all surveys which shall be ordered by any court, board of county commissioners, or town supervisors, does not authorize a county surveyor, whenever a county or a town lets a contract for public improvements, the plans of which, in his opinion, necessitate the service of a surveyor or civil engineer, to do the work at the expense of the county or town, on his own motion.—*Haynes v. Board of Com'rs of Blue Earth County* (Minn.) 67 N. W. 1905.

§ 22. Settlement of accounts—Conclusion.

[a] (Neb.; 1896.)

If the county board be negligent in the examination of the accounts of the county treasurer, the examination will not be available as a defense to the sureties on the treasurer's bond, in an action for funds not turned over.—*Bush v. Johnson County* (Neb.) 66 N. W. 1023.

48 Neb. 1.

[b] (Neb.; 1896.)

A county treasurer, during his first term, had on deposit in a bank \$6,000 of the public funds, such deposit being evidenced by a certificate of deposit. At the close of this term of office and the beginning of the second term, in his report to and settlement with the county board, he included and stated the amount of the certificate of deposit as so much cash; the board possessing no knowledge of the existence of the certificate, or of the deposit of the money. Before the close of the treasurer's first term, the bank failed. *Held*, that such settlement did not bind the county as an acceptance or approval of the certificate of deposit as so much cash accounted for.—*Bush v. Johnson County* (Neb.) 66 N. W. 1023.

48 Neb. 1.

§ 23. Compensation and fees.

[a] (Iowa; 1896.)

Under Code, § 771, providing that, "when a county officer receiving a salary is compelled by the pressure of business of his office to employ a deputy, the board of supervisors may make a reasonable allowance to such deputy," a county auditor may employ necessary assistance without authority from the supervisors, and the county will be liable to pay for such assistance.—*State v. Van Auken* (Iowa) 68 N. W. 454.

[b] (Iowa; 1896.)

Code, § 771, providing that, when a county officer receiving a salary is compelled to employ a deputy, the supervisors may make a reasonable allowance to such deputy, relates to the employment of temporary assistance without the authority of the supervisors, and does not conflict with Code, § 3798, as amended by Acts 18th Gen. Assem. c. 184, § 3, fixing the annual compensation of the county auditor at \$1,200, and providing that, when it is necessary for the proper discharge of the duties of the office, the supervisors may, on application of the auditor, authorize him to employ a deputy, on a salary not exceeding \$600 per annum. *Harris v. Chickasaw Co.* (1889) 42 N. W. 313, 77 Iowa, 345, followed.—*State v. Van Auken*, 68 N. W. 454.

§ 24. — Of clerk.

[a] (Mich.; 1896.)

Sess. Laws 1895, Act No. 236, creating the office of state statistician, does not make it the duty of the county clerk to furnish copies of records in his office to the state statistician, and therefore the county is not liable for work so done by the clerk.—*Gardner v. Board of Sup'rs of Newaygo County* (Mich.) 67 N. W. 1091.

[b] (Mich.: 1896.)

Under Laws 1893, Act No. 206, § 123, providing that each county clerk shall receive such reasonable compensation for the extra services required by such section as may be allowed by the board of supervisors, a clerk who is paid a salary is not entitled to recover on a claim for services rendered in tax proceedings under Laws 1893, Act No. 206, §§ 90, 110, and How. Ann. St. § 9009, subd. 7.—Gardner v. Board of Sup'rs of Newaygo County (Mich.) 67 N. W. 1091.

[c] (Neb.: 1896.)

The requirements of Comp. St. 1895, c. 28, §§ 42-44, in regard to a fee book to be kept by the county clerk, and the reports of his fees to be regularly made to the county board, combined with the statutory provisions in respect to the amount to be charged in each instance as a fee, and the fact that what has been done by the clerk for which a fee should be charged appears of record, are sufficient to charge the board with notice of any discrepancy between the amounts of the fees of the clerk reported by him as collected and the true amounts; hence the right of action to enforce the duty of making a true report for any current year, and to pay any excess of fees into the county treasury, accrues at the time the report is due, or is made in an incomplete form, though the rendering of an incomplete or false report be considered a fraud on the board.—State v. Boyd (Neb.) 68 N. W. 510.

§ 25. — Of treasurer.

[a] (Neb.: 1896.)

A county treasurer is not, under Comp. St. 1889, c. 28, § 20, entitled to a commission or collection fee on funds, the proceeds of sales of bonds paid or delivered to him as such officer.—Stoner v. Keith County (Neb.) 67 N. W. 311.

48 Neb. 279.

[b] (Neb.: 1897.)

Sess. Laws 1887, c. 44, § 42, limiting the compensation of county treasurers of counties of 25,000 inhabitants or less to \$2,000 per annum, was not modified by Sess. Laws 1887, c. 80, allowing county treasurers a fee of 1 per cent. on educational land funds collected and remitted to the state treasurer, but the legislature intended the state to reimburse such counties for services rendered by its treasurers in the collection and remittance of its funds.—Bedwell v. Custer County (Neb.) 70 N. W. 945.

IV. COUNTY BOARD.

Conclusiveness of decision on claim, see post, § 51. Votes necessary for award of contract, see post, § 33.

Delegation of legislative power to, see "Constitutional Law," § 14.

Injunction against, see "Injunction," § 15.

Power as to care and maintenance of poor, see "Poor and Poor Laws," § 1.

§ 26. Meeting of board—Notice.

[a] (Mich.: 1895.)

Where a statute provides for calling a meeting of county supervisors by giving a written notice to each of them, it will be presumed that their meeting was legally called, and one attacking its validity must prove that the notices were not given.—Board of Sup'rs of Wayne County v. Judges of Wayne Circuit Court (Mich.) 64 N. W. 42.

[b] (Mich.: 1895.)

Proof of service of such notice need not be filed with the board or recorded on the record of its proceedings in the absence of a statutory provision.—Board of Sup'rs of Wayne County v. Judges of Wayne Circuit Court (Mich.) 64 N. W. 42.

§ 27. Formalities in transacting business.

(Neb.: 1895.)

County commissioners cannot legally transact county business except at a regular session, or one specially called by the county clerk, on notice as required by law.—Morris v. Merrel (Neb.) 62 N. W. 865.

44 Neb. 423.

§ 28. County board as court.

(Neb.: 1896.)

Neither Laws 1856, c. 20, p. 70, Laws 1861, p. 146 (Rev. St. 1866, c. 9), nor Act 1873 (Gen. St. p. 232), constituted the board of county commissioners a court, within the meaning of the constitutional provision limiting the jurisdiction of inferior courts.—Stenberg v. State (Neb.) 67 N. W. 190.

48 Neb. 299.

§ 29. Power as to establishment of city precincts.

(Neb.: 1897.)

In 1886 the statute governing cities of the second class, having the specified number of inhabitants (Comp. St. 1895, c. 14), provided that each city should be divided into not less than four nor more than six wards, and that the precinct lines should correspond with the ward lines, and in number with the wards of the city. Nebraska City had been divided into four wards. The county commissioners attempted to establish a precinct including therein the whole of Nebraska City and a number of sections of land. Held, that they had no such authority.—Morton v. Carlin (Neb.) 70 N. W. 966.

§ 30. Delegation of power.

(Iowa: 1896.)

A resolution of a board of county supervisors that the county furnish and pay for plank for culverts and small bridges in the respective townships, each member of the board to determine by inspection of his district what plank is needed, and to issue an order therefor when called upon by the road supervisors, is not void because of the power thus delegated to the individual members of the board.—Denison v. Watts (Iowa) 66 N. W. 886.

§ 31. Reviewing action of former board.

[a] (Neb.: 1896.)

In the absence of statutory authority, one county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law.—Stenberg v. State (Neb.) 67 N. W. 190.

48 Neb. 299.

[b] (Neb.: 1896.)

Where a county board disposed of part of the public grounds of the county without authority, and gave deeds therefor, its successor had jurisdiction to pass on claims of the grantees for the return of the price paid for the lots, interposed on the ground that the conveyances were void.—Stenberg v. State (Neb.) 67 N. W. 190.

48 Neb. 299.

[c] (Neb.: 1897.)

No official finding by a county board that a proposition for the sale of public grounds, submitted to a vote of the people of the county, received votes sufficient, under Comp. St. c. 18, art. 1, § 20, to work its adoption, is necessary to authorize the sale; and therefore, where the sale has been made, and a subsequent claim by the purchasers for repayment of the consideration on the ground that the sale was unauthorized has been denied, the allowance of such claim by a subsequent board is not objectionable, as involving a review or reversal of the finding of the former board.—Stenberg v. State (Neb.) 69 N. W. 849.

§ 32. Notice to member—When imputed to board.

(Neb.; 1896.)

The knowledge of one member of a county board, at the time of the approval by them, of the conditional signing of a county treasurer's bond by the sureties, not shown to have been imparted to the board, is not knowledge of or notice to the board of such fact.—*Stoner v. Keith County (Neb.)* 67 N. W. 311. 48 Neb. 279.

V. CONTRACTS.

§ 33. Consent of two-thirds of supervisors.

(Mich.; 1896.)

Const. art. 10, § 9, authorizes county supervisors to raise money for public buildings, but requires sums greater than \$1,000 to be authorized by a vote of the electors. How. Ann. St. § 483, subd. 6, authorizes the board to erect necessary county buildings, and to prescribe the time and manner of erecting the same; and section 484 provides that "none of the powers mentioned in the sixth subdivision of the last preceding section shall be exercised without a vote of two-thirds of" all the members of the board. *Held* that, where the electors have authorized the raising of funds for a public building, the contracts in relation to specific parts thereof must be let by a two-thirds vote of all the supervisors.—*Board of Sup'rs of Wayne County v. Donovan (Mich.)* 69 N. W. 83.

§ 34. Submission of questions to voters.

[a] (Iowa; 1895.)

Code, § 303, subd. 24, renders the board of supervisors incompetent to order the erection of a courthouse or other building, the probable cost of which will exceed \$5,000, without submitting the question to the people. Section 309 provides that the board may submit to the people the question whether money may be borrowed to erect any building. Section 310 requires the whole question, including the sum to be raised and the amount of tax to be levied, to be published; and section 311 provides that when the question so submitted involves the borrowing or the expenditure of money, the proposition must be accompanied by a provision to levy a tax for the payment thereof. *Held*, that when there is available money in the county treasury sufficient to pay for a proposed building it is not necessary to submit to the people a proposition to levy a tax.—*Miller v. Merriam (Iowa)* 62 N. W. 689.

[b] (Neb.; 1895.)

In the absence of a statutory provision therefor, a sale of county land, which is void because not previously authorized by a vote of the people on a submission under Comp. St. c. 18, § 24, cannot be ratified by a subsequent submission.—*Douglas County v. Keller (Neb.)* 62 N. W. 60, 43 Neb. 635.

[c] (Neb.; 1895.)

A sale of county land, made without the consent of a majority of the electors voting at an election therefor, under Comp. St. c. 18, § 24, passes no title to the purchaser.—*Douglas County v. Keller*, 62 N. W. 60, 43 Neb. 635.

[d] (Neb.; 1896.)

Where a tract composing part of the county poor farm was platted into city lots by the county commissioners without the sanction of the voters of the county, the lots nevertheless continued to constitute public grounds of the county, which the county board could not dispose of until authorized so to do in the mode provided by Comp. St. c. 18, art. 1, § 24.—*Stenberg v. State (Neb.)* 67 N. W. 190. 48 Neb. 299.

§ 35. For county printing.

(Minn.; 1895.)

The proprietor of a newspaper filed a bid for printing and publishing the official notices of the county, proceedings of the county commissioners, and delinquent tax list, at certain specified rates, conditioned upon his doing all of the county job printing at certain rates. By written resolution, the board of county commissioners awarded to him, at the specified rates, the printing and publication of "the delinquent tax-lists and all other official notices and commissioners' proceedings." *Held*, that the contract was for the work mentioned in the resolution only.—*McKenzie v. Board of Com'rs Polk County (Minn.)* 63 N. W. 613. 61 Minn. 145.

§ 36. Loan of county funds.

(S. D.; 1896.)

A general deposit by a county treasurer, of county funds, subject to check, is not a "loan," within the statutory or constitutional inhibition against the loaning of county funds, with or without interest.—*Allibone v. Ames (S. D.)* 68 N. W. 165.

Authority of treasurer, see ante, § 18.

§ 37. Donation to state institution.

[a] (Wis.; 1896.)

The authority conferred on counties by Laws 1895, c. 138, relating to a state home for feeble-minded persons, to donate a site for the home, and money for its establishment and support, in competing with each other for its location, is not against public policy.—*Lund v. Chippewa County (Wis.)* 67 N. W. 927. 93 Wis. 927.

[b] (Wis.; 1896.)

Under Laws 1895, c. 138, which creates a state home for feeble-minded persons, and (section 2) authorizes the state board of control to entertain proposals for and receive donations of money or "other securities" for the benefit and support of said home, and empowers counties to make the donations therein mentioned; and Const. art. 4, § 22, empowering the legislature to confer on county boards of supervisors powers of a local, legislative, and administrative character; and Rev. St. § 69, subd. 5, authorizing a county to levy taxes as provided by law to defray all charges incident to the execution of their lawful authority,—a county board of supervisors has authority to make a donation to the home, and to issue county bonds, payable out of county taxes, to secure its payment, in consideration of the home being located in the county.—*Lund v. Chippewa County (Wis.)* 67 N. W. 927. 93 Wis. 927.

§ 38. Bonds.

[a] (Neb.; 1895.)

The fact that county bonds were ante-dated eight days, to the date on which the election was ordered on the proposition to issue bonds, did not affect their validity.—*State v. Moore*, 65 N. W. 193, 46 Neb. 590.

[b] (Wis.; 1896.)

Under Const. art. 11, § 3, declaring that any county incurring indebtedness shall provide for the collection of an annual tax to pay the interest thereon; and Rev. St. § 943, providing that no bonds shall be issued until an ordinance or resolution has been passed directing the levy of a tax sufficient to pay the interest, etc., and that such tax shall be after the issue of the bonds irrevocable; and section 945, providing, when bonds are issued in aid of any railroad, they shall not be delivered, or, if delivered, shall not be valid until the road is completed and in operation,—a tax levied to pay the interest on bonds deposited in escrow, to be delivered in aid of a railroad at its completion, but which has not yet been completed, is invalid.—*Keystone*

Lumber Co. v. Town of Bayfield (Wis.) 69 N. W. 162.

§ 39. — Time of maturity or payment.

[a] (Mich.; 1894.)

1 How. St. § 483, cl. 8, providing that payment of loans obtained by boards of county supervisors "shall in all cases be made within 15 years from the date of such loan," limits an issue of county bonds to 15 years.—McMullen v. Ingham Circuit Judge (Mich.) 61 N. W. 260.

102 Mich. 608.

[b] (Mich.; 1894.)

1 How. St. § 483, cl. 7, provides that the board of county supervisors must be authorized by a majority of the electors before it can make a loan of more than \$1,000 for public building purposes. *Held*, that where the voters authorized such a loan, to be paid in installments extending over a period of 30 years, an issue of bonds therefor, all payable 15 years from date, was void.—McMullen v. Ingham Circuit Judge (Mich.) 61 N. W. 260.

102 Mich. 608.

[c] (Mich.; 1895.)

Pub. Acts 1893, No. 149 (relating to the county road system), § 22, providing that the board of supervisors may, by a two-thirds vote, resolve to issue bonds, and shall submit the question to the electors, but which is silent as to the time of their maturity, does not remove such bonds from the limitations of 1 How. Ann. St. § 483, cl. 8, which provides that payment of loans obtained by such board "shall in all cases be made within 15 years from date."—Board of Sup'rs of Alpena County v. Simmons (Mich.) 62 N. W. 292.

104 Mich. 305.

§ 40. Bond taken from contractor.

(Neb.; 1895.)

The contract for the erection of a courthouse provided that the contractor should receive 85 per cent. of the money earned thereunder, on monthly estimates; "that in each case of payment a certificate shall be obtained by the contractor from the clerk of the county that he has carefully examined the records, and finds no liens or claims against said work or on account of said contractor. Neither shall there be any lawful claims against the contractor in any manner, from any source whatever, for work or material furnished on said work." *Held* a promise by the contractor to satisfy claims of laborers and material men, and that the sureties on his bond for the faithful performance of the contract are liable for a breach of such condition.—Korsmeyer Plumbing & Heating Co. v. McClay, 62 N. W. 50, 43 Neb. 619.

§ 41. Unauthorized sale—Rights of purchaser.

(Neb.; 1895.)

A purchaser of public property of a county is not chargeable with constructive notice of the fact that the proposition to sell such property was in fact defeated by a vote of the electors.—Douglas County v. Keller (Neb.) 62 N. W. 60, 43 Neb. 635.

§ 42. Ratification of void contract.

(Neb.; 1895.)

A county could not ratify a contract to pay for extra materials and labor furnished and performed in the completion of a contract for the erection of a county bridge, the value of which exceeded \$100, which was void for failure of the county authorities to advertise for bids for the performance and furnishing of such labor and materials.—Tullock v. Webster County, 64 N. W. 703, 46 Neb. 211.

VI. LIABILITIES IMPOSED BY STATUTE.

Costs of seizing liquors, see "Intoxicating Liquors," § 44.

— in criminal cases, see "Costs," § 36.

§ 43. Expense of fish chutes.

(Mich.; 1895.)

3 How. Ann. St. § 2155, providing that a supervisor of a township, on order of the board, shall cause the owner of a dam to construct a fish chute, the expense thereof to be audited and allowed by the board, a county must pay for fish chutes constructed by owners of dams within its borders.—Hart v. Board of Sup'rs of Genesee County (Mich.) 63 N. W. 67.

105 Mich. 209.

VII. LIABILITY FOR TORTS.

§ 44. Negligence in constructing drains.

(Iowa; 1895.)

A county is not liable for damages due to the negligence of its agents in constructing a drain across a highway.—Packard v. Voltz (Iowa) 62 N. W. 757.

§ 45. Personal liability of county officers.

(Iowa; 1895.)

Since a county is not liable for the negligence of its agents in performing a duty required by law, and which the county must necessarily perform through agents, the agents themselves are not personally liable.—Packard v. Voltz (Iowa) 62 N. W. 757.

VIII. PRESENTATION, ALLOWANCE, AND ENFORCEMENT OF CLAIMS.

For salaries or fees of officers, see ante, §§ 23–25. Claim of subcontractor for labor on county building, see "Mechanics' Liens," § 20.

Compelling allowance of claims, see "Mandamus," §§ 18, 19.

§ 46. In general.

[a] (Iowa; 1896.)

Code, § 321, permits a county auditor to issue warrants only on the recorded vote or resolution of the board of supervisors, except in payment of jury fees; and the issuance of a warrant without such vote to a taxpayer for an amount claimed to have been paid by him to the treasurer on an excessive valuation of his property is without authority.—Polk County v. Sherman (Iowa) 68 N. W. 562.

[b] (Iowa; 1896.)

A complaint against a county for medical services rendered a person at the instance of the board of health, pursuant to Acts 18th Gen. Assm. c. 151, § 21, providing that when any person shall be infected with sickness dangerous to the public health the board of health shall provide for the safety of the inhabitants by removing him to a separate house, and furnishing him assistance, "which shall be charged to the person himself, his parents, or other person who may be liable for his support, if able; otherwise at the expense of the county," must make it appear that such person and those liable for his support are unable to pay the claim; and this is not shown, as to the latter at least, by the allegation that he was a pauper patient, and a charge upon the county.—Tweedy v. Fremont County (Iowa) 68 N. W. 921.

[c] (Neb.; 1896.)

The allowance of a writ of mandamus to compel a county board to include relator's claim in its estimate of the taxes to be levied for the ensuing year (Comp. St. c. 18, art. 1, § 25) is not necessarily an adjudication that a definite

sum is due from the county to relator, in view of the fact that said section contemplates that the estimate shall be made before the allowance of claims against the county, and the drawing of warrants in payment of the same.—*State v. Bushhausen* (Neb.) 68 N. W. 950.

§ 47. Who to audit claims.

(Neb.; 1895.)

All claims against a county must be filed with the county clerk, and presented to the county board, and it alone has authority to audit and allow such claims.—*State v. Merrell* 61 N. W. 754, 43 Neb. 575.

§ 48. Verification and filing of claim.

[a] (Iowa; 1891.)

Fees of a justice and constable cannot be recovered under Code, § 3806, providing for the payment out of the county treasury of the fees of the justice of the peace and constable in criminal cases when the prosecution fails, unless the account is verified and filed as required by section 3843, providing that no fees or compensation shall be paid any officer out of the county treasury until a particular account showing clearly the nature of his services has been verified by affidavit, and filed in the county auditor's office.—*Hegele v. Polk County* (Iowa) 61 N. W. 393.

92 Iowa, 701.

[b] (Neb.; 1897.)

Comp. St. c. 18, art. 1, § 37, providing that all claims against a county must be filed with the clerk and passed on by the commissioners, refers only to claims originating in contract between the claimant and county, and does not include a claim for damages arising from filling in a street.—*County of Douglas v. Taylor* (Neb.) 70 N. W. 27.

§ 49. Necessity of presentation of claim.

[a] (Mich.; 1895.)

Const. art. 10, § 10, giving the board of supervisors exclusive power to fix the compensation for all services rendered for the county, is not violated by Pub. Acts 1885, No. 169, authorizing the auditor general to charge the expense of maintaining the militia to the county where their services were rendered, though the claim is not submitted to the county supervisors.—*Auditor General v. Board of Suprs of Bay County* (Mich.) 64 N. W. 570.

[b] (Wis.; 1896.)

Plaintiff's tax certificates being invalid, and it therefore being the duty of the county board to order repayment of the amount paid for them when she surrendered them for cancellation (Rev. St. § 1184), her remedy is by presenting her claim to the county board (section 676), and by appeal (sections 682, 683) on their disallowing it.—*Pier v. Oneida County* (Wis.) 67 N. W. 702.

93 Wis. 463.

Presentation of claim as condition precedent to right to sue thereon, see post, § 56.

§ 50. Necessity of itemized account.

(Mich.; 1896.)

The claim of a county clerk for disbursements was properly rejected by the board of supervisors, where it was not itemized.—*Gardner v. Board of Suprs of Newaygo County* (Mich.) 67 N. W. 1091.

§ 51. Conclusiveness of decision of board.

[a] (Neb.; 1895.)

Where a claim is presented to a county board for its examination and allowance or rejection, in the examination of such claim the board acts judicially, and its judgment is conclusive, unless reversed on appeal.—*Sionx County v. Jameson*, 61 N. W. 596, 43 Neb. 265.

[b] (Neb.; 1895.)

A decision of the county commissioners in allowing or rejecting claims has the effect of a judgment. *State v. Vincent* (Neb.) 65 N. W. 50, 46 Neb. 408.

[c] (Neb.; 1896.)

The board of supervisors could not, on the presentation of a claim against the county in all respects meritorious, offset against it the amount of a claim for fees which had been allowed claimant by a former board, and paid, on the ground that the former claim was erroneously allowed.—*Cuming County v. Thiele* (Neb.) 67 N. W. 885.

48 Neb. 888.

§ 52. Reconsideration of claim.

[a] (Neb.; 1896.)

Laws 1879, p. 353, § 40 (Comp. St. 1895, c. 18), declaring that "the provisions of this subdivision shall not be so construed as to prevent the county board from once reconsidering their action upon any claim," authorizes the board to once reconsider its action in the allowance of a claim against the county.—*State v. Bushhausen* (Neb.) 68 N. W. 950.

[b] (Neb.; 1896.)

Notice of reconsideration of the allowance of a claim against a county by the county board, under Laws 1879, p. 353, § 40 (Comp. St. 1895, c. 18), was waived by the claimant, where his counsel was notified and appeared, and obtained a postponement to a subsequent day, on which he again appeared.—*State v. Bushhausen* (Neb.) 68 N. W. 950.

§ 53. Recovery back of claim paid.

[a] (Iowa; 1896.)

A county may sue to recover taxes which have been paid into its treasury, and are alleged to have been illegally refunded by its officers.—*Polk County v. Sherman* (Iowa) 68 N. W. 562.

[b] (Neb.; 1895.)

Where the county board approved the county clerk's report, and the clerk retained \$1,500 as the compensation allowed him by law, and at the same time the clerk filed a claim for making out a tax list, which was audited by the board and paid, the county could not recover from the clerk and his sureties the amount so paid, though the claim was one for which the county was not legally liable.—*Heald v. Polk County*, 64 N. W. 376, 46 Neb. 28.

IX. ACTIONS.

Action by state to compel county to collect state taxes, see "States and State Officers," § 20.

Presumption as to authority to sue in name of county, see "Appeal," § 210.

Venue of action to restrain issuance of bonds, see "Venue in Civil Cases," § 5.

§ 54. Action by.

(S. D.; 1896.)

Under Laws 1890, c. 1, authorizing a "person" to sue the state in the supreme court after the refusal of a claim by the state auditor, an organized county may bring such an action, being a body corporate for civil and political purposes (Comp. Laws, § 572), and therefore a "person," as defined by section 4746.—*Lyman County v. State* (S. D.) 69 N. W. 461.

§ 55. Actions against.

[a] (Neb.; 1895.)

A petition in a suit against a county for more than \$100, for labor and materials, in constructing a bridge, which did not allege that the bridge was situate in the county, nor that at the time the contract was made there was money on hand to pay for the same, as required by Comp. St. 1887, c. 78, § 83, nor that bids

were advertised for, was insufficient.—*Tullock v. Webster County*, 64 N. W. 705, 46 Neb. 211.

[b] (S. D.; 1897.)

In an action by S. against a county for services, the complaint alleged that "plaintiff, at the request of the coroner," performed the services; and he testified that the coroner directed him to do certain work, and get such help as he needed; that he took three other men to assist him; and that he told them he would "put the bill in to the county for our services, and, as soon as the bill is allowed, you will have your money." S. put in a bill in his own name for the amount claimed in suit, without mentioning either of the other men, and there was no evidence that he had paid either of them. *Held*, that he could not recover for their services.—*Shearer v. Hutchinson County* (S. D.) 70 N. W. 1051.

§ 56. — Conditions precedent.

[a] (Iowa; 1896.)

The presentation of a claim to the county board of supervisors, alleging injuries to claimant in a certain sum by the fall of a bridge, and stating that he will accept a less sum in full settlement, to avoid litigation, is a sufficient compliance with Code, § 2610, providing that no action shall be brought against any county on any unliquidated demand until the same has been presented to such board and payment demanded.—*Homan v. Franklin County* (Iowa) 68 N. W. 559.

[b] (Iowa; 1896.)

The fact that additional injuries are alleged in the complaint to those set out in the claim presented to the board of supervisors does not prevent the action from being one for the same cause of action presented to the board.—*Homan v. Franklin County* (Iowa) 68 N. W. 559.

[c] (Iowa; 1896.)

Nor does the fact that a greater sum is claimed in the complaint for damages than in the claim presented to the supervisors.—*Homan v. Franklin County* (Iowa) 68 N. W. 559.

[d] (S. D.; 1895.)

The county may sue in its own name on the official bond of a county treasurer which runs to the county commissioners and their successors, instead of to the county.—*Custer County v. Albien* (S. D.) 64 N. W. 533.

§ 57. — Pleading.

(Neb.; 1896.)

In an action on a treasurer's bond for a part of the proceeds of certain bonds which he failed to turn over to his successor, defendant admitted receiving the money, but as to his failure to turn any portion thereof over to his successor the answer was a general denial. The county introduced proof showing that the treasurer charged a per cent. of the amount of the proceeds of the bonds as collection fees, which sum he retained, and did not pay to his successor. *Held*, sufficient to show a failure to comply with the obligations of his bonds.—*Stoner v. Keith County*, 67 N. W. 311, 48 Neb. 279.

COUNTY BOARD.

See "Counties," §§ 26-32.

COUNTY SEAT.

See "Counties," §§ 11-16.

COUPONS.

On city bonds, see "Municipal Corporations," § 181.

COURSES AND DISTANCES.

Control by monuments, see "Boundaries," § 4.

COURT COMMISSIONERS.

Approval by court of opinion of commissioners, see "Courts," § 5.

[a] (Mich.; 1896.)

A court commissioner has no jurisdiction of an action against a tenant to recover possession, where defendant asserts that, after the commencement of the tenancy, he was obliged to attorn to one who procured a paramount tax title.—*Jenkinson v. Winans* (Mich.) 67 N. W. 549.

[b] (Mich.; 1897.)

In a summary proceeding before a commissioner to obtain possession of real estate, the mere fact that the defendant asserts that the instrument under which the plaintiff claims is void, as a matter of law, does not oust the court of jurisdiction on the ground that a question of title is involved.—*Barrett v. Cox* (Mich.) 70 N. W. 446.

[c] (Minn.; 1896.)

Under Const. art. 6, § 15, giving court commissioners the judicial power of a judge of the district court at chambers, and Gen. St. 1894, § 7132, relating to the powers of district judges, court commissioners have power to issue a warrant of arrest, and apprehend, examine, commit, or bail all persons charged with crime.—*Hoskins v. Baxter* (Minn.) 66 N. W. 969.

64 Minn. 226.

[d] (Wis.; 1897.)

Under Rev. St. § 2815, providing that a court commissioner may exercise the powers of a circuit judge at chambers, except where the statutes authorize an order to be made "by the presiding judge or by the circuit judge, using such words of designation"; and section 2640, declaring that an order for service of summons without the state may be made by the court or a judge thereof, such order may be made by a court commissioner.—*Pfister v. Smith* (Wis.) 69 N. W. 984.

COURTS.

I. IN GENERAL, §§ 1-5.

II. JURISDICTION, §§ 6-8.

III. TERM TIME, § 9.

IV. TERRITORIAL COURTS, §§ 10, 11.

V. STATE COURTS, §§ 12-22.

1. Of Appellate Jurisdiction, §§ 12-14.

2. Of General Original Jurisdiction, §§ 15-17.

3. Of Inferior Jurisdiction, § 18.

4. Courts of Probate, §§ 19-21.

5. Transfer of Causes from One Court to Another, § 22.

VI. CONCURRENT AND CONFLICTING JURISDICTION, §§ 23-27.

VII. RULES OF DECISION—COMITY, §§ 28-30.

See, also, "Clerk of Court"; "Court Commissioners"; "Judge"; "Justices of the Peace"; "Removal of Causes"; "Rules of Court."

Certiorari to, see "Certiorari," §§ 3, 4.

Conduct and remarks of court during trial, see "Trial," § 5.

Contempt of, see "Contempt."

Contracts relating to administration of justice, public policy, see "Contracts," § 18.

Criticism of court or judge, see "Contempt," § 1.

Delegation of legislative power to courts, see "Constitutional Law," § 15.

Discretion of trial court, see "App'l," §§ 202-205.
 Division of governmental powers as between judicial and executive departments, see "Constitutional Law," § 8.
 Exercise of duties other than judicial, see "Constitutional Law," §§ 5, 6.
 Grant of new trial by court suo motu, see "New Trial," § 2.
 Judicial proceedings on Sunday, see "Sunday."
 Leave of court to intervene, see "Parties," § 12.
 to sue receiver, see "Receivers," § 28.
 Mandamus to, see "Mandamus," §§ 10-13.
 Opinion of trial court as part of record, see "Appeal," § 131.
 Power to amend findings of jury, see "Trial," § 117.
 — to amend records, see "Records," § 2.
 — to appoint trustee for charitable devise, see "Charities," § 4.
 Review on appeal from intermediate court, see "Appeal," § 192.
 Right to obtain justice freely, see "Constitutional Law," § 62.
 Rules of, see "Rules of Court."
 Taking case from jury, see "Trial," §§ 88-92.
 Trial by court without a jury, see "Trial," §§ 119-126.
 When county board acts as court, see "Counties," § 28.

I. IN GENERAL.

§ 1. Creation of court.

(Wis.; 1895.)

Laws 1893, c. 33, § 2, establishing the superior court of Douglas county, and providing that such court shall have civil jurisdiction concurrent with the jurisdiction of the circuit court, with certain limitations, does not conflict with Const. art. 7, § 2, providing that "the legislature * * * shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction, * * * and that the legislature shall provide * * * for the election * * * of the judges of inferior courts by the qualified electors of the respective jurisdictions."—*American Loan & Trust Co. v. Bond*, 64 N. W. 854, 91 Wis. 204.

§ 2. Place of holding court.

(Iowa; 1895.)

Under Code, § 192, which provides that "courts must be held at the place provided by law, except for the determination of actions, special proceedings or other matters not requiring a jury, when they may, by consent of the parties therein, be held at some other place," a judge trying a case without a jury cannot, on granting defendant's motion for continuance conditionally, upon its allowing the testimony of the witness because of whose absence, from illness, defendant's motion was made, to be taken at that witness' house, adjourn to that place, and proceed with the trial.—*Funk v. Carroll County* (Iowa) 64 N. W. 768.

§ 3. When judge acts as court.

[a] (Neb.; 1897.)

Where a statute, in terms, confers jurisdiction to hear matters on a court as contradistinguished from a judge thereof, such matters must be heard in court, and not before a judge at chambers or in vacation.—*Fisk v. Thorp* (Neb.) 70 N. W. 498.

[b] (S. D.; 1895.)

A circuit judge may exercise the power conferred on him as judge in the name of the court and as the acts of the court.—*King v. McClurg* (S. D.) 63 N. W. 219.

[c] (S. D.; 1895.)

Under Comp. Laws, § 4675, authorizing the circuit judge to remove an assignee for the benefit of creditors, for cause shown, and appoint another in his stead, a judge may, by an order

as that of the court, remove such assignee.—*King v. McClurg* (S. D.) 63 N. W. 219.

§ 4. Appointment of assistant clerk.

(S. D.; 1896.)

Under Comp. Laws, 1138, directing the circuit court to appoint bailiffs to wait on the court during term, who shall receive from the county two dollars per day for their services, and also by virtue of its inherent power, as a court of general jurisdiction, to provide the necessary means of conducting the business of the court with reasonable dispatch, the circuit court has authority to appoint an assistant to its clerk during term time at two dollars per day, for whose services the county will be liable.—*White v. Hughes County* (S. D.) 67 N. W. 855.

§ 5. Opinion of supreme court commissioners—Approval of court.

(Neb.; 1895.)

The opinions prepared by the commissioner of the supreme court are submitted to the judges for examination and criticism by all the members of the court, and are the opinions of the court.—*Randall v. National Building, Loan & Protective Union of Minneapolis* (Neb.) 62 N. W. 252, 43 Neb. 876.

II. JURISDICTION.

Of proceedings begun in another court, see post, §§ 21, 25.

Compelling assumption of jurisdiction, see "Mandamus," § 11.

Judicial notice of boundary of judicial district, see "Evidence," § 3.

Of bastardy proceedings, see "Bastardy," § 3.

On appeal, see "Appeal," §§ 1-45.

Over administration proceedings, see "Executors and Administrators," § 2.

Over executive officers, see "Constitutional Law," § 8.

— proceedings at corporate meeting, see "Corporations," § 65.

— religious societies, see "Religious Societies," § 6.

To determine rights under mutual benefit policy, see "Insurance," § 179.

§ 6. Jurisdiction in general.

[a] (Iowa; 1897.)

Where the relief sought by plaintiff in an action at law is within the court's jurisdiction, an intervener tendering an equitable issue cannot delay the action by having the cause transferred to the equity docket.—*Kassing v. Ordway* (Iowa) 69 N. W. 1013.

[b] (Wis.; 1895.)

Where a question is raised relative to the disposition of a bequest after the death of the legatee, no binding judgment can be given until after that event happens.—*In re Zentner's Estate* (Wis.) 63 N. W. 162; *Schintz v. Schintz*, Id.

90 Wis. 236.

§ 7. Submission of questions by executive.

(S. D.; 1896.)

Const. art. 5, § 13, provides that the governor shall have authority to require the opinion of the judges of the supreme court upon important questions of law involved in the exercise of his executive powers and upon solemn occasions. Held, upon request by the governor for an opinion upon the construction of Sess. Laws 1890, c. 6, with reference to the appointment of regents of education, involving the duration of the terms of office of certain regents, that an opinion thereon should not be given as involving rights of persons not given an opportunity to be heard.—*In re Chapter 6, Session Laws of 1890* (S. D.) 66 N. W. 310.

§ 8. Action relating to property in another state.

[a] (Mich.; 1896.)

A foreign court, having general equity powers, and having jurisdiction of the parties in a suit for the dissolution of a partnership and the settlement of its affairs, had power to direct a receiver to sell partnership lands situated in this state.—*Dunlap v. Byers* (Mich.) 67 N. W. 1067.

[b] (Minn.; 1896.)

Since the statute requiring actions for injuries to real estate to be brought in the county where the subject of the action is situated applies only to causes of action arising in the state, an action will lie in Minnesota to recover damages for injuries to land situated in another state. *Buck, J., dissenting.*—*Little v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 67 N. W. 846.

III. TERM TIME.

§ 9. Terms of court.

[a] (Iowa; 1896.)

A term of court, by a proper order of the judges, commenced in C. county on September 9th, and in H. county, in the same judicial district, on September 23d, the only disengaged judge being assigned to hold both terms. On September 19th, the court in C. county was adjourned to September 23d, on which day it was again opened, and in the evening was adjourned until noon of September 28th. On September 24th court was opened by the same judge in H. county, and continued in session until nearly noon of September 28th, when it adjourned to September 30th, the business of the term not having been completed, and the adjourned term in C. county was then opened. *Held*, that the court was legally in session in C. county on September 28th.—*State v. Van Auker* (Iowa) 68 N. W. 454.

[b] (Minn.; 1896.)

Gen. St. 1894, § 4850, gives the judge or judges of the district court no authority to provide by a standing order for the holding, year after year, of terms of court for the trial of issues of fact.—*Flanagan v. Borg* (Minn.) 67 N. W. 216.

64 Minn. 394.

IV. TERRITORIAL COURTS.

Appeal from territorial admiralty courts, see "Admiralty," § 1.

§ 10. Admission of states—Jurisdiction of state court.

[a] (N. D.; 1895.)

Where, after an undertaking was given on appeal in a territorial court sitting in admiralty, the territory became a state, no principle of comity would prevent the state court which superseded the territorial court from taking cognizance of an action to enforce the undertaking.—*Braithwaite v. Jordan* (N. D.) 65 N. W. 701.

5 N. D. 196.

[b] (N. D.; 1895.)

Where, after an undertaking was given on appeal in a territorial court sitting in admiralty, the territory became a state, it was no objection to the taking cognizance by the state court of an action to enforce the undertaking that plaintiff might have secured in the federal court, in the action in which the undertaking was given, a summary judgment against the signers of the undertaking.—*Braithwaite v. Jordan* (N. D.) 65 N. W. 701.

5 N. D. 196.

§ 11. — Transfer to federal courts.

(N. D.; 1895.)

Where the record of the state court shows that on two different occasions, after statehood,

defendant submitted matters which were decided in that court prior to his filing a request under the North Dakota enabling act for a removal of the case to the federal court, *held*, that the filing of such request did not oust the state court of jurisdiction of the case.—*Sargent v. Kindred* (N. D.) 63 N. W. 151.

5 N. D. 8.

V. STATE COURTS.

Jurisdiction over actions against national banks for penalties for exacting usury, see "Usury," §§ 15, 16.

—over officers of general government, see "United States."

1. OF APPELLATE JURISDICTION.

§ 12. Minnesota district courts.

(Minn.; 1895.)

Where the territory of a city lies in two counties, to any constable in either of which process may issue, under the law, from the city justice, an appeal will lie to the district court of either county from a judgment of the justice. —*Minneapolis Threshing Co. v. Voigt* (Minn.) 65 N. W. 261.

63 Minn. 145.

§ 13. North Dakota supreme court.

(N. D.; 1896.)

Laws 1893, c. 82, which provides that all cases tried below by the court shall on appeal be tried anew in the supreme court, and final judgment rendered thereon, does not require the supreme court to perform any functions that do not pertain to appellate jurisdiction, and is not therefore a violation of the constitutional provisions conferring appellate jurisdiction only upon the supreme court.—*Christianson v. Farmers' Warehouse Ass'n* (N. D.) 67 N. W. 300.

5 N. D. 438.

§ 14. Wisconsin supreme court.

(Wis.; 1896.)

Under Laws 1895, c. 6, creating the police court of the city of Milwaukee and making it a court of record, and section 16, vesting in the municipal court for the city and county of Milwaukee appellate jurisdiction to review all judgments entered in the police court, a judgment rendered in such court cannot be taken directly to the supreme court for review on appeal or writ of error. *City of Milwaukee v. Gross* (1866) 21 Wis. 241, distinguished.—*City of Milwaukee v. Simons*, 67 N. W. 922, 93 Wis. 576.

2. OF GENERAL ORIGINAL JURISDICTION.

§ 15. Supreme court.

[a] (Neb.; 1896.)

Under Const. art. 6, § 2, conferring jurisdiction on the supreme court "in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus and such appellate jurisdiction as may be provided by law," the supreme court is without jurisdiction to award a writ of prohibition as an independent remedy.—*State v. Hall* (Neb.) 66 N. W. 642.

47 Neb. 579.

[b] (Neb.; 1896.)

A proceeding in the supreme court for mandamus to compel the secretary of state to certify to the county clerks, as nominees of a political party, the names of persons nominated at a specific convention, pursuant to Comp. St. c. 25, § 136, is not a proceeding for injunction, which is without the original jurisdiction of said court, because the relief asked involves the perpetual

enjoining of the certification of the names of nominees of other conventions of said party.—*State v. Piper* (Neb.) 69 N. W. 378.

[c] (N. D.; 1896.)

The supreme court has original jurisdiction in cases in which the writs named in the constitution may be employed to initiate the same, provided the cases involve the sovereignty of the state, its prerogatives or franchises, or the liberty of the citizen.—*State v. Archibald* (N. D.) 66 N. W. 234.

5 N. D. 359.

[d] (N. D.; 1896.)

The state hospital for the insane is by law under the general management and control of a board of five trustees, which has power to appoint the superintendent of such hospital and remove him at pleasure. *Held*, that defendant having been removed by the board from the office of superintendent, and the relator having been appointed by the board to fill such office in his place, in mandamus proceedings to compel defendant to turn over to the relator such office, the sovereignty of the state was involved, in a direct and important sense, and that therefore the supreme court held original jurisdiction of such proceedings.—*State v. Archibald* (N. D.) 66 N. W. 234.

5 N. D. 359.

[e] (S. D.; 1896.)

The supreme court will not assume original jurisdiction of mandamus proceeding to compel the board of canvassers to reconvene and canvass the votes, unless some reason is shown why the application was not made to the circuit court.—*In re Ringrose* (S. D.) 69 N. W. 584.

Power of supreme court to grant supersedeas, see "Appeal," § 268.

§ 16. Superior court.

(Wis.; 1895.)

Under Laws 1893, c. 33, organizing the superior court of Douglas county, and making the provision of law relating to circuit courts applicable to said superior court, it had power to foreclose a mortgage on lands situated in said county, and acquired jurisdiction of defendant by the service of process on him in another county.—*American Loan & Trust Co. v. Bond*, 64 N. W. 854, 91 Wis. 294.

§ 17. Circuit court.

[a] (Mich.; 1896.)

Under How. Ann. St. § 6861, which provides that all actions against corporations, except municipal corporations, shall be cognizable before a justice of the peace, an action against a city for trespass in laying a sewer through plaintiff's land must be brought in the circuit court.—*Mason v. City of Muskegon* (Mich.) 67 N. W. 692.

[b] (S. D.; 1896.)

Comp. Laws, § 1324, provides that one aggrieved by any determination or award of damages made by supervisors in the laying out of a highway may appeal to a justice of the peace, "provided the amount of damages allowed him in such appeal does not exceed \$100." Section 1327 provides, "in case the amount of damages claimed exceed \$100," appeal may be taken to the circuit court. *Held*, that the word "allowed," in section 1324, should be read "claimed," and that, though the supervisors allowed one nothing, he could appeal from their order to the circuit court, where he claimed in his notice of appeal more than \$100.—*Town of Dell Rapids v. Irving* (S. D.) 68 N. W. 313.

3. OF INFERIOR JURISDICTION.

Appeals from inferior tribunals, see "Appeal," §§ 44, 45.

Power as to bills of exceptions, see "Exceptions, Bill of," § 1.

§ 18. Municipal courts.

[a] (Minn.; 1895.)

An action by a receiver appointed in an action under the provisions of chapter 76, Gen. St. 1878 (chapter 76, Gen. St. 1894), to sequester the property of an insolvent corporation, to recover from a stockholder the amount due on his subscription, is an action at law, of which a municipal court has jurisdiction, though the sum, when recovered, is subject to equitable distribution.—*Hause v. Newel* (Minn.) 62 N. W. 817.

60 Minn. 481.

[b] (Minn.; 1895.)

The municipal court of Duluth has jurisdiction of an action to recover damages for fraudulent covenants of warranty.—*Carlson v. Segog* (Minn.) 62 N. W. 1132.

60 Minn. 498.

[c] (Minn.; 1896.)

The fact that plaintiff, in an action brought in the municipal court of the city of Minneapolis, to recover possession of personal property, did not claim immediate delivery, under Laws 1889, c. 34, § 11, did not change the action to one for conversion merely, so as to oust the court of jurisdiction.—*White v. Flamme* (Minn.) 67 N. W. 959.

64 Minn. 5.

[d] (Minn.; 1896.)

In an action by the indorsee after maturity of a promissory note, an indebtedness of the payee to the maker, existing at the date of the transfer of the note, is not a counterclaim, but a defense; and the fact that the indebtedness thus set up as a defense exceeds \$500 does not oust the municipal court of Duluth of jurisdiction to try the action.—*Lynch v. Free* (Minn.) 66 N. W. 973.

64 Minn. 277.

[e] (N. D.; 1896.)

Rev. Codes, § 2209, superseding the police magistrates and their courts provided for in Const. § 113, by municipal courts, which were given all the jurisdiction of the police magistrates, and in addition other jurisdiction, not mentioned in said section of the constitution, is void.—*McDermont v. Dinne* (N. D.) 69 N. W. 294.

[f] (Wis.; 1895.)

Under Sanb. & B. Ann. St. § 2499, making the municipal court of Milwaukee a court of record, with powers, in cases of crimes and misdemeanors, equal to those of the circuit court of such county, in a prosecution for the sale of liquor without license the court has power to set aside a verdict therein, and grant a new trial.—*State v. Municipal Court of City and County of Milwaukee* (Wis.) 61 N. W. 1100, 89 Wis. 358.

Change of venue on appeal from municipal court, see "Venue in Civil Cases," § 16.

Special law establishing municipal courts, see "Constitutional Law," § 19.

4. COURTS OF PROBATE.

Jurisdiction over rights of beneficiaries, see "Trusts," § 27.

—to review drainage proceedings, see "Drainage," § 10.

§ 19. Claim against decedents' estates.

(Minn.; 1895.)

Where a claim against a decedent's estate has been allowed in the probate court, the district court has no jurisdiction of an action to enforce the claim against the estate of decedent.—*Boltz v. Schuetz* (Minn.) 64 N. W. 48; *Wilhelm v. Same*, *Id.*

61 Minn. 444.

§ 20. Matters relating to guardian and ward.

(Neb.: 1896.)

Under Comp. St. c. 34, § 28, the county court has power to remove a guardian on notice where he has become incapable of discharging his trust, or evidently unsuited therefor.—*Crooker v. Smith* (Neb.) 66 N. W. 19.
47 Neb. 102.

§ 21. Specific performance of contract.

(Mich.: 1896.)

Where, on petition of an heir for the appointment of an administrator, his co-heirs oppose the appointment on the ground that the estate has been fully settled by a written agreement between the heirs, the probate court has no power to decree specific performance of the agreement in case it is valid, or to cancel the same if it be invalid.—*Shurte v. Fletcher* (Mich.) 69 N. W. 233.

5. TRANSFER OF CAUSES FROM ONE COURT TO ANOTHER.

§ 22. From county court to district court.

[a] (Mich.: 1895.)

Where, in proceedings for divorce, a preliminary injunction had issued on an ex parte showing restraining defendant from disposing of his property, and defendant entered appearance, and filed a petition for the removal of the cause, the case had not proceeded so far that a removal could not be made under How. Ann. St. § 6584, providing for the removal of causes from the circuit court of Kent county to the superior court of Grand Rapids.—*Wood v. Adsit* (Mich.) 63 N. W. 419.
105 Mich. 378.

[b] (Neb.: 1896.)

An action of trespass was begun in the county court. After issues joined there, a stipulation was entered into transferring the case to the district court. The pleadings were then refiled in the district court, and a trial was there had. It turned out that the vital issue concerned the title and boundaries of land. *Held*, that the stipulation was equivalent to one dismissing the case in the county court and recommencing it in the district court, with appearance of parties, and that the district court had jurisdiction, although the county court had not.—*Lundgren v. Crum* (Neb.) 66 N. W. 284.
47 Neb. 242.

VI. CONCURRENT AND CONFLICTING JURISDICTION.

§ 23. Concurrent jurisdiction.

(N. D.: 1895.)

A stipulation for value in a possessory action may be enforced in any court having jurisdiction of an action of debt for the amount due on the stipulation.—*Braithwaite v. Jordan* (N. D.) 65 N. W. 701.
5 N. D. 196.

Of offenses committed on river forming boundary of states, see "Criminal Law," § 10.

§ 24. Jurisdiction of proceedings instituted in another court.

(Wis.: 1896.)

Where a sufficient complaint has been filed and served, asking for the sequestration of the property of a debtor corporation and the appointment of a receiver, and the court has issued an order to show cause why a receiver should not be appointed, and forbidding interference with the assets of the corporation pending the motion, a like court in another county cannot, by declaring the corporation insolvent, and appointing a receiver therefor, acquire superior jurisdiction,

where such proceedings are had while the order to show cause and the restraining order are pending in the other court.—*Northwestern Iron Co. v. Lehigh Coal & Iron Co.* (Wis.) 66 N. W. 515.
92 Wis. 487.

§ 25. — Interpleader.

(Mich.: 1895.)

A fund due under an insurance policy by a company was garnished in W. county. An assignee afterwards sued the company for the money in another county. The company filed its bill in equity in W. county, praying that the claimants be interpleaded and that they be enjoined from prosecuting their several suits. *Held*, that the suit was properly filed in the court first obtaining jurisdiction.—*Hogan v. Donovan* (Mich.) 64 N. W. 37.

§ 26. Action to enforce judgment of other court.

[a] (Mich.: 1895.)

The mere fact that a state court would not have rendered judgment against the old township, in an action on bonds issued by it, on the ground that the act authorizing the issuance was unconstitutional, does not prevent a state court from enforcing the liability of a new township created out of the old, for its proportion of a judgment rendered by a federal court against the old township.—*Township of Grant v. Township of Reno* (Mich.) 65 N. W. 376.

[b] (N. D.: 1895.)

An undertaking given on appeal in a territorial court sitting in admiralty may be enforced by the state court which superseded the territorial court, the action not being a proceeding to enforce the judgment in the admiralty cause, within the rule that the court in which a judgment is rendered has exclusive jurisdiction to enforce it.—*Braithwaite v. Jordan* (N. D.) 65 N. W. 701.
5 N. D. 196.

§ 27. Conflicting state and federal jurisdiction.

(Neb.: 1896.)

A state court, having no prior jurisdiction of the subject-matter, will not restrain a plaintiff in whose favor judgment has been rendered in a federal court from proceeding to the execution of such judgment.—*Prugh v. Portsmouth Sav. Bank* (Neb.) 67 N. W. 309.
48 Neb. 414.

VII. RULES OF DECISION—COMITY.

§ 28. *Stare decisis*.

(Neb.: 1896.)

In the absence of complications resulting from property rights, it is the privilege, if not the duty, of courts to re-examine questions, and modify or overrule previous decisions shown to be wrong.—*State v. Hill* (Neb.) 66 N. W. 541.
47 Neb. 456.

§ 29. State court following federal decision.

(Neb.: 1896.)

The construction placed on provisions of the federal constitution by the supreme court of the United States must be followed by state courts in all matters to which such construction is applicable.—*State v. Sioux City, O. & W. R. Co.*, 65 N. W. 766, 46 Neb. 682.

§ 30. Comity.

[a] (Neb.: 1897.)

It will be presumed, in the absence of contrary proof, that courts of general jurisdiction of other states have the authority they assume to exercise, though similar courts in Nebraska have no such authority.—*Council Bluffs Sav. Bank v. Griswold* (Neb.) 70 N. W. 376.

161 (Wis.; 1896.)

It is no ground for the refusal of a court to entertain an action to enforce a right that it will be called upon to administer the laws of another state, where there is no fundamental difference of policy between such laws and those of the forum.—*Eingartner v. Illinois Steel Co.* (Wis.) 68 N. W. 661.

COVENANTS.

I. AGAINST INCUMBRANCES, §§ 1-5.
II. WARRANTY, §§ 6-8.

See, also, "Deed"; "Vendor and Purchaser."

As to party walls, see "Party Walls," § 3.
 In grants of right of way, see "Railroad Companies," § 4.
 In leases, see "Landlord and Tenant," §§ 20, 26.
 Liability of heir on covenant of ancestor, see "Descent and Distribution," § 14.
 Limitation of actions for breach, see "Limitation of Actions," § 7.

I. AGAINST INCUMBRANCES.**§ 1. Construction and effect.****[a] (Mich.; 1896.)**

Where one conveyed premises, covenanting that they were free from incumbrances, excepting a certain mortgage, and that he would warrant and defend the title to the same against all lawful claims whatever, he was bound to defend the title as against all lawful claims, including the mortgage.—*Welton v. Welton* (Mich.) 67 N. W. 338.

[b] (Minn.; 1896.)

The rule that a contingent right of dower is an incumbrance on land previously conveyed by the husband alone, within the covenant against incumbrances, is not changed by the fact that estates in dower *eo nomine* have been abolished in Minnesota, and that there has been substituted a life estate in the homestead of the husband, and title in fee to an undivided one-third of other lands.—*Crowley v. C. N. Nelson Lumber Co.* (Minn.) 69 N. W. 321.

[c] (Neb.; 1897.)

A covenant against incumbrances is, in effect, that the premises are free from incumbrances at the time of the conveyance, and, if any incumbrances exist, the covenant is broken, and a cause of action accrues which will be barred by limitation in five years.—*Bellamy v. Chambers* (Neb.) 69 N. W. 770.

§ 2. Knowledge of incumbrance by grantee.**[Iowa; 1895.]**

The grantee of a deed with covenants against incumbrances may recover for a breach thereof, though he knew of the incumbrance before his deed was made.—*Yancey v. Tatlock* (Iowa) 61 N. W. 997.
 93 Iowa, 386.

§ 3. Taxes.**(Neb.; 1895.)**

Where land was sold with a covenant against incumbrances, and at that time taxes were assessed against the land for the year, and on their subsequently becoming due the grantor neglected to pay them, and the grantee paid them to prevent the sale of the land, the grantee could recover the amount paid from the grantor.—*Campbell v. McClure* (Neb.) 63 N. W. 920.
 45 Neb. 608.

§ 4. Effect of special warranty.**(Iowa; 1897.)**

A deed, after reciting that it was subject to two mortgages, covenanted that the grantors had a perfect title, and right to convey, and that the

premises were free from all incumbrances, "except as above," and contained a further covenant to warrant and defend the premises against the claims of all persons claiming the same, "in, through, or by us"; the portions quoted being written, and the covenants being printed otherwise. *Held*, that the special warranty did not limit the preceding covenant against incumbrances, so as to exclude from its operation an outstanding mortgage other than those mentioned in the deed.—*Duroe v. Stephens* (Iowa) 70 N. W. 610.

§ 5. Covenant running with the land.**(Minn.; 1896.)**

A covenant against incumbrances which are a money charge on the land runs with the land, and an action may be maintained thereon by a remote grantee, who has discharged the incumbrances, although such covenant is one of the covenants in a mortgage through which he acquired his title to the land by a purchase thereof at a foreclosure sale.—*Security Bank of Minnesota v. Holmes* (Minn.) 68 N. W. 113.

II. WARRANTY.**§ 6. Breach.****[a] (Iowa; 1895.)**

Defendant conveyed to plaintiff, with a covenant to warrant and defend the title, land which he had acquired by a swamp-land entry. The United States land office afterwards set aside the entry, and issued muniments of title to a third person. *Held*, that though the proceedings of the land office were invalid, as they cast on the third person the apparent legal title, defendant was required to defend plaintiff's title against any claim by such person.—*Meservey v. Snell* (Iowa) 62 N. W. 767.

[b] (Neb.; 1895.)

A covenantee need not resist an action by the holder of a paramount title until actually dispossessed, but may recover against his covenantor after voluntarily surrendering to the holder of the better title.—*Chaney v. Straube* 62 N. W. 234, 43 Neb. 879.

§ 7. Action for breach.**[a] (Iowa; 1895.)**

In an action for the price of land conveyed by warranty deed, the fact that a judgment against the grantor was not satisfied until a few days after the commencement of the suit is no defense.—*Winch v. Bolton* (Iowa) 63 N. W. 330.

[b] (Minn.; 1896.)

Where a covenantee in a deed containing the usual covenant of warranty surrenders and abandons possession of the land conveyed because a paramount title has been asserted against him in the courts by the holder thereof, and such title has been adjudged valid, his right of action for a breach of the covenant is complete.—*Wagner v. Finnegan* (Minn.) 67 N. W. 795.

§ 8. Damages—Attorney's fees.**(Iowa; 1895.)**

Where a grantor, who has covenanted to warrant and defend title, is notified by the grantee to defend an action against him, based on an actual defect in the legal title, and fails to do so, the grantee may recover reasonable attorney's fees necessarily expended in successfully defending the action.—*Meservey v. Snell* (Iowa) 62 N. W. 767.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witness," §§ 49-74.

CREDITORS.

See "Assignment for Benefit of Creditors"; "Composition with Creditors"; "Creditors' Bill"; "Fraudulent Conveyances"; "Insolvency."

CREDITORS' BILL.

Against foreign corporation, see "Corporations," § 108.

§ 1. When lies and who may maintain.

[a] (Iowa; 1895.)

Where a deed absolute in terms is given as security, an action may be brought by a judgment creditor of the grantor to have the deed declared a mortgage, and to have the grantor's interest therein subjected to the payment of the judgment, though the debt for which the deed was given as security has not been fully paid.—*Dunton v. McCook* (Iowa) 61 N. W. 977, 93 Iowa, 258.

[b] (Iowa; 1895.)

Creditors need not resort to property of the debtor out of the state before recourse to creditors' bill to subject real estate within the state fraudulently conveyed.—*O'Brien v. Stambach* (Iowa) 69 N. W. 1133.

[c] (Minn.; 1896.)

After the rendition and docketing of a judgment against a debtor in whose name the title to certain land stood of record, he executed a conveyance of the property, in which he "fraudulently" recited that he merely held the title in trust for the grantee, who had always been the beneficial owner of the premises. *Held*, that this recital did not constitute an apparent obstruction to the enforcement of the judgment lien, for the removal of which the judgment creditor could maintain an action.—*Cornman v. Sidle* (Minn.) 67 N. W. 667.

[d] (Neb.; 1895.)

The statutory proceedings in aid of execution did not supersede the action in the nature of a creditors' bill.—*Monroe v. Reid* (Neb.) 64 N. W. 983, 46 Neb. 316.

[e] (Neb.; 1897.)

One who has taken the title of an insolvent firm to real property, under an agreement to dispose of it, and pay a part of the proceeds to a creditor of the firm, and the balance to the firm, may be required, in an equitable proceeding against him and the firm by one of its creditors, to pay the balance to such creditor.—*Raymond v. Leinberger* (Neb.) 70 N. W. 400.

§ 2. — Issuance and return of execution as condition precedent.

[a] (Iowa; 1897.)

Where a judgment debtor is insolvent, issuance of execution is not necessary to maintenance of creditors' bill to reach land fraudulently conveyed.—*O'Brien v. Stambach* (Iowa) 69 N. W. 1133.

[b] (Iowa; 1897.)

Objection that, on a creditors' bill to reach personally fraudulently conveyed, the creditors should first issue execution and levy it on the same, and have it returned nulla bona, not being jurisdictional, cannot be raised on appeal for the first time.—*O'Brien v. Stambach* (Iowa) 69 N. W. 1133.

[c] (Mich.; 1896.)

A creditors' bill will not lie before an execution is issued and returned unsatisfied, and where this has not been done the defect cannot be cured by a supplemental bill setting forth the issuance of an alias execution after the original bill was filed, and its return unsatisfied.—*Greuell v. Perry* (Mich.) 68 N. W. 144.

[d] (S. D.; 1896.)

To enable a judgment creditor to maintain an action to subject land standing in the name

of a third person, it is not necessary that he should first have made a levy on the land.—*Brown v. Edmonds* (S. D.) 68 N. W. 734.

[e] (S. D.; 1897.)

Issue of execution to the sheriff of the county where the judgment debtor lives, with return thereof unsatisfied, authorizes suit to reach property of his, standing in the name of another.—*Minneapolis Threshing Mach. Co. v. Hanrahan* (S. D.) 70 N. W. 636.

[f] (Wis.; 1895.)

One is not entitled to relief under a creditors' bill against a foreign corporation, when he has not issued execution under his judgment in the only county in the state in which the corporation has a place of business and where its property is, as he knows, though he has issued an execution in the county in which his judgment was rendered, and it has been returned unsatisfied.—*Northwestern Iron Co. v. West Superior Iron & Steel Co.* (Wis.) 63 N. W. 752.

90 Wis. 570.

[g] (Wis.; 1895.)

A creditors' bill must show that plaintiffs have exhausted their remedy at law by obtaining judgment and issuing execution.—*Hughes v. Hunner*, 64 N. W. 887, 91 Wis. 116.

[h] (Wis.; 1895.)

Rev. St. § 3836, provides that a creditor's action against a decedent's estate shall not be brought to trial until the sufficiency or insufficiency of the estate to pay the debts of decedent shall be ascertained, and, if found insufficient, such action may proceed to trial and judgment, and any property described in the complaint, which is subject to such debts, shall be sold, and the proceeds applied thereon. *Held*, that where a creditor has procured the allowance of his claim against a decedent's estate, he may maintain a creditors' bill against one to whom decedent caused land, purchased and paid for by him, to be conveyed, to establish a trust therein, without first obtaining a judgment at law, and having an execution issued thereon and returned unsatisfied.—*Allen v. Meltae* (Wis.) 64 N. W. 889, 91 Wis. 226.

[i] (Wis.; 1897.)

A creditors' bill must show that execution on complainant's judgment at law has been returned unsatisfied, at least in part, or that the action is in aid of an existing execution levy.—*Kronskop v. Kronskop* (Wis.) 70 N. W. 475.

§ 3. Laches.

(Iowa; 1897.)

An action by a subsequent creditor to set aside a fraudulent conveyance cannot be held barred by laches, having been commenced immediately after recovery of judgment on his debt, and it not appearing how long prior to judgment his debt had existed.—*Brundage v. Cheneworth* (Iowa) 70 N. W. 211.

§ 4. Parties.

(Mich.; 1896.)

Where an execution is levied on land of one of several judgment debtors, and is unsatisfied, the other judgment debtors are not necessary parties to a bill in aid of execution filed by the judgment creditor against the owner of the land and mortgagees thereof to cancel the mortgage as fraudulent.—*Hodge v. Gray* (Mich.) 68 N. W. 979.

§ 5. Pleading.

[a] (Mich.; 1896.)

Where an execution is levied on the land of one of several judgment defendants, and is unsatisfied, a bill in aid of execution by the judgment plaintiff, against the owner of the land and mortgagees thereof, to cancel and set aside the mortgage and proceedings to foreclose the same as fraudulent, need not allege the insolvency of any of the other judgment defendants, or that plain-

tiff's remedy is exhausted against them.—Hodge v. Gray (Mich.) 68 N. W. 979.

[61] (S. D.; 1896.)

Where an answer to a creditors' bill against a husband and wife to subject realty standing in the name of the wife to a judgment against the husband alleges that the property was purchased for the purpose of using the same as a homestead, and there is evidence tending to support the allegation, the defendants are entitled to a finding thereon.—Brown v. Edmonds (S. D.) 68 N. W. 734.

[61] (S. D.; 1897.)

A complaint in a suit to subject property standing in the name of wife to judgment against husband, alleging that the husband furnished the funds for purchase of the property, and caused title thereto to be put in her name, she never having had any pecuniary interest therein, will not allow a contention that, though the funds with which the property was bought were hers, she was estopped to claim the property, because bought with the proceeds of property which she had allowed to stand in his name at the time he contracted the debt for which the judgment was rendered.—Minneapolis Threshing Mach. Co. v. Hanrahan (S. D.) 70 N. W. 656.

§ 6. — Multifariousness.

(Mich.; 1895.)

A bill by judgment creditors on behalf of themselves and certain other judgment creditors, against the debtor and various persons to whom he transferred distinct parts of his property, the sole purpose of which is to impound all the assets of the debtor to pay his debts, is not multifarious.—Hulbert v. Detroit Cycle Co. (Mich.) 64 N. W. 950.

§ 7. Evidence and practice.

[1a] (Iowa; 1897.)

Regularity of judgments on which creditors' bill is founded being admitted, they are prima facie evidence of indebtedness, and the burden is on defendants to prove payment.—O'Brien v. Stambach (Iowa) 69 N. W. 1133.

[1b] (Iowa; 1897.)

The claim that creditors realized from securities, and did not give the debtor credit therefor on their judgments against him, on which their creditors' bill is founded, cannot be considered, unless raised by defendants' pleadings, and not then if the matters arose before the judgments were obtained.—O'Brien v. Stambach (Iowa) 69 N. W. 1133.

§ 8. Lien created by bill.

(Iowa; 1895.)

Code, § 3150, provides that at any time after judgment an action by equitable proceedings may be brought to subject any property belonging to defendant to satisfaction of the judgment. Section 3052 provides that in such case a lien shall be created on the property of the judgment debtor in the hands of any defendant described in the petition from the time of the service of notice and a copy of the petition on the defendant holding the property. *Held*, that where plaintiff brought an equitable suit before obtaining a judgment at law, and after judgment filed a supplemental petition, the service of the original notice in the suit and the filing of such supplemental petition would not give a lien on property in the hands of a defendant belonging to the judgment debtor, though all the defendants appeared, the notice not being such as was required by the statute, and it being necessary that the petition be served. 60 N. W. 526 (1894) reversed.—Ware v. Delahaye, 64 N. W. 640.

CRIMINAL CONVERSATION.

See "Adultery"; "Husband and Wife," §§ 36, 37; "Seduction."

CRIMINAL LAW.

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See, also, "Arrest"; "Bail"; "Extradition"; "Graud Jury"; "Habeas Corpus"; "Indictment and Information"; "Pardon"; "Reformatories"; "Witness."

For particular crimes, see "Adultery"; "Arson"; "Assault and Battery," §§ 4-10; "Bastardy"; "Body Stealing"; "Bribery"; "Burglary"; "Conspiracy," § 1; "Disorderly Conduct"; "Disorderly House"; "Disturbance of Public Assembly"; "Embezzlement"; "Escape"; "False Pretenses"; "Forgery"; "Fornication"; "Gaming"; "Homicide"; "Incest"; "Indecent Assault"; "Intoxicating Liquors," §§ 30-42; "Larceny"; "Libel and Slander," § 34; "Malicious Mischief"; "Offense Publications"; "Obstructing Justice"; "Perjury"; "Pointing Firearms," § 3; "Poi-

son"; "Prostitution"; "Rape"; "Receiving Stolen Goods"; "Robbery"; "Seduction," §§ 3-8; "Threats and Threatening Letters," see "Contracts," § 21.
 Arrest on criminal charge, see "Arrest," §§ 4-6.
 Constitutional rights of persons accused or convicted of crime, see "Constitutional Law," §§ 71-76.
 Conviction of crime as ground for divorce, see "Divorce," § 6.
 — of other offense than charged, see "Indictment and Information," §§ 29, 30.
 Costs in criminal cases, see "Costs," §§ 33-40.
 Criminal conspiracy, see "Conspiracy," § 1.
 — fraud, see "Fraud," § 7.
 — libel or slander, see "Libel and Slander," § 34.
 — trespass, see "Trespass," § 10.
 Cruel or unusual punishments, see "Constitutional Law," § 76.
 Disintering and carrying away dead body, see "Body Stealing."
 Displacing railroad tracks, see "Railroad Companies," § 81.
 Failure of state treasurer to pay over money to successor, see "States and State Officers," § 8.
 Fees of witnesses in criminal cases, see "Witnesses," § 77.
 Illegal liquor sales, see "Intoxicating Liquors," §§ 30-42.
 Joinder of parties and defenses, see "Indictment and Information," §§ 27, 28.
 Libelous words imputing crime, see "Libel and Slander," § 3.
 Limitation of prosecution, see "Limitation of Actions," §§ 43, 44.
 Obstructing highway, see "Highways," §§ 31, 32.
 Offenses against fish laws, see "Fisheries," § 3.
 Propelling steam engine on highway, see "Highways," § 2.
 Receiving deposits after insolvency, see "Banks and Banking," §§ 33-36.
 Recognizance on appeal, see "Bail," § 2.
 Responsibility for crime of wife, see "Husband and Wife," § 22.
 Right to compulsory process for witnesses, see "Constitutional Law," § 74.
 — to fair and impartial trial, see "Constitutional Law," § 72.
 — to jury trial, see "Constitutional Law," § 39.
 Sale of mortgaged chattels, see "Chattel Mortgages," § 60.
 Setting prairie fire, see "Fires."
 Showing conviction of crime to affect credibility, see "Witness," § 67.
 Timber cutting, see "Public Lands," § 22.
 Using false weights and measures, see "Weights and Measures."
 Violation of city ordinance, see "Municipal Corporations," § 36.
 Waiver of right to jury trial, see "Jury," § 28.
 Who may institute prosecution for adultery, see "Adultery," § 1.

I. IN GENERAL.

§ 1. To what law responsible.

(Neb.: 1895.)

The crime of murder is committed at the time of the fatal blow, though the death does not occur until a subsequent day, and the accused is to be tried by the laws in force at the time the injurious act is done.—*Debney v. State*, 64 N. W. 446, 45 Neb. 856.

§ 2. What constitutes crime.

(Mich.: 1895.)

On the trial of a township supervisor, charged with converting money appropriated by the supervisors for township roads and bridges, and using the same to bribe voters, the court directed a verdict of conviction, on proof that the appro-

priation had been made, and that defendant had drawn the sum appropriated from the treasurer. *Held* error to refuse to allow defendant to show that the money had been legally expended, on the theory that the appropriation was unlawful.—*People v. Fairchild* (Mich.) 63 N. W. 436. 105 Mich. 437.

§ 3. Duress.

(Mich.: 1895.)

A threat to take one's life unless the person threatened assist in the perpetration of a murder, made three days before the murder was committed, is no defense to a prosecution therefor.—*People v. Repke* (Mich.) 61 N. W. 861.

103 Mich. 459.

§ 4. Entrapment into crime.

(Mich.: 1895.)

One who has actually accepted a bribe cannot excuse his act on the ground that it was instigated by others for the purpose of entrapping him.—*People v. Liphardt* (Mich.) 62 N. W. 1022.

105 Mich. 80.

II. CAPACITY TO COMMIT CRIME.

§ 5. Who are capable.

(S. D.: 1897.)

Comp. Laws, § 6215, providing that "all persons are capable of committing crimes except * * * (5) persons who committed the act or made the omission charged, under an ignorance or mistake of fact which disproves any criminal intent," is only applicable to a class of cases where a scienter is material to constitute the offense.—*State v. Dorman* (S. D.) 70 N. W. 848.

§ 6. Intoxication.

[a] (Neb.: 1894.)

Though intoxication is in general no excuse for crime, the evidence thereof should be considered for the purpose of determining whether defendant was, at the time of the alleged assault with intent to rape, capable of entertaining such intent.—*Head v. State* (Neb.) 61 N. W. 494, 43 Neb. 30.

[b] (Wis.: 1896.)

Exclusion of evidence of defendant's acts, conduct, and declarations subsequent to the fourth day after the homicide, showing the continuance of his condition the same as immediately before the homicide, offered on the question of his insanity at the time of the killing, is error, especially where it was claimed by the prosecution that his condition at the time of the killing was the result of protracted and excessive intoxication, producing a fit of drunken excitement and fury.—*French v. State* (Wis.) 67 N. W. 706.

93 Wis. 325.

[c] (Wis.: 1896.)

In a homicide case it is error to admit testimony that a man suffering from delirium tremens has no more control over his actions in that respect than a man suffering from delirium produced from any other cause, but still he is sane; as, while drunkenness is no excuse, delirium tremens caused by drunkenness may be an excuse, if it produces such a state of mind as would, if otherwise produced, relieve the person from responsibility.—*French v. State* (Wis.) 67 N. W. 706.

93 Wis. 325.

§ 7. Insanity.

[a] (Mich.: 1896.)

Where the defense is insanity, it is proper to refuse to charge that if a man is insane he is irresponsible, and should be acquitted of crime.—*People v. Beverly* (Mich.) 66 N. W. 379.

[b] (Neb.: 1895.)

An order by the commissioners of insanity, made under Comp. St. c. 10, finding accused to be a fit subject for treatment in the hospital for the insane, was neither conclusive nor prima facie evidence that accused was insane. *Pflueger v. State* (Neb.) 64 N. W. 1094, 46 Neb. 493.

§ 8. — Opinion evidence as to insanity.**[a] (Neb.: 1895.)**

Proper foundation having been laid, a nonexpert witness could state whether, in his judgment, accused was able to distinguish between right and wrong with respect to the crime charged.—*Pflueger v. State* (Neb.) 64 N. W. 1094, 46 Neb. 493.

[b] (Neb.: 1895.)

Persons who knew accused for 15 years, and who observed him almost daily for 6 weeks previous to the commission of the homicide, their attention having been directed in particular to his mental condition, were competent to give their opinions on the question of his sanity.—*Pflueger v. State*, 61 N. W. 1094, 46 Neb. 493.

[c] (Neb.: 1896.)

Nonexpert witnesses can be permitted to express an opinion as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of such mental condition is based.—*Hoover v. State* (Neb.) 66 N. W. 1117.

48 Neb. 184.

§ 9. — Trial of the issue specially.**[a] (Neb.: 1895.)**

Where insanity does not originate since the commission of the offense, the existence thereof is not to be determined by a jury impaneled for that purpose alone.—*Walker v. State*, 64 N. W. 357, 46 Neb. 25.

[b] (Wis.: 1896.)

The jury having disagreed on the special issue of insanity, defendant cannot obtain the affirmative of the issue of his sanity or insanity, and the right to open and close, by admitting the homicide, and alleging in defense his insanity at the time thereof.—*French v. State* (Wis.) 67 N. W. 706.

93 Wis. 325.

[c] (Wis.: 1896.)

Under Rev. St. § 4697, as amended by Laws 1885, c. 164, providing that, when the jury disagree on the trial of the special issue of accused's insanity at the time of the commission of the alleged offense, the court shall forthwith order the trial on the issue of not guilty to proceed, and the question of insanity involved in such special plea "shall be tried and determined by the jury with the plea of not guilty," defendant cannot have a second trial on the special issue, there having been a disagreement on the first.—*French v. State* (Wis.) 67 N. W. 706.

93 Wis. 325.

III. JURISDICTION.

Of justices, see "Justices of the Peace," § 9. Over bastardy proceedings, see "Bastardy," § 3.

§ 10. Over rivers forming boundary of states.**(Minn.: 1895.)**

The courts of Minnesota have jurisdiction to try one charged with crime committed on an island in the Mississippi river, on the Wisconsin side of the channel; the enabling act of both Wisconsin (9 Stat. 57, § 3) and Minnesota (11 Stat. 166, § 2) providing that such state shall have concurrent jurisdiction on the Mississippi and all other rivers forming the com-

mon boundary of that and any other state *State v. George* (Minn.) 63 N. W. 100, 60 Minn. 593.

IV. PRINCIPALS AND ACCESSORIES.**§ 11. Principals in the second degree.****[a] (Mich.: 1895.)**

A person present at the commission of a murder, and aiding, either by keeping guard, or by counseling or encouraging the commission of the crime, is equally guilty with the person who delivers the mortal blow.—*People v. Repke* (Mich.) 61 N. W. 861.

103 Mich. 459.

[b] (Neb.: 1895.)

A conviction under an indictment charging defendant with having performed an operation which produced an abortion was sustained by evidence that defendant procured another to actually perform the operation in his presence, while he watched for intruders, to prevent interruption.—*Dixon v. State* (Neb.) 64 N. W. 961, 46 Neb. 298.

§ 12. — Indictment and punishment.**[a] (Neb.: 1894.)**

Under an information charging defendant with procuring, aiding, and abetting another to commit an assault with intent to wound, defendant may be convicted of assault and battery as principal.—*Wagner v. State* (Neb.) 61 N. W. 85, 43 Neb. 1.

[b] (N. D.: 1895.)

Under Comp. Laws, § 7260, abolishing the distinction between principals and accessories before the fact, it is proper to charge as principal one who counsels and directs a murder.—*State v. Kent* (N. D.) 62 N. W. 631.

4 N. D. 577.

§ 13. Accessories before the fact.**[a] (Iowa: 1896.)**

Under Code, § 4314, which abrogates the distinction between an accessory before the fact and a principal, making both principals, it is error to charge that a defendant who did not actually commit the act constituting the crime, which was committed by another, is guilty, if at all, of whatever offense the evidence shows such other to have committed.—*State v. Smith* (Iowa) 69 N. W. 269.

[b] (Neb.: 1896.)

Since Cr. Code, § 1, relating to accessories before the fact, merely declares the common law, one charged as an accessory before the fact cannot be convicted as a principal.—*Casey v. State* (Neb.) 68 N. W. 643.

§ 14. Aiding and abetting in misdemeanor.**(Neb.: 1894.)**

As there are no accessories in misdemeanors, those whose conduct would constitute them accessories before the fact if the principal offense were a felony, are, if it be a misdemeanor, guilty as principals.—*Wagner v. State*, 61 N. W. 85, 43 Neb. 1.

V. COMPLAINT AND WARRANT.

Necessity of producing evidence leading to issuance of warrant, see post, § 57.

Warrant as evidence, see post, § 90.

Complaint for illegal sale of liquor, see "Intoxicating Liquors," §§ 32, 33.

—violation of city ordinance, see "Municipal Corporations," § 37.

In particular prosecutions, see "Adultery," § 3; "Arson," § 1; "Disorderly Conduct."

§ 15. Complaint.**[a] (Mich.; 1895.)**

A written complaint in a prosecution before a justice of the peace is unnecessary.—*People v. Bennett* (Mich.) 65 N. W. 280.

[b] (Mich.; 1896.)

A complaint filed with a justice contained a description of property belonging to the complaining witness, and alleged on oath that the property was taken without his consent, and that the complainant had good cause to believe that a person named did feloniously take, steal, and carry away the said property. *Held*, that such complaint, when supplemented by testimony of witnesses cognizant of the facts, was sufficient to give the justice jurisdiction, under How. Ann. St. § 7093, providing that on complaint made before a justice that any of certain offenses has been committed within the county, he shall examine the complainant on oath, and witnesses produced by him, and shall reduce the complaint to writing, and cause the same to be subscribed by the complainant, and, if it shall appear that said offense has been committed, said justice shall issue his warrant, etc.—*Curnow v. Kessler* (Mich.) 67 N. W. 982.

§ 16. Waiver of objections.**[a] (Mich.; 1895.)**

A contention that a complaint for assault to do great bodily harm less than the crime of murder, pursuant to How. Ann. St. Mich. § 9122a, is insufficient, because omitting the words "the crime of," is not available when urged for the first time on appeal.—*People v. Sutherland* (Mich.) 62 N. W. 566.

104 Mich. 468.

[b] (Mich.; 1896.)

After the jury has been impaneled, the defendant cannot introduce testimony to show that the justice issuing the warrant did not have sufficient evidence to authorize its issuance, where there was evidence of an examination before the justice.—*People v. Whipple* (Mich.) 66 N. W. 490.

VI. PRELIMINARY HEARING.

Admissibility of testimony given at preliminary examination, see post, § 112.

Replacing lost transcript of proceedings, see post, § 57.

In prosecution for illegal sale of liquor, see "Intoxicating Liquors," § 31.

§ 17. Necessity of preliminary examination.**(Neb.; 1895.)**

A defendant, unless a fugitive from justice, is entitled to a preliminary examination before trial.—*Coffield v. State* (Neb.) 62 N. W. 875. 44 Neb. 417.

§ 18. Finding of probable cause.**[a] (Mich.; 1894.)**

Where the examining magistrate certified that he found that there was probable cause to believe that an offense had been committed by defendant, and defendant gave bail to appear and answer to the information, the regularity of the information is not affected by the fact that the magistrate did not positively certify that an offense had been committed.—*People v. Whittemore* (Mich.) 61 N. W. 13.

102 Mich. 519.

[b] (Mich.; 1895.)

A certificate of a committing magistrate stating that it appears to him that an offense has been committed, and that there is just cause to suspect the defendant to be guilty thereof, is a sufficient finding of probable cause, under How. Ann. St. Mich. § 9471, and will confer jurisdiction on the circuit court to try the case where the whole of the evidence and proceedings had

before the magistrate are not in the record.—*People v. Sutherland* (Mich.) 62 N. W. 566. 104 Mich. 468.

§ 19. The hearing.**[a] (Mich.; 1896.)**

The question whether the evidence before a justice of the peace justified his conclusion to issue a warrant for arrest cannot be tried in the circuit court, the complaint and warrant being valid in form.—*People v. Payment* (Mich.) 67 N. W. 689.

[b] (Wis.; 1896.)

Rev. St. § 4786, providing that the magistrate shall, on preliminary examination, examine the witness to support the accusation, does not require that all the witnesses known to the state be examined, but merely requires that sufficient witnesses be examined to justify the magistrate in binding over the accused for trial.—*Emery v. State* (Wis.) 65 N. W. 848.

92 Wis. 146.

§ 20. Waiver of preliminary examination.**[a] (Neb.; 1895.)**

The objection that a preliminary examination was not had must be raised before trial by motion to quash the information or by plea in abatement.—*Coffield v. State* (Neb.) 62 N. W. 875.

44 Neb. 417.

[b] (Neb.; 1896.)

A record of the proceedings in the examining court disclosing that a complaint was filed charging the crime for which defendant was tried in the district court, and that defendant was arraigned thereupon, and waived examination, sufficiently showed compliance with Crim. Code, § 585.—*Korth v. State* (Neb.) 65 N. W. 792, 46 Neb. 631.

[c] (Wis.; 1895.)

Where the complaint charged defendant with perjury committed on a trial in the county court on October 7, 1892, and defendant waived examination, and the information subsequently filed charged the commission of perjury on a trial in the circuit court on December 16, 1892, a plea in abatement on the ground that there was no examination of defendant on the offense charged in the information should be sustained.—*Brown v. State* (Wis.) 64 N. W. 749, 91 Wis. 245.

§ 21. Waiver of objections.**(Mich.; 1895.)**

Where defendant waived examination before the justice, and upon arraignment pleaded not guilty, his right to object that there was no examination of witnesses cognizant of the facts before the issuance of the warrant was waived.—*People v. Harris* (Mich.) 61 N. W. 871.

103 Mich. 473.

VII. OBJECTIONS TO INDICTMENT.

Certiorari to review refusal to quash, see post, § 201.

Harmless error in overruling motion to quash, see post, § 231.

Dismissal of indictment, finding new indictment, see "Indictment and Information," § 3.

§ 22. Method of raising objections.**[a] (Neb.; 1895.)**

Objections to an indictment on the ground that the offense therein charged differs from that named in the complaint on which accused was held to answer should be made by plea in abatement, and not by motion to quash.—*Whitener v. State* (Neb.) 64 N. W. 704, 46 Neb. 144.

[b] (Neb.; 1897.)

The remedy of the accused in case of a redundant indictment or information is by plea,

and not by motion to strike unnecessary allegations.—*Blodgett v. State* (Neb.) 69 N. W. 751.

[c] (Neb.; 1897.)

A motion or objection directed to an indictment or information as a whole will be overruled unless applicable to each count thereof.—*Blodgett v. State* (Neb.) 69 N. W. 751.

§ 23. Motion to quash.

[a] (Iowa; 1895.)

The fact that the clerk of the grand jury, who was a practicing attorney, asked the witnesses some questions at the request of the foreman, is not ground for setting aside the indictment.—*State v. Miller* (Iowa) 64 N. W. 288.

[b] (Iowa; 1896.)

Affidavits of the grand jurors are admissible, on motion to quash an indictment, to show that the judge visited the grand jury during its deliberation, and directed that an indictment should be returned against a certain person for a certain crime, and that the indictment was found under such express directions of the court.—*State v. Will* (Iowa) 65 N. W. 1010.

[c] (Iowa; 1896.)

On a motion to set aside an indictment on the ground that one not a member of the grand jury was present during the investigation of the case against defendant, and took part in the examination of witnesses, it is incumbent on defendant to show that such person was present when the vote was taken, though not "required or permitted by law" to be present, within the exception of Code, § 4337, and was not acting as a deputy of the county attorney, as authorized by McClain's Code, § 274.—*State v. Fertig* (Iowa) 67 N. W. 87.

§ 24. Waiver of objections.

[a] (Iowa; 1895.)

Objection to an indictment on the ground of duplicity cannot be made for the first time on appeal.—*State v. Callahan* (Iowa) 65 N. W. 150.

[b] (Mich.; 1896.)

An objection that an information for a third offense is defective for not alleging prior convictions is not waived by pleading to the information, but may be taken by objection to the sentence.—*People v. Buck* (Mich.) 67 N. W. 982.

[c] (N. D.; 1896.)

The objection that the information was not properly verified cannot be made by motion to set aside after a plea of not guilty and one trial upon that plea, nor by motion in arrest.—*State v. Pancoast* (N. D.) 67 N. W. 1052.
5 N. D. 516.

VIII. ARRAIGNMENT AND PLEAS.

Showing in record as to arraignment and plea, see post, § 214.

Pleading in bastardy cases, see "Bastardy," § 5.
Right to plead limitations, see "Limitation of Actions," § 44.

1. IN GENERAL.

§ 25. Waiver of formal arraignment.

(Iowa; 1895.)

Where a criminal case was set for trial several days before by consent of both parties, and both parties subpoenaed witnesses accordingly, and the trial actually commenced, defendant will be deemed to have waived his right of arraignment.—*State v. Thompson* (Iowa) 64 N. W. 419.

§ 26. Time in which to plead.

[a] (Iowa; 1895.)

Code, § 4336, provides that defendant shall have one day in which to plead to the in-

dictionment. *Held*, that it was not error to give defendant 30 minutes to plead after he had waived the right thereto by consenting several days before to have the case set for trial.—*State v. Thompson* (Iowa) 64 N. W. 419.

[b] (Iowa; 1896.)

Defendant's statutory right to three days after entering his plea to the indictment in which to prepare for trial is waived by requesting that the case be assigned for a particular time, and by insisting on a trial at a much earlier date than that at which the case was called.—*State v. King* (Iowa) 66 N. W. 735.

§ 27. Plea of not guilty.

(Neb.; 1897.)

So long as the plea of not guilty remains on the record, the state is under no necessity of replying or demurring to a plea in bar, and the court, on its own motion, may disregard it.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 28. — Withdrawal.

[a] (Neb.; 1897.)

If a prisoner, after a plea of not guilty, tenders a proper plea in bar, stating facts which have occurred or come to his knowledge since the entry of his plea of not guilty, and which facts, if true, entitle him to discharge, it is the duty of the court to permit the prisoner to withdraw his plea of not guilty, and file such plea in bar.—*Davis v. State* (Neb.) 70 N. W. 984.

[b] (S. D.; 1895.)

It is within the discretion of a trial court to allow a plea of not guilty to be withdrawn for the purpose of presenting a motion to set aside the indictment upon grounds which, if established, would be fatal to the verdict.—*State v. Van Nice* (S. D.) 63 N. W. 537.

Effect of plea of former acquittal, see post, § 30.

§ 29. Reply.

(Mich.; 1895.)

On the overruling of a demurrer to a plea in abatement on an indictment, the state may reply on the merits to the plea.—*People v. O'Neill* (Mich.) 65 N. W. 540.

2. FORMER JEOPARDY.

§ 30. In general.

[a] (Iowa; 1896.)

The quashing of an indictment, and the discharge of a defendant thereon, on the ground that the grand jury finding the indictment was illegally constituted, is no bar to a subsequent indictment or prosecution of the defendant for the same offense.—*State v. Scott* (Iowa) 68 N. W. 451.

[b] (Mich.; 1895.)

There is no acquittal where the court refuses to go on with the trial, and quashes the proceedings for invalidity of the ordinance under which they were instituted.—*City of Grand Rapids v. Brandy* (Mich.) 64 N. W. 29.
105 Mich. 670.

[c] (N. D.; 1896.)

A plea of former acquittal is not sustained without the production of a verdict of acquittal.—*State v. Bronkol* (N. D.) 67 N. W. 680.
5 N. D. 507.

[d] (Wis.; 1896.)

A plea of former acquittal does not withdraw a plea of not guilty.—*Tandy v. State* (Wis.) 69 N. W. 160.

§ 31. When jeopardy begins.

(Minn.; 1895.)

An accused is "put in jeopardy of punishment," in the legal sense, when a jury is impaneled and sworn to try his case, on a valid indictment.—*State v. Sommers* (Minn.) 61 N. W. 907.

60 Minn. 90.

§ 32. Discharge of jury.

[a] (Neb.; 1897.)

The insanity of a juror is an "accident or calamity" authorizing the discharge of the jury, within the meaning of Code Cr. Proc. § 485.—*Davis v. State* (Neb.) 70 N. W. 984.

[b] (N. D.; 1896.)

Defendant having been put upon trial without being arraigned, his attorneys moved, after the state had rested its case, that he be discharged. The motion was denied, but while it was pending the jury were discharged, and under direction of court defendant was arraigned. *Held*, that the plea of former jeopardy was not sustained.—*State v. Bronkol* (N. D.) 67 N. W. 680.

5 N. D. 507.

§ 33. — In absence of accused.

(Minn.; 1895.)

Where the jury was discharged because of a disagreement, in the absence of defendant, who was imprisoned, he cannot be again tried for the same offense.—*State v. Sommers* (Minn.) 61 N. W. 907.

60 Minn. 90.

§ 34. Effect of conviction of lesser offense.

(Iowa; 1894.)

A defendant charged with murder in the first degree, and convicted in the second degree, is acquitted as to the former charge.—*State v. Helm* (Iowa) 61 N. W. 246.

92 Iowa, 540.

§ 35. Former conviction set aside or reversed on appeal.

[a] (Iowa; 1895.)

A verdict of guilty in a criminal case, which was set aside on the ground that it was contrary to the evidence, does not constitute a bar to a subsequent trial under the same indictment.—*State v. Bowman* (Iowa) 62 N. W. 759.

[b] (Neb.; 1895.)

A defendant who procures a reversal of a judgment of conviction for errors on the trial cannot object to a second trial on the ground that he was once in jeopardy.—*McGinn v. State* 65 N. W. 46, 46 Neb. 427.

[c] (S. D.; 1896.)

When defendant procures a reversal of his conviction, for errors in the charge of the trial court, he is not entitled to be discharged on the ground that he has once been in jeopardy.—*State v. Reddington* (S. D.) 66 N. W. 464.

§ 36. Identity of offenses.

[a] (Iowa; 1895.)

Under Code, § 3985, making it a criminal offense to destroy, injure, or secrete any goods or chattels of another, an indictment will lie for secreting and injuring a horse, though other sections of the Code prohibit "killing, maiming, and disfiguring horses," and "tormenting, beating, mutilating or overdriving of animals."—*State v. Phipps* (Iowa) 64 N. W. 411.

[b] (Iowa; 1895.)

An acquittal of persons prosecuted under Code, § 3682, for compelling a woman to be defiled against her will, cannot be pleaded in bar of a prosecution of the same persons under Code, § 4087, for conspiracy to injure the person of the same woman, and to do an act injurious to public morals, though the indictment in the latter case is based on the same facts as those relied on in the former case.—*State v. Brown* (Iowa) 64 N. W. 277.

[c] (Iowa; 1895.)

A plea of former acquittal is no defense to acts transpiring after the return of a former indictment.—*State v. Ingraham* (Iowa) 65 N. W. 152.

[d] (Iowa; 1896.)

An acquittal of larceny is not a bar to prosecution for breaking and entering.—*State v. Ingalls* (Iowa) 68 N. W. 445.

[e] (Mich.; 1895.)

A conviction of selling intoxicating liquors on June 30th without paying the tax is not a bar to a subsequent prosecution for making similar sales on May 1st, which latter date was not declared on in the information, or referred to in the evidence, in the former case.—*People v. Gault* (Mich.) 62 N. W. 724.

104 Mich. 575.

[f] (Mich.; 1895.)

3 How. Ann. St. § 1997a, declares that all keepers of bawdyhouses, or houses for the resort of prostitutes, shall be deemed disorderly persons. Section 9286 provides that every person who shall keep a house of ill fame, resorted to for the purposes of prostitution, shall be punished. *Held*, that a person cannot be punished for the same transgression under both statutes.—*People v. Cox* (Mich.) 65 N. W. 283.

[g] (Mich.; 1895.)

After a conviction for keeping a disorderly house, defendant cannot be convicted of the same offense on a date anterior to the former indictment, as the offense is a continuing one.—*People v. Cox* (Mich.) 65 N. W. 283.

§ 37. Sufficiency of plea.

(Iowa; 1895.)

Under Code, § 4359, providing that the only pleas to an indictment shall be guilty or not guilty or a plea of former acquittal or conviction, where defendant was indicted for perjury on his trial for larceny, of which he was acquitted, it was proper to strike out a plea setting out what defendant claimed was in issue on the trial for larceny, and averring that the same matters were in issue under the indictment for perjury.—*State v. Caywood* (Iowa) 65 N. W. 385.

IX. VENUE.

1. IN GENERAL.

§ 38. Proof.

(Iowa; 1895.)

A contention by an accused that the venue was not proved as laid will not be sustained where the objection was not made in the trial court, and the issue of venue was submitted to the jury, and there was testimony from which the jury was warranted in finding that the crime was committed in the county alleged.—*State v. Hopkins* (Iowa) 62 N. W. 656.

2. CHANGE OF VENUE.

§ 39. Presence and consent of accused.

(Wis.; 1895.)

When a person is charged with felony a change of venue cannot be had in his absence and in the absence of his attorney, on an affidavit made without their knowledge or consent.—*Lester v. State*, 64 N. W. 850, 91 Wis. 249.

§ 40. At instance of state.

(Mich.; 1895.)

In a criminal case the court may grant a change of venue at the request of the state. *People v. Peterson* (1892) 52 N. W. 1039, 93 Mich. 27, followed.—*People v. Fuhrman*, 61 N. W. 865, 103 Mich. 593.

§ 41. Application and hearing.

[a] (N. D.; 1896.)

Under Comp. Laws, § 7312, providing for a change of place of trial in certain criminal cases, a trial does not begin until the jury is impaneled; and a change of venue granted before that time is granted "before the trial is

begin."—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 510.

[b] (Wis.; 1896.)

Under Saub. & B. Ann. St. § 4686a, providing that where a change of venue is applied for on account of the prejudice of the judge, the court may, in lieu of awarding a change of venue, make a request of the judge in an adjoining circuit to hold the court where the case is pending, and try the same, defendant cannot couple his application for a change of venue with a condition that the case be not sent out of the county, but that another judge be called in to try it.—*French v. State* (Wis.) 67 N. W. 706.

93 Wis. 325.

§ 42. Prejudice of judge.

[a] (Iowa; 1895.)

The fact that a judge who presided at a former trial has formed and expressed an opinion that defendant is guilty, does not show such prejudice on his part as to entitle defendant to a change of venue.—*State v. La Grange* (Iowa) 62 N. W. 661.

[b] (N. D.; 1895.)

Under Comp. Laws, § 7312, providing that where one on trial for felony presents to the district judge an affidavit that he cannot have an impartial trial by reason of the bias and prejudice of such judge, the judge "may" call in another judge to try the case, it is the absolute duty of such judge to so call in another judge.—*State v. Kent* (N. D.) 62 N. W. 631.

4 N. D. 577.

§ 43. Local prejudice.

[a] (Iowa; 1894.)

On petition for change of venue of a murder trial, defendant's attorneys made affidavit that numerous newspapers had given alleged facts showing that defendant had deliberately prepared to shoot deceased; that there was great prejudice against defendant; and that the sheriff had removed him for safety to another county, and did not return him until it was thought safe. Numerous counter affidavits were filed denying the prejudice and excitement, and the sheriff made affidavit that defendant was removed to another county because of rumors of threatened violence, but that, on the day after the removal, such rumors were ascertained to be unfounded, and that four days afterwards the defendant was returned. *Held*, that in overruling the petition the court did not abuse its discretion.—*State v. Helm* (Iowa) 61 N. W. 246.

92 Iowa, 540.

[b] (Iowa; 1895.)

An application for change of venue of a murder trial, because of prejudice caused by newspaper articles and threats of a mob, was properly denied, though 19 citizens swore that defendant could not obtain a fair trial, where many other citizens swore to the contrary, and the sheriff who had removed the prisoner from the county after the murder swore that on his return there had been no excitement, and, as a matter of fact, no violence was offered on the trial.—*State v. Weems* (Iowa) 65 N. W. 387.

[c] (Iowa; 1895.)

Error cannot be predicated of refusal, in a murder case, to grant change of venue, on the ground of prejudice from published reports of a previous trial of one indicted with defendant for the offense; it appearing that there was no error in rulings or determinations as to competency of jurors by reason of opinions formed.—*State v. Hamil* (Iowa) 65 N. W. 395.

[d] (Iowa; 1896.)

Under McClain's Code, § 5759, giving the court discretion to decide motions for change of venue, it was not error, in a prosecution for forgery, to refuse to grant defendant's motion on the ground of prejudice of the people, though it was supported by the uncontroverted affida-

vids of himself and two other citizens, where, on a former trial, the jury failed to agree, and the motion was made three days before the case was for trial, and soon after a motion for a continuance had been overruled.—*State v. White* (Iowa) 67 N. W. 267.

[e] (Iowa; 1896.)

On a motion for change of venue because of prejudice caused by newspaper reports of the homicide, and the fact that the family of deceased was influential, and was scattered over the county, it appeared that, though defendant was removed by the sheriff to another locality on the death of the boy whom he shot, he was taken back in a few days to the place of the homicide, where he remained till the trial, which occurred over five months after the shooting, and that the newspaper reports were in the main temperate, though some of them referred to rumors of mobs and lynching. The state secured a large number of affidavits showing that defendant could have a fair trial in that county. *Held*, that a refusal of the motion showed no abuse of discretion.—*State v. Edgerton* (Iowa) 69 N. W. 280.

§ 44. To what county.

(N. D.; 1896.)

Where an accused charged with the crime of murder has established his right to a change of place of trial to the satisfaction of the court, he may, in open court, consent that the case be sent for trial to the district court of some county that is not "near or adjoining" the county of original venue; and, after trial in the court to which the case is so sent by his request, he cannot be heard to object to the jurisdiction of such court.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

X. TIME OF TRIAL.

Delaying trial to procure testimony, see post, § 67.

Waiver of right to three days for preparation, see post, § 52.

§ 45. Time of beginning prosecution.

(Neb.; 1896.)

There must, to show prejudicial error, be made to appear something more than that, within three weeks after a homicide had been committed, there was a conviction of the accused, in respect to such homicide, of the crime of murder. *Irvine and Ragan, CC., dissenting.*—*Hoover v. State* (Neb.) 66 N. W. 1117.

48 Neb. 184.

§ 46. Right to discharge for delay.

[a] (Minn.; 1896.)

The fact that the county attorney and sheriff had heard and believed that defendant had left the state does not affect the right to a dismissal under Gen. St. 1894, § 6279, providing that if an indictment, the trial of which has not been postponed on defendant's application, is not tried at the term of court at which it is first triable, it shall be dismissed, unless good cause to the contrary be shown.—*State v. Radioich* (Minn.) 69 N. W. 25.

[b] (Neb.; 1895.)

Before defendant in a criminal case, who has been committed to jail in default of bail, is entitled to be discharged under Cr. Code, § 389, for want of prosecution, it must appear that neither an information was filed nor an indictment was found against him at the term of court to which he is held to answer.—*State v. Miller*, 62 N. W. 238, 43 Neb. 860.

[c] (Neb.; 1895.)

Cr. Code, § 391, provides for the discharge of any person indicted who, after giving bail, shall not be brought to trial before the end of the third term of court held after the finding of the indictment. *Held* that, in

computing the three terms, the term at which the indictment was found should be excluded.—*Whitener v. State*, 64 N. W. 704, 46 Neb. 144.

[d] (Neb.; 1896.)

An application for the discharge of one charged with crime under Crim. Code, § 391, on the ground that three terms of court have elapsed since the one at which the information was filed, without accused having been brought to trial, must show that the delay did not happen on the prisoner's application, and that it was not occasioned by want of time to try it.—*Korth v. State*, 65 N. W. 792, 46 Neb. 631.

[e] (Neb.; 1897.)

The indictment against the prisoner was filed at the September, 1894, term of the court. There was a February, 1895, term, a May, 1895, term, and a September, 1895, term, at which latter term the prisoner was tried. He was put on trial at the February, 1895, term, and the jury failed to agree, and were discharged. *Held*, that the prisoner was not entitled to be discharged under Cr. Code, § 390, because not brought to trial either before the end of the second or the third term of court in which his case was pending, held after the indictment against him was found.—*Davis v. State* (Neb.) 70 N. W. 984.

XI. CONTINUANCE.

Bringing affidavits for continuance into record, see post, § 211.

Discretion of court, see post, § 217.

Harmless error in refusing, see post, §§ 231-233.

Postponement for illness of juror, see post, § 62.

Review of ruling in absence of certain matter from record, see post, §§ 223-226.

§ 47. In absence of accused.

(Wis.; 1896.)

After a trial for embezzlement was begun, it was adjourned to a certain day, defendant being on bail. On two subsequent days he failed to appear, and two adjournments were taken in his absence, and on the last adjourned day his bail was forfeited. *Held*, that where he was afterwards brought into court in the custody of the sheriff, and trial was had before another jury, he could not complain of the adjournments in his absence.—*Tandy v. State* (Wis.) 69 N. W. 160.

§ 48. Indorsing additional witnesses.

(Neb.; 1896.)

When the court permits names of additional witnesses to be indorsed on the information immediately before the trial, it is error to refuse to postpone the trial for 24 hours to enable defendant to meet the testimony expected to be given by such witnesses.—*Rauschkolb v. State*, 65 N. W. 776, 46 Neb. 658.

§ 49. Local prejudice or excitement.

(Neb.; 1896.)

An application for continuance, supported by the affidavits of the prisoner and his counsel, alleging in general terms only the existence in the county of a great deal of excitement in regard to the crime, was properly refused.—*Hoo-ver v. State* (Neb.) 66 N. W. 1117, 48 Neb. 184.

§ 50. Surprise.

[a] (Iowa; 1895.)

On trial for resisting an officer, a continuance on the ground that defendant did not know that the prosecution would claim that the officer's authority was on the warrant itself, and that he could procure witnesses to testify to the contrary, was properly denied, since from the nature of the case he should have known that evidence of such officer's authority would

be introduced.—*State v. Seery* (Iowa) 64 N. W. 631.

[b] (Iowa; 1896.)

Where notice of the introduction of additional testimony was served on defendant more than four days before the trial, a continuance on the ground that he had not time to investigate such testimony was properly denied.—*State v. King* (Iowa) 66 N. W. 735.

[c] (Neb.; 1895.)

A continuance asked for the purpose of meeting evidence unexpectedly adduced by the state was properly refused where it was not disclosed by defendant in what respect he expected to meet the new phase of the evidence.—*Dixon v. State*, 64 N. W. 961, 46 Neb. 298.

§ 51. Want of preparation.

[a] (Iowa; 1895.)

A conviction will not be disturbed because, at the first term after the commission of the crime, defendant's motion for a continuance was denied, where it does not appear that defendant was unable at such term to get any evidence he needed, or was prejudiced by want of preparation.—*State v. Weems* (Iowa) 65 N. W. 387.

[b] (Iowa; 1896.)

Though defendant had been detained at home by an order quarantining his family from the 3d to the 31st of December, it was not error to refuse to grant a motion for a continuance, made on January 11th following, where the cause had been tried early in the preceding November, resulting in a disagreement of the jury, and it did not appear that anything was required that could not have been readily done by defendant or his counsel, both of whom were familiar with the case before it was called for trial.—*State v. White* (Iowa) 67 N. W. 207.

§ 52. Absence of witnesses.

[a] (Iowa; 1896.)

Where defendant moves for a continuance on the ground of absent witnesses, he waives the right given by Code, § 4419, to three days in which to prepare for trial if demanded.—*State v. Harris* (Iowa) 69 N. W. 413.

[b] (Mich.; 1895.)

The denial of a continuance is not ground for reversal where the application did not state what defendant proposed to prove by the absent witnesses, and several of them testified.—*People v. Burwell* (Mich.) 63 N. W. 986.

[c] (Mich.; 1897.)

An admission that an absent witness for defendant will testify as stated in the application for continuance is sufficient to avoid a continuance, where the witness is beyond the jurisdiction of the court.—*People v. Savant* (Mich.) 70 N. W. 576.

[d] (Neb.; 1897.)

A continuance for absent witnesses may be denied when the state admits what defendant alleges the witness will testify to.—*Fanton v. State* (Neb.) 69 N. W. 953.

XII. WHO MAY ACT AS ATTORNEY FOR STATE.

Compensation of attorney appointed to assist prosecuting attorney, see "District and Prosecuting Attorneys."

§ 53. Appointment of special prosecuting attorney.

[a] (Iowa; 1894.)

An attorney appointed to prosecute a criminal case in place of the county attorney, who is disqualified, may appear before the grand jury in regard to the case, in the same manner as the county attorney could have done if he had not been disqualified under Code, §§

4281, 4282.—*State v. Kovolosky* (Iowa) 61 N. W. 223.

92 Iowa, 498.

[b] (Neb.: 1896.)

An attorney appointed under Comp. St. 1895, c. 7, § 21, as a substitute for the county attorney in the absence or disability of the latter, may prosecute offenses by information.—*Korth v. State*, 65 N. W. 792, 46 Neb. 631.

[c] (Neb.: 1896.)

The fact that an attorney appointed under Comp. St. 1895, c. 7, § 21, as a substitute for a county attorney in the absence or sickness of the latter, may prosecute offenses by information, does not render that section in conflict with Bill of Rights, § 10, requiring the legislature to provide for holding persons to answer for crimes on information of a public prosecutor.—*Korth v. State*, 65 N. W. 792, 46 Neb. 631.

§ 54. Attorney to assist.

(Mich.: 1895.)

How. Ann. St. § 551, requires prosecuting attorneys to prosecute or defend all civil and criminal actions or proceedings. Id. § 560, authorizes an assistant on trials for felonies. *Held*, that the allowance of additional counsel in preparing and presenting cases involving misdemeanors to the grand jury is not prohibited.—*People v. O'Neill* (Mich.) 65 N. W. 540.

§ 55. — Qualifications.

[a] (Iowa: 1894.)

It was not error in a murder case to allow an attorney employed by deceased's brother (who, with deceased, jointly attacked defendant, and thus brought on the murder) to assist in the prosecution, and to make the closing argument to the jury, although the court had employed another attorney to aid in prosecuting the case.—*State v. Helm* (Iowa) 61 N. W. 246. 92 Iowa, 540.

[b] (Mich.: 1894.)

An attorney is not disqualified to act as counsel for the state, in a trial for threatening to accuse the prosecuting witness of perjury, by the fact that, after he was retained by the state, he was retained by the prosecuting witness to defend him in other criminal proceedings.—*People v. Whittemore* (Mich.) 61 N. W. 13.

102 Mich. 519.

[c] (Mich.: 1895.)

The fact that a prosecuting attorney of one county had been employed by the authorities to prosecute a criminal case in another county does not, on removal of the case to his county, raise a presumption that he was still to receive a reward for the prosecution of the case, so as to thereby disqualify him.—*People v. Fuhrman* (Mich.) 61 N. W. 865.

103 Mich. 593.

[d] (Mich.: 1895.)

The fact that an attorney has strong prejudice against liquor traffic does not disqualify him from acting as an assistant in prosecutions for violating the local option law.—*People v. O'Neill* (Mich.) 65 N. W. 540.

§ 56. — Nonresidence.

[a] (Mich.: 1896.)

The fact that an attorney is a nonresident of the county does not disqualify him from acting as assistant to the prosecutor in the trial of a defendant for felony.—*People v. Thacker* (Mich.) 66 N. W. 562.

[b] (N. D.: 1895.)

It is not error for the trial judge to permit an attorney who is a nonresident, and employed solely by relatives of the person for whose murder the accused is on trial, to assist the prosecuting attorney.—*State v. Kent* (N. D.) 62 N. W. 631.

4 N. D. 577.

XIII. CONDUCT OF TRIAL.

Motion to quash indictment, see ante, § 23.

Time of trial, see ante, §§ 45, 46.

Trial of specific issue of insanity, see ante, § 9.

Indorsing names of witnesses after commencement of trial, see "Indictment and Information," §§ 9-11.

Presence of accused during trial, see "Constitutional Law," § 73.

1. IN GENERAL.

§ 57. In general.

[a] (Iowa: 1891.)

The court may, in case a witness for the state shows that he is unwilling to testify, direct him to stand aside for 10 minutes to collect his thoughts.—*State v. Gillett* (Iowa) 61 N. W. 169.

92 Iowa, 527.

[b] (Mich.: 1895.)

The evidence taken before a justice of the peace prior to issuing a warrant for defendant's arrest for an offense not cognizable by the justice need not be reduced to writing and returned to the circuit court when defendant is held for trial.—*People v. Caldwell* (Mich.) 65 N. W. 213.

[c] (Neb.: 1896.)

When a transcript of the proceedings at the preliminary examination and the information on which such examination was based become lost, an order for the substitution of another transcript of the record and of a copy of the information is proper.—*Korth v. State* 65 N. W. 792, 46 Neb. 631.

[d] (Neb.: 1897.)

A person convicted of felony, and represented by counsel, cannot, as a matter of right, insist on being present in court either at the time of the filing, the argument, or the ruling upon his motion for a new trial.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 58. Reporting testimony.

(Iowa: 1895.)

McClain's Code, § 227, providing that the judge shall not direct testimony to be taken by an official reporter "in any criminal case unless it shall satisfactorily appear to him that the interests of the state or defendant require the reporting of the testimony," applies to all criminal cases.—*State v. Frost* (Iowa) 64 N. W. 401.

§ 59. Remarks and conduct of judge.

[a] (Iowa: 1896.)

A witness who was jointly indicted with defendant for rape testified that, while he and defendant were at a certain picnic, prosecutrix, who was a stranger to them, approached and addressed them; that, shortly afterwards, witness asked her if she did not wish to take a ride, to which she assented; that he then asked her if she would submit to sexual intercourse, and she said she would; that the three drove to a certain place, where prosecutrix voluntarily alighted, and defendant and witness had intercourse with her. On cross-examination, witness was asked if, on the day of the picnic, he did not ask a certain person if he could not inform them (defendant and witness) where they could obtain sexual intercourse. The question was objected to by defendant. The court, after overruling the objection, said: "This witness has already testified that he was himself seduced, practically, according to his testimony; that this lady invited him out, or something to that effect. Now, if it can be shown on cross-examination, or by asking him impeaching questions, that this witness went there for this specific purpose, it is a contradiction of his testimony." *Held*, that the remarks of the court were prejudicial, as the effect of the testimony was solely for the jury, and that it was for the jury to say whether the

evidence was susceptible only of the construction given to it by the court.—*State v. Philpot* (Iowa) 66 N. W. 730.

[b] (Iowa; 1896.)

Where defendant's counsel made frequent exceptions, a remark by the court that such exceptions had been very frequent is not objectionable, as placing defendant's counsel in a ridiculous position before the jury.—*State v. Brown* (Iowa) 69 N. W. 277.

[c] (Mich.; 1894.)

The expression, "Exceptions don't amount to anything in this case, I suppose you understand," addressed by the judge at the trial to respondent's attorney in a bastardy trial, was not prejudicial.—*People v. Keefer* (Mich.) 61 N. W. 338.

103 Mich. 83.

[d] (Minn.; 1895.)

Where defendant's counsel, in making his argument, commented on papers openly offered in evidence by him on the trial and admitted, and was interrupted by the judge, who denied his right to comment on the papers, and stated that, if the papers were in evidence, they were put in surreptitiously, it constituted reversible error.—*State v. English* (Minn.) 64 N. W. 1136.

62 Minn. 402.

[e] (Minn.; 1895.)

After a state's witness who appeared perfectly sane testified at considerable length, defendant objected to his competency on the ground that he was insane. *Held* that, in the absence of an offer to prove insanity, it was not error for the judge to assert that he did not see that the witness was at that time any more insane than was counsel.—*State v. Hayward* (Minn.) 65 N. W. 63.

62 Minn. 474.

§ 60. Joint defendants.

(Iowa; 1895.)

Whether, on a trial for murder, defendant's counsel should be allowed to have a person jointly indicted with defendant, and who was confined in the county jail, continually in court, ready for consultation, rests in the discretion of the trial court.—*State v. Weems* (Iowa) 65 N. W. 387.

§ 61. — Separate trials.

[a] (Mich.; 1895.)

The court may, in its discretion, at the request of the state, grant separate trials to persons jointly indicted.—*People v. Fuhrman* (Mich.) 61 N. W. 865.

103 Mich. 593.

[b] (Neb.; 1895.)

Objections to the granting of the state's motion for a separate trial of one of two defendants jointly indicted comes too late after formation of the jury.—*Metz v. State* (Neb.) 65 N. W. 190.

46 Neb. 547.

[c] (Neb.; 1895.)

Under Cr. Code, § 465, providing that each of two or more persons jointly indicted shall, on application to the court, be separately tried, a defendant jointly indicted with another may, in the discretion of the court, be separately tried, either on his own motion, or on motion of the state.—*Metz v. State* (Neb.) 65 N. W. 190.

46 Neb. 547.

§ 62. Postponement for illness of juror.

(Iowa; 1896.)

Code, § 4443, provides that if, before the conclusion of a trial, a juror becomes sick, so as to be unable to perform his duty, the court may discharge him, and swear in a new juror, and begin the trial anew, or may discharge the entire jury, and thereafter impanel a new one to try the case. *Held*, that the statute was not mandatory, and did not prohibit the court

from adjourning for a few days until the sick juror became able to resume the discharge of his duty.—*State v. Garrity* (Iowa) 67 N. W. 92.

2. RECEPTION OF EVIDENCE.

§ 63. In general.

[a] (Iowa; 1896.)

The testimony of a witness on a criminal trial need not be confined to questions of fact referred to in his testimony before the grand jury.—*State v. Bernstein* (Iowa) 68 N. W. 442.

[b] (Iowa; 1897.)

Evidence of a conversation between witnesses and the county attorney on the night before the witnesses were called was properly excluded, where the purpose of its introduction was not disclosed.—*State v. Hurd* (Iowa) 70 N. W. 613.

[c] (Mich.; 1895.)

A statement by a witness, in reply to a question as to whether he knew defendant, that he was "unlucky enough to get acquainted with him," having been promptly stricken out by the court, there was no error in not proceeding further by rebuking the witness, and instructing the jury to give his statement no weight.—*People v. Smith* (Mich.) 64 N. W. 200.

[d] (Mich.; 1896.)

It was no ground for reversal that counsel for the state was permitted to read in the presence of the jury the notice given to defendant to produce upon the trial a paper which defendant failed to produce, where the reading was done merely in connection with the reading of the proof of service of the notice.—*People v. Brown* (Mich.) 67 N. W. 1112.

[e] (Neb.; 1897.)

Permitting the state to withdraw its rest for the purpose of introducing further testimony is within the discretion of the trial court.—*Hans v. State* (Neb.) 69 N. W. 838.

[f] (Neb.; 1897.)

The court may, on its own motion, refuse to permit a witness to answer a question which calls for incompetent evidence.—*Davis v. State* (Neb.) 70 N. W. 984.

[g] (N. D.; 1895.)

An accomplice, who was a Bohemian, may translate into English the instructions given him by defendant as to the killing, and written out by himself in a book in the Bohemian dialect, after having testified to his ability to make the translation correctly.—*State v. Kent* (N. D.) 62 N. W. 631.

4 N. D. 577.

§ 64. Offer of evidence.

(Mich.; 1896.)

A conviction in a case of assault with intent to rape will not be reversed because the prosecuting attorney offered to show that defendant on several occasions before the commission of the offense charged had committed similar acts, where the court refused to permit him to do so.—*People v. Ricketts* (Mich.) 66 N. W. 483.

§ 65. Order and time of admission.

[a] (Minn.; 1895.)

It was not error to refuse to receive, at the close of a protracted trial, evidence to connect a state's witness with the murder, when that issue had not before been raised, and the witness by whom the evidence was to be given had been in the court room throughout the trial.—*State v. Hayward* (Minn.) 65 N. W. 63.

62 Minn. 474.

[b] (Neb.; 1894.)

It is within the discretion of the court to permit the introduction, in closing, of evidence not strictly rebutting.—*Murphey v. State*, 61 N. W. 491, 43 Neb. 34.

1c1 (Neb.: 1895.)

The action of the court in determining the order in which testimony should be introduced will not be reviewed, in the absence of abuse of discretion.—*Basye v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

1d1 (Neb.: 1897.)

The order in which the state shall introduce its proof is a matter for the sound discretion of the court.—*Davis v. State* (Neb.) 70 N. W. 984.

1c1 (N. D.: 1896.)

It is not error to permit preliminary questions to be answered when such answers lead up to or connect what follows either in the testimony of the witness under examination or any other witness who testifies in the case, even though the relevancy of such questions may not be apparent when asked.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

§ 66. — Rebuttal.

(Iowa: 1896.)

It was within the discretion of the court to admit evidence not strictly in rebuttal, under Code Civ. Prac. § 2779, which is applicable to criminal cases (Code, § 4556), providing that the party having the burden must first produce his evidence, then the other party must produce his, and then the parties will be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permits them to offer original evidence.—*State v. Yetzer* (Iowa) 66 N. W. 737.

§ 67. Delaying trial to procure testimony.

(Iowa: 1895.)

Where the rebuttal evidence is closed, it is within the discretion of the trial court to refuse defendant's request for time to procure witnesses who are in the city where the trial is had, in the absence of any showing as to the purpose for which the witnesses are wanted.—*State v. Osborne* (Iowa) 65 N. W. 159.

§ 68. Limiting number of witnesses.

(Iowa: 1896.)

The district court may limit the number of defendant's impeaching witnesses.—*State v. Beabout* (Iowa) 69 N. W. 429.

§ 69. Separation and exclusion of witnesses.

1a1 (Mich.: 1895.)

The court can permit a witness for the prosecution to remain in court during the trial.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

1b1 (Neb.: 1894.)

The court may, in its discretion, refuse to exclude the witnesses for the state from the court room during trial.—*Murphey v. State*, 61 N. W. 491, 43 Neb. 34.

1c1 (S. D.: 1897.)

The presence of a witness during the taking of testimony in violation of an order of exclusion, is not ground for rejecting his testimony, unless the party calling him connived at his disobedience.—*State v. King* (S. D.) 70 N. W. 1046.

§ 70. Duty to call witnesses.

1a1 (Iowa: 1894.)

The state is not obliged to call as witnesses all persons whose names are indorsed on the indictment as such.—*State v. Helm* (Iowa) 61 N. W. 246.

92 Iowa. 540.

1b1 (Mich.: 1895.)

It is not the right of defendant to insist that the prosecutor call accomplices of defendant charged with the same offense, when

their testimony would be merely cumulative.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

1c1 (Mich.: 1895.)

The state is not required to call as a witness defendant's accomplice.—*People v. Resh* (Mich.) 65 N. W. 99.

1d1 (Mich.: 1895.)

The state is not required to call a witness whose name is placed on the information at defendant's request.—*People v. Resh* (Mich.) 65 N. W. 99.

1e1 (Mich.: 1896.)

The prosecution can be required to place on the stand only witnesses who can testify as to the res gestæ.—*People v. Grant* (Mich.) 69 N. W. 647.

§ 71. Compelling calling of witnesses.

1a1 (Mich.: 1895.)

On a criminal trial, a refusal by the court to compel the prosecution to call a witness whose name is indorsed on the information will be held proper where proof of the fact he was to testify to became unnecessary.—*People v. Berry* (Mich.) 65 N. W. 98.

1b1 (Mich.: 1895.)

A refusal to compel the prosecution to call a witness whose name was indorsed on the information is proper where the witness was beyond the jurisdiction of the court, and all evidence of the transaction in regard to which he was to testify was stricken out by the court.—*People v. Berry* (Mich.) 65 N. W. 98.

1c1 (Mich.: 1896.)

On the prosecution resting in a homicide case, the defense called attention to the fact that witnesses whose names were indorsed on the information had not been called, and demanded that they be called and examined, so the defense could cross-examine them. Held that, they not having been eyewitnesses of the transaction, it was enough that they were produced and tendered to the defense for cross-examination.—*People v. Pope* (Mich.) 66 N. W. 213.

1d1 (Mich.: 1897.)

The state will not be compelled to indorse on an indictment the names of persons indicted for the same offense with defendant, and to call them as witnesses.—*People v. Baker* (Mich.) 70 N. W. 431.

1e1 (Mich.: 1897.)

It was not error to refuse to compel the prosecution to indorse on the information and produce witnesses who testified at the inquest that they saw a man who did not resemble defendant enter a store a mile from the scene of the homicide, to which the criminal was traced by tracks in the snow, where the person found in the store was not at the scene of the homicide, and defendant knew that the names of such witnesses were not in the information, but made no effort to produce them.—*People v. Savapt* (Mich.) 70 N. W. 576.

§ 72. Recalling witnesses.

(Iowa: 1895.)

On a trial for rape it was not abuse of discretion to permit the state, after both parties rested, to recall the prosecutrix, who testified that defendant never had intercourse with her with her consent, particularly as it was in rebuttal of defendant's testimony to the contrary.—*State v. Case* (Iowa) 65 N. W. 149.

3. OBJECTIONS TO EVIDENCE.

Necessity and sufficiency of exceptions, see post, § 228.

§ 73. Time of making.

(Iowa: 1896.)

An objection to a question asked a witness must be made before he has answered.—*State v. McKinstry* (Iowa) 69 N. W. 207.

§ 74. Sufficiency and scope of objections.

[a] (Iowa; 1895.)

Objections as to the admissibility of testimony, not stating the grounds thereof, will not be reviewed on appeal.—State v. Lee (Iowa) 64 N. W. 284.

[b] (Iowa; 1896.)

In a criminal case defendant moved to strike out the evidence of certain witnesses on the ground that no notice was given of any such testimony, that the witness "did not so testify" before the grand jury, etc. *Held*, that the objections to the evidence were not based on the ground that the witness was not examined before the grand jury.—State v. Bernstein (Iowa) 68 N. W. 442.

[c] (S. D.; 1896.)

An objection that evidence is irrelevant and immaterial is insufficient.—State v. La Croix (S. D.) 66 N. W. 944.

§ 75. Motion to strike out testimony.

[a] (Mich.; 1896.)

On trial of one for murdering her husband to obtain insurance on his life, an insurance agent, who had testified that he demanded policies back from defendant, was asked why he demanded them. *Held* that, as a preliminary question, it was proper, and that, if the answer contained incompetent or immaterial matter, the proper practice was a motion to strike it out.—People v. Pope (Mich.) 66 N. W. 213.

[b] (Mich.; 1896.)

Before completion of the cross-examination of a witness for the prosecution, she was taken sick, and carried away. Thereafter the defense wished to further cross-examine her, but she was too ill to appear. *Held*, that the defense could not complain, but should have moved to strike out her testimony.—People v. Pope (Mich.) 66 N. W. 213.

[c] (Neb.; 1894.)

Where a witness is called to testify to a confession by defendant, and the latter's counsel neglects to cross-examine him as to the circumstances under which it was made before he answers, and the answer is responsive to the question, the refusal to strike out such answer is not error.—Willis v. State (Neb.) 61 N. W. 254, 43 Neb. 102.

§ 76. Estoppel to object.

[a] (Neb.; 1897.)

A litigant who propounds a question to a witness, and obtains from him an answer responsive thereto, cannot complain that the court erred in refusing, on his motion, to expunge such answer from the record.—Davis v. State (Neb.) 70 N. W. 984.

[b] (Wis.; 1896.)

Defendant cannot complain of the admission of evidence which his own counsel voluntarily elicited from a state's witness in cross-examination, and made no motion to strike.—Hanscom v. State (Wis.) 67 N. W. 419, 93 Wis. 273.

§ 77. Waiver of objections.

[a] (Iowa; 1895.)

Questions as to the admissibility of evidence will not be considered on appeal where no objections were made or exceptions taken on the trial.—State v. Lee (Iowa) 64 N. W. 284.

[b] (Iowa; 1895.)

Objections to evidence not raised below are waived.—State v. Seery (Iowa) 64 N. W. 631.

[c] (Iowa; 1895.)

Where the testimony of an absent witness was taken during the trial in the presence of defendant's counsel and the county attorney, with the consent of defendant, such testimony being afterwards read to the jury without objection, defendant cannot subsequently com-

plain that the testimony was taken in his absence.—State v. Minard (Iowa) 65 N. W. 147.

[d] (Iowa; 1895.)

An objection to evidence in a criminal case cannot be made for the first time on appeal.—State v. Osborne (Iowa) 65 N. W. 159.

[e] (Iowa; 1896.)

Defendant, by refusing to recall a witness after the state has withdrawn its objection to his testimony, waives any error in the rejection of the testimony.—State v. Smith (Iowa) 68 N. W. 428.

[f] (Iowa; 1896.)

Where no objection was interposed to the question, a motion to exclude the answer—no reason being assigned therefor—is properly overruled.—State v. Wright (Iowa) 68 N. W. 440.

[g] (Iowa; 1897.)

A question asked and answered without objection cannot afterwards be objected to.—State v. Carter (Iowa) 69 N. W. 880.

[h] (Neb.; 1895.)

Where objection to the materiality of evidence was not made when the evidence was offered, and before it went to the jury, the objection was waived.—Ford v. State (Neb.) 64 N. W. 1082, 46 Neb. 390.

§ 78. Error cured.

(Iowa; 1897.)

On objection to certain evidence, the court reserved its ruling. The objection was afterwards sustained, and the jury were orally told that the evidence was withdrawn from their consideration. *Held*, that a written instruction was not necessary.—State v. Bigelow (Iowa) 70 N. W. 600.

4. CONDUCT, ARGUMENT, AND REMARKS OF COUNSEL.

How improper remarks brought into record on appeal, see post, § 208.

Matters necessary to review arguments, see post, § 228.

§ 79. Time of argument.

(Neb.; 1895.)

The limitation of the time for argument to the jury is in the discretion of the trial court.—Dixon v. State, 64 N. W. 961, 46 Neb. 298.

§ 80. Refusal to allow argument.

(Wis.; 1896.)

Action by the trial court in refusing to give defendant's counsel time to argue his motion for a new trial, on the ground that his views and authorities were presented to the court during the trial, will not be disturbed as an abuse of discretion.—Frank v. State (Wis.) 68 N. W. 657.

§ 81. Opening statements.

(Wis.; 1896.)

Defendant's counsel, before the introduction of the evidence for the defense, is not entitled to review the testimony on the part of the state for the purpose of showing that it did not warrant a conviction, but can only comment on the evidence already in, for the purpose of showing the relevancy of the evidence he expects to introduce.—Emery v. State (Wis.) 65 N. W. 848, 92 Wis. 146.

§ 82. — For prosecution.

[a] (Iowa; 1895.)

Statements by the prosecutor, in opening the case, that he would prove by the dying declarations of deceased that defendant killed him, when made in good faith, and under the belief that the declarations were admissible, are not ground for reversal because the declarations were

afterwards excluded.—*State v. Tippet* (Iowa) 63 N. W. 445.

[b] (Iowa; 1895.)

On appeal of a criminal case from a justice's court to the district court, a statement by the county attorney, in his opening to the jury, that defendant had been tried in justice court and there convicted, is no ground for reversal.—*State v. Valure* (Iowa) 64 N. W. 280.

[c] (Iowa; 1896.)

It is not reversible error for the attorney for the prosecution, in good faith, and with reasonable grounds to believe certain evidence to be admissible, to state to the jury the substance of such evidence, though, when offered, it is rejected.—*State v. Allen* (Iowa) 69 N. W. 274.

[d] (Mich.; 1895.)

A statement in good faith by the prosecuting attorney, in his opening argument, that he expected to prove certain facts, not followed up by proof, is not ground for reversal where he discovered on the trial that he could not substantiate the statement by proofs.—*People v. Fowler* (Mich.) 62 N. W. 572.

104 Mich. 449.

[e] (Mich.; 1896.)

The assertion, in the opening argument of the prosecuting attorney, on the trial of one for murder of her husband, the motive for which was claimed to be the obtaining of insurance on his life, that she had all the policies assigned to herself, is harmless, even if, instead of their being assigned to her, she was the beneficiary therein.

People v. Pope (Mich.) 66 N. W. 213.

§ 83. Misconduct of prosecuting attorney during trial.

[a] (Iowa; 1894.)

The jury having expressed indignation at defendant and his counsel for obtaining an order that they be kept together during adjournment, counsel gave his consent that they separate. He, however, privately requested another order, and asked that the jury be not informed at whose request it was made. *Held*, that the conduct of the prosecuting attorney in stating, when the order was made, that he was willing the jury should separate, by reason of which, and the further expression of indignation by the jury, counsel waived the order, and they were permitted to separate, was not ground for new trial.—*State v. Walton* (Iowa) 61 N. W. 179.

92 Iowa, 455.

[b] (Iowa; 1896.)

For state's counsel to ask defendant if he did not make certain statements to a certain person, objection to which question was sustained on its being shown that defendant went to such person to employ him as counsel, is not ground for reversal; it not appearing that the state's counsel knew, when he asked the question, of defendant's purpose in going to such person.—*State v. Forsythe* (Iowa) 68 N. W. 446.

§ 84. Argument of prosecuting attorney.

[a] (Iowa; 1894.)

In reply to a remark of defendant's attorney that the state had not called certain witnesses, the prosecuting attorney in his argument said: "I will tell you, gentlemen, money talks. O, A., and S. were witnesses before the grand jury and at the coroner's inquest. They were then witnesses for the state. Now they are witnesses for the defendant." There was nothing to justify an accusation that the witnesses were bribed. *Held*, that such remarks constitute reversible error.—*State v. Helm* (Iowa) 61 N. W. 246.

92 Iowa, 540.

[b] (Iowa; 1896.)

A reversal for prejudicial remarks by prosecuting attorneys cannot be had where the record shows without question that the defendant had in this respect a fair trial.—*State v. Weston* (Iowa) 67 N. W. 84.

[c] (Mich.; 1895.)

It is reversible error to permit the prosecuting attorney to use language calculated to prejudice defendant's case, without checking him, or instructing the jury to disregard his remarks.—*People v. Fowler* (Mich.) 62 N. W. 572.

104 Mich. 449.

[d] (Mich.; 1896.)

The statement by a prosecuting attorney to a jury that he believed the evidence showed the witnesses for the defendant to be "a lot of liars" is not ground for reversal.—*People v. Wirth* (Mich.) 66 N. W. 41.

§ 85. — Expressing opinion as to guilt.

[a] (Iowa; 1897.)

It is not error for the counsel for the state, in his argument to the jury, to state his belief in defendant's guilt.—*State v. Carter* (Iowa) 69 N. W. 880.

[b] (Wis.; 1895.)

Where, on prosecution for possession of burglars' tools, with intent to use them, the only evidence is that defendant, when arrested, had all the tools usually carried by burglars concealed on his person, and no evidence that he has ever been convicted of theft, an assertion in argument by the prosecuting attorney that defendant is a thief, and a ruling by the court that it is warranted by the evidence, is ground for reversal.—*Scott v. State* (Wis.) 65 N. W. 61.

91 Wis. 552.

§ 86. — Comment on defendant's failure to testify.

[a] (Iowa; 1894.)

In a trial for seduction, the remark of a prosecuting attorney "that nowhere in the record is there any evidence tending to deny sexual intercourse, promise of marriage, or the seduction itself," does not entitle defendant to a new trial, under Code, § 3636, as amended by Laws 1878, c. 168, § 1, providing that, if the attorneys for the state refer to the fact of defendant's failure to testify, defendant shall be entitled to a new trial.—*State v. Seely* (Iowa) 61 N. W. 184.

92 Iowa, 488.

[b] (Minn.; 1896.)

Where the prosecuting attorney in his argument said to defendant's counsel, in reply to a remark as to producing witnesses, "You know the laws of this state permitted the defendant to remain silent, and it would be improper and cowardly for me to comment upon it, and it is not my intention to evade the spirit or letter of the law," it was erroneous, under Gen. St. 1894, § 5658, providing that the refusal of a defendant to testify shall not be commented on by the prosecuting attorney.—*State v. Holmes* (Minn.) 68 N. W. 11.

§ 87. — Argument justified by that of adversary.

[a] (Mich.; 1895.)

A statement by the prosecuting attorney in his argument, that "he [referring to defendant's counsel] says this man has as good record as any one in the court room. Why don't he show it?"—was not improper, being induced by remarks of defendant's counsel wholly outside the evidence.—*People v. Oblaser* (Mich.) 62 N. W. 732.

104 Mich. 579.

[b] (Mich.; 1895.)

Defendant's attorney having argued that defendant had led a life of usefulness, it was not an abuse of legitimate argument for the prosecuting attorney to refer to the fact, which appeared in evidence without objection, that at the time of defendant's arrest he was in jail for another crime.—*People v. Smith* (Mich.) 64 N. W. 200.

§ 88. Waiver of objection and review on appeal.

(Iowa; 1895.)

Where objections to remarks of the prosecuting attorney are not made at the time, the refusal of the court to grant a new trial because of such remarks will be disturbed only for abuse of discretion.—*State v. Hutehison* (Iowa) 64 N. W. 610.

§ 89. Error cured by action of court.

[a] (Iowa; 1895.)

The county attorney propounded irrelevant and prejudicial questions to defendant's witnesses, and attempted to show that one witness had been convicted of petit larceny. *Held* that, since the court immediately sustained objections to the questions, the misconduct was harmless.—*State v. Beal* (Iowa) 62 N. W. 657.

[b] (Iowa; 1895.)

There is no ground to complain of the conduct of the prosecuting attorney in asking improper questions, when objections thereto were promptly sustained, and motions to strike out incompetent testimony were immediately granted.—*State v. Lee* (Iowa) 64 N. W. 284.

[c] (Mich.; 1895.)

The defense being an alibi, and the testimony of defendant and his wife being that they were at his father-in-law's at the time the crime was charged to have been committed, any error in allowing the prosecuting attorney to comment on the failure of the defense to call the father-in-law as a witness was rendered harmless by the court's stating, at the time, that it was an improper subject for his remarks.—*People v. Smith* (Mich.) 64 N. W. 200.

[d] (Mich.; 1896.)

The expression of opinion by the prosecuting attorney as to the guilt of defendant cannot be complained of, the court having told the jury to disregard it.—*People v. Pope* (Mich.) 66 N. W. 213.

[e] (Neb.; 1896.)

Where a prosecuting attorney referred to facts not in evidence, and, upon objection that the statements were unwarranted by the evidence, the district court instructed the jury to disregard such statements, there was left no ground for complaint, for the reason that the court, when appealed to, granted all the relief prayed for.—*Hoover v. State* (Neb.) 66 N. W. 1117.

48 Neb. 184.

[f] (N. D.; 1896.)

Any prejudice arising from the fact that, in passages between the court and counsel, some ill temper was indicated, was cured by an instruction calling the attention of the jury thereto, and directing them not to permit such matters to prejudice them.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

[g] (Wis.; 1895.)

On trial for murder, comment by the district attorney on the prevalence of stabbing affrays in the city, with allusions to their similarity to the case at bar, is not ground for reversal, where it was made in reply to similar comment by defendant's attorney, and the court, in a charge, instructed the jury to disregard it.—*Barcynski v. State*, 64 N. W. 1026, 91 Wis. 415.

XIV. EVIDENCE.

Comment by judge on character of evidence, see ante, § 59.

— on defendant's failure to testify, see ante, § 86.

Giving undue prominence to particular evidence, see post, § 145.

Harmless error in admitting or excluding, see post, §§ 232, 233.

Instructions as to presumption of innocence, see post, § 159.

— on circumstantial evidence, see post, § 163.

— on defendant's failure to testify, see post, § 144.

Matters necessary for review of rulings on, see post, § 225.

Necessity of charge on defendant's failure to testify, see post, § 133.

Of insanity, see ante, §§ 7, 8.

Proof of venue, see ante, § 38.

Rejecting testimony of witness violating order excluding him from court room, see ante, § 69.

Reporting testimony, see ante, § 58.

To support instructions, see post, § 140.

Compelling accused to give incriminating testimony, see "Witness," § 45.

Corroboration of prosecutrix, see "Rape," § 11; "Seduction," § 6.

Cross-examination of accused, see "Witness," §§ 38, 47.

In prosecutions for illegal sales of liquor, see "Intoxicating Liquors," §§ 35-39.

— libel, see "Libel and Slander," § 37.

— receiving deposits after insolvency, see "Banks and Banking," § 36.

Of particular crimes, see "Adultery," § 3; "Arson," §§ 4, 5; "Assault and Battery," § 8;

"Bastardy," §§ 6-9; "Burglary," §§ 6-8;

"Disorderly Conduct," "Disorderly House," § 4; "Embezzlement," §§ 10, 11; "Homicide,"

§§ 23-34; "Incest," § 3; "Larceny," §§ 5-7;

"Obscene Publications," "Perjury," §§ 6, 7; "Pointing Firearms," § 3; "Rape," §§ 4-

11; "Robbery," §§ 2-4; "Seduction," §§ 4-7;

"Threats and Threatening Letters," § 4.

1. COMPETENCY AND RELEVANCY.

§ 90. In general.

[a] (Mich.; 1895.)

The warrant and return are admissible on a trial under an information.—*People v. Case* (Mich.) 62 N. W. 1017.

105 Mich. 92.

[b] (Mich.; 1895.)

Defendant shipped to K. a package containing the bonds alleged to have been stolen by him, and also wrote a letter telling K. what to do with the package, which letter K. claimed had been destroyed as requested therein. *Held*, that what was said by K. to his office associates in regard to the disposition of the package, and what had occurred on the receipt of the package, was admissible as bearing on the character of the letter K. received.—*People v. Parsons* (Mich.) 63 N. W. 69.

105 Mich. 177.

[c] (Mich.; 1895.)

Where the testimony of the people tended to show that defendant was given a check for the goods, and when arrested threw a piece of paper into his mouth, and chewed it beyond recognition, it was proper to permit the prosecution to introduce a blank check which the giver testified was similar to the one given to defendant, to show that it corresponded in color to one found in the form of a wad near the place of arrest.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

[d] (Neb.; 1897.)

A train was derailed at night, and a passenger thereon killed. Defendant was indicted for causing the derailment by unscrewing nuts with a monkey wrench introduced in evidence, and by removing the spikes holding down a rail on the trestle with a claw bar introduced in evidence. A witness testified, as an expert for defendant, that it was impossible, with the monkey wrench in evidence, to unscrew the nuts on the fish-plate bolts of the railway track. *Held*, that evidence by a nonexpert that with the monkey wrench in evidence he unscrewed nuts from

fish-plate bolts on a portion of the track in all respects like the track where the accident occurred, and with the claw bar in evidence removed all the spikes which held down a rail, and that he did all this in 25 minutes, was admissible.—*Davis v. State* (Neb.) 70 N. W. 981.

[c] (Wis.: 1896.)

Where defendant's counsel, in a prosecution for perjury committed on a murder trial, voluntarily drew from a state's witness, on cross-examination, testimony that, previous to the murder trial, witness had heard a rumor of possible tampering with defendant by S., an attorney for the accused in that case, it was not error to refuse to permit S. to deny such hearsay evidence, the court having told the jury that there was no proof of anything reflecting on S.'s integrity.—*Hanscom v. State* (Wis.) 67 N. W. 419.

93 Wis. 273.

§ 91. Motive.

[a] (Mich.: 1891.)

On a prosecution under a city ordinance for creating disorder, and quarreling and fighting, defendant may, on cross-examination, be questioned as to his acts after the quarrel, in attempting to follow the person with whom he had been quarreling, in order to show motive.—*Village of Vicksburg v. Briggs* (Mich.) 61 N. W. 1.

102 Mich. 551.

[b] (Neb.: 1897.)

Where the intention of the accused is a material fact, he may be asked directly with what intention he did the act complained of.—*Cummings v. State* (Neb.) 69 N. W. 756.

§ 92. Conviction of co-defendant.

(Iowa: 1896.)

Where two persons have been jointly indicted for the same offense, a judgment of conviction against one of them is inadmissible on the trial of the other.—*State v. Fertig* (Iowa) 67 N. W. 87.

§ 93. Indorsing minutes of testimony before grand jury.

[a] (Iowa: 1894.)

The minutes of the testimony of the prosecutrix at the preliminary examination were filed with the indictment. The grand jury brought her before them, but made no minutes of her testimony, except to note on the back of the indictment that she had been examined, and that her testimony was the same as on the preliminary examination, and returned the minutes made on such examination with the indictment, with a statement that they had been used in finding it. *Held*, that prosecutrix could testify for the state.—*State v. Cook* (Iowa) 61 N. W. 185.

92 Iowa, 483.

[b] (Iowa: 1895.)

Though a paper purporting to contain the minutes of the testimony given by witnesses to the grand jury has no formal caption or filing mark, but is certified by the clerk to be a part of the files in the case, and contains perforations indicating that it was originally attached to the indictment, it is sufficient to admit the testimony of said witnesses on the trial.—*State v. Cross* (Iowa) 64 N. W. 614.

[c] (Iowa: 1897.)

Code, § 4337, providing that an indictment must be set aside, on motion, "where the minutes of the evidence of witnesses examined before the grand jury are not returned therewith," does not require the return of documentary evidence.—*State v. Hurd* (Iowa) 70 N. W. 613.

[d] (Iowa: 1897.)

Nor does it require such minutes to be returned in the handwriting of the grand jury's clerk.—*State v. Hurd* (Iowa) 70 N. W. 613.

§ 94. Indorsing names of witnesses.

[a] (Iowa: 1895.)

Where a witness in a criminal case was before the grand jury, the failure to indorse his name on the indictment is no ground for objection to his testimony.—*State v. Beal* (Iowa) 62 N. W. 657.

[b] (Iowa: 1896.)

The fact that the Christian name of a witness is incorrectly indorsed on the indictment will not preclude his being a witness if there is evidence to establish his identity.—*State v. Arnold* (Iowa) 67 N. W. 252.

[c] (Iowa: 1897.)

Under a statutory provision that the state shall not introduce any witness whose name is not indorsed on the indictment, defendant waives objection to the introduction of such a witness by allowing him to be examined in part without objection.—*State v. Hurd* (Iowa) 70 N. W. 613.

[d] (Mich.: 1896.)

A dying declaration is not within the provision of the statute requiring the names of witnesses to be indorsed on the information.—*People v. Beverly* (Mich.) 66 N. W. 379.

[e] (Mich.: 1896.)

It is proper to allow at the trial the indorsement on the information of the name of a witness, and to admit his testimony, on the affidavit of the prosecuting attorney, dated some 13 days before the trial, and filed on the day after it was made, reciting that he was a necessary and material witness, that affiant was not till then advised of his name, or of the character of his testimony, and that he had communicated the name of the person to defendant's attorney.—*People v. Isham* (Mich.) 67 N. W. 819.

[f] (Neb.: 1896.)

Evidence contradictory of the statements of a prosecuting witness may be rebutted by witnesses whose names were not indorsed on the information.—*Pager v. State* (Neb.) 68 N. W. 611.

[g] (N. D.: 1896.)

The rule that no witness can testify for the state whose name is not indorsed on the information, unless he was not known to the state's attorney when the information was filed, does not apply, on the second trial of the same information, to a witness who testified on the first trial without objection by defendant.—*State v. Panoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

[h] (S. D.: 1897.)

Under Laws 1895, c. 64, § 2, requiring the state's attorney to indorse on the information the names of the witnesses known to him at the time of filing the same, and, at such time before the trial as the court may direct, also to indorse thereon other witnesses then known to him, witnesses whose names are not so indorsed are properly allowed to testify, in the absence of any showing that they were known to the state's attorney before the trial began.—*State v. King* (S. D.) 70 N. W. 1046.

Permitting indorsement of additional names, ground for continuance, see ante, § 48.

§ 95. Noticing witnesses not indorsed.

[a] (Iowa: 1896.)

A notice by a county attorney of the intention to use a witness whose name is not on the indictment is not rendered insufficient by the fact that it states, as one of the facts expected to be proved by the witness, that defendant stole the property charged in the indictment from a certain place, the connection showing that the word "stole" was used in the sense of taking and carrying away.—*State v. Hall* (Iowa) 66 N. W. 725.

[b] (Iowa: 1896.)

In a prosecution for fraudulent banking, a notice by the state that it would on the trial introduce certain witnesses whose names were

not on the indictment stated that it expected to prove by such witnesses that a certain bank was on a certain day a bank of deposit, and defendant was a stockholder and director and managing party thereof; that it was insolvent; and that defendant permitted and connived at the receiving of deposits, etc. *Held*, that such notice complied with Code, § 4421, providing that the state shall not use a witness whose name is not indorsed on the indictment unless defendant is given notice in writing, stating the name, etc., of the witness, and the substance of what it expects to prove by him on the trial.—*State v. Yetzer* (Iowa) 66 N. W. 737.

[c] (Iowa; 1896.)

Code, § 4421, provides that the county attorney shall not use a witness whose name is not indorsed on the indictment, unless he shall have given defendant a notice in writing, stating the name, etc., of the witness, "and the substance of what he expects to prove by him on the trial," etc. *Held*, that the evidence of such witness need not be limited strictly to the matters stated in such notice, where the departure is not such as to be evasive of the law.—*State v. Yetzer* (Iowa) 66 N. W. 737.

[d] (Iowa; 1896.)

Under Code, § 4421, requiring that in criminal cases notice shall be given to the defendant of the introduction of witnesses not examined before the grand jury, stating the substance of what it is expected to prove by them, a notice reciting that certain persons would be introduced, and that it was expected to be proved by each of said witnesses that they were present when defendant was arrested, and saw what he did and heard what he said, was sufficient to render admissible the testimony of such witnesses as to statements made by the defendant at the time of his arrest.—*State v. Harlan* (Iowa) 67 N. W. 381.

[e] (Iowa; 1896.)

Code, § 4421, provides that the state shall not introduce any witness who was not examined before the grand jury, etc., unless the district attorney shall have given "to the defendant" a notice in writing, stating the name, place of residence, and occupation of said witness, etc. *Held*, that such notice must be served on defendant personally, and service on his attorney is insufficient.—*State v. Russell* (Iowa) 68 N. W. 433.

[f] (S. D.; 1895.)

There being no statute requiring notice to defendant as a condition precedent to the calling by the state of witnesses whose names are not indorsed on the indictment, and the allowance of the calling of such witnesses being in the discretion of the trial court, it was not ground for reversal that the state was permitted to call witnesses whose names did not appear on the indictment, without previous notice to defendant, though a week before the trial it intended to call them.—*State v. Reddington* (S. D.) 64 N. W. 170.

[g] (S. D.; 1895.)

Where, before the trial commenced, counsel for the prosecution, in open court, gave oral notice that certain witnesses not examined before the grand jury would be called by the state, it was proper to permit such witnesses to testify, over an objection, that the notice was not in writing, and was given too late.—*State v. Isaacson* (S. D.) 65 N. W. 430.

Harmless error in admitting testimony of witness not noticed, see post, § 232.

§ 96. Best and secondary.

[a] (Iowa; 1896.)

It was not error to permit a witness who sat as a juror on the trial of defendant's alleged co-conspirator to state what defendant testified to on that trial.—*State v. Mushrush* (Iowa) 66 N. W. 746.

[b] (Mich.; 1895.)

On a prosecution for violation of a local option law, a witness who delivered goods and the bills therefor to the defendant cannot testify where the goods were billed from, where notice to produce the bills was not given, since the bills are the best evidence.—*People v. O'Neill* (Mich.) 65 N. W. 540.

[c] (Mich.; 1896.)

On an indictment for perjury committed on a trial of another for burglary, the jury in the burglary case may testify as to the evidence given by the accused in such case to show its materiality.—*People v. Ostrander* (Mich.) 67 N. W. 1079.

[d] (S. D.; 1895.)

The public record of a duly-acknowledged instrument is admissible in evidence on proof that the original is beyond the jurisdiction of the court, and is neither owned nor controlled by the party offering the record.—*State v. Serenson* (S. D.) 64 N. W. 130.

§ 97. Hearsay.

[a] (Mich.; 1895.)

A witness in a rape case, after testifying that before the commission of the offense she saw respondent pulling prosecutrix around, said that her husband remarked about it at the time. In his argument the prosecuting attorney referred to the act as being an improper overture, so notorious as to attract the attention of both witness and her husband. *Held*, that in admitting said testimony error was committed, which was rendered harmful by the prosecuting attorney's remarks.—*People v. Duncan* (Mich.) 62 N. W. 556.

104 Mich. 460.

[b] (Mich.; 1896.)

In a prosecution for adultery with D., a witness for the state testified that she had met defendant and D. together at D.'s place and elsewhere. On cross-examination defendant sought to show that D. then claimed to be defendant's wife, and witness stated she had no personal knowledge of defendant and D. having intercourse. *Held*, that it was error to permit such witness to testify on redirect, in substance, that, at the time D. claimed to be his wife, she spoke of their having intercourse, it being hearsay.—*People v. Imes* (Mich.) 68 N. W. 157.

[c] (Mich.; 1896.)

A foreign certificate of marriage of defendant to his alleged wife, identified by the person issuing it, is inadmissible, being hearsay.—*People v. Imes* (Mich.) 68 N. W. 157.

[d] (Mich.; 1896.)

Testimony of a witness that a third person had told him before defendants were arrested that he knew who had committed the acts, and that he had found the right parties, was inadmissible, being hearsay.—*People v. Gillespie* (Mich.) 69 N. W. 490.

[e] (Wis.; 1896.)

Where, in a prosecution for murder, evidence of a remark by accused is admitted in evidence to show malice, he may show the conversation accompanying it, and circumstances prompting the remark, though it involves the introduction of evidence which would otherwise be hearsay.—*Emery v. State* (Wis.) 65 N. W. 848.

92 Wis. 146.

§ 98. Experiments.

(S. D.; 1895.)

On a trial for maliciously exposing poison to be taken by a horse, the owner of the horse could testify that, after the horse died, he administered some of the contents of its stomach to a hen, and that the hen died 10 minutes later.—*State v. Isaacson* (S. D.) 65 N. W. 430.

§ 99. Opinion evidence.

[a] (Iowa; 1896.)

A witness cannot testify as to what he understood by a statement of a person out of court,

to which such witness has testified.—*State v. Itudd* (Iowa) 66 N. W. 748.

[b] (Iowa; 1896.)

Where the articles stolen consisted of a trunk containing the family wearing apparel, the wife of the prosecutor, having testified that she knew the value of the articles, is competent to testify as to such value.—*State v. Hathaway* (Iowa) 69 N. W. 449.

[c] (S. D.; 1897.)

The erroneous admission of testimony that deceased's brother-in-law, who had come 120 miles to investigate the homicide, and made a careful investigation, said that he was convinced that defendant killed deceased, is ground for reversal.—*State v. Davidson* (S. D.) 70 N. W. 879.

Of insanity, see ante, § 8.

§ 100. — Expert testimony.

(Mich.; 1896.)

A practicing physician, who is a graduate of a medical college, and who has sufficiently qualified himself to have a definite opinion of his own, may testify as an expert on the subject of poisoning, though it is not shown that he has had any experience in poisoning cases.—*People v. Thacker* (Mich.) 66 N. W. 562.

§ 101. Documents.

(N. D.; 1895.)

A book in which instructions given by defendant to an accomplice, as to the story the latter should tell in explanation of the killing, is admissible, where the accomplice swears that he wrote them down as they were given to him by defendant.—*State v. Kent* (N. D.) 62 N. W. 631.

4 N. D. 577.

§ 102. Parol evidence.

(Mich.; 1896.)

Whether parol evidence as to the contents of a paper was properly admitted is immaterial, the paper having afterwards been produced and admitted.—*People v. Pope* (Mich.) 66 N. W. 213.

§ 103. Former testimony.

[a] (Minn.; 1895.)

The testimony of a witness given on the preliminary examination of defendant is competent against defendant on his trial, the witness having died in the meantime.—*State v. George* (Minn.) 63 N. W. 100.

60 Minn. 503.

[b] (Wis.; 1896.)

Parts of the testimony of accused at the inquest may be introduced in evidence against him without the introduction of his whole testimony.—*Emery v. State* (Wis.) 65 N. W. 848.

92 Wis. 146.

§ 104. Res gestæ.

(Iowa; 1897.)

On trial for uttering a forged check, evidence that defendant was employed by the same company which employed the person whose name was forged, and that on the day the forgery was committed defendant requested such person to make out for him a check, and that one was made out, and numbered 444, and that the forged check was signed in the same manner, but was numbered 445, was admissible as part of the res gestæ.—*State v. Bigelow* (Iowa) 70 N. W. 600.

See, also, "Homicide," § 29.

§ 105. Attempt to escape.

[a] (Iowa; 1895.)

Evidence that defendant left the funeral procession of deceased before it reached the cemetery, several miles from town, because of a report that he was to be charged with causing the death of deceased, and remained away for over a week, is admissible on his trial for

murder, though he subsequently returned voluntarily, and surrendered.—*State v. Minard* (Iowa) 65 N. W. 147.

[b] (Mich.; 1895.)

Where one arrested for a criminal offense escapes, and, after voluntarily surrendering, is tried, the voluntary surrender of defendant is inadmissible to remove the inference of guilt raised by evidence of the escape.—*People v. Cleveland* (Mich.) 65 N. W. 216.

[c] (N. D.; 1896.)

To show the flight and secretion of the accused, it is proper to prove by the officers of the law what steps were taken by them to locate and arrest the accused.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

§ 106. Identity of defendant.

[a] (Iowa; 1895.)

To identify defendant, a witness was asked if he knew who the man was that he saw, and he answered that he did not "know positive," but was satisfied in his own mind that he did; that the man he saw was defendant. *Held*, that the testimony was competent.—*State v. Seymour* (Iowa) 63 N. W. 661.

[b] (Mich.; 1897.)

Testimony of witnesses who saw defendant at the time of the alleged offense, that, about 45 minutes later, they attempted to detain him, and that he broke away and escaped, was competent for the purpose of identification.—*City of Grand Rapids v. Williams* (Mich.) 70 N. W. 547.

[c] (Neb.; 1897.)

The wreck which it was alleged the prisoner caused by displacing the fixtures of a railway track occurred on Thursday. The evidence against him was largely circumstantial. *Held*, competent for the state to show that the prisoner was possessed of a superstitious belief that Thursday was a lucky day for him; that anything he attempted upon that day would succeed,—as tending to identify the prisoner as the man who displaced the fixtures of the railway track.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 107. On question of alibi.

[a] (Iowa; 1894.)

On a trial for arson, where defendant attempts to prove an alibi, evidence that he could not have left his home to set the fire without arousing the inmates is admissible.—*State v. Delaney* (Iowa) 61 N. W. 189.

92 Iowa, 467.

[b] (Neb.; 1897.)

The proof of an alibi need not include the entire period during which the offense might possibly have been committed, but it is sufficient if creating in the minds of the jurors a reasonable doubt of defendant's presence at the commission of the offense.—*Henry v. State* (Neb.) 70 N. W. 924.

Instructions as to alibi, see post, §§ 135, 164.
Sufficiency of alibi, see post, § 126.

§ 108. Evidence made admissible by that of adverse party.

[a] (Iowa; 1896.)

In a prosecution of a bank officer for receiving deposits after knowledge of the bank's insolvency, a witness testified that on a certain day he and defendant were together in the bank, examining bills receivable. Defendant, in his own behalf, as a witness, denied the facts testified to by such witness. *Held*, that it was not error to permit other witnesses to testify in rebuttal to having seen defendant and the former witness in the bank on the day stated.—*State v. Yetzer* (Iowa) 66 N. W. 737.

[b] (Iowa; 1896.)

Where defendant's wife, on cross-examination, denied that in a conversation with the prosecutrix, in his presence, she said she and de-

fendant had talked the matter over, it was not error to permit the prosecutrix to testify in rebuttal that defendant's wife made such statement.—*State v. Rudd* (Iowa) 66 N. W. 748.

2. CONFESSIONS, ADMISSIONS, AND DECLARATIONS.

Conviction on confession only, see post, § 126.
Instruction as to confession, see post, § 165.
Confession of marriage, see "Adultery," § 3.
Declarations as evidence in bastardy case, see "Bastardy," § 8.
— and complaints of prosecutrix, see "Rape," § 6, 7.

§ 109. Confessions.

[a] (Iowa; 1897.)

Evidence that defendant had stated that he had "swiped" the watch is admissible as a confession of guilt, the word "swipe" being equivalent to "steal."—*State v. Lee* (Iowa) 70 N. W. 594.

[b] (Mich.; 1895.)

Where there was testimony tending to show that a confession of the defendant introduced in evidence was obtained by the prosecuting attorney by improper means, a refusal to charge that a confession "caused by any inducement, threat, or promise proceeding from a person in authority, and having reference to the charge against the accused," and giving the latter "reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceeding against him," was not deemed voluntary, and should not be considered by the jury, was error, the charge which was given not submitting the question of the undue influence used or the inducements held out to obtain the confession.—*People v. Clarke* (Mich.) 62 N. W. 1117.

105 Mich. 169.

[c] (Neb.; 1895.)

A confession by defendant, made on the day of the homicide, before his arrest, without inducements or threats, was admissible.—*Basye v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

§ 110. — Proof of voluntary character.

[a] (Neb.; 1894.)

In a criminal case, before a witness testifies to the details of a confession made by defendant, the latter may cross-examine the witness as to the circumstances under which such confession was made.—*Willis v. State* 61 N. W. 254, 43 Neb. 102.

[b] (Wis.; 1897.)

About half an hour after the chief of police made a violent assault on defendant in the jail, to prevent him from injuring another prisoner, defendant made statements elicited by questions by the chief. There was no allusion to the crime charged against defendant, at the time of the assault. *Held*, that a determination by the trial court, after preliminary inquiry, that the statements were voluntary, would not be disturbed.—*Connors v. State* (Wis.) 69 N. W. 981.

§ 111. Admissions of counsel.

[a] (Iowa; 1895.)

While the county attorney, in a criminal trial, may admit what defendant would have the right to establish by proof, it is not competent for him to vary or contradict by admissions records which the law makes conclusive.—*State v. Miller* (Iowa) 64 N. W. 288.

[b] (Mich.; 1894.)

On a prosecution for peddling without a license, defendant's attorney, after stating that he did not dispute the sale, stated "We admit," and thereupon gave what was apparently his defense. *Held*, that such statement could not

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be regarded as either evidence or an admission, in the absence of an oath, or assent by counsel for the city.—*People v. Thomson* (Mich.) 61 N. W. 345.

103 Mich. 80.

§ 112. Declarations and admissions of accused.

[a] (Mich.; 1897.)

In a joint trial of two defendants for conspiring to commit a crime, testimony voluntarily given by one defendant on his preliminary examination, and taken down, is admissible against him.—*People v. Butler* (Mich.) 69 N. W. 734.

[b] (Wis.; 1896.)

Where accused, after his arrest, in response to the remark of the sheriff to him that "I am satisfied that your gun did the shooting," replied, "It looks so, don't it?" an objection to the admittance in evidence of the remark of the sheriff to explain the admission of accused, on the ground that its effect is to show the opinion of the sheriff as to whose gun did the shooting, is not tenable.—*Emery v. State* (Wis.) 65 N. W. 848.

92 Wis. 146.

§ 113. Declarations of third persons.

[a] (Iowa; 1895.)

Admission of testimony of a witness as to what defendant told him that he said to his (defendant's) wife and she said to him is not an admission of the wife's statement, but of defendant's.—*State v. Mecum* (Iowa) 64 N. W. 256.

[b] (Iowa; 1896.)

On trial of a defendant for assault with intent to kill his wife, a question put to the wife, on cross-examination, as to whether she had stated to a third person, before her marriage, that she was going to marry defendant for the purpose of getting him to build a house for her, was improper.—*State v. Clark* (Iowa) 69 N. W. 257.

3. ACCOMPLICES, CONSPIRATORS, AND CO-DEFENDANTS.

Allowing accomplice to translate defendant's instructions as to the crime, see ante, § 63.
Credibility of accomplice, question for jury, see post, § 166.
Duty of state to call accomplice as witness, see ante, § 70.

§ 114. Who are accomplices.

[a] (Iowa; 1896.)

The woman upon whom an abortion has been committed is not the accomplice of the person committing the abortion, so as to require her testimony to be corroborated, to warrant a conviction.—*State v. Smith* (Iowa) 68 N. W. 428.

[b] (Wis.; 1895.)

On a prosecution for incest, the question whether the female was an accomplice is one of fact for the jury.—*Porath v. State* (Wis.) 63 N. W. 1061.

90 Wis. 527.

§ 115. Corroboration of accomplice.

[a] (Neb.; 1896.)

A conviction may be rendered on the uncorroborated evidence of an accomplice, when sufficient, in connection with other evidence, to satisfy the jury beyond a reasonable doubt of the guilt of the accused.—*Lawhead v. State* 65 N. W. 779, 46 Neb. 607.

[b] (N.D.; 1896.)

An accomplice, as a witness, cannot by any means corroborate himself, within the meaning of the statute which requires the testimony of an accomplice to be corroborated in order to warrant conviction; but the state has the right to introduce, through the accomplice, all

matters of probative force in the case to which he can testify, whether written or otherwise, in order to make his testimony as strong and inherently probable as the facts will warrant.—*State v. Pancoast* (N. D.) 67 N. W. 1052. 5 N. D. 516.

[c] (Wis.; 1895.)

A reversal cannot be had for refusal to set aside a verdict based upon the uncorroborated testimony of an accomplice.—*Porath v. State* (Wis.) 63 N. W. 1061. 90 Wis. 527.

§ 116. — Sufficiency.

[a] (Iowa; 1896.)

The testimony of accomplices to the stealing of property is sufficiently corroborated by other evidence that the property was stolen and secreted by some one, and that shortly afterwards the defendant and another went to the place where it was concealed in the night, with a team and wagon, with the evident purpose of removing it.—*State v. Hall* (Iowa) 66 N. W. 725.

[b] (N. D.; 1895.)

Evidence corroborating an accomplice as to the fact that a murder has been committed, and that the accomplice is guilty thereof, is not sufficiently corroborative of his testimony that he committed the murder at defendant's request.—*State v. Kent* (N. D.) 62 N. W. 631. 4 N. D. 577.

§ 117. Acts and declarations of accomplices, co-conspirators, and co-defendants.

[a] (Iowa; 1895.)

Where persons form a conspiracy to extort money from others by threats accusing such persons of crimes, the acts of one in pursuance of the joint enterprise are admissible against the other.—*State v. Lewis* (Iowa) 65 N. W. 295.

[b] (Iowa; 1896.)

Evidence that, immediately before the affray in which deceased was killed, defendant's alleged co-conspirators whispered together and pointed to deceased, defendant not being then present, was properly admitted on condition that the state would thereafter show a conspiracy.—*State v. Mushrush* (Iowa) 66 N. W. 746.

[c] (Iowa; 1896.)

Conversations had in defendant's presence and hearing, on the way to the place where the homicide occurred, were admissible to establish a conspiracy to kill deceased.—*State v. Mushrush* (Iowa) 66 N. W. 746.

[d] (Iowa; 1896.)

Declarations of defendant's alleged co-conspirators made shortly after the homicide, and evidence that they and defendant were subsequently seen whispering together, were admissible as a part of the res gestæ.—*State v. Mushrush* (Iowa) 66 N. W. 746.

[e] (Iowa; 1896.)

On the trial of one jointly indicted with her husband for the unlawful selling of intoxicating liquors, where there is no evidence to show that the wife was carrying on an independent business, or owned the stock in trade, or the building, it was error to admit testimony of what the husband had said about his wife's running the business.—*State v. Fertig* (Iowa) 67 N. W. 87.

[f] (Mich.; 1895.)

Where defendant and L. were jointly charged with manslaughter by abortion, it was not error to admit evidence of the delivery of a registered letter to L., a money order contained in it, the indorsement of the order by defendant, and the cashing of the order.—*People v. Seaman* (Mich.) 65 N. W. 203.

[g] (Mich.; 1895.)

Where there is evidence that several persons jointly charged with assault in perpetrating robbery were seen together the day before the robbery, on the separate trial of one, evidence of the condition of another the day after

the robbery, as identifying him, and therefore defendant, as his companion of the day before, as having been engaged in the robbery, is admissible.—*People v. Cleveland* (Mich.) 65 N. W. 216.

[h] (Mich.; 1896.)

On trial of two persons for robbery, accompanied by an assault, it was not error to admit evidence that one of the defendants, when arrested, had some blood on his coat sleeve, though the defendants were not found together at the time of their arrest, where there was evidence that they had been together prior to and after the assault, and the court charged that the evidence should not be considered as against the other defendant unless the jury were satisfied that the two were "together in this affair, acting in concert, and were the parties who committed this robbery."—*People v. Gillespie* (Mich.) 69 N. W. 490.

[i] (S. D.; 1896.)

Under Comp. Laws, § 7381, providing that in criminal proceedings the person charged shall, at his own request, be a competent witness, a co-defendant is competent as a witness, in a trial for robbery, against a defendant who has asked for a separate trial, although such co-defendant has not been discharged under section 7379, providing that, when two or more persons are included in an indictment, one of them may, on application of the district attorney, be discharged, in order that he may be a witness for the state.—*State v. Smith* (S. D.) 67 N. W. 619.

§ 118. Escape of co-defendants.

(Mich.; 1895.)

On the separate trial of one of three persons jointly charged with assault, it is competent to show that they all, after being arrested for the crime, escaped from jail.—*People v. Cleveland* (Mich.) 65 N. W. 216.

4. CHARACTER.

Instruction as to effect of evidence, see post, § 168.

§ 119. When evidence admissible.

[a] (Mich.; 1895.)

Evidence of good character is admissible, not only when there is a conflict of evidence as to guilt, but to create a doubt, and it was error to charge that it has but little weight unless there is a conflict in the evidence as to guilt.—*People v. Van Dam* (Mich.) 65 N. W. 277.

[b] (Neb.; 1895.)

On a trial for murder, evidence of defendant's general reputation for honesty and integrity is not admissible.—*Basye v. State* (Neb.) 63 N. W. 811. 45 Neb. 261.

5. VARIANCE.

See, also, "Burglary," § 5; "Embezzlement," § 9.

§ 120. As to time.

(Neb.; 1897.)

The state need not prove that an unlawful sale of intoxicating liquors was made on the precise date laid in the information.—*Hans v. State* (Neb.) 69 N. W. 838.

§ 121. As to ownership.

(S. D.; 1896.)

An information alleged that defendant broke and entered the store building of H. & S., situate in the town of G., with intent to steal the goods of said H. & S. The evidence showed that such firm was composed of H. and S.'s wife; that the store occupied by such firm was owned by B., and contained a stock of merchandise

belonging to such firm. *Held*, that the variance between the information and proof was immaterial.—*State v. La Croix* (S. D.) 66 N. W. 944.

6. OTHER CRIMES.

See, also, "Incest," § 3.

§ 122. When evidence admissible.

[a] (Iowa; 1895.)

Where, on a prosecution for burglariously entering a dwelling with intent to commit adultery, defendant and the woman testified that her husband was angry with her, and had threatened her with personal injury; that defendant, knowing this, and having on the night in question seen her husband going towards the house in which she was stopping, went to the window to warn her of the fact, and to keep away from the window; that he so warned her, and refused to enter the house till a noise supposed to be caused by her husband was heard,—it is proper, on her cross-examination, to ask her whether she knew that there had been a great deal of talk about the conduct of herself and defendant, and whether defendant had not called on her frequently since such night.—*State v. Mecum* (Iowa) 64 N. W. 286.

[b] (Iowa; 1896.)

On the trial of an officer charged with cheating by false pretenses, by filing and collecting from the county a claim for money falsely claimed by him to have been paid out for transportation for poor persons, evidence of the collection of other similar fraudulent claims by defendant is admissible on the question of intent, both as showing knowledge of the character of the claim, and that the act charged was part of a systematic scheme to defraud.—*State v. Brady* (Iowa) 69 N. W. 290.

[c] (Mich.; 1895.)

It is error to admit evidence tending to show a similar offense, committed three months after that alleged in the indictment.—*People v. Fowler* (Mich.) 62 N. W. 572.
104 Mich. 449.

[d] (Mich.; 1896.)

On the trial of a defendant charged with crime, evidence of the commission by him of another similar crime, or of an attempt to commit another, is not admissible in proof of the substantive act charged; but where there is evidence tending to prove such act, but leaving room for question as to the intent with which it was done, evidence of other similar acts may be admitted to be considered on that issue alone.—*People v. Thacker* (Mich.) 66 N. W. 562.

[e] (Minn.; 1895.)

Admissions made by defendant before the homicide as to the commission of other, independent crimes in order to induce a third person to take part in the commission of the homicide, were properly admitted.—*State v. Hayward* (Minn.) 65 N. W. 63.
62 Minn. 474.

[f] (N. D.; 1896.)

For the purpose of showing motive, the remoteness in point of time of the commission of the collateral crime cannot be considered; the sole question being whether it furnished an active, existing motive for the commission of the crime for which the party is on trial.—*State v. Pancoast* (N. D.) 67 N. W. 1052.
5 N. D. 516.

[g] (N. D.; 1896.)

It is proper, in a criminal case, to prove the commission by the accused of another and collateral crime, where such crime furnishes a motive for the commission of the crime for which the accused is being tried.—*State v. Pancoast* (N. D.) 67 N. W. 1052.
5 N. D. 516.

§ 123. — Abortion.

(Mich.; 1895.)

Defendant and L. were jointly charged with manslaughter by abortion committed at L.'s house. There was evidence that the premature birth resulted from accidental causes, and the evidence of guilt was circumstantial. *Held*, that it was not error to admit evidence that defendant produced other abortions at L.'s house within about a year previous to the one charged.—*People v. Seaman* (Mich.) 65 N. W. 203.

§ 124. — Larceny and burglary.

[a] (Iowa; 1896.)

On trial for burglary, where the defense was intoxication, evidence that witness had been robbed by defendant in the evening of the day of the burglary is admissible to show that, at the time of the robbery, defendant was not intoxicated.—*State v. Harris* (Iowa) 69 N. W. 413.

[b] (Mich.; 1895.)

On a prosecution for embezzlement, evidence of previous acts of embezzlement is admissible to prove intent.—*People v. Hawkins* (Mich.) 64 N. W. 736.

§ 125. — Threats.

(Iowa; 1895.)

In a prosecution for conspiracy to extort money by threats to accuse a person of a crime, evidence of other similar attempts at extortion are admissible to show the intent with which defendants acted.—*State v. Lewis* (Iowa) 65 N. W. 295.

7. SUFFICIENCY OF EVIDENCE.

Essentials to review sufficiency of evidence, see post, § 220.

Review on appeal, see post, § 222.

Sufficiency of proof of adultery, see "Divorce," § 8.

§ 126. In general.

[a] (Iowa; 1896.)

Under testimony of witnesses for the state, some of them fixing the date of the crime (breaking and entering the store of M.) "about the 15th of July," others fixing it "about the middle of July," and one testifying that it may have been a week before July 15th when he found defendant in the store, the jury may have found that the crime was committed before the night of July 11th, at which time defendant's evidence tended to show that he left the city where the crime was committed.—*State v. White* (Iowa) 68 N. W. 564.

[b] (Iowa; 1896.)

Though the testimony of defendant's unimpeached witnesses was that defendant was at another place at the time of the commission of the crime (breaking and entering the store of M.), yet the verdict will not be disturbed as against evidence, witnesses for the state having positively identified him as one of the persons seen at the place of the crime at the time of its commission.—*State v. White* (Iowa) 68 N. W. 564.

[c] (Mich.; 1895.)

When the statement of a witness is unreasonable, the jury are not bound to accept it as true.—*People v. Duncan* (Mich.) 62 N. W. 556.
104 Mich. 460.

[d] (Neb.; 1897.)

The accused is not bound to establish an alibi by a preponderance of the evidence.—*Beck v. State* (Neb.) 70 N. W. 498.

[e] (Neb.; 1897.)

The jury are not bound to acquit defendant because one of them retains a reasonable doubt of his guilt.—*Davis v. State* (Neb.) 70 N. W. 984.

[*Id.* (Neb.: 1897.)

The confession of an accused that he committed the crime is not, alone, sufficient evidence to sustain his conviction thereof.—*Davis v. State* (Neb.) 70 N. W. 981.

XV. INSTRUCTIONS.

Matters necessary to review instructions, see post, § 226.

In particular prosecutions, see "Adultery," § 4; "Bastardy," § 10; "Burglary," § 9; "Disorderly House," § 5; "Embezzlement," § 12; "Forgery," § 9; "Homicide," §§ 36-43; "Indecent Assault"; "Intoxicating Liquors," § 40; "Larceny," §§ 8-11; "Perjury," § 8; "Rape," §§ 12-16; "Receiving Stolen Goods," § 3; "Robbery," § 5; "Seduction," § 8.

To grand jury, see "Grand Jury," § 4.

1. IN GENERAL.

§ 127. Propriety.

[*a*] (Mich.: 1895.)

When one count of an indictment charged that the defendant purposely overturned a boat in which he and the deceased were riding, throwing her into the river, and another count charged that he overturned the boat unintentionally, while committing or attempting to commit rape upon the deceased, it was proper for the court to charge the jury to notice the difference between the two theories of the prosecution.—*People v. Willett* (Mich.) 62 N. W. 1115. 105 Mich. 110.

[*b*] (Minn.: 1895.)

On a prosecution for larceny of a bond it was error, after charging at defendant's request that, if the taking of the bond was not unlawful, defendant's failure to return the bond on demand was not sufficient to constitute the offense, to add that, if the taking was wrongful, the failure to return the bond on demand was simply a recurrence of the wrong, adding insult to injury.—*State v. English* (Minn.) 64 N. W. 1136.

62 Minn. 402.

[*c*] (Neb.: 1897.)

An instruction that, if the jury should find the facts essential to establish guilt, they should acquit, but, if such facts had not been proven, they should convict, is erroneous, and ground for reversal, though the trial court unintentionally transposed the words "convict" and "acquit."—*Cummings v. State* (Neb.) 69 N. W. 756.

§ 128. Requirement to be in writing.

(Neb.: 1895.)

Under Comp. St. c. 19, §§ 52-56, requiring written instructions in every case, whether civil or criminal, unless written instructions are waived, the giving of oral instructions is reversible error.—*Ehrlick v. State* (Neb.) 63 N. W. 35. 44 Neb. 810.

§ 129. — Interlineation or erasure.

(Neb.: 1895.)

Error in modifying an instruction by interlineation and erasure, in violation of Comp. St. 1895, § 2447, would not work a reversal where defendant was not entitled to the instruction as requested, and the instruction as given correctly stated the law, and was not excepted to on account of the manner of modification.—*Tracy v. State* (Neb.) 64 N. W. 1069. 46 Neb. 361.

§ 130. Numbering paragraphs.

(Neb.: 1895.)

The failure of the court to number the paragraphs of the charge, or to write the word "Given" on the margin of each, as required by

law, is no ground for reversal, where no objection was taken when the charge was given.—*Jolly v. State*, 62 N. W. 300, 43 Neb. 857.

§ 131. On what points necessary.

[*a*] (Iowa: 1895.)

It is not error, on a trial for assault with intent to maim, to refuse to submit defendant's guilt of the crime of assault and battery, where the evidence clearly shows him guilty of such crime.—*State v. Akin* (Iowa) 62 N. W. 667.

[*b*] (Iowa: 1895.)

On trial for carnally knowing a female child, where evidence was received of defendant's carnal knowledge of prosecutrix in another county, defendant cannot complain because the court failed to specifically instruct the jury that the evidence was admissible only to show the relation of the parties, where he requested no such instruction, and the court charged that, before the jury could convict, they must be satisfied that he carnally knew prosecutrix at the time and place charged.—*State v. Gaston* (Iowa) 65 N. W. 415.

[*c*] (Iowa: 1896.)

On trial for robbery, where there was no evidence tending to show that the offense might have been larceny, it was not error to fail to instruct as to such offense.—*State v. Reasby* (Iowa) 69 N. W. 451.

[*d*] (Wis.: 1895.)

Where evidence of prior convictions of defendant is admitted to discredit his testimony, it is error to refuse to charge that it can be considered for no other purpose.—*Fosdahl v. State*, 62 N. W. 185, 89 Wis. 482.

§ 132. — Presumption of innocence.

(Mich.: 1896.)

Where the court charges that the jury must be convinced, by the evidence, of accused's guilt beyond any reasonable doubt, an omission to charge as to the presumption of innocence is not error, the attention of the court not being called to it. *People v. Graney* (1892) 52 N. W. 66, 91 Mich. 646, and *Same v. Smith* (1892) 52 N. W. 67, 92 Mich. 10, followed.—*People v. Ostrander*, 67 N. W. 1079.

§ 133. — Defendant's failure to testify.

(Neb.: 1895.)

It was not error that the court failed of its own motion to charge that defendant's failure to testify created no presumption against him.—*Meitz v. State*, 65 N. W. 190, 46 Neb. 547.

§ 134. — As to lower offense.

[*a*] (Neb.: 1895.)

On a prosecution for assault with intent to kill, an instruction that withdraws from the jury the consideration of elements in the case tending to reduce the degree of the crime is reversible error.—*Dolan v. State* (Neb.) 62 N. W. 1090.

44 Neb. 643.

[*b*] (Neb.: 1895.)

It was not error, on a prosecution for felony, not to define a lesser offense included in the crime charged, in the absence of a request to do so.—*Barr v. State* (Neb.) 63 N. W. 856.

45 Neb. 438.

§ 135. — Alibi.

(Iowa: 1895.)

It was not error to omit to instruct with reference to an alibi where the murder occurred about 8 o'clock, and there was no testimony as to the whereabouts of defendant from 7:30 to 8:15 o'clock, and the defendant could have committed the deed in that time.—*State v. Seymore* (Iowa) 63 N. W. 661.

§ 136. Requests to charge.

[a] (Mich.: 1896.)

The court may refuse to give instructions based on the testimony of certain witnesses, such testimony not forming the sole basis on which conviction can be had.—*People v. Pope* (Mich.) 66 N. W. 213.

[b] (Mich.: 1896.)

It is sufficient if requested instructions in criminal cases are substantially given.—*People v. Weaver* (Mich.) 66 N. W. 567.

[c] (Neb.: 1895.)

Instructions given at the request of a prosecuting attorney are entitled to the same weight as instructions given by the court of its own motion.—*Dixon v. State* (Neb.) 64 N. W. 961, 46 Neb. 298.

§ 137. — Necessity for requests.

[a] (Iowa: 1895.)

Where no request has been made to have an instruction correctly stating the law made more definite, the objection of indefiniteness cannot be urged on appeal.—*State v. Jelinek* (Iowa) 64 N. W. 259.

[b] (Iowa: 1895.)

If the instructions given covered the defense, defendant cannot complain of them, in the absence of a request for more specific instructions.—*State v. Phipps* (Iowa) 64 N. W. 410.

[c] (Iowa: 1896.)

The judgment will not be reversed for failure to give instructions, where no request for such instructions was made at the time, unless such failure deprived the defendant of a fair trial.—*State v. Hathaway* (Iowa) 69 N. W. 449.

[d] (Mich.: 1895.)

Where, on a trial for forgery, defendant's counsel did not request the court to define "false" and "forgery," and to caution the jury that defendant's failure to testify was not evidence of guilt, defendant cannot complain of the court's failure to do so.—*People v. Warner* (Mich.) 62 N. W. 405.

104 Mich. 337.

[e] (Mich.: 1895.)

The failure of the court to instruct the jury that they may convict the prisoner of any offense included in the crime charged, when no such instruction is asked by counsel, and when the evidence shows that the prisoner is either guilty as charged or not guilty of any crime, is not error.—*People v. Ezso* (Mich.) 62 N. W. 407, 104 Mich. 341.

[f] (Mich.: 1895.)

Failure to give specific instructions for one who has not asked them is not error.—*People v. Willett* (Mich.) 62 N. W. 1115, 105 Mich. 110.

[g] (Neb.: 1895.)

A statement by the court, in ruling on evidence, that an instruction of a certain character would be given in relation to such evidence, does not excuse a party from requesting such instruction at the proper time.—*Carleton v. State*, 61 N. W. 699, 43 Neb. 373.

[h] (Wis.: 1895.)

Error cannot be assigned upon the omission to require the evidence of an accomplice to be corroborated, in the absence of a request for an instruction or an exception to the evidence.—*Porath v. State* (Wis.) 63 N. W. 1061, 90 Wis. 527.

§ 138. Repetition.

[a] Requested instructions already substantially given are properly refused.

—(Iowa: 1895) *State v. Cody*, 62 N. W. 702; (1896) *State v. Case*, 68 N. W. 434;

(Mich.: 1895) *People v. Berry*, 65 N. W. 98; *Same v. Cleveland*, *Id.* 216;

(Neb.: 1896) *Bush v. State*, 66 N. W. 638, 47 Neb. 642.

[b] (Iowa: 1895.)

On a prosecution for unlawfully selling intoxicating liquors, an instruction as to the time within which the sales charged must be proven to have been made is not erroneous in omitting to state that they must be proven beyond a reasonable doubt, where the jury have before been instructed to that effect.—*State v. Hopkins* (Iowa) 62 N. W. 656.

[c] (Iowa: 1895.)

A failure in giving specific instructions to state that, before convicting defendant, the jury must be satisfied of his guilt beyond a reasonable doubt, is not error when they are so instructed in the general charge.—*State v. Tippet* (Iowa) 63 N. W. 445.

[d] (Mich.: 1895.)

Where the jury were instructed that they must be satisfied beyond all reasonable doubt that defendant committed the offense charged, he was not prejudiced by an omission to charge that defendant is presumed to be innocent, the court having stated in the presence of the jury that nothing could be presumed against defendant.—*People v. Parsons*, 63 N. W. 69, 105 Mich. 177.

[e] (Neb.: 1895.)

Where a charge states that, to warrant a conviction, the state must make out the whole case beyond a reasonable doubt, it is not necessary to repeat in every instruction the degree of proof required.—*Carleton v. State* (Neb.) 61 N. W. 699, 43 Neb. 373.

[f] (Neb.: 1897.)

The trial court is not obliged to repeat in every instruction the degree of proof required, when the jury has been properly instructed that the state must make out its whole case beyond a reasonable doubt.—*Davis v. State* (Neb.) 70 N. W. 984.

[g] (N. D.: 1896.)

Plaintiff in error requested that a large number of instructions be given to the jury, some of them correctly stating the law applicable to the case, and others not. They were all refused, but the court, in its charge, had fully, fairly, and correctly covered every point upon which instructions were requested. *Held*, no error in refusing the instructions requested.—*State v. Pancoast* (N. D.) 67 N. W. 1052, 5 N. D. 516.

[h] (Wis.: 1896.)

On a criminal trial it is error to refuse to instruct that the law presumes every man innocent, and a conviction cannot be had if any juror has a reasonable doubt of the defendant's guilt, though an instruction has been given that they could not convict unless the evidence left no reasonable doubt of defendant's guilt.—*Franklin v. State* (Wis.) 66 N. W. 107.

§ 139. Argumentative instructions.

[a] (Mich.: 1896.)

It is the province of the court, in instructing as to the defense of insanity, to define what in law constitutes such a degree of insanity as excuses an act which, but for the clouded faculties, would be a crime; and an instruction impressing on the jury the court's views of the case, and in which argumentative language is quoted from an opinion of the supreme court in another case on different facts, is calculated to prejudice the jury, and is erroneous.—*People v. Holmes* (Mich.) 69 N. W. 501.

[b] (Neb.: 1895.)

A fact that an instruction was argumentative, in that it stated a reason for a rule of law given, is no ground for reversing a conviction.—*Carleton v. State*, 61 N. W. 699, 43 Neb. 373.

§ 140. Evidence to support.

[a] (Iowa: 1895.)

A request to charge not applicable to the testimony was properly denied.—*State v. Phipps* (Iowa) 64 N. W. 410.

[b] (Iowa; 1896.)

A charge to inquire whether defendant had committed the crime at any time within three years prior to the finding of the indictment, that being the statutory period, was proper, though the evidence limited the inquiry to a less time.—*State v. Waddle* (Iowa) 69 N. W. 279.

[c] (Mich.; 1895.)

It is not error to refuse an instruction containing a correct proposition of law, which has no application to the case.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

[d] (Neb.; 1896.)

An instruction based on matters not in evidence is erroneous.—*Morcarty v. State* (Neb.) 65 N. W. 784, 46 Neb. 652.

§ 141. Submission of issues.**(Neb.; 1895.)**

Where an information contained one count for an assault with intent to commit murder, and one for an assault with intent to do great bodily injury, and there was no evidence to support the first count, it was reversible error to submit to the jury the question of the guilt under the first count, though defendant was not convicted of such crime.—*Botsch v. State*, 61 N. W. 730, 43 Neb. 501.

§ 142. As to arriving at verdict.**(Wis.; 1895.)**

There is no error in charging in a criminal cause: "It is the duty of each jurymen, while the jury are deliberating upon their verdict, to give careful consideration to the views his fellow jurymen may have to present upon the testimony in the case. He should not shut his ears, and stubbornly stand upon the position he first takes, regardless of what may be said by the other jurymen. It should be the object of all of you to arrive at a common conclusion, and to that end you should deliberate together with calmness. It is your duty to agree upon a verdict if that is possible."—*Jackson v. State*, 64 N. W. 838, 91 Wis. 253.

§ 143. As to punishment.**(Neb.; 1895.)**

Where the jury were not required to fix the punishment, there was no error in refusing to instruct as to the statutory penalty, or to permit the question of penalty to be argued.—*Ford v. State*, 64 N. W. 1082, 46 Neb. 390.

§ 144. On defendant's failure to testify.**(Iowa; 1895.)**

On trial for murder, a charge that the jury must not give any thought to the fact that defendant did not testify in his own behalf is not contrary to Code, § 3636, providing that, where defendant does not elect to be a witness, the fact shall not have weight against him.—*State v. Weems* (Iowa) 65 N. W. 387.

Necessity for instruction, see ante, § 133.

§ 145. Singling out and giving undue prominence to evidence.**[a] (Iowa; 1897.)**

It is improper to underscore words in an instruction, as it gives undue weight to them.—*State v. Cater* (Iowa) 69 N. W. 880.

[b] (Mich.; 1895.)

Charges in which the strong points of the evidence for the state were brought out by calling the witness by name, while the evidence for the defendant was not so emphasized, and certain testimony which tended to negative material statements of the state's witness was not even referred to, were prejudicial to the defendant.—*People v. Clarke* (Mich.) 62 N. W. 1117.

105 Mich. 169.

§ 146. Citing supreme court decisions.**(Mich.; 1896.)**

It is not error for the court to cite decisions for the purpose of showing the interpretation placed upon the provisions of the statute by the supreme court.—*People v. Bowkus* (Mich.) 67 N. W. 319.

§ 147. Harmless error.**[a] (Iowa; 1896.)**

In a prosecution for larceny, the fact that the court does not define grand and petit larceny to the jury is not prejudicial error, where the question of the value of the property is submitted to the jury by a proper instruction, and they find its value to be greater than the limit of petit larceny.—*State v. Hall* (Iowa) 66 N. W. 725.

[b] (Mich.; 1895.)

A conviction will not be reversed because the court inadvertently misstates a part of the testimony, his statement being unchallenged at the time, and not apparently prejudicial.—*People v. Caldwell* (Mich.) 65 N. W. 213.

[c] (Neb.; 1895.)

Though a prosecution for an assault and battery must be commenced within one year (Cr. Code, § 256), where the evidence shows the offense to have been committed within that time, the error of instructing the jury to convict if committed within 18 months is harmless.—*Jolly v. State*, 62 N. W. 300, 43 Neb. 557.

[d] (Neb.; 1895.)

The repetition in instructions of the proposition that defendant's interest must be considered in determining his credibility was not ground for reversal, in the absence of evidence that defendant was harmed thereby.—*Dixon v. State*, 64 N. W. 961, 46 Neb. 298.

[e] (Neb.; 1896.)

Where an omission to instruct as to the rules of law governing the disposition of the cause, as to which the court is bound to instruct without request, was clearly not prejudicial, it was no ground for reversal.—*Pjarron v. State* (Neb.) 66 N. W. 422.

47 Neb. 294.

[f] (Neb.; 1897.)

The court charged: "And if the jury find from the evidence that all the incriminating circumstances upon which the prosecution relies" will as well apply to some other person as to the defendant, or if they are reconcilable with any reasonable theory other than the guilt of the defendant, or if they, together with the direct evidence, do not satisfy the minds of the jury, beyond any reasonable doubt, of the guilt of the defendant, they should acquit him. *Held*, that the use of the expression "incriminating circumstances," if error, was without prejudice to the prisoner.—*Davis v. State* (Neb.) 70 N. W. 984.

[g] (Neb.; 1897.)

The burden is upon the party complaining of the refusal to give an instruction not only to show that he was probably prejudiced by such refusal of the court, but that the entire instruction is correct, and applicable to the facts in evidence.—*Davis v. State* (Neb.) 70 N. W. 984.

[h] (S. D.; 1896.)

An instruction that it is the duty of the jury, in determining the weight to which the evidence is entitled, to take into consideration the interest of the defendant and his co-defendant, and the natural interest and sympathy of his relatives and friends who testified, while improper, in that it was not general, but specified certain witnesses whose interests should be considered, was not prejudicial.—*State v. Smith* (S. D.) 67 N. W. 619.

[i] (Wis.; 1895.)

Defendant, on trial under an indictment for both rape and fornication, having been found guilty under the second count, the court's refusal to charge as requested on the crime of

rape becomes immaterial.—*Jackson v. State* 64 N. W. 838, 91 Wis. 253.

[j] (*Wis.*; 1895.)

The error, if any, in charging, on the trial of one indicted for both rape and fornication, who has pleaded not guilty, and has denied the charges under oath, that, if the jury finds the accusation made by the prosecutrix "a pure fabrication," they ought "at least to be able to find some motive for such a wicked fabrication," is not reversible.—*Jackson v. State* 64 N. W. 838, 91 Wis. 253.

See, also, "Homicide," § 43.

§ 148. Construction as a whole.

[a] (*Iowa*; 1895.)

That a portion of a charge may be subject to criticism does not require a reversal, where no harm could have resulted therefrom, in view of the whole charge.—*State v. Kennedy* (Iowa) 62 N. W. 673.

[b] (*Iowa*; 1897.)

Where the instructions, as a whole, are correct, an objection to a particular paragraph, because not in itself sufficient, will not be considered, unless it conflicts with other paragraphs, or contains some affirmative error.—*State v. Urie* (Iowa) 70 N. W. 603.

[c] (*Mich.*; 1896.)

Where the charge is correct as a whole, a conviction will not be set aside because portions of it, standing alone, might tend to mislead the jury.—*People v. Ricketts* (Mich.) 66 N. W. 483.

[d] (*Neb.*; 1895.)

Where the instructions, construed together, properly state the law, they are sufficient.—*Debnay v. State*, 64 N. W. 446, 45 Neb. 856.

§ 149. Cure of error by other instructions.

[a] (*Iowa*; 1895.)

Error in refusing an instruction is cured by a subsequent instruction fully covering the subject of the instruction refused.—*State v. La Grange* (Iowa) 62 N. W. 664.

[b] (*Neb.*)

Error in incorrectly stating the law in an instruction is not cured by a subsequent instruction which correctly states the law.—(1895) *Barr v. State*, 63 N. W. 856, 45 Neb. 458; (1897) *Beck v. Same*, 70 N. W. 498.

[c] (*Neb.*; 1897.)

On a prosecution for libel, a misstatement in the charge of the averment of the information as to the circulation of the paper containing the libelous article is not cured by a correct statement in regard thereto in another paragraph of the charge.—*Raker v. State* (Neb.) 69 N. W. 749.

[d] (*Neb.*; 1897.)

An erroneous instruction is not cured by the mere giving of another on the same subject, contradicting it.—*Henry v. State* (Neb.) 70 N. W. 924.

§ 150. Objections and exceptions.

[a] (*Iowa*; 1895.)

A charge will not be considered on appeal when no objection thereto was made below.—*State v. Callahan* (Iowa) 65 N. W. 150.

[b] (*Iowa*; 1896.)

An order entered in a criminal case in vacation, six months after judgment, reciting that the record did not show that exceptions had been taken to the instructions given, and that exceptions should therefore be entered as of the date of the instructions, is unauthorized, and of no effect.—*State v. Hathaway* (Iowa) 69 N. W. 449.

[c] (*Iowa*; 1896.)

A judgment will not be reversed for error in instructions, if objection was not made and exception taken at the time.—*State v. Hathaway* (Iowa) 69 N. W. 449.

[d] (*Neb.*; 1896.)

Instructions will not be reviewed unless the record shows they were excepted to when given.—*Bush v. State* (Neb.) 66 N. W. 638, 47 Neb. 642.

2. PROVINCE OF COURT AND JURY.

§ 151. Particular instructions invading province of jury.

[a] (*Iowa*; 1896.)

In a prosecution for selling liquor to minors in violation of law witnesses testified that they saw minors purchase liquors in defendant's saloon, and some of them stated that they did not know the ages of such persons, but believed from their appearance they were minors. *Held*, that it was not error to refuse to instruct the jury that the testimony as to the belief of such witnesses should be disregarded.—*State v. Bernstein* (Iowa) 68 N. W. 442.

[b] (*Iowa*; 1897.)

An instruction that if defendant took hold of the prosecutrix, and tore open her coat, and seized her arm, with intent to have carnal intercourse against her will, and with the intent of accomplishing his object at all events, without regard to any resistance she would make, he was guilty of an assault with intent to commit rape, does not invade the province of the jury.—*State v. Urie* (Iowa) 70 N. W. 603.

§ 152. Expression of opinion.

(*Neb.*; 1896.)

An instruction intimating an opinion of the effect of the evidence or of the inferences deducible therefrom is erroneous.—*Williams v. State*, 65 N. W. 783, 46 Neb. 704.

§ 153. Directing verdict.

(*Mich.*; 1896.)

Where, in the trial of a criminal case, the facts are undisputed, and are sufficient in law to constitute the crime charged, it is the duty of the court to direct a verdict of guilty.—*People v. Elmer* (Mich.) 67 N. W. 550.

§ 154. Credibility of witnesses.

[a] (*Mich.*; 1895.)

It is error to give an instruction discrediting and casting suspicion on the evidence of medical experts.—*People v. Seaman* (Mich.) 65 N. W. 203.

[b] (*Neb.*; 1895.)

The credibility of a state's witness whose testimony on the preliminary examination conflicted with that given on the trial was for the jury.—*Dixon v. State*, 64 N. W. 961, 46 Neb. 298.

[c] (*Neb.*; 1896.)

It is error for the court to single out a witness for the defense by name, and apply to his testimony the rule, "Falsus in uno, falsus in omnibus."—*Argabright v. State* (Neb.) 69 N. W. 102.

§ 155. Credibility of accused.

[a] (*Iowa*; 1895.)

An instruction that the jury are not required to receive blindly the testimony of accused as true, but are to consider whether it is true, and are not obliged to believe it any further than it might be corroborated by other credible evidence, is not objectionable as singling out defendant as a mark for suspicion.—*State v. Mecum* (Iowa) 64 N. W. 286.

[b] (*Iowa*; 1895.)

An instruction that the jury were not required to receive blindly the testimony of accused as true, but were to consider whether it was true and made in good faith, or only for the purpose of avoiding conviction, and that they were not obliged to believe it any further than it might be corroborated by other credible evidence, is not objectionable as singling

out defendant as a mark for suspicion, as it relates to weighing the evidence of accused, and, of necessity, applies to defendant alone.—*State v. Mecum* (Iowa) 61 N. W. 286.

§ 156. Assumption of facts.

[a] (Mich.; 1896.)

On trial for keeping a saloon open on Sunday, an instruction that it made no difference whether the defendant sold any liquor or not, that he had not the right to let persons into the saloon, is not open to objection on the ground that it assumes that defendant let persons into his saloon.—*People v. Bowkus* (Mich.) 67 N. W. 319.

[b] (Neb.; 1896.)

An instruction assuming as proved matters not in evidence is erroneous.—*Williams v. State* (Neb.) 65 N. W. 783, 46 Neb. 704.

[c] (Neb.; 1897.)

An instruction reciting that the defendant is charged with keeping "vinous liquors, consisting of" certain named liquors, for sale without license, does not assume that such liquors were in fact vinous.—*Hans v. State* (Neb.) 69 N. W. 838.

[d] (Wis.; 1897.)

A charge that the "state had sought to prove defendant's guilt by * * * admissions, and by showing that he was seen, after the burglary, carrying something under his coat," is not open to the objection that it states that defendant was so seen, and takes the question from the jury.—*Connors v. State* (Wis.) 69 N. W. 981.

§ 157. Jurors as judges of degree of offense.

(Mich.; 1895.)

It is not error to instruct that defendant, if guilty at all, is guilty of murder in the first degree, when there is no evidence on which a lower degree of crime can rest.—*People v. Repke*, 61 N. W. 861, 103 Mich. 459; *Same v. Fuhrman*, 61 N. W. 865, 103 Mich. 593.

3. STATEMENT OF RULES OF EVIDENCE.

§ 158. In general.

[a] (Iowa; 1896.)

A charge that defendant cannot be convicted unless the state has overcome the presumption of innocence, and has made out every material allegation of the indictment beyond all reasonable doubt, and that satisfactory proof is required, and that no mere preponderance of testimony will be sufficient to warrant a conviction, unless so strong as to remove all reasonable doubt of guilt, is not objectionable, as authorizing a conviction on a "mere weight or preponderance" of evidence.—*State v. Brown* (Iowa) 69 N. W. 277.

[b] (Neb.; 1897.)

It is not prejudicial error for a court, in its charge, to say to the jury that the evidence before them is both direct and circumstantial.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 159. Presumption of innocence.

[a] (Iowa; 1896.)

Where defendant testified in his own behalf, and the court charged the jury that they might consider his interest in the case, and consider the evidence of his bad character, such instruction, joined with the statement that defendant should be presumed to be innocent, is proper.—*State v. Harris* (Iowa) 66 N. W. 728.

[b] (Mich.; 1895.)

Charges that "the law presumes every man innocent of the crime charged, * * * and this presumption abides with him throughout the entire trial, and should be borne in mind at each successive step in your deliberations as

to your verdict," and that the burden of proof rests on the prosecution to prove the guilt of the accused "beyond a reasonable doubt," were sufficiently specific as to the presumption of defendant's innocence.—*People v. Willett* (Mich.) 62 N. W. 1115.

105 Mich. 110.

[c] (Mich.; 1895.)

It is not prejudicial error to instruct that the presumption of innocence surrounds defendant until removed by evidence proving beyond a reasonable doubt his guilt of the offense charged in the information, or "any other offense."—*People v. Resh* (Mich.) 65 N. W. 99.

[d] (Wis.; 1895.)

It is error to refuse to instruct that defendant is presumed to be innocent until his guilt is proven beyond a reasonable doubt.—*Posdahl v. State*, 62 N. W. 185, 89 Wis. 482.

Necessity of charge on, see ante, §§ 132-135.

§ 160. Presumption from unlawful act.

[a] (Minn.; 1895.)

The law presumes a criminal intent from the intentional commission of an act in itself unlawful.—*State v. Kortgaard* (Minn.) 64 N. W. 51.

62 Minn. 7.

[b] (Neb.; 1895.)

In a prosecution for assault with intent to murder, it is not error to instruct that defendant is presumed to have intended the natural and proximate consequences of his acts.—*Krehnau v. State*, 61 N. W. 628, 43 Neb. 337.

§ 161. Reasonable doubt.

[a] (Iowa; 1895.)

An instruction that a reasonable doubt is such a doubt as naturally arises after considering all the evidence introduced, when reviewed in the light of all the facts and circumstances surrounding the same, was not erroneous, in that it permitted the jury to consider all the facts, whether in evidence or not.—*State v. Case* (Iowa) 65 N. W. 149.

[b] (Iowa; 1895.)

The addition to an instruction that, "to warrant a conviction, defendant must be proven guilty so clearly and conclusively that there is no reasonable theory on which he can be innocent, when all the evidence is considered together," of the remark, "and if there is any one material fact, which is proved to the satisfaction of the jury, by a preponderance of the evidence, which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt," is misleading.—*State v. Indiesch* (Iowa) 65 N. W. 157.

[c] (Mich.; 1897.)

An instruction that, if certain testimony be true, defendant "is not guilty, and you should say so; or, if you have a reasonable doubt about it, you should say so,"—is equivalent to a statement that, if the jury have a reasonable doubt, they should acquit.—*People v. Pickette* (Mich.) 69 N. W. 739.

[d] (Neb.; 1896.)

In a criminal case it is not erroneous to direct the jury that its oath imposes upon it no obligation to doubt where no doubt would have existed if no oath had been administered. *Spies v. People* (1887) 12 N. E. 865, 17 N. E. 898, and 122 Ill. 1, followed.—*Barney v. State*, 68 N. W. 636.

[e] (Neb.; 1897.)

It is no error to charge the jury that its oath imposes no obligation to doubt where, in the absence of the oath, there would be no doubt.—*Fonton v. State* (Neb.) 69 N. W. 933.

§ 162. — Definition.

[a] (Iowa; 1895.)

Instructions to the jury that if, after hearing all the evidence, their minds were brought to a belief in the defendant's guilt,

they may be said to have no reasonable doubt, and should convict, but if, after weighing all the evidence, their minds should be in a condition of uncertainty, they might be said to have reasonable doubt, in which case their verdict should be "Not guilty," and that a reasonable doubt is one that arises reasonably from the evidence, was not prejudicial to defendant.—*State v. Harris* (Iowa) 66 N. W. 728.

[b] (Mich.; 1895.)

An instruction which defines proof beyond a reasonable doubt to be "such proof as satisfies the judgment and conscience of the jury, as reasonable men applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible," is correct.—*People v. Ezzo* (Mich.) 62 N. W. 407.

104 Mich. 341.

[c] (Neb.; 1894.)

An instruction that "a doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty," held correct.—*Willis v. State*, 61 N. W. 254, 43 Neb. 102.

[d] (Neb.; 1894.)

An instruction that: "A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. * * * You are not at liberty to disbelieve as jurors if, from the evidence, you believe as men; your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. * * * If, after an impartial consideration of all the evidence, you feel an abiding conviction of the guilt of defendant, and are satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt."—held proper.—*Willis v. State*, 61 N. W. 254, 43 Neb. 102.

[e] (Neb.; 1895.)

An instruction is not erroneous because it states, after defining a "reasonable doubt," and calling attention to what proof will overcome such doubt, that "this is proof beyond a reasonable doubt, because, if the law, which mostly depends on considerations of a moral nature, should go further than this, and require absolute certainty, it would defeat criminal prosecutions altogether."—*Carleton v. State* 61 N. W. 699, 43 Neb. 373.

[f] (Neb.; 1896.)

It is proper to instruct that "the proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of" ordinarily prudent men "with a conviction upon which they would act in their own most important affairs or concerns of life."—*Lawhead v. State* (Neb.) 65 N. W. 779, 46 Neb. 607.

[g] (S. D.; 1895.)

It was not material error to charge, on a prosecution for embezzlement, as to "reasonable doubt," that "the reasonable doubt which entitles an accused to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is deemed to be beyond reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction, on which they would act without hesitation in their own most important concerns or affairs of life. In other words, in a legal sense, a reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for."—*State v. Serenson* (S. D.) 64 N. W. 130.

[h] (Wis.; 1896.)

An instruction that a reasonable doubt exists when the judgment and conscience are not convinced of accused's guilt to an extent such as would lead a careful and prudent man to act affirmatively in "important" matters of his own is erroneous.—*Emery v. State* (Wis.) 65 N. W. 848.

92 Wis. 146.

[i] (Wis.; 1896.)

An instruction that a reasonable doubt is a doubt reasonably arising on all the evidence, and that proof is said to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men "with a conviction" on which they would act "without hesitation" in their own "most important" concerns and affairs of life, is not erroneous.—*Frank v. State* (Wis.) 68 N. W. 657.

§ 163. Circumstantial evidence.

[a] (Iowa; 1895.)

It was not error to refuse to charge that, before the defendant could be convicted on circumstantial evidence, the circumstances should all concur to show that he committed the crime, and must all be inconsistent with any other rational conclusion, where the court, after charging as to the weight and convincing power of circumstantial evidence, and the reasonable inferences to be drawn therefrom, added that "if, in connection with the positive evidence before you, you have no reasonable doubt as to defendant's guilt, you should convict him, but, if you then entertain such doubt, you should acquit him."—*State v. Seymore* (Iowa) 63 N. W. 661.

[b] (Iowa; 1895.)

On a prosecution for adultery, the jury are sufficiently warned against being misled by a train of circumstantial evidence when the court charges that the circumstances offered by the state must be such as necessarily lead the mind of a reasonable, just, and prudent man to the conclusion of guilt, and that they must exclude all reasonable doubt, and he further narrates the facts relied on by the state, which facts, if true, could leave no reasonable doubt of guilt, and then leaves to the jury the question of fact.—*State v. Hart* (Iowa) 64 N. W. 278.

[c] (Mich.; 1895.)

A charge in a criminal case, in which the evidence was wholly circumstantial, that the jury should acquit "if a single circumstance proven is inconsistent with the guilt of the accused," was properly refused.—*People v. Willett* (Mich.) 62 N. W. 1115.

105 Mich. 110.

[d] (Neb.; 1897.)

An instruction defining both direct and circumstantial evidence, and stating that the circumstantial evidence which had been received was competent, and that "if it is of such a character as to exclude every reasonable supposition, other than that of defendant's guilt, then and in that event it should be given the same weight as direct evidence," was not an unconditional direction to the jury to give the same weight to circumstantial evidence as to direct evidence.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 164. Alibi.

[a] (Mich.; 1895.)

On the question of alibi, it is proper to instruct that if, "in view of the evidence, the jury have any reasonable doubt as to whether defendant was at some other place at the time the crime was committed, they should give the defendant the benefit of any doubt," and acquit him.—*People v. Resh* (Mich.) 65 N. W. 99.

[b] (Mich.; 1897.)

A statement that if the jury are "satisfied, beyond a reasonable doubt," that defendant was at another place before and during the fire, it should acquit, is not ground for complaint, where

the court immediately added that it should acquit if it had a reasonable doubt as to whether defendant was at such other place during that time.—*People v. Pichette* (Mich.) 69 N. W. 739.

[c] (Neb.; 1896.)

It is error to instruct that the accused is required to prove an alibi; it being sufficient to entitle him to an acquittal if the jury, from a consideration of all the evidence, entertain a reasonable doubt of his presence at the commission of the crime, whether such doubt arise from a failure of proof on the part of the state, or from evidence submitted by the accused.—*Casey v. State* (Neb.) 68 N. W. 643.

[d] (Neb.; 1897.)

It is error for the court to advise the jury that the defense of alibi is one "easily fabricated, that it has occasionally been successfully fabricated, and that the temptation to resort to it as a spurious defense is very great, especially in cases of importance."—*Henry v. State* (Neb.) 70 N. W. 924.

Necessity of instruction, see ante, § 135.

§ 165. Confessions.

(Mich.; 1895.)

It appeared that defendant, who bore an assumed name when arrested, confessed when the sheriff confronted him with his true name, and afterwards told the sheriff that he should plead guilty, and that the sheriff replied that in that case he would speak to the judge and get defendant off as easy as possible. *Held*, that a charge that confessions must be made voluntarily, and that if defendant made them under undue influence they could not be considered, was sufficiently favorable to defendant.—*People v. Warner* (Mich.) 62 N. W. 405.

§ 166. Credibility of witness.

[a] (Iowa; 1894.)

In a murder case, where there is evidence that deceased, whose dying declarations were introduced by the state, was an habitual drunkard, and it appears that he received the injuries of which he died while intoxicated, and while he and defendant were alone, it is error to charge that, if a witness gives evidence of an event which occurred while he was intoxicated, such intoxication should be considered as a circumstance "not affecting his credibility, but the probability of his correctly remembering what transpired."—*State v. Nolan* (Iowa) 61 N. W. 181.

92 Iowa, 491.

[b] (Mich.; 1895.)

The jury, as a matter of law, are not bound to take the testimony of an accomplice as true, when corroborated.—*People v. Shaver* (Mich.) 65 N. W. 538.

§ 167. Credibility of defendant's statement or testimony.

[a] (Iowa; 1895.)

An instruction that defendant was a competent witness in his own behalf, and that his testimony should be weighed by the rules given by the court for weighing testimony, was proper.—*State v. Case* (Iowa) 65 N. W. 149.

[b] (Mich.; 1895.)

It is not error to instruct that the jury, in determining the weight to be given to defendant's testimony, may consider his relation to the offense charged.—*People v. Resh* (Mich.) 65 N. W. 99.

[c] (Neb.; 1895.)

It is not error, in a trial for murder, to instruct that the jury may take into consideration the interest of defendant in weighing his evidence.—*Housh v. State* (Neb.) 61 N. W. 571, 43 Neb. 163.

[d] (Neb.; 1895.)

It is not error to charge the jury that, in weighing defendant's testimony, they should

fully and fairly consider whether it is true and made in good faith; the terms "true" and "made in good faith" being in such case synonymous, and not implying that the testimony should be rejected, though true, if not made in good faith.—*Carleton v. State* (Neb.) 61 N. W. 690, 43 Neb. 373.

§ 168. Character of defendant.

(Minn.; 1896.)

A charge as follows: "That [evidence of good character] is a legitimate subject for you to take into consideration, but it goes only to this extent: If an act which the law makes an offense has been actually committed, if you are satisfied beyond a reasonable doubt that the prohibited act was committed, it makes no difference what the character of the man is. It is not the subject of your investigation. But if the evidence should leave your minds in such a state that you cannot say that you are satisfied beyond a reasonable doubt, and if you find that the defendant has borne hitherto an unblemished character, such a character as makes the act inconsistent with his history and standing, that circumstance should turn the scale in his favor. At such a time the influence of a good character ought to weigh very strongly in behalf of a person accused,"—is erroneous, in permitting such evidence to be considered only where the other evidence leaves a doubt in the minds of the jury as to defendant's guilt.—*State v. Holmes* (Minn.) 68 N. W. 11.

XVI. DELIBERATIONS OF JURY.

Instructions as to arriving at verdict, see ante, § 142.

§ 169. What is before the jury for consideration.

[a] (Iowa; 1895.)

The jury may properly consider the conduct of defendant in court during the trial.—*State v. Hutchison* (Iowa) 64 N. W. 610.

[b] (Iowa; 1895.)

The fact that, in deliberating on their verdict on a trial for larceny, some of the jurors stated that defendant had committed larceny before, is not ground for a new trial, where it was not shown that said statements had any influence on the verdict.—*State v. Cross* (Iowa) 64 N. W. 614.

[c] (Iowa; 1896.)

On a trial for rape the jury may consider the mental capacity of prosecutrix, her age, and her demeanor, as exhibited during the trial.—*State v. Philpot* (Iowa) 66 N. W. 730.

[d] (Iowa; 1896.)

In a prosecution for the illegal sale of liquor, the fact that one juror, while the jury were in deliberation, stated to two others that he knew that defendant had sold liquor, as he had purchased it, is not ground for the reversal of a conviction, where the jurors who heard the statement testified that they did not consider it in arriving at the verdict.—*State v. Wright* (Iowa) 68 N. W. 440.

§ 170. Manner of arriving at verdict.

(Iowa; 1895.)

Misconduct of the jury cannot be shown by affidavits alleging that the jurors did not consider expert testimony, and that a juror said that, if a verdict of guilty was brought in, the court would set it aside if it was not right, and that another juror relied upon the judgment of others in agreeing upon the verdict.—*State v. Landerbeck* (Iowa) 65 N. W. 158.

§ 171. Coercing agreement.

(Wis.; 1895.)

After a jury had failed to agree, the court informed them that they should reason together, and arrive at some kind of a verdict,

and, if they wanted no instructions on the law, to continue to deliberate till they agreed on a verdict. *Held* not improper as being a threat to keep the jury until they agreed, or as expressing a wrong opinion on the law or the facts, or as expressing an opinion on a fact which was wholly for the jury.—*Odette v. State* (Wis.) 62 N. W. 1054.

90 Wis. 258.

XVII. CUSTODY AND CONDUCT OF JURY.

How misconduct shown of record, see post, § 208.

§ 172. Officer in charge.

[a] (Mich.; 1895.)

It is within the discretion of the trial court to direct the jury to remain in the custody of the officer during the trial.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

[b] (Mich.; 1896.)

The fact that one of the officers in charge of the jury was a witness in the case did not necessarily affect defendant's right to a new trial.—*People v. Beverly* (Mich.) 66 N. W. 379.

[c] (Mich.; 1896.)

During the trial the jurors, when on the streets, were attended by a sworn officer, and an officer not sworn; and such officers communicated with them, to the extent of saying "Good morning," and supplying their wants. *Held* not to entitle defendant to a new trial.—*People v. Beverly* (Mich.) 66 N. W. 379.

§ 173. Separation of jury.

[a] (Iowa; 1896.)

Under Code, § 4434, providing that the jurors may, before the final submission of the cause, separate, except where one of the parties objects, it is error to permit a jury to separate against defendant's objection.—*State v. Garrity* (Iowa) 67 N. W. 92.

[b] (Iowa; 1896.)

Under Code, § 4442, requiring the jury in a criminal case to be kept together after a cause has been submitted for deliberation, the fact that they were not kept together is not ground for a new trial, if defendant was not injured thereby.—*State v. Wright* (Iowa) 68 N. W. 440.

[c] (S. D.; 1895.)

Where the jury in a criminal case, after retiring, were taken into the courthouse yard, by reason of a fire in the courthouse, and there mingled with the crowd for about five minutes, a new trial should be granted.—*State v. Church* (S. D.) 64 N. W. 152.

§ 174. Misconduct.

[a] (Iowa; 1896.)

A conviction cannot stand where the jury sent one of its members to ask the bailiff how long they would have to stay out if they did not agree on a verdict, and the bailiff told the jurors that the judge said they would have to stay until Monday morning unless they agreed sooner; Code, § 4442, providing that the bailiff shall not speak to the jury, unless to ask if they have agreed on their verdict.—*State v. La Grange* (Iowa) 68 N. W. 557.

[b] (Iowa; 1896.)

Statement of jurors that they were influenced by what the bailiff said, in agreeing on a verdict, cannot be given any weight.—*State v. La Grange* (Iowa) 68 N. W. 557.

§ 175. — Reading newspaper.

(Iowa; 1894.)

Under Code, § 4453, providing that the jury may take with them notes of the testimony taken by themselves, but none taken by any other person, the taking into the jury room,

and the perusal by members of the jury, of newspapers containing reports of the evidence and the arguments of counsel, and praising the arguments for the state, and criticising, in general, the failure of courts to bring criminals to justice, is ground for reversal.—*State v. Walton* (Iowa) 61 N. W. 179.

92 Iowa, 455.

§ 176. — Use of liquor.

(Neb.; 1895.)

A verdict will not be set aside because a juror had liquor in his possession before the jury were sworn; it not being shown that he was intoxicated, or partook of the liquor, after being accepted as a juror.—*Carleton v. State* 61 N. W. 699, 43 Neb. 373.

§ 177. — Cautioning jury.

(Minn.; 1895.)

It was proper for the court, in a criminal case, to speak of rumors affecting the conduct of one of the jury, and admonish the jury as to a repetition of the misconduct.—*State v. Floyd* (Minn.) 63 N. W. 1096.

61 Minn. 467.

§ 178. — Waiver of objections.

(Minn.; 1895.)

Where defendant, on being informed of rumors concerning alleged misconduct of one of the jury, did not move for a dismissal of the jury, he cannot complain that the court did not dismiss them.—*State v. Floyd* (Minn.) 63 N. W. 1096.

61 Minn. 467.

§ 179. Attending church in body.

(N. D.; 1896.)

Where, before the close of the trial, the jury, by order of court, made with consent of counsel, were permitted to attend church on a certain day, defendant could not urge as a ground for new trial that the tendency of the sermon was prejudicial to him, it being conceded that the discourse was not delivered with any intention of influencing the jury, and was an ordinary emanation from a Christian pulpit.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

XVIII. VERDICT.

Directing verdict, see ante, § 153.

In particular prosecutions, see "False Pretenses," § 7; "Homicide," § 44; "Larceny," § 12.

§ 180. Construction and effect.

(Iowa; 1895.)

An acquittal of assault with intent to inflict great bodily injury, by a finding of guilty of an assault only, is not in legal effect an acquittal of the lower degree of simple assault, on the ground that it is a practical finding that the blow admitted to have been struck was not unlawful, and a battery, and hence that there could have been no assault under the admitted facts.—*State v. Cody* (Iowa) 62 N. W. 702.

§ 181. Several counts.

(Iowa; 1895.)

A verdict of guilty of unlawfully selling intoxicating liquors is not illegal because, instead of a separate verdict on each count, the court submits only the two forms of guilty and not guilty, and the verdict rendered is, "Guilty on the first, second, and fourth counts of the information."—*State v. Hopkins* (Iowa) 62 N. W. 656.

§ 182. Sufficiency.

[a] (Wis.; 1895.)

Under Rev. St. § 4449, making the "willful conversion" of floating logs larceny, convic-

tion may be based on a verdict omitting the word "feloniously" therefrom.—*State v. Fackler* 64 N. W. 1029, 91 Wis. 418.

[b] (Wis.; 1896.)

An information in the first count charged embezzlement, and, in the second, larceny of the same sum. The state elected to proceed on the count for embezzlement, and was granted leave to amend, and a new count was added, charging embezzlement in different language. The verdict was guilty of "embezzlement" as charged in the "second" count. *Held*, that the verdict was sufficiently certain, and showed that the added count for embezzlement was intended.—*Tandy v. State* (Wis.) 69 N. W. 160.

XIX. JUDGMENT, SENTENCE, AND COMMITMENT.

Instructions as to punishment, see ante, § 143.

Invalidity of conviction, effect as prior jeopardy, see ante, § 35.

Judgment on appeal, see post, §§ 234-240.

Modification of judgment or sentence on appeal, see post, § 238.

Commutation of sentence, see "Pardon."

Dissolution of marriage by sentence to life imprisonment, see "Marriage," § 6.

In prosecutions for illegal liquor sales, see "Intoxicating Liquors," § 41.

§ 183. Validity.

(Neb.; 1897.)

Where the jury adjudges the accused not guilty as charged, though it adjudges him guilty of another crime, the sentence pronounced is absolutely void.—*In re McVey* (Neb.) 70 N. W. 51.

§ 184. Jurisdiction and power to sentence.

[a] (Mich.; 1895.)

The failure to ask, in sentencing one convicted of murder in the second degree, if he had aught to say why sentence should not be pronounced against him, is not reversible error.—*People v. Palmer* (Mich.) 63 N. W. 656. 105 Mich. 568.

[b] (Neb.; 1895.)

A prisoner was sentenced to be executed on a certain day, and in the meantime remain in solitary confinement. On the following day the sentence was set aside, and a later day fixed for execution. *Held* that, since the confinement was no part of the sentence, the second sentence was not void on the ground that the punishment first fixed had been suffered in part before the second was pronounced.—*McGinn v. State*, 65 N. W. 46, 46 Neb. 427.

§ 185. Statement of accused before pronouncing sentence.

(Neb.; 1895.)

A district court, in pronouncing judgment against one convicted of felony, is not limited to the question prescribed by Crim. Code, § 495, whether the person convicted has anything to say why judgment should not be pronounced, and hence could ask how many terms the prisoner had already served in the penitentiary.—*Tracey v. State* (Neb.) 64 N. W. 1069, 46 Neb. 361.

§ 186. Necessary recitals in judgment.

[a] (Iowa; 1894.)

A judgment which recites that defendant, having been convicted of a certain crime, and having been informed of the matters in the indictment, of his plea, and the verdict thereon, was brought in to receive sentence, and, no sufficient cause being shown why sentence should not be pronounced, "it is therefore adjudged and ordered that defendant be confined," etc., is sufficient, though the court did not expressly enter therein that defendant was

guilty of the crime of which he was convicted.—*State v. Cook* (Iowa) 61 N. W. 185.

92 Iowa, 482.

[b] (Iowa; 1896.)

The record showed a trial and a verdict of guilty; that defendant's motion to set aside the verdict and for a new trial was overruled; that afterwards defendant, being present, was informed of the nature of the indictment, his plea, and the verdict of the jury; and that, no legal cause being shown against the same, it was ordered and adjudged that defendant be imprisoned, etc. *Held*, that the judgment was not open to the objection that it was insufficient because there was no finding of guilty by the court. *State v. Cook* (1894) 61 N. W. 185, 92 Iowa, 483, followed.—*State v. Rudd*, 66 N. W. 748.

§ 187. Excessive punishment.

[a] (Neb.; 1895.)

In the absence of an abuse of discretion, the sentence imposed by the trial court, which is within limit by law, will not be disturbed on appeal.—*Wright v. State* (Neb.) 63 N. W. 147. 45 Neb. 44.

[b] (S. D.; 1895.)

The imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence void.—*In re Taylor* (S. D.) 64 N. W. 253.

§ 188. Place of imprisonment.

[a] (Mich.; 1895.)

A sentence of confinement in a certain prison is subject to conditions imposed by law, at the time of the sentence, for the transfer of prisoners from one prison to another.—*Rich v. Chamberlain* (Mich.) 62 N. W. 584.

[b] (Mich.; 1895.)

A sentence of confinement in the state prison is subject to conditions imposed by law, at the time of the sentence, for the transfer of female convicts to the Detroit House of Correction. *Rich v. Chamberlain* (1895) 62 N. W. 584, followed.—*Rich v. Chamberlain*, 65 N. W. 235.

[c] (Mich.; 1895.)

Pub. Acts 1893, No. 8, approved February 24, 1893, provides that any person selling liquor in any of the waters within the jurisdiction of the state, outside of the boundaries of any city, village, or town, may be imprisoned in the county jail. Pub. Acts 1893, No. 118, approved May 26, 1893, provides that courts may sentence to the state house of correction and branch of the state prison in the Upper Peninsula all persons convicted, as is or may be provided by law for sentencing prisoners to any of the other prisons of the state. *Held*, that a person convicted under the former act may be sentenced to imprisonment in the house of correction and branch state prison.—*People v. Smith* (Mich.) 65 N. W. 561.

§ 189. Modification of sentence.

(N. D.; 1895.)

The trial court could not, after imposing a definite sentence of imprisonment, which the judgment provided should begin on the day on which the sentence was imposed, postpone the day at which the imprisonment should commence.—*In re Markuson* (N. D.) 64 N. W. 939, 5 N. D. 180.

§ 190. Suspension of sentence.

(Wis.; 1895.)

A court has no power to suspend execution of a sentence, except as incident to a writ of error or on some other legal ground; and having sentenced defendant to pay a fine, and to stand committed till it was paid, not exceeding six months, the term of imprisonment for failure to pay the fine commenced at once; and where the court without legal cause suspended execution of the sentence till further order, and no further order was made till after expira-

tion of the six months, defendant could not thereafter be committed, though the fine was not paid.—*In re Webb*, 62 N. W. 177, 89 Wis. 354.

§ 191. Stay of execution—Pendency of appeal.

(Minn.; 1895.)

When an appeal involves human life, a stay of execution should be granted until the appeal can be heard and determined, if the court has a reasonable doubt whether some of the assignments of error have merit.—*State v. Hayward* (Minn.) 64 N. W. 90, 62 Minn. 114.

XX. NEW TRIAL.

Denying motion, appealable order, see post, § 200.

Discretion of court, see post, § 218.

For misconduct of jury, see ante, § 174.

—of officer in charge of jury, see ante, § 172.

Refusal to allow time to argue motion, see ante, § 80.

Review of errors not assigned on motion for, see post, § 230.

Right of defendant to be present on hearing of motion, see ante, § 57.

§ 192. Time of making motion.

(Mich.; 1897.)

Under How. Ann. St. § 9576, stating that the court in which indictment is tried may at the same term, or at the next term thereafter, on motion of defendant, grant a new trial, jurisdiction to grant same on motion made 7½ months after conviction, 3 full terms having intervened, is not saved by order entered at date of conviction granting 90 days to move for new trial, order entered over 100 days later extending time 45 days from the expiration of the 90 days, order within the 45 days extending time 60 days, and order at expiration of such time again extending 60 days for such purpose; no reason appearing why motion might not have been made and disposed of within the statutory time, the bench being occupied by a judge having jurisdiction to act, though the regular judge was away, and the orders not showing consent of the prosecuting attorney, and it not appearing that the last order extending time was made by his assent, unless his silence gave assent.—*Frazer v. Chapin* (Mich.) 70 N. W. 1042.

§ 193. Affidavits.

[a] (Iowa; 1896.)

Affidavits showing that, while the jury was deliberating on its verdict in a criminal case, portions of the Code in regard to the crime were read to the jury, and explained by one or more of its members, do not show facts from which prejudice will be presumed, the verdict being in harmony with the charge.—*State v. Whalen* (Iowa) 68 N. W. 554.

[b] (Iowa; 1896.)

The weight which jurors gave to the reading of portions of the Code after retiring, and the explanation thereof by one of their members, cannot be shown by any statement of the jurors.—*State v. Whalen* (Iowa) 68 N. W. 554.

[c] (Neb.; 1895.)

The fact that defendant's affidavit, in support of his motion for new trial, as to misconduct of the jury, was uncontroverted, did not require the court to consider it true, where it was not corroborated.—*Tracy v. State*, 64 N. W. 1069, 46 Neb. 361.

§ 194. — Counter affidavits.

(Minn.; 1896.)

The defendant, in his affidavit in support of his motion for new trial, charged his attorney, who conducted his defense, with falsely

and fraudulently neglecting to introduce certain material evidence, as requested by the defendant, and with making false representations to him as to what a certain witness would testify. *Held*, that the affidavit of such attorney was admissible on behalf of the state to disprove such charge.—*State v. Madigan* (Minn.) 68 N. W. 179.

§ 195. Misconduct of prosecuting attorney.

(Mich.; 1895.)

A new trial will not be granted because of improper remarks of the prosecuting attorney, unless they were so clearly outside the evidence and line of legitimate argument that any reasonable person would conclude that the jury were prejudiced thereby.—*People v. Conley* (Mich.) 64 N. W. 325.

§ 196. Misconduct of bystanders.

(Neb.; 1895.)

It was no ground for new trial that, on the completion of the county attorney's argument, some of the bystanders applauded, where the applause was quickly suppressed by the judge, and those engaged in it rebuked.—*Debney v. State*, 64 N. W. 446, 45 Neb. 856.

§ 197. Disqualification of jurors.

(Neb.; 1894.)

One who accepts a juror shown by his examination to be disqualified, on account of an opinion formed from a knowledge of the facts involved, cannot afterwards allege the prejudice of such juror as ground for a new trial.—*Murphy v. State*, 61 N. W. 491, 43 Neb. 34.

§ 198. Newly-discovered evidence.

[a] (Iowa.)

A new trial in a criminal case will not be granted on the ground of newly-discovered evidence.—(1895) *State v. Burgor*, 62 N. W. 696; (1896) *Same v. Harris*, 66 N. W. 728; (1896) *Same v. King*, Id. 735; (1896) *Same v. Graff*, Id. 779.

[b] (Iowa; 1897.)

The statute does not make newly-discovered evidence a cause for granting a new trial in criminal cases.—*State v. Cater* (Iowa) 69 N. W. 880.

Discretion of court, see post, § 218.

§ 199. — Diligence.

(Iowa; 1896.)

An affidavit for a new trial stated that defendant was prejudiced by the testimony of a confederate in the crime, who was brought from the penitentiary to testify for the state; that neither defendant nor his counsel was permitted to see or converse with the witness; that the witness had made certain statements which would tend to impeach his testimony, and which were unknown to defendant at the time of the trial. *Held*, that the showing was insufficient, there being no claim that defendant or his counsel attempted to see or talk with the witness named.—*State v. Hall* (Iowa) 66 N. W. 725.

XXI. APPEAL AND ERROR.

Stay of execution pending appeal, see ante, § 191.

Appeal in bastardy cases, see "Bastardy," § 11.

Costs on appeal, see "Costs," § 35.

1. IN GENERAL—JURISDICTION.

§ 200. Appealable order.

(Wis.; 1896.)

An order denying a motion for a new trial, made after judgment (Rev. St. § 4719), is not a final judgment, nor an order in the nature of a final judgment. *Pinney and Winslow, JJ.*,

dissenting.—*Jackson v. State* (Wis.) 66 N. W. 393.

92 Wis. 422.

§ 201. Certiorari.

(Mich.; 1896.)

A writ of certiorari will not be granted to review the action of a lower court in refusing to quash an indictment, prior to the final disposition of the case in the trial court.—*People v. Thompson* (Mich.) 66 N. W. 478.

§ 202. Appeal from inferior courts.

(Iowa; 1896.)

Code, §§ 543, 546, give police judges in all criminal cases the jurisdiction vested in justices of the peace, and provide for appeals in like manner as from judgments of a justice. Section 4697 provides for appeals to the district court by defendants in criminal cases tried before justices, and such section is by section 4707 made applicable to police courts. Section 4705 relates to criminal cases tried in the district court on appeal, and provides that either party may appeal to the supreme court in the same manner as in prosecutions by indictment. *Held*, that a prosecution for the violation of an ordinance which imposes a fine for running conveyances for hire, without a license, is a "criminal case"; and hence, where a defendant convicted in police court under such ordinance appeals to the district court, and is there acquitted, the city may appeal to the supreme court.—*City of Burlington v. Unterkircher* (Iowa) 68 N. W. 795.

(Neb.; 1895.)

Where a justice was without jurisdiction, the district court did not, on appeal, acquire jurisdiction.—*Keeshan v. State*, 64 N. W. 695, 46 Neb. 155.

(Wis.; 1896.)

Under Laws 1895, c. 6, creating the police court of the city of Milwaukee, and making it a court of record; and section 16, vesting in the municipal court for the city and county of Milwaukee appellate jurisdiction to review all judgments entered in the police court,—a judgment rendered in such court cannot be taken directly to the supreme court for review on appeal or writ of error. *City of Milwaukee v. Simons* (1896) 67 N. W. 922, 93 Wis. 576, followed.—*City of Milwaukee v. Weiss*, 68 N. W. 390, 93 Wis. 653.

(Wis.; 1897.)

Appeal from order of a municipal court (with jurisdiction of a justice of the peace) binding over to keep the peace one arrested on its "peace warrant," lies to the circuit court, whither Rev. St. § 4827, directs appeals from final order of a magistrate binding over one on a "proceeding" under chapter 196 "to prevent the commission of crime," and not to the county court, to which Laws 1891, c. 99, provides for appeals "from judgments" of justices in "criminal cases."—*Weisselman v. State* (Wis.) 70 N. W. 169.

2. PRACTICE.

Reversal for failure to file brief, see post, § 237.

§ 203. Notice of appeal.

(Iowa; 1896.)

Appeal in a criminal case cannot be entertained, the notice of appeal not being certified to or otherwise identified by the clerk of court, or shown to have been served on him.—*Town of Manning v. Wichmer* (Iowa) 66 N. W. 756.

§ 204. Assignment of errors.

(Neb.; 1895.)

An assignment of error to the refusal of a group of instructions will not be reviewed if the refusal of any of the instructions was

proper.—*Thompson v. State* (Neb.) 62 N. W. 1069.

44 Neb. 366.

(Neb.; 1897.)

Where a motion states several distinct grounds for a new trial, an assignment that the court erred in denying the motion is too indefinite.—*Ilans v. State* (Neb.) 69 N. W. 838.

§ 205. On appeal from inferior court.

(S. D.; 1896.)

The sworn complaint required in all prosecutions before a justice (Comp. Laws, § 6147, is jurisdictional in all stages of the prosecution, and a defendant cannot be tried in the circuit court on an appeal on questions of both law and fact, unless such complaint has been certified up by the justice.—*State v. Walker* (S. D.) 69 N. W. 586.

(S. D.; 1896.)

A defendant is entitled, on appeal from a conviction before a justice on questions of both law and fact, to have all papers filed in the cause transmitted to the circuit court (Comp. Laws, § 6182), and to the benefit of all legal questions raised on the pleadings in the justice court.—*State v. Walker* (S. D.) 69 N. W. 586.

3. RECORD.

Presumption in absence of any showing of record, see post, § 220.

Review of particular points in absence of certain matters from record, see post, §§ 223-226.

Showing in record as to notice, see post, §§ 213, 214.

§ 206. Time of filing.

(Iowa; 1895.)

A party has no right, without the court's permission, to file a transcript and amended abstract after the cause has been submitted on appeal.—*State v. Thompson* (Iowa) 64 N. W. 419.

§ 207. Authentication of transcript and bill of exceptions.

(Iowa; 1895.)

What purports to be a transcript of evidence on appeal cannot be considered, unless the certificate of the clerk of the district court is attached thereto.—*State v. Tower* (Iowa) 64 N. W. 764.

(Neb.; 1894.)

A bill of exceptions must be certified as being a part of the record, or as being the original bill of exceptions in the cause, in order that the matters therein may be considered on review.—*Wax v. State*, 61 N. W. 117, 43 Neb. 18.

§ 208. How matters brought into record.

(Iowa; 1896.)

Misconduct of the jury and its bailiff, not occurring in the presence of the court or judge, is properly shown and made of record by affidavits filed with motion for new trial.—*State v. La Grange* (Iowa) 68 N. W. 557.

(Iowa; 1897.)

Improper remarks of the county attorney will not be reviewed where shown only by affidavits not made part of the record by bill of exceptions or otherwise.—*State v. Bigelow* (Iowa) 70 N. W. 600.

§ 209. — Bringing up evidence.

(Iowa; 1896.)

Though the rule requiring printed abstracts and arguments is suspended, and leave given to file typewritten abstracts, when it is made to appear, in a criminal case, that appellant is unable to pay for the printing, this does not suspend the requirement that the case shall

be abstracted.—*State v. Warner* (Iowa) 67 N. W. 250.

§ 210. — By incorporation in bill of exceptions.

[a] (Iowa; 1895.)

The bill of exceptions in another case in the lower court cannot be reviewed unless it is made part of the record by proper bill of exceptions.—*State v. Lee* (Iowa) 64 N. W. 284

[b] (Iowa; 1896.)

Where it is assigned as error that the judge did not caution the jury as provided by Code, § 4435, such omission should be set out in a bill of exceptions.—*State v. Harris* (Iowa) 66 N. W. 728.

[c] (Iowa; 1896.)

Remarks of the court during the trial cannot be shown by affidavit, but should be made of record by bill of exceptions signed by the judge, or, in case of his refusal to sign it, by two or more attorneys, officers of the court, or disinterested bystanders, who should swear to it, after which it should be filed.—*State v. La Grange* (Iowa) 68 N. W. 557.

[d] (Mich.; 1896.)

Requests to charge, which are added to the bill of exceptions without authority, and not certified to by the court, cannot be considered.—*People v. Macard* (Mich.) 67 N. W. 968.

§ 211. — Affidavits.

[a] (Iowa; 1896.)

Affidavits attached to a motion for new trial in a criminal case, and filed with it, are part of the record, and may be certified by transcript on appeal; Code, § 4482, declaring that "all papers pertaining to the cause and filed with the clerk" are to be deemed parts of the record, and making it the duty of the clerk, when an appeal is taken, "to make out a full and perfect transcript of all the papers in the case on file in his office," except papers returned by an examining magistrate.—*State v. Whalen* (Iowa) 68 N. W. 554.

[b] (Iowa; 1896.)

Where the abstract of appellant in a criminal case purports to be full and complete, and the state files an additional abstract, stating that the two together present the record fully, they will be held to be complete and correct, though in a subsequent abstract the state denies that affidavits filed on motion for new trial were ever made of record by bill of exceptions or otherwise; that denial being evidently based on the erroneous theory that the filing of the affidavits did not make them of record.—*State v. Whalen* (Iowa) 68 N. W. 554.

[c] (Neb.; 1895.)

Affidavits used as evidence on the trial will not be considered on appeal unless preserved and identified by bill of exceptions.—*Wright v. State* (Neb.) 63 N. W. 147.
45 Neb. 44.

[d] (Neb.; 1897.)

Affidavits for continuance will not be considered unless embodied in the bill of exceptions.—*Hans v. State* (Neb.) 69 N. W. 838.

§ 212. What record must show.

(Minn.; 1894.)

Assignments of error will not be reviewed where the return fails to show any order or judgment on a conviction.—*State v. Anderson* (Minn.) 61 N. W. 448.

59 Minn. 484.

§ 213. — As to notice of appeal and jurisdiction.

[a] (Iowa; 1895.)

Where it does not appear from the record that an appeal has been taken, the supreme court has no jurisdiction of the case.—*State v. Forsythe* (Iowa) 64 N. W. 265.

[b] (Iowa; 1896.)

Where the record does not show any notice of appeal served, the case will be dismissed.—*State v. McNamara* (Iowa) 66 N. W. 192.

[c] (Iowa; 1896.)

An appeal in a criminal case, submitted on printed abstracts and arguments, will be dismissed, when there is no showing that an appeal has been taken.—*State v. Benard* (Iowa) 68 N. W. 433.

§ 214. — As to arraignment and pleas.

(S. D.; 1895.)

Where the record shows that defendant announced himself ready for trial, and went to trial without objection as on a plea of not guilty, it is no ground for reversal that it fails to show that defendant was arraigned or pleaded.—*State v. Reddington* (S. D.) 64 N. W. 170.

§ 215. Contradicting or impeaching record.

[a] (Iowa; 1895.)

In the absence of a denial of appellee's amended abstract, or a reaffirmation of appellant's abstract, the amended abstract will be deemed correct, and the court will not resort to the transcript.—*State v. Seery* (Iowa) 64 N. W. 631.

[b] (S. D.; 1897.)

The bill of exceptions, unless corrected in the manner provided by statute (Comp. Laws, § 7443), is conclusive upon the supreme court.—*State v. Dorman* (S. D.) 70 N. W. 848.

4. REVIEW.

§ 216. In general.

[a] (Iowa; 1895.)

Where, on appeal from a conviction, the record is fully presented, without briefs or arguments, the court will examine the record to see whether it sustains the conviction.—*State v. Cox* (Iowa) 65 N. W. 304.

[b] (Iowa; 1895.)

An abstract and argument, filed after submission of a case on a transcript of the record, will not, except on a proper showing, be considered.—*State v. Windahl* (Iowa) 64 N. W. 420.

[c] (Mich.; 1895.)

The denial of a motion in arrest of judgment will be reviewed on appeal, though the trial judge assigned no reason for his ruling.—*People v. Rathbun* (Mich.) 63 N. W. 973.
105 Mich. 699.

[d] (Neb.; 1896.)

When a word used by a witness has a signification so generally known that it must have been understood by the triors of fact, an appellate court will not disregard such signification, or treat the word as unintelligible, merely because, from motives of decency and propriety, lexicographers have ignored it.—*Bruce v. State* (Neb.) 67 N. W. 454.
48 Neb. 570.

§ 217. Discretion of trial court.

[a] (Iowa; 1896.)

The discretion of the court in assigning cases with a view to an orderly and timely disposition of the term business will not be controlled.—*State v. King* (Iowa) 66 N. W. 735.

[b] (Mich.; 1895.)

It is within the discretion of the court to refuse leave for a continuance to obtain counsel.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

§ 218. — Ruling on motion for new trial.

[a] (Minn.; 1895.)

Where the affidavits presented on motion for new trial as to alleged misconduct of the

prosecuting officer raised questions of fact, the determination of such questions by the trial court will not be disturbed.—*State v. Floyd* (Minn.) 63 N. W. 1096.

61 Minn. 467.

[b] (Neb.; 1894.)

Where the evidence by which it is sought to impeach a verdict on account of the prejudice of a juror, subsequently discovered, is conflicting, an order denying a new trial will not, as a rule, be disturbed on appeal.—*Murphy v. State*, 61 N. W. 491, 43 Neb. 31.

[c] (Neb.; 1895.)

Refusing a new trial on the ground of newly-discovered evidence is not an abuse of discretion, when the statements in the affidavit on which it is based are contradicted by the evidence of the proposed witness.—*Housh v. State* 61 N. W. 571, 43 Neb. 163.

[d] (Neb.; 1895.)

Where a new trial is asked on the ground of misconduct of jurors, and the evidence is conflicting as to the existence of such misconduct, the finding of the trial court will not be disturbed.—*Carleton v. State* (Neb.) 61 N. W. 699, 43 Neb. 373.

[e] (Neb.; 1895.)

The finding of the trial court, on a motion for new trial, as to alleged misconduct of jurors, will not be disturbed, where the evidence was conflicting.—*McMahon v. State* 64 N. W. 694, 46 Neb. 166.

[f] (Neb.; 1895.)

The refusal to set aside the verdict because the prosecuting attorney talked with one of the jurors will not be disturbed where the conversation had no relation to the prosecution.—*Lindsay v. State*, 64 N. W. 716, 46 Neb. 177.

§ 219. Presumptions.

[a] (Iowa; 1895.)

In a case submitted without argument on a transcript of a part of the record, where none of the evidence offered on the trial is shown, it will be presumed that motions to direct a verdict, and for a new trial, founded upon objections relating to the evidence, were properly overruled.—*State v. Kennedy* (Iowa) 62 N. W. 673.

[b] (Iowa; 1895.)

Where the bill of exceptions recites that the jury was waived, and the record shows that a verdict of guilty was returned and the "jury discharged," and the motion for a new trial was directed to "the instructions of the court to the jury," and "to the verdict of the jury," it will not be assumed that a jury trial was waived.—*State v. Ingraham* (Iowa) 65 N. W. 152.

[c] (Iowa; 1895.)

An appellate court cannot say that defendant was prejudiced because, in the jury's hearing, the trial judge gave as a reason for excluding one jointly indicted that, when in court on another day, he procured a bottle of liquor.—*State v. Weems* (Iowa) 65 N. W. 387.

[d] (Mich.; 1896.)

A complaint before a justice showed that it was made on complainant's information and belief only; but the warrant recited that the complaining witness "this day made complaint in writing and on oath," etc., and that, on examination of such complainant "by me, the said justice, it appears to me, the said justice, that said offense has been committed," etc. *Held*, that the supreme court could not say that there was no other testimony taken by the justice before the warrant was issued than that set out in the complaint.—*People v. Whipple* (Mich.) 66 N. W. 490.

[e] (Minn.; 1895.)

After the court refused, at the close of the trial, to admit evidence raising a new issue, defendant's counsel asked whether it was a question of order of proof, and the judge answered

"No." The offer of proof was not renewed, however, and the prior remarks of the judge show that the question was as to order of proof and defendant's failure to offer the evidence earlier. *Held*, that the supreme court would not presume that the judge in his discretion admitted the evidence out of order, and subsequently rejected it on another ground.—*State v. Hayward* (Minn.) 65 N. W. 65.

62 Minn. 474.

[f] (Neb.; 1896.)

There is no presumption that the district judge, without sufficient justification, required witnesses, though relations of the prisoner, to leave the immediate vicinity of the accused during the progress of the trial; neither does the mere fact that this was done in an unusual manner justify the assumption that thereby prejudice resulted.—*Hoover v. State* (Neb.) 66 N. W. 1117.

48 Neb. 184.

[g] (Neb.; 1896.)

From the mere fact that the word "purposely" was interlined with a pen in a typewritten information upon which a preliminary examination was had, it is not a necessary inference that the interlineation was made after or during the preliminary examination, and a plea in abatement sustained only by such assumption was properly overruled in the district court.—*Hoover v. State* (Neb.) 66 N. W. 1117.

48 Neb. 184.

[h] (S. D.; 1896.)

On appeal it will be presumed in favor of an order of the trial court overruling an unsupported motion to set aside the information that such information was not filed until a preliminary examination had either been held, or waived by defendant, as required by Laws 1895, c. 64, § 8.—*State v. La Croix* (S. D.) 66 N. W. 914.

§ 220. — In absence of any showing by record.

[a] (Iowa; 1895.)

Where all the reasons for excluding a person jointly indicted from the court room are not in the record, the supreme court will not presume that those not appearing were insufficient to warrant his exclusion.—*State v. Weems* (Iowa) 65 N. W. 387.

[b] (Mich.; 1895.)

Where the record contains none of the papers or proceedings had before the justice who issued the warrant for defendant's arrest, except the complaint, it will be presumed that the evidence authorized the issuing of the warrant.—*People v. Caldwell* (Mich.) 65 N. W. 213.

§ 221. — Necessity of affirmatively showing error.

(N. D.; 1896.)

Where evidence is properly admitted in the case for one purpose, it will not be presumed, in the absence of all showing, that it was considered for a purpose for which it was not proper.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

§ 222. Weight and sufficiency of evidence.

[a] (Iowa; 1895.)

Where the evidence is conflicting as to the identity of the defendant and as to an alibi interposed as a defense, a verdict of guilty will not be disturbed.—*State v. Thorp* (Iowa) 64 N. W. 265.

[b] (Iowa; 1895.)

A verdict on conflicting evidence will not be disturbed on appeal.—*State v. Landierbeck* (Iowa) 65 N. W. 158.

[c] (Minn.; 1896.)

When an issue of fraud is raised by affidavits on a motion for new trial, the decision of the trial court thereon will not be disturbed, if

the evidence reasonably tends to support it.—*State v. Madigan* (Minn.) 68 N. W. 179.

§ 223. Matters not apparent of record.

[a] (Iowa; 1895.)

Refusal of a motion in arrest of judgment cannot be reviewed, the ground for the motion not appearing in the record, but only in the argument.—*State v. Frost* (Iowa) 64 N. W. 401.

[b] (Iowa; 1895.)

An indictment, even if subject to attack on the ground that defendant's wife testified before the grand jury, cannot be attacked on that ground where it does not appear from the record what she testified to, or that she was not there at the instance of defendant.—*State v. Frost* (Iowa) 64 N. W. 401.

[c] (Neb.; 1895.)

An objection that the charge of the information was not included in the complaint on which defendant was arrested will not be reviewed after judgment of conviction, where the complaint is not in the record.—*Wright v. State* (Neb.) 63 N. W. 147.

45 Neb. 44.

[d] (Neb.; 1896.)

An assignment of error for the overruling of a motion for a continuance will not be considered by this court, when the record fails to disclose that such motion was ever passed on.—*Bush v. State* (Neb.) 66 N. W. 638.

47 Neb. 642.

[e] (Wis.; 1896.)

Allowing amendment of an information cannot be reviewed if the record does not show an objection.—*Tandy v. State* (Wis.) 69 N. W. 160.

§ 224. — Objecting to conduct or arguments of counsel.

[a] (Iowa; 1896.)

Remarks of counsel are not available for reversal, unless incorporated in the bill of exceptions.—*State v. Helm* (Iowa) 66 N. W. 751.

[b] (Iowa; 1897.)

Alleged improper remarks of the county attorney will not be reviewed where the record does not show that it contains all the evidence considered by the court below in passing on the alleged misconduct.—*State v. Bigelow* (Iowa) 70 N. W. 600.

[c] (Mich.; 1897.)

Where the record does not show what was said by the prosecuting attorney, exceptions to his argument will not be reviewed.—*People v. Baker* (Mich.) 70 N. W. 431.

§ 225. — Ruling on evidence.

(Neb.; 1896.)

Affidavits presented as evidence on a hearing in the lower court will not be examined on appeal unless embodied in a bill of exceptions.—*Korth v. State*, 65 N. W. 792, 46 Neb. 631.

§ 226. — Review of instructions.

(Iowa; 1895.)

Alleged error in instructions will not be considered unless all the instructions are set out.—*State v. Lauderbeck* (Iowa) 65 N. W. 158.

§ 227. Objections not raised below.

[a] (Iowa; 1895.)

The objection that the attorney for the witness, and not the witness himself, made the claim of personal privilege, cannot be raised for the first time on appeal.—*State v. Weems* (Iowa) 65 N. W. 387.

[b] (Mich.; 1895.)

The objection that a witness' name was not indorsed on the information cannot be taken for the first time on appeal.—*People v. De France* (Mich.) 62 N. W. 709.

104 Mich. 563.

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[c] (Mich.; 1895.)

An objection that there is no evidence of any intent to commit the crime with which defendant is charged comes too late on appeal.—*People v. Smith* (Mich.) 64 N. W. 200.

Objections to evidence, see ante, § 77.

§ 228. Necessity and sufficiency of exceptions.

[a] (Neb.; 1895.)

The admission of evidence will not be reviewed in the absence of an exception taken at the trial.—*Thompson v. State* (Neb.) 62 N. W. 1060.

44 Neb. 366.

[b] (Neb.; 1895.)

When an objection is sustained to a question asked on the examination in chief, the party desiring the evidence should offer to prove the facts sought to be elicited by the question, in order to obtain a review of the ruling.—*Ford v. State*, 64 N. W. 1082, 46 Neb. 390.

§ 229. In absence of evidence or statement of facts.

[a] (Iowa; 1895.)

The sufficiency of the evidence cannot be reviewed, the record not showing that it contains all the evidence.—*State v. French* (Iowa) 65 N. W. 156.

[b] (Neb.; 1895.)

Statements by counsel, made in the course of argument, though contained in the bill of exceptions, cannot be considered as evidence of the facts stated.—*Grossman v. State* (Neb.) 64 N. W. 354, 46 Neb. 21.

§ 230. Errors not assigned on motion for new trial.

[a] (Neb.; 1895.)

Instructions of which no complaint is made by motion for a new trial or in the petition in error will not be reviewed.—*Jolly v. State*, 62 N. W. 300, 43 Neb. 857.

[b] (Neb.; 1895.)

Alleged error in overruling challenges to jurors for cause, not called to the attention of the trial court in the motion for new trial, will not be considered.—*Ford v. State* (Neb.) 64 N. W. 1082, 46 Neb. 390.

[c] (Neb.; 1897.)

The denial of a motion to require the state to elect upon which count of an information it will rely for conviction is reviewable without being assigned as error in the motion for a new trial.—*Hans v. State* (Neb.) 69 N. W. 838.

§ 231. Harmless error.

[a] (Iowa; 1895.)

Where, after one jointly indicted with defendant had taken the stand as a witness for the defense, he was withdrawn by his counsel for consultation, defendant was not prejudiced by the refusal of the court to allow him to take part in the consultation; the witness refusing to answer any questions, on the ground that his answers would tend to criminate him.—*State v. Weems* (Iowa) 65 N. W. 387.

[b] (Mich.; 1895.)

Where defendant places on the stand a witness whose name was indorsed on the information, the failure of the state to call such witness is harmless error.—*People v. Resh* (Mich.) 65 N. W. 99.

[c] (Neb.; 1897.)

Refusal of a continuance, when not an abuse of discretion, is not ground for reversal.—*Fanton v. State* (Neb.) 69 N. W. 953.

[d] (Neb.; 1897.)

A case will not be reversed because of the limitation placed upon the cross-examination of a witness as to his interest or bias, unless the party against whom the witness was called was

probably prejudiced by such limitation.—*Davis v. State* (Neb.) 70 N. W. 984.

[c] (S. D.: 1895.)

Whether the order in which peremptory challenges were made, under direction of court, was that contemplated by statute, is immaterial, where the record shows that defendant accepted the jury before all his peremptory challenges were exhausted.—*State v. Reddington* (S. D.) 61 N. W. 170.

[d] (S. D.: 1895.)

It was not reversible error to overrule a motion to quash an indictment made after plea, for the reason that the name of a witness was omitted therefrom, when such witness was not allowed to testify for the state.—*State v. Isaacson* (S. D.) 65 N. W. 430.

[e] (Wis.: 1895.)

Where the only matter pleaded in abatement was that the accused had not had a preliminary examination, and the proof of such plea consisted of the affidavit of the accused and the record in court, and the court, without an answer or demurrer being interposed, determined that the plea was not in accordance with the facts, and overruled it, and such determination was sustained by the record, the irregularity was not prejudicial.—*Lester v. State* (Wis.) 64 N. W. 850, 91 Wis. 249.

In instructions, see ante, § 147.

§ 232. — In admission of evidence.

[a] (Iowa: 1894.)

On a criminal trial, error in permitting a witness to testify to a conversation with a person who claimed to represent defendant, without proof that such person did represent him, is cured by subsequent evidence that defendant admitted that the person represented him.—*State v. Oeder* (Iowa) 61 N. W. 190, 92 Iowa, 767.

[b] (Iowa: 1894.)

Error in admitting the testimony of an abstractor of titles to show title in a married woman to the building which defendant was charged with attempting to burn was not prejudicial where, without it, such title was sufficiently shown by deed and by the testimony of her husband.—*State v. Tennehom* (Iowa) 61 N. W. 193, 92 Iowa, 551.

[c] (Iowa: 1895.)

Where the officer's testimony covering the contents of his return on the warrant of arrest is uncontradicted, the fact that the warrant and return were improperly admitted in evidence is immaterial.—*State v. Seery* (Iowa) 64 N. W. 631.

[d] (Iowa: 1896.)

In a prosecution for fraudulent banking, defendant, on cross-examination, was asked, as touching his expenditures, if there had not been a hasty proceeding against him a few years before that cost him a great deal of money to settle. After the examination proceeded for some time, the court struck out the testimony as too remote. *Held* that, though the evidence should not have been offered, defendant was not prejudiced.—*State v. Yetzer* (Iowa) 66 N. W. 737.

[e] (Iowa: 1896.)

Where a witness for the state, on cross-examination, denies having made a certain statement out of court, and a witness for defendant afterwards testifies that such witness made such statement, it is not prejudicial error to allow the state's witness to again deny it.—*State v. Rudd* (Iowa) 66 N. W. 748.

[f] (Iowa: 1896.)

Error in admitting evidence that before the homicide defendant's reputation as an orderly and peaceable man was bad, and that that of deceased was good, in the absence of prior evidence by defendant as to his good reputation, was cured by a charge to "disregard it, as hav-

ing no weight whatever."—*State v. Helm* (Iowa) 64 N. W. 751.

[g] (Iowa: 1896.)

Permitting a witness who was not examined before the grand jury, whose name was not indorsed on the indictment, and whose testimony was not returned with the indictment, to testify, without proof that notice was given, as required by Code, § 4421, that he would be offered as a witness, is harmless error; the prosecution being for seduction; defendant's intercourse with prosecutrix, as well as the fact that he was the father of the child, being admitted; and his contention being only that there was no seduction; witness' testimony being merely that, when he told defendant that prosecutrix had a child and needed assistance, defendant, who was laboring for the child's support, said "he was going to do something for her next week."—*State v. Whalen* (Iowa) 68 N. W. 554.

[h] (Mich.: 1895.)

On a trial for assault, defendant was asked if he had not been convicted before for assault on the complaining witness, and on his admission that he had the prosecuting attorney asked other questions in regard to the details of that assault, but the court held them inadmissible, and instructed the jury that the sole use for which such conviction was admitted was to affect defendant's credibility as a witness. *Held*, that defendant had no cause for complaint.—*People v. Conley* (Mich.) 64 N. W. 325.

[i] (Wis.: 1895.)

A witness for the state in a murder case, after testifying that shortly after the murder the accused gave cartridges belonging to his gun to witness, saying that he was going away, and did not want them, was allowed to testify that he supposed accused thereby meant that he was going "over the road." *Held* that, since Rev. St. § 2829, requires errors not affecting the substantial rights of a party to be disregarded, the error is no ground for reversal.—*Odette v. State* (Wis.) 62 N. W. 1054, 90 Wis. 258.

§ 233. — In exclusion of evidence.

[a] (Iowa: 1895.)

Where, on trial of an indictment for failing to stop a steam engine propelled on a highway on the approach of a person driving on the highway, it appeared that defendant, after stopping the engine, started it again because it was sinking in mud, defendant was not prejudiced by the refusal to permit him to state what effect on the engine the sinking would have.—*State v. Kowolski* (Iowa) 65 N. W. 306.

[b] (S. D.: 1896.)

Error in sustaining an objection to a question is harmless where the witness subsequently answers the question.—*State v. Hughes* (S. D.) 66 N. W. 1076.

[c] (S. D.: 1896.)

The refusal of the court to permit answers to certain questions on cross-examination is not prejudicial error, when, in other parts of the record, and in answer to other questions, the witness has testified fully upon the matters excluded.—*State v. Smith* (S. D.) 67 N. W. 619.

5. DECISION.

§ 234. Affirmance.

[a] (Iowa: 1895.)

After judgment of conviction has been affirmed on appeal, the supreme court cannot reverse an order denying a motion, made after conviction, to appoint an attorney for defendant, to prosecute an appeal.—*State v. Cross* (Iowa) 64 N. W. 614.

[b] (Iowa: 1895.)

A conviction for obtaining property by false pretenses, presented for review on transcripts of the record without argument, will be affirmed where the evidence clearly warranted

the findings.—State v. Cooper (Iowa) 65 N. W. 155.

[c] (Iowa; 1895.)

Where the record does not contain the evidence or instructions, and no error is apparent, the judgment will be affirmed.—State v. Addison (Iowa) 65 N. W. 309.

§ 235. Dismissal.

(Iowa; 1896.)

An appeal in a criminal case will be dismissed where there is no appearance for the appellant, and nothing in the record to show that an appeal has been taken.—State v. Dolezol (Iowa) 68 N. W. 917.

For failure of record to show taking of appeal, see ante, § 213.

§ 236. — Escape pending appeal.

(Iowa; 1894.)

Defendant was convicted in justice court of unlawfully selling intoxicating liquors, and pending appeal, fled to another state. He afterwards appeared in the district court, and demanded a trial. *Held*, that it was proper for the court to overrule a motion to dismiss the appeal.—State v. Colby (Iowa) 61 N. W. 187.

92 Iowa, 463.

§ 237. Reversal.

(Neb.; 1895.)

Ordinarily a conviction in a criminal case will be reversed where the attorney general fails to file a brief because, in his opinion, the evidence is insufficient to sustain a conviction.—George v. State (Neb.) 62 N. W. 1094.

44 Neb. 757.

§ 238. Modification of judgment or sentence pronounced below.

[a] (Iowa; 1896.)

A sentence to imprisonment for three years and nine months, on conviction of the larceny of property of the value of \$23, will not be reduced, where there is evidence in the record rendering it probable that the defendant was concerned in other thefts, and was one of an organization for such purpose.—State v. Hall (Iowa) 66 N. W. 725.

[b] (Neb.; 1896.)

Where no error appears in the record of a criminal case, the supreme court will not reduce a sentence warranted by the statute because of apparent undue severity.—Barney v. State (Neb.) 68 N. W. 636.

[c] (Neb.; 1897.)

Where no error appears, the supreme court will not reduce a sentence warranted by statute because apparently too severe.—Fanton v. State (Neb.) 69 N. W. 953.

[d] (S. D.; 1895.)

Where the judgment imposes a longer term of imprisonment than is authorized, it may, under Comp. Laws, § 7521, be modified on error by substituting the maximum penalty.—State v. Taylor (S. D.) 64 N. W. 548.

§ 239. Remand.

(Neb.; 1895.)

Where a verdict was responsive to each of two counts which together charged but one crime, and the court imposed separate sentences under each, it constituted an irregularity, to cure which the cause would be remanded for judgment, finding defendant guilty of two elements of but one crime.—Griffen v. State, 64 N. W. 966, 46 Neb. 282.

§ 240. — Proceedings below.

(Iowa; 1896.)

Code, §§ 4541–4545, provide that on affirmation the original judgment shall be carried into effect as the supreme court shall direct, and that after a certified copy of its judgment, with instructions, have been remitted,

all proceedings to carry the judgment into effect must be had in the court below. *Held*, that a simple procedendo, stating that the judgment had been affirmed, and directing the court to proceed in execution thereof, was insufficient to authorize forfeiture of defendant's bail for nonappearance.—State v. McInturff (Iowa) 67 N. W. 272.

CROPS.

Mortgage on, see "Chattel Mortgages," § 13.

— future crops, see "Chattel Mortgages," § 8.

Renting on shares, see "Landlord and Tenant," § 64.

Reservation in contract of sale, see "Vendor and Purchaser," § 7.

Right of purchaser at foreclosure sale, see "Mortgages," § 75.

— of tenant to emblements, see "Landlord and Tenant," § 5.

Seizure under thresher's lien, see "Liens," § 4.

Tenancy in common, see "Tenancy in Common," § 1.

[a] (Minn.; 1896.)

A finding that a mortgagor of a crop of grain had an interest therein was not sustained by evidence that he "operated" the land on which it was raised under an agreement with the owner, the terms of which were undisclosed; that part of the grain was hauled by the landowner to his home, and part taken to an elevator, the disposition of the remainder not being shown; that the landowner and the mortgagor called at the elevator to see how much grain was there; and that the former obtained and sold tickets for the stored grain, and out of the proceeds paid a seed-grain note, the maker of which was not named, and threshing bills, and paid the balance to the mortgagor.—Hogan v. Atlantic Elevator Co. (Minn.) 69 N. W. 1.

[b] (Minn.; 1896.)

Where one entitled to the possession of land which had been cultivated by a trespasser for a number of years, entered on the land peaceably in the spring, and without real opposition proceeded to seed the ground, the crop raised thereon belonged to him.—Mercil v. Brouillette (Minn.) 69 N. W. 218.

[c] (N. D.; 1896.)

A mortgagor planted from seed purchased by him, and harvested, threshed, and sold, a crop raised on land owned by another, on which, during seeding time, and for a short time prior thereto, the mortgagor resided with his family. The owner did not reside on the land, and whether he consented to the mortgagor's occupancy was not shown. *Held*, that the question whether the landowner or the mortgagor owned the crop was for the jury.—Elstad v. Northwestern Elevator Co. (N. D.) 69 N. W. 44.

CROSS BILL.

See "Equity," § 46.

CROSS-EXAMINATION.

Of witness, see "Witness," §§ 35–39.

CROSSINGS.

Accidents at, see "Railroad Companies," §§ 28–44.

CROSS INTERROGATORIES.

See "Deposition," § 5.

CRUELTY.

As ground for divorce, see "Divorce," §§ 9, 10.
Cruel or unusual punishments, see "Constitutional Law," § 76.

CURATIVE ACTS.

Affecting foreign acknowledgments, see "Acknowledgment," § 5.
Retrospective legislation, see "Constitutional Law," § 27.

CURATORS.

See "Executors and Administrators"; "Guardian and Ward"; "Insanity."

CURTESY.

See "Dower."

CUSTODIA LEGIS.

Exemption of property, see "Exemptions," § 10.
Expense of caring for property, see "Sheriffs and Constables," § 5.
Property assigned, see "Assignment for Benefit of Creditors," § 21.
—subject to attachment, see "Attachment," § 10.
Replevin of property, see "Replevin," § 3.

CUSTOM AND USAGE.

Effect on negligence, see "Negligence," § 40.

§ 1. Knowledge of custom.

(Neb.: 1896.)
Proof of knowledge is required, to give effect to a custom, unless it is so widely and generally known and so well established as that knowledge thereof may well be presumed.—Union Stock-Yards Co. v. Westcott (Neb.) 66 N. W. 419.

47 Neb. 300.

§ 2. When may be shown.

(Iowa: 1895.)
A custom of railroad companies to build their switches in a certain way is not evidence of want of negligence in a company following the custom, where the customary manner of building is in itself negligent.—Austin v. Chicago, R. I. & P. Ry. Co. (Iowa) 61 N. W. 849. 93 Iowa, 236.

(Iowa: 1896.)
Evidence of a usage or custom is admissible, though it establish a rule different from, but not in contravention of, the general law of

the land.—Milroy v. Chicago, M. & St. P. Ry. Co. (Iowa) 67 N. W. 276.

§ 3. — To explain or modify contract.

(a) (Iowa: 1896.)
Parol evidence is admissible to show that a guaranty in a contract for sale of goods, reciting, "Prices guaranteed against market price to date of shipment," meant, according to business custom and usage, that the purchaser should have the benefit of any decline in prices.—Coulter Manuf'g Co. v. Ft. Dodge Grocery Co. (Iowa) 65 N. W. 875.

(b) (Mich.: 1894.)
Where a lumbering contract provides that payment for cutting the timber is to be made according to the tally of a certain saw-mill, where the logs were to be sawed, dead culls being excluded, the fact that the grading of the mill was higher than was customary among other mills is immaterial.—Brigham v. Martin (Mich.) 61 N. W. 276.

103 Mich. 150.

(c) (Mich.: 1896.)
Where a building contract in express terms calls for doors of a certain thickness, evidence of a custom among carpenters to use doors one-eighth of an inch less in thickness when doors of such thickness were specified, due to the fact that the lumber from which the doors were manufactured lost that much when dressed, is inadmissible to vary the contract, there being no evidence that the custom was general in its application, or that the owner of the building had knowledge of it.—Eaton v. Gladwell (Mich.) 66 N. W. 598.

(d) (Neb.: 1897.)
The business usage of a particular individual is not admissible to interpret a contract between him and another, without proof that the latter knew of such usage.—Gamble v. A. Stanber Manuf'g Co. (Neb.) 69 N. W. 960.

§ 4. Province of court and jury.

(a) (Iowa: 1896.)
How far a usage testified to should modify or control a contract is a question of law.—Milroy v. Chicago, M. & St. P. Ry. Co. (Iowa) 67 N. W. 276.

(b) (Iowa: 1896.)
The mere fact of a conflict in the testimony as to the existence of the usage or custom pleaded does not, as a matter of law, negative such custom; and if plaintiff has produced evidence which, when fairly and reasonably considered, would prove the alleged custom, the question is for the jury, under proper instructions.—Milroy v. Chicago, M. & St. P. Ry. Co. (Iowa) 67 N. W. 276.

CUTTING TIMBER.

See "Adverse Possession," § 13; "Logs and Logging."

Damages for trespass, see "Trespass," §§ 7, 8.
License to cut, see "License," § 1.
Right to costs in action for, see "Costs," § 9.

D.

DAMAGES.

- I. IN GENERAL—NOMINAL DAMAGES, §§ 1, 2.
- II. EXEMPLARY DAMAGES, §§ 3-5.
- III. PROXIMATE AND REMOTE CAUSE, § 6.
- IV. PENALTIES AND LIQUIDATED DAMAGES, §§ 7-9.
- V. MEASURE FOR BREACH OF CONTRACT, §§ 10-22.
 1. In General, §§ 10-13.
 2. Particular Contracts, §§ 14-22.
- VI. MEASURE FOR TORTS, §§ 23-32.
- VII. INTEREST AS ELEMENT OF DAMAGES, § 33.
- VIII. EXCESSIVE AND INADEQUATE DAMAGES, §§ 34-37.
- IX. PRACTICE, §§ 38-52.

Arising from public improvements, see "Municipal Corporations," §§ 164-168.
 Attorney's fees as damages in action for breach of covenant, see "Covenants," § 8.
 Caused by alteration of highway, see "Highways," § 19.
 Civil damage laws, see "Intoxicating Liquors," §§ 54-63.
 For alienating affections, see "Husband and Wife," § 40.
 For establishment of highway, see "Highways," § 15.
 For forcible entry and detainer, see "Forcible Entry and Detainer," § 8.
 For frivolous or vexatious appeal, see "Appeal," § 277.
 For sale under mortgage before statutory time, see "Chattel Mortgages," § 54.
 In replevin, see "Replevin," § 29.
 Measure for land taken for public use, see "Eminent Domain," §§ 33-40.

I. IN GENERAL—NOMINAL DAMAGES.

§ 1. Costs and expenses of litigation.

(Iowa; 1896.)

In a suit to set aside a judgment by confession, there can be no recovery of expenditures for attorney's fees, hotel bills, and for loss of time.—*Bull v. Keenan* (Iowa) 69 N. W. 433.

§ 2. Nominal damages.

[a] (Mich.; 1897.)

Nominal damages only are recoverable for being deprived of the convenience of the use of gas by the removal of the meter by the gas company, where no pecuniary loss is suffered.—*Detroit Gas Co. v. Moreton Truck & Storage Co.* (Mich.) 69 N. W. 659.

[b] (S. D.; 1896.)

Defendants agreed to erect a mill and operate it for five years except at such times as, for causes beyond their control, it could not be operated without loss by the use of economy and skill, and that they would not sell the mill during that period unless the vendee would bind himself to fulfill the contract. Before the five years expired, defendants sold the mill without the consent of the other contracting party, and without requiring the vendee to observe the contract, and thereafter within the five years the mill was burned, and ceased to be operated. *Held*, that the damages resulting from the transfer, and from the vendee's failure to rebuild and operate, were not "clearly ascertainable in both their nature and origin," within Comp. Laws, § 4551, and hence the other contracting party was

entitled to nominal damages only.—*Hudson v. Archer* (S. D.) 68 N. W. 541.

See, also, "Replevin," § 30.

Reversal for failure to assess nominal damages, see post, § 52.

II. EXEMPLARY DAMAGES.

In action against master for injuries by servant, see "Master and Servant," § 21.

Under civil damage laws, see "Intoxicating Liquors," § 63.

§ 3. Liability of carrier.

(Wis.; 1895.)

No punitive damages can be assessed against the owner of a steamboat for the misconduct of the captain towards a passenger on the boat, in the absence of evidence of a ratification of such conduct.—*Mace v. Reed* (Wis.) 62 N. W. 186, 89 Wis. 440.

§ 4. For conversion of goods.

[a] (Iowa; 1896.)

In conversion, where there is some evidence that defendants took possession of and sold the property with intent to oppress and injure the plaintiff, it was proper to instruct that exemplary damages may be allowed if the acts complained of were committed maliciously, or with intent to oppress and injure the plaintiff.—*Casey v. Ballou Banking Co.* (Iowa) 67 N. W. 98.

[b] (Minn.; 1896.)

In an action by a third party against a judgment creditor for conversion of property levied on as the property of the judgment debtor, but claimed by the plaintiff as his property, it is error to admit evidence of the wealth of defendant, with a view to the recovery of punitive damages, unless there is evidence tending to prove that he was guilty of gross oppression, or wanton disregard of the rights of plaintiff, in converting the property, so as to justify the allowance of punitive damages.—*Cohen v. Goldberg* (Minn.) 67 N. W. 1149.

§ 5. Personal injuries.

[a] (Wis.; 1896.)

In an action for a personal tort, plaintiff is not entitled to punitive damages as a matter of legal right, but the awarding of such damages is within the discretion of the jury. *Hooker v. Newton* (1869) 24 Wis. 292, criticised.—*Robinson v. Superior Rapid-Transit Ry. Co.*, 68 N. W. 961.

[b] (Wis.; 1896.)

Where a man, retaliating for a kick, strikes a woman with such force as to inflict serious injuries, and the blow is not necessary for his protection from threatened or impending injury, punitive damages may be awarded.—*Nichols v. Brabazon* (Wis.) 69 N. W. 342.

III. PROXIMATE AND REMOTE CAUSE.

Proximate cause of injury to passenger, see "Carriers," § 42.

§ 6. Damages for breach of condition in deed.

(Neb.; 1895.)

Where one takes a deed on the express condition that he is to convey the land to another, his refusal to convey renders him liable

for any damages caused thereby to the party entitled to the conveyance.—*McMurtry v. Blake* (Neb.) 63 N. W. 467.
15 Neb. 213.

IV. PENALTIES AND LIQUIDATED DAMAGES.

Directing verdict for liquidated amount, see post, § 49.

§ 7. Validity of provision for liquidated damages.

(S. D.; 1896.)

A stipulation that the grantor may retain all payments made or secured, in case the grantee fails to perform a contract for the sale of land, containing covenants and conditions the number and nature of which made it impracticable to fix the actual damage in case of a breach thereof, is valid.—*Barnes v. Clement* (S. D.) 66 N. W. 810.

§ 8. When contract construed to provide for liquidated damages.

[a] (Iowa; 1895.)

Defendant contracted to purchase a one-half interest in plaintiff's store, and to enter into partnership with him, depositing in a bank \$500 as "a forfeit" in case he should fail to carry out the contract. Plaintiff leased the building for the firm, notified all creditors of the proposed change, and added to the stock, on defendant's suggestion, certain goods which he had not previously carried. Subsequently defendant refused to comply with the terms of the contract. *Held*, that the \$500 should be considered liquidated damages, and not a penalty.—*Sanford v. First Nat. Bank* (Iowa) 63 N. W. 459.

[b] (Iowa; 1895.)

Whether a sum named in a contract is to be regarded as liquidated damages or as a penalty depends on the intention of the parties as it appears from the nature of the contract, the situation of the parties, and surrounding circumstances, and not merely on the language of the contract.—*Sanford v. First Nat. Bank* (Iowa) 63 N. W. 459.

[c] (Neb.; 1896.)

A contract for a conveyance of land provided that, if the vendor should default, the purchaser should have the use of the premises to be conveyed for a certain term of about a year, "the same being compensation as damages to the purchaser for the failure of the vendor to execute said deed." *Held*, that the provision was not for a penalty, but for liquidated damages.—*Lorius v. Abbott* (Neb.) 68 N. W. 480.

[d] (Wis.; 1896.)

Plaintiff's contract for refitting a barge provided that, in case work was not done by a certain day, he should pay \$50 per day for each day the boat was delayed, and that, "as regards the date of finishing and fine," the contract should include certain work. The fair rental value of the boat without crew was over \$40 a day. *Held*, that the \$50 per day was liquidated damages, and not a penalty.—*Manistee Iron-Works Co. v. Shores Lumber Co.* (Wis.) 65 N. W. 563.
92 Wis. 21.

§ 9. Proof of actual damages.

(Iowa; 1895.)

In an action to recover a sum stipulated in a contract as liquidated damages, no proof of actual damages is required.—*Sanford v. First Nat. Bank* (Iowa) 63 N. W. 459.

V. MEASURE FOR BREACH OF CONTRACT.

Proximate cause, see ante, § 6.

When contract provides for liquidated damages, see ante, § 8.

1. IN GENERAL.

§ 10. Profits lost and expenses incurred.

[a] (Mich.; 1895.)

One who contracts with a mill owner to furnish men and operate the mill for cutting shingles out of timber furnished by the owner, at so much per thousand shingles turned out, may, on breach of the contract, recover as damages the prospective profits of the contract. *Grant, J.*, dissenting.—*Fell v. Newberry* (Mich.) 61 N. W. 471.

[b] (Mich.; 1896.)

In an action for breach of a contract to erect a mill on defendant's land, and manufacture timber thereon into lumber and shingles, for a fixed price, where it appears that defendant partially performed the same, and that the prospective profits were ascertainable by deducting the reasonable cost of manufacture from the fixed price, plaintiff was entitled to have evidence as to such profits submitted to the jury on the question of damages. *Fell v. Newberry* (1895) 61 N. W. 471, followed.—*Barrett v. Grands Rapids Veneer Works*, 67 N. W. 976.

[c] (Minn.; 1894.)

The measure of damages for a breach of contract to allow one to collect certain claims for a fixed per cent. is the loss of profits.—*Singer Manuf'g Co. v. Potts* (Minn.) 61 N. W. 23.
59 Minn. 240.

[d] (Neb.; 1896.)

In an action for breach of contract in refusing to permit plaintiff to perform the same, the measure of damages is the profit plaintiff would have made on the contract had he been permitted to perform it.—*Kreamer v. Irwin* 65 N. W. 885, 46 Neb. 827.

§ 11. Partial performance by one party before breach by other.

(Minn.; 1896.)

One who was to drill and sink a well for another for a compensation of 90 cents per lineal foot, but was to be paid nothing until water was reached, was entitled to recover, as damages for the other's breach of contract in refusing to permit him to finish the well, 90 cents for each foot actually drilled and sunk.—*Olson v. Nonenmacher* (Minn.) 65 N. W. 642.
63 Minn. 425.

§ 12. Avoidable consequences.

(Neb.; 1895.)

Where the owner knew that the furnace was so constructed as to imperil the building, and continued to use it without having it repaired, *held* that he could not recover from the person constructing the furnace the value of the property destroyed by a resulting fire.—*Uhlig v. Barnum*, 61 N. W. 749, 43 Neb. 584.

§ 13. Liability of surety.

[a] (Iowa; 1897.)

A landlord agreed to furnish his tenant a certain number of cows and hogs. The tenant was to purchase the stock on time, and the landlord was to become his surety; the tenant to set the milk produced by the cows, and apply the receipts on the purchase price. The landlord refused to comply with the contract. *Held*, that the measure of damages was the value of the stock over and above the cost thereof at the time when they would have been fully paid for as provided in the contract.—*Chesmore v. Barker* (Iowa) 70 N. W. 701.

[b] (Minn.; 1895.)

The measure of damages, as against a surety, for breach of a bond executed by a mortgagor to the mortgagee, conditioned that the mortgagor would rebuild a house on the mortgaged premises, is the difference at the time of the breach between the value of the premises without the house and the amount of the mortgage debt at that time, not to exceed the amount in which the building of the house

would have increased the value of the premises.—*Longfellow v. McGregor* (Minn.) 63 N. W. 1032.

61 Minn. 494.

2. PARTICULAR CONTRACTS.

Contract of carriage, see "Carriers," § 10.
— of sale, rights of buyers, see "Sale," § 78.
— to exchange property, see "Exchange of Property," § 3.
Covenant of warranty, see "Covenants," § 8.
Marriage promise, see "Breach of Marriage Promise," § 4.
Warranty, see "Sale," §§ 37, 83.

§ 14. In general.

[a] (Iowa; 1896.)

In an action by a contractor with a city for street work, to recover damages caused by the stoppage of work under the contract by the city, causing a delay, the additional cost of materials and labor after work was resumed is a proper element of damages.—*King v. City of Des Moines* (Iowa) 68 N. W. 708.

[b] (Mich.; 1897.)

The measure of damages for breach of a contract by a purchaser of gravel to leave the lots graded to the alley level after removing the gravel therefrom is the cost of such grading.—*Grady v. Sullivan* (Mich.) 70 N. W. 1040.

[c] (Minn.; 1897.)

Depreciation of stock of an insurance company purchased from it by one upon engaging as its agent cannot be considered in estimating the damages to be allowed the agent for a breach of the contract of agency.—*Ray v. Lewis* (Minn.) 69 N. W. 1100.

[d] (S. D.; 1896.)

A written contract provided that defendants would erect a mill and operate it for five years, except at such times as, for causes beyond their control, it could not be operated without loss by the use of economy and skill; that they would not during said period sell the mill unless the vendee would bind himself to fulfill the conditions of the contract; and that plaintiffs would pay defendants a specified sum,—a part on the arrival of the machinery, the balance on completion of the mill. After the mill was set up, defendants received the designated sum, and, before the expiration of five years, sold the mill without the consent of plaintiffs, and without requiring the vendee to observe said contract. Subsequently, within the five years, the mill was destroyed by fire, and ceased to be operated. Held that, as all the conditions on which the money was to be paid were performed, plaintiffs could not recover back said sum, but were only entitled to damages resulting from defendants' breach in transferring the property without the required guaranty on the part of the vendee.—*Hudson v. Archer* (S. D.) 68 N. W. 541.

§ 15. Contract of sale—Failure to deliver.

[a] (Iowa; 1894.)

In an action for breach of contract of sale, where the time for delivery was extended by plaintiff, the measure of damages was the difference between the contract price and the market price at the place where and time when the breach occurred, which could not be complete until the end of the time agreed on, with interest at 6 per cent. from such time of breach.—*Brown v. Sharkey* (Iowa) 61 N. W. 364.

93 Iowa, 157.

[b] (Neb.; 1895.)

In an action for a breach of contract, by which defendant agreed to furnish plaintiff a certain amount of feed daily for two years, commenced before the expiration of such term, plaintiff cannot recover for damage sustained

after the date of the action.—*Terry v. Beatrice Starch Co.*, 62 N. W. 253, 43 Neb. 866.

§ 16. — Goods defective.

[a] (Iowa; 1896.)

Where importers, at the time they accept an order from jobbers for goods to be delivered at a particular time, are notified that, soon after the time fixed for such delivery, the jobbers intend to send out their traveling men, and the importers fail to deliver the goods, the jobbers are entitled to damages resulting from the fact that their traveling men were idle until the goods could be obtained elsewhere.—*Blumenthal v. Stable* (Iowa) 68 N. W. 447.

[b] (Minn.; 1895.)

Where plaintiff delivered to defendant logs inferior to those called for by the contract, the measure of defendant's damages is the difference between the market value of the logs delivered at the various dates of delivery and the market value at the same dates of logs of the quality called for by the contract.—*St. Anthony Lumber Co. v. Bardwell-Robinson Co.* (Minn.) 62 N. W. 274.

60 Minn. 199.

§ 17. Building contracts.

[a] (Mich.; 1896.)

In an action by an owner against contractors for failure to complete a house within the time fixed by the contract, plaintiff can recover the rental value as damages, although he did certain work just before the house was completed, which was not covered by the contract, where defendants, down to within a very few days before the work was completed, assumed to keep control of the house, and were from time to time at work on it, and said work consisted of plumbing which could not be put in until the house was substantially ready for occupancy.—*Covode v. Principaal* (Mich.) 68 N. W. 987.

[b] (Minn.; 1895.)

Where plaintiff agreed for a gross sum to finish a house with a certain quality of wood, and, on its being objected to, agreed that, if it did not prove to be the quality contracted for, it need not be paid for, and it proved inferior, defendant is entitled to have deducted from the contract price of the entire work the reasonable value of the quality agreed on, and not merely the value of the inferior wood actually used.—*Wheaton v. Lund* (Minn.) 63 N. W. 251.

61 Minn. 94.

§ 18. Contract to lease premises.

(Minn.; 1894.)

The damages for failure to lease premises as agreed are the difference between the rent agreed on and the actual rental value.—*Knowles v. Steele* (Minn.) 61 N. W. 557.

59 Minn. 452.

§ 19. Contract to move building.

(Minn.; 1895.)

On defendant's failure to move a building pursuant to a contract with plaintiff for a stipulated sum, plaintiff may recover the difference between the contract price and the reasonable cost of performance.—*Anderson v. Nordstrom* (Minn.) 61 N. W. 1132.

60 Minn. 231.

§ 20. Contract to cut logs.

(Mich.; 1895.)

In an action for the breach of a contract to cut logs, on the part of the owner of the timber, the measure of damages is the difference in the cost of cutting the logs and the contract price, the cost being proven by expert testimony, though the cost of the work depends on the management of the work and the season.—*Greenwood v. Davis* (Mich.) 64 N. W. 26.

§ 21. Contract to manufacture.

(Wis.: 1896.)

The breach of a contract by a defendant to receive from plaintiff a certain number of cans, to be manufactured from material to be furnished by defendant, is the difference between the contract price and the cost of manufacture.—*Walsh v. Myers* (Wis.) 66 N. W. 250.
92 Wis. 397.

§ 22. Contract to redeem stock.

(Minn.: 1895.)

On breach of a contract by a corporation to redeem at a certain time, at par value, certain stock issued by it in payment for property previously purchased, without attempting to rescind the contract, the measure of damages is the par value of the stock.—*Browne v. St. Paul Plow Works* (Minn.) 64 N. W. 66.
62 Minn. 90.

VI. MEASURE FOR TORTS.

See, also, "Assault and Battery," § 3; "Death by Wrongful Act," §§ 6-10; "Libel and Slander," §§ 29-32; "Malicious Prosecution," §§ 16-18; "Trespass," §§ 6-9; "Trove and Conversion," §§ 19-21.

Evidence as to nature and extent of personal injuries, see post, §§ 41-43.

Instruction as to future suffering, see post, § 48.

For conversion by mortgagee, see "Chattel Mortgages," § 42.

For criminal conversation, see "Husband and Wife," § 37.

For delay or mistake in delivery of message, see "Telegraph Companies," §§ 9-12.

— in transporting goods, see "Carriers," § 10.

For injuries from fire set by locomotives, see "Railroad Companies," § 78.

— to passenger, see "Carriers," §§ 54, 70.

— to wife, see "Husband and Wife," § 32.

For loss or injury to goods in transit, see "Carriers," § 12.

For maintenance of nuisance, see "Nuisance," § 10.

For malpractice, see "Malpractice," § 6.

For wrongful attachment, see "Attachment," § 64.

— discharge of servant, see "Master and Servant," § 8.

— eviction, see "Landlord and Tenant," § 7.

— seizure of property by sheriff, see "Sheriffs and Constables," § 12.

§ 23. Fraud and false representations.

[a] (Neb.: 1895.)

Where a tenant was induced to take the lease by false representations as to the condition of the premises, and because of their condition he was compelled to move his business therefrom, he may recover as damages the actual expense of such removal.—*Barr v. Kimball* 62 N. W. 196, 43 Neb. 766.

[b] (Neb.: 1897.)

Where expenses incurred by reason of a tort are recoverable, plaintiff need not have actually paid the money, but it is sufficient if he has incurred a legal obligation to do so.—*Minneapolis Threshing-Mach. Co. v. Regier* (Neb.) 70 N. W. 934.

[c] (Wis.: 1895.)

The measure of damages on a sale of mining stock, voidable on account of fraudulent representations, is the difference between the real value of the stock at the time of sale and what the value would have been had the representations been true.—*Warner v. Benjamin* 62 N. W. 179, 89 Wis. 290.

[d] (Wis.: 1897.)

In an action to recover damages for an alleged conspiracy to defraud plaintiff by a fraudulent purchase of goods, where the evidence

shows that the goods were worth the contract price, an instruction that the measure of damages was the contract price of the goods, with interest from the commencement of the action, was error without prejudice. *John V. Farwell Co. v. Wolf* (Wis.) 70 N. W. 289.

§ 24. Injuries to real property.

[a] (Iowa: 1896.)

In an action for the value of property destroyed by a fire negligently set by defendant, defendant was not entitled to a reduction of damages in the amount received by plaintiff on a policy of insurance covering the property.—*Allen v. Barrett* (Iowa) 69 N. W. 272.

[b] (Neb.: 1897.)

The measure of damages for the negligent construction of ditches by a railroad company, causing the surface water to collect and be precipitated on plaintiff's land, destroying his crops, etc., and depositing sand and clay upon the land, is the value of the crops destroyed, and the difference in value of the land immediately before and after the deposit thereon of the sand and clay.—*Premont, E. & M. V. R. Co. v. Harlin* (Neb.) 70 N. W. 263.

§ 25. Injury to chattels.

[a] (Neb.: 1895.)

Where chattels are injured by the negligence of another, but not wholly destroyed, the measure of damages is the difference between the value of the chattels immediately before and immediately after the injury.—*Chicago, B. & Q. R. Co. v. Metcalf* (Neb.) 63 N. W. 51.
44 Neb. 848.

[b] (Neb.: 1895.)

One whose chattels are injured, but not wholly destroyed, cannot render the person causing the injury liable for the entire value of the chattels by merely abandoning them.—*Chicago, B. & Q. R. Co. v. Metcalf* (Neb.) 63 N. W. 51.

44 Neb. 848.

§ 26. Personal injuries.

[a] (Iowa: 1896.)

A charge that, if plaintiff is unable to perform manual labor, he should be compensated therefor, not authorizing the jury to consider his capacity to earn money otherwise than by manual labor, is erroneous.—*Laird v. Chicago, R. I. & P. Ry. Co.* (Iowa) 69 N. W. 414.

[b] (Iowa: 1896.)

Disfigurement caused by the injuries may be considered in assessing the damages.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co.* (Iowa) 69 N. W. 743.

[c] (Neb.: 1895.)

The amount of damages for mental and bodily suffering due to an injury is for the jury to determine by the circumstances of each case.—*St. Joseph & G. I. R. Co. v. Hedge* (Neb.) 62 N. W. 887.

44 Neb. 448.

[d] (Wis.: 1895.)

When the injuries—a fracture and dislocation of the spinal column—were permanent, it is not error to charge that in estimating damages the jury might consider injury to feelings, anxiety, and mental and physical suffering.—*Reinke v. Bentley* (Wis.) 63 N. W. 1055.

90 Wis. 457.

[e] (Wis.: 1896.)

In an action for a personal tort, mental suffering resulting from a sense of wrong or insult is an element of compensatory damages.—*Robinson v. Superior Rapid-Transit Ry. Co.* (Wis.) 68 N. W. 961.

[f] (Wis.: 1897.)

In a suit for personal injuries, an instruction that, if the jury find for plaintiff, they shall bring in such damages as "will make him whole, in dollars, as far as possible," is improper, as it suggests an exaggerated idea of the amount

plaintiff is entitled to recover.—*Guinard v. Knapp, Stout & Co. Company (Wis.)* 70 N. W. 671.

§ 27 — Aggravation by plaintiff's conduct.

[a] (Mich.; 1895.)

In an action for personal injuries, where it appears that plaintiff employed a reputable physician to care for the injuries, defendant is not liable for any aggravation of the injuries caused by negligence of plaintiff in failing to follow the directions of such physicians.—*Strudgeon v. Village of Sand Beach (Mich.)* 65 N. W. 616.

[b] (Mich.; 1896.)

Where plaintiff did not call in a surgeon at once, but attempted to go on with her duties, and the court, in response to defendant's request, instructed the jury that it was plaintiff's duty to use proper care and proper treatment, and, if she aggravated the injury by her own acts, defendant would not be liable for any injury caused thereby, it was proper to add to such instructions that if plaintiff did what a reasonably prudent person would do under the circumstances she was not negligent, and that she cannot be charged with knowledge of what might subsequently develop in the way of additional injury.—*Moore v. City of Kalamazoo (Mich.)* 66 N. W. 1089.

§ 28. — Aggravation by unskillfulness of surgeon.

(Mich.; 1896.)

In an action for personal injuries, that the effect of the injuries was increased through the unskillfulness of the surgeon employed by plaintiff to attend her will not diminish the amount of her recovery, where she used reasonable diligence and care in the selection of the surgeon.—*Reed v. City of Detroit (Mich.)* 65 N. W. 967.

§ 29. — Expenses of medical attendance.

[a] (Iowa; 1896.)

The cost of medical attendance is not an element of damages, where not paid for.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co. (Iowa)* 69 N. W. 743.

[b] (Neb.; 1897.)

Plaintiff may recover the reasonable value of medical services made necessary by the injury, not exceeding the amount actually expended; and hence evidence of actual expenditures for such purpose is admissible.—*Golder v. Lund (Neb.)* 70 N. W. 379.

[c] (N. D.; 1895.)

A married woman who in fact incurred liability for medical attendance made necessary by an injury for which another is liable may recover, as part of her damages, the amount of such liability, though she had not paid the same at the time of trial.—*Chacey v. City of Fargo (N. D.)* 64 N. W. 932.
5 N. D. 173.

[d] (Wis.; 1894.)

Damages cannot be recovered for medical expenses which were voluntarily paid by another.—*Peppercorn v. City of Black River Falls*, 61 N. W. 79, 89 Wis. 38.

§ 30. — Future suffering.

[a] (Wis.; 1895.)

A charge which allows damages for the pain and suffering which plaintiff "may endure hereafter," and for the loss of such time as the evidence shows "she will be likely to suffer hereafter," is erroneous, as allowing the jury to go into the field of mere probability.—*Hardy v. Milwaukee St. Ry. Co. (Wis.)* 61 N. W. 771, 89 Wis. 183.

[b] (Wis.; 1895.)

In an action for personal injuries, recovery for future disability must be limited to such

as is reasonably certain to result from the injury, and it was error to charge that plaintiff could recover for pain and suffering which "he may have to endure hereafter."—*Raymond v. Keseberg*, 64 N. W. 861, 91 Wis. 191.

[c] (Wis.; 1895.)

In an action for injuries suffered from a brick falling on plaintiff's head from a building in course of erection, it was error to instruct that plaintiff was entitled to compensation "for the pain and suffering which she had endured, and for pain which she might be likely to," or that there is "a reasonable probability" that she will, endure, for she can recover only for such future pain as the evidence shows she is reasonably certain to endure.—*Smith v. Milwaukee Builders' & Traders' Exchange (Wis.)* 64 N. W. 1041, 91 Wis. 360.

[d] (Wis.; 1895.)

Plaintiff cannot recover, in an action for personal injuries, for the pain and suffering he was likely to endure in the future.—*Kucera v. Merrill Lumber Co.*, 65 N. W. 374, 91 Wis. 637.

[e] (Wis.; 1896.)

A jury should not be permitted to estimate damages for future disability resulting from an injury, unless it is shown to be reasonably certain that the injury will be permanent, or how long it will continue.—*Groundwater v. Town of Washington (Wis.)* 65 N. W. 871.

92 Wis. 56.

[f] (Wis.; 1896.)

Damages for physical pain and mental suffering in the future, resulting from an injury, will be allowed where it is reasonably certain that such pain and suffering will be endured.—*Nichols v. Brabazon (Wis.)* 69 N. W. 342.

§ 31. — Recovery by unemancipated minor.

(Wis.; 1894.)

In an action by an unemancipated minor for personal injuries, she cannot recover for loss of time during her minority from inability to work by reason of the injuries.—*Peppercorn v. City of Black River Falls (Wis.)* 61 N. W. 79, 89 Wis. 38.

§ 32. — Recovery by married woman.

[a] (Mich.; 1894.)

In an action by a wife for injuries resulting in a miscarriage, damages will not be allowed for the society, enjoyment, and prospective services of the child.—*Tunnicliffe v. Bay Cities Consol. Ry. Co. (Mich.)* 61 N. W. 11, 102 Mich. 624.

[b] (Minn.; 1895.)

A wife cannot recover, in an action for personal injury, expenses incurred for medical treatment, which her husband is liable for.—*Belyea v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.)* 63 N. W. 627.
61 Minn. 224.

VII. INTEREST AS ELEMENT OF DAMAGES.

§ 33. When recoverable.

(Neb.; 1896.)

Plaintiff in an action against a railroad company for damages for property destroyed by fire set by a locomotive is entitled to interest on the value of the property from the time of its destruction.—*Union Pac. Ry. Co. v. Ray (Neb.)* 65 N. W. 773, 46 Neb. 750.

VIII. EXCESSIVE AND INADEQUATE DAMAGES.

As ground for new trial, see "New Trial," § 28. Excessive damages for alienating affections, see "Husband and Wife," § 40.

Excessive damages for breach of marriage promise, see "Breach of Marriage Promise," § 4.
 — conversion, see "Trove and Conversion," § 20.
 — death by wrongful act, see "Death by Wrongful Act," § 10.
 — libel or slander, see "Libel and Slander," § 22.
 — malicious prosecution, see "Malicious Prosecution," § 17.
 — nuisance, see "Nuisance," § 11.
 Inadequate damages for the taking of property for public use, see "Eminent Domain," § 37.

§ 34. Excessive damages.

[a] (Iowa; 1896.)
 In an action against a carrier for conversion of goods, after refusal of the consignee to take them, by selling them to a third person, where there was evidence that the goods were worth from \$10 to \$12, a verdict for \$6 will not be disturbed.—*Baker v. Chicago, M. & St. P. Ry. Co.* (Iowa) 67 N. W. 376.

[b] (Iowa; 1896.)
 Plaintiff cannot complain of a ruling requiring him to remit the excess of a verdict over the amount of damages claimed in his petition.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co.* (Iowa) 69 N. W. 743.

[c] (Minn.; 1895.)
 The day after the death of plaintiff's husband, defendants, his brothers, came to plaintiff's house, and demanded, as special administrators, certain articles, part of which belonged to plaintiff; and, plaintiff refusing to give them up, they threatened to break open the doors of the rooms in which the articles were, and one of them threatened to strike her, and they made remarks to the effect that she had committed forgery and was crazy. She ordered them to leave the premises, and, on their refusal to do so, abused them. *Held*, that a verdict in plaintiff's favor, of \$1,000, should be reduced to \$500. *Buck, J.*, dissenting.—*Mitchell v. Mitchell* (Minn.) 61 N. W. 682.
 60 Minn. 12.

[d] (Neb.; 1897.)
 That a verdict for \$2,865.30 was \$105 in excess of the amount recoverable is not sufficient to show that the jury was influenced by passion or prejudice, such excess being remitted by plaintiff.—*Omaha Fire Ins. Co. v. Thompson* (Neb.) 70 N. W. 30.

§ 35. Personal injuries.

[a] (Iowa; 1894.)
 Plaintiff having received several injuries, some of which might be permanent, and he having been lamed thereby, his jaw injured, his hearing impaired, and his injuries having caused him much suffering, a verdict for \$1,000 was not excessive.—*Morgan v. Fremont County* (Iowa) 61 N. W. 231.
 92 Iowa, 644.

[b] (Iowa; 1896.)
 A verdict for \$4,000 for a single woman, 21 years old, earning \$75 a month as stenographer, was not excessive, where plaintiff was confined in bed for five weeks, having difficulty in breathing, and suffered intense pain in her leg from inflammation of the bone; that such pain continued to the time of trial, a period of 17 months, and was likely to be permanent; that she had been able to do no regular work, and had paid \$200 for medical treatment.—*Bryant v. Omaha & C. B. Railway & Bridge Co.* (Iowa) 67 N. W. 392.

[c] (Minn.; 1897.)
 A verdict of \$4,000 in favor of one 75 years old, for an injury consisting of the fracture of one of the bones, and tearing the ligaments, of her ankle, by reason of which she suffered great pain, was confined to her bed three months, and disabled for the rest of her life from walking without a crutch, is excessive.

ive.—*Johnson v. St. Paul City Ry. Co.* (Minn.) 69 N. W. 900.

[d] (Neb.; 1895.)
 Where the evidence showed that plaintiff's ankle was fractured, that she suffered great pain, was confined to her bed for three weeks, and was unable to walk without crutches for five months, and tended to show that her injuries were permanent, *held*, that a verdict of \$3,000 was not excessive.—*St. Joseph & G. I. R. Co. v. Hedger* (Neb.) 62 N. W. 887.
 44 Neb. 448.

[e] (Neb.; 1896.)
 A farmer 24 years of age received injury consisting of a cut in the fleshy part of his heel, and the laceration of the muscles of his ankle. He was in bed some 11 weeks, and was compelled to use crutches after getting up, and lost about a year's time. *Held*, that a verdict for \$6,300 should be reduced by \$1,500.—*Fremont, E. & M. V. R. Co. v. French* (Neb.) 67 N. W. 472.

48 Neb. 638.
 [f] (Wis.; 1897.)
 A verdict for \$5,000 was not excessive, where there was evidence the plaintiff suffered from paresis as a result of the injury.—*McMahon v. Eau Claire Waterworks* (Wis.) 70 N. W. 829.

§ 36. — Permanent injuries.

[a] (Iowa; 1895.)
 A verdict of \$1,500 for personal injuries is not excessive, where plaintiff lost a finger, had his hand crushed and its use impaired, and earns \$15 a month less than before the injury.—*Strong v. Iowa Cent. Ry. Co.* (Iowa) 62 N. W. 799.

[b] (Iowa; 1895.)
 A verdict of \$6,565 for injuries permanently and completely disabling, and leaving in a condition of suffering, a woman 44 years of age, who previously did all her housework, and earned in addition \$6 to \$12 a week, is not excessive.—*Miller v. Boone County* (Iowa) 63 N. W. 352.

[c] (Minn.; 1895.)
 A verdict of \$14,500 was not excessive for injuries received by a young man in a railroad accident, which left him permanently maimed.—*Howe v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.) 64 N. W. 102.
 62 Minn. 71.

[d] (Minn.; 1896.)
 A verdict of \$3,000 for injuries received by a railroad engineer, resulting in chronic inflammation of the knee joint, which will be permanent, is not excessive.—*Rogers v. Chicago G. W. Ry. Co.* (Minn.) 67 N. W. 1003.

§ 37. — Loss of limbs.

[a] (Minn.; 1896.)
 A verdict of \$4,000 for the loss by a boy 15 years of age of three fingers, through defendant's negligence, will not be set aside as excessive.—*Barg v. Bousfield* (Minn.) 68 N. W. 45.

[b] (Minn.; 1897.)
 A verdict of \$1,800 in favor of a boy eight years old, for an injury requiring the amputation of two fingers of the left hand near the first joint, is excessive.—*Gahagan v. Aerometer Co.* (Minn.) 69 N. W. 914.

IX. PRACTICE.

Proof of actual damages where contract provides for liquidated damages, see ante, § 9.

§ 38. Pleading.

(Wis.; 1895.)
 An allegation that, by reason of defendant's negligently running into plaintiff's vehicle, plaintiff was thrown out, and, in consequence, his arm, shoulder, and back were seriously and permanently injured, and his body otherwise

bruised and injured, as a result of which he became sick, sore, maimed, and disordered, and suffered great pain and distress, sufficiently defining the injuries.—*Hanson v. Anderson* (Wis.) 62 N. W. 1055.
90 Wis. 195.

§ 39. Pleading and proof—In action for personal injuries.

[a] (Mich.; 1894.)

Under allegations that plaintiff's body was injured by dislocation and injuries of muscles and nerves, evidence by a physician that neuritis resulted from the injury is admissible.—*Williams v. Cleveland, C., C. & St. L. Ry. Co.* (Mich.) 61 N. W. 52.
102 Mich. 537.

[b] (Mich.; 1894.)

In an action for injuries caused by a street car, evidence that plaintiff's lung was injured, and that consumption ensued, is properly admitted, under a declaration alleging "that, when said car so struck said plaintiff as aforesaid, the blow and collision resulting therefrom seriously hurt, wounded, and crippled said plaintiff," that "his back and spine were seriously crippled, bruised, and sprained, and injured," and that "said injuries so inflicted upon his * * * back and spine were permanent and lasting, and each and all are incurable." *Johnson v. McKee* (1873) 27 Mich. 471, followed.—*Montgomery v. Lansing City Electric Ry. Co.*, 61 N. W. 543, 103 Mich. 46.

[c] (Mich.; 1895.)

A declaration in an action by an infant for personal injuries averring that plaintiff has lost the use of his right arm, and has become a confirmed invalid, is sufficient to admit recovery for impairment of plaintiff's ability to earn his living by ordinary avocations of life.—*Strudgeon v. Village of Sand Beach* (Mich.) 65 N. W. 616.

[d] (Mich.; 1896.)

In an action for injuries due to defective sidewalks, where the declaration alleged that the injury prevented plaintiff from attending to her necessary household affairs and business, whereby she lost all the profits therefrom; that the injury is permanent; that prior thereto plaintiff was a strong, healthy woman, but is now lame, and crippled for life,—it was proper to allow plaintiff to show what her earnings were, and to instruct the jury that her earnings, and her ability to earn anything in the future, should be taken into account on the question of damages.—*Moore v. City of Kalamazoo* (Mich.) 66 N. W. 1089.

[e] (Mich.; 1896.)

In an action against a city for injuries due to a defective sidewalk, where the declaration alleged that prior to the action plaintiff was a healthy, active, and able-bodied woman; that by reason of the injury she was subject to great pain and suffering, and totally incapacitated from doing any work, and was a permanent cripple, dependent on others,—such allegations were sufficient to admit proof of her inability to do ordinary work, and proof of what she could have earned by ordinary labor.—*McKormick v. City of West Bay City* (Mich.) 68 N. W. 148.

§ 40. Evidence.

[a] (Iowa; 1895.)

Where plaintiff, a physician, claimed that he lost his practice by being rendered unable to attend to it, in consequence of an injury sustained through defendant's negligence, it was proper to show on cross-examination that he lost his practice through immoral conduct.—*Hood v. Chicago & N. W. Ry. Co.* (Iowa) 64 N. W. 261.

[b] (Iowa; 1896.)

In an action for personal injuries which prevented plaintiff from performing her work as a stenographer, it was proper to show, as

bearing on the question of damages, that under her contract of employment she was to receive an increase of salary in a short time if her work proved satisfactory.—*Bryant v. Omaha & C. B. Railway & Bridge Co.* (Iowa) 67 N. W. 392.

[c] (Iowa; 1897.)

In an action to recover damages for the failure of a heating apparatus to properly warm a greenhouse, by reason of which plants kept by plaintiff were destroyed by cold, evidence was admissible of conversations, prior to the making of the contract, in which defendant was told of the use to be made of the building, as bearing on the question of the damages contemplated by the parties in case of a breach of the contract.—*Kramer v. Messner* (Iowa) 69 N. W. 1142.

[d] (Iowa; 1897.)

Evidence was also admissible to show the temperature which must be maintained in order to preserve plants and keep them in good condition, which must also have been contemplated by the parties in making the contract.—*Kramer v. Messner* (Iowa) 69 N. W. 1142.

[e] (Mich.; 1894.)

Evidence as to the wages received by plaintiff in a personal injury suit during six years immediately preceding her injury is admissible on the question of damages.—*Sias v. Village of Reed City* (Mich.) 61 N. W. 502.
103 Mich. 312.

[f] (Mich.; 1896.)

In an action for personal injuries, the admission, on cross-examination of plaintiff, of evidence to show plaintiff's physical condition, and that he drew a pension, is not ground for reversing a verdict for defendant.—*Le Bean v. Telephone & Telegraph Const. Co.* (Mich.) 67 N. W. 339.

§ 41. Evidence as to nature and extent of personal injuries.

[a] (Iowa; 1895.)

In an action to recover for permanent injuries it was proper to show that defendant's claims on an insurance society for indemnity were only for a limited period.—*Hood v. Chicago & N. W. Ry. Co.* (Iowa) 64 N. W. 261.

[b] (Mich.; 1895.)

Though plaintiff's evidence shows that she is suffering from troubles other than those arising from the injury attributable to defendant, she may introduce testimony as to her present appearance as to health, compared with what it was before the injury.—*Turner v. Township of Ridgeway* (Mich.) 63 N. W. 406.
105 Mich. 409.

[c] (Mich.; 1896.)

Testimony that the plaintiff was a boarding-house keeper, and as to the amount of work she did, was admissible as showing the physical abilities of the plaintiff.—*McKormick v. City of West Bay City* (Mich.) 68 N. W. 148.

[d] (Wis.; 1895.)

Where there is evidence that plaintiff was injured by contact with an electric wire, his physician may testify that plaintiff's condition could have been so produced.—*Block v. Milwaukee St. Ry. Co.* (Wis.) 61 N. W. 1101.
89 Wis. 371.

[e] (Wis.; 1896.)

On the issue as to the future effects of a personal injury, testimony which tends to establish the ultimate fact is competent, though in the end it may be found insufficient.—*Nichols v. Brabazon* (Wis.) 69 N. W. 342.

§ 42. — Testimony of physicians.

[a] (Wis.; 1895.)

A doctor may testify as to statements made by plaintiff as to his symptoms while he was being physically examined, where the examination was not made for the purpose of enabling the doctor to testify on the trial.—*Block*

v. Milwaukee St. Ry. Co. (Wis.) 61 N. W. 1101. 89 Wis. 371.

[b] (Wis.; 1895.)

In an action for personal injuries a doctor may testify as to plaintiff's condition one year and a half after the accident.—Block v. Milwaukee St. Ry. Co. (Wis.) 61 N. W. 1101. 89 Wis. 371.

§ 43. — Complaints of suffering.

[a] (Mich.; 1895.)

In an action by an infant for personal injuries, exclamations of pain made by the child during the pendency of the action while at home, due to suffering caused by the injuries, are admissible.—Strudgeon v. Village of Sand Beach (Mich.) 65 N. W. 616.

[b] (Minn.; 1895.)

Where, in an action for personal injuries, the bodily and mental feelings of plaintiff are material, evidence of his expressions at the time of suffering is admissible as original evidence.—Firkins v. Chicago Great Western Ry. Co. (Minn.) 63 N. W. 172. 61 Minn. 31.

§ 44. Physical examination.

[a] (Iowa; 1896.)

Where the condition of plaintiff's foot and ankle is material on the question of permanency of injury, and witnesses for plaintiff have testified that the injured foot is larger than the other, but that the leg six inches above the ankle is smaller than the other leg at the same point, and witnesses for defendant have testified that the foot is the same size as the other, and that the leg at the point specified is larger than the other, all the witnesses having just made measurements, it is error for the court to refuse defendant's request for measurement of such parts in the presence of the jury, plaintiff or her counsel not having objected. Robinson, J., dissenting.—Hall v. Incorporated Town of Manson (Iowa) 68 N. W. 922.

[b] (Mich.; 1895.)

In an action for breach of warranty on the sale of a horse the court has no power to order that defendant have the privilege of sending a veterinary surgeon into plaintiff's stable to examine the horse.—Martin v. Elliot (Mich.) 63 N. W. 998.

[c] (Mich.; 1895.)

In an action for injuries to an arm, a refusal to require plaintiff to submit to an examination of the arm in open court, requiring the administration of anaesthetics, being within the discretion of the court, is proper if plaintiff objects to taking anaesthetics.—Strudgeon v. Village of Sand Beach (Mich.) 65 N. W. 616.

[d] (Neb.; 1895.)

Where it is proper, in an action for personal injuries, to have a commission of physicians appointed to examine plaintiff, the application must be made before the trial commences.—City of Chadron v. Glover (Neb.) 62 N. W. 62. 43 Neb. 732.

§ 45. Evidence as to value and market price.

[a] (Neb.; 1896.)

In an action by a vendee for breach of a contract to sell cattle, evidence of the market value of the cattle in South Omaha at the time fixed for delivery was properly admitted, though the place of delivery was Creston, where it was shown that prices of cattle in the state were ruled largely by the South Omaha market,—the only difference between the prices at that point and those at the interior towns being the cost of shipment, shrinkage, commissions, etc.—and that 25 cents per 100 pounds would cover the freight from Creston to South Omaha, and all other charges attending a shipment between those points.—Graham v. Frazier (Neb.) 68 N. W. 367.

[b] (Wis.; 1895.)

In an action to recover damages for inducing one by false representations to purchase worthless mining stock, the market value of the stock at or about the time of the sale is evidence on the question of its real value.—Warner v. Benjamin, 62 N. W. 179, 89 Wis. 290.

[c] (Wis.; 1895.)

In an action against a vendor for breach of warranty against defects, the price paid, or agreed to be paid, is competent to show what the goods would have been worth, had they been as warranted.—J. I. Case Plow Works v. Niles & Scott Co. (Wis.) 63 N. W. 1013. 90 Wis. 590.

§ 46. Burden and necessity of proof.

[a] (Mich.; 1896.)

It was error to charge, in an action for personal injuries, that plaintiff was entitled to recover expenses for nursing, where there was no evidence of any expenses incurred in that respect.—Williams v. Village of Petoskey (Mich.) 66 N. W. 55.

[b] (Mich.; 1896.)

Where contractors fail to complete a building within the time fixed by the contract, the owner need not show that he had an opportunity to rent it in order to recover as damages the rental value from such time until the house was in fact completed.—Covode v. Principaal (Mich.) 68 N. W. 987.

[c] (Neb.; 1896.)

In an action for personal injuries it is error to permit the jury, in assessing damages, to consider whether the injuries were permanent, in the absence of evidence tending to establish such permanency with reasonable certainty.—Chicago, R. I. & P. R. Co. v. Archer 65 N. W. 1043, 46 Neb. 907.

§ 47. Instructions.

(Mich.; 1896.)

Where it appeared that the act of defendant in casting plaintiff's scow adrift was done deliberately and intentionally, it was not prejudicial error to charge that damages would not be mitigated by proof that the owner of the scow, after it was "willfully" unfastened and cast adrift, neglected to take measures to recover it.—Runnells v. Village of Pentwater (Mich.) 67 N. W. 558.

§ 48. — Personal injuries.

[a] (Iowa; 1895.)

Where personal injuries are permanent, an instruction to allow for bodily and mental suffering which plaintiff may reasonably be expected to undergo in the future, refers to plaintiff's condition as shown by the evidence, and does not authorize conjecture.—Miller v. Boone County (Iowa) 63 N. W. 352.

[b] (Mich.; 1895.)

In an action for injuries, plaintiff claimed that one result was a miscarriage, and the court charged that plaintiff might recover for all suffering occasioned by the accident, and that the jury might consider the fact that she was enfeebled. It also gave defendant's request,—that the fact that plaintiff had a miscarriage did not give her any right to damages, but that she must show that the injury was caused by defendant's neglect,—and then instructed that the miscarriage did not give plaintiff any right to any damages, but might be considered, if it was produced by the accident. Held that, in the absence of a request for further instructions, defendant could not complain.—Tunncliffe v. Bay Cities Consol. Ry. Co. (Mich.) 65 N. W. 226.

[c] (Wis.; 1896.)

A charge that plaintiff may recover for pain which she has endured in the past, and which she "may" have to endure in the future, but, in order to assess damages for the future, the jury "must be satisfied to a reasonable extent

from the evidence that she will continue to suffer," does not violate the rule that damages for future disability must be such as are "reasonably certain" to result, and not such as "may" result.—*Kliegel v. Aitken* (Wis.) 69 N. W. 67.

[d] (Wis.: 1896.)

An instruction that, "if the evidence establishes that [plaintiff] will suffer damages in the future, she may recover such damages in this action," is sufficient, in the absence of a request by defendant for a more definite instruction.—*Nichols v. Brabazon* (Wis.) 69 N. W. 342.

§ 49. Province of court and jury.

(Neb.: 1895.)

Where damages are liquidated, and there is no conflict as to their amount, it is proper to direct a verdict for a precise amount.—*Camp v. Pollock*, 64 N. W. 231, 45 Neb. 771.

§ 50. Harmless error.

[a] (Iowa: 1896.)

In attachment, where defendant claimed damages for wrongful attachment, and the evidence showed that the grounds of attachment were true, an instruction as to exemplary damages was, in view of a verdict for defendant for one dollar, error without prejudice.—*De Goey v. Van Wyk* (Iowa) 66 N. W. 787.

[b] (Mich.: 1895.)

Where, in an action for breach of a contract, the verdict is for substantial damages, error in failing to instruct that the verdict should not be limited to nominal damages, or in instructing that if the jury could not fix a basis for recovery the verdict should be nominal, is harmless.—*Hitchcock v. Supreme Tent of Knights of Maccabees of the World* (Mich.) 65 N. W. 285.

[c] (Minn.: 1896.)

The evidence would not have justified a verdict for plaintiff for any considerable amount of substantial damages. The court, instead of leaving it to the jury to assess plaintiff's damages, directed a verdict in his favor for one dollar. *Held* that, even if the evidence would have justified a verdict for a trifle more than directed by the court, yet the direction, if error, was without substantial prejudice, and no ground for a new trial.—*Jensen v. Chicago G. W. Ry. Co.* (Minn.) 67 N. W. 631. 64 Minn. 511.

[d] (Neb.: 1896.)

Error in submitting to the consideration of the jury an element of damages not sustained by the evidence will be treated as harmless, though the damages are unliquidated, when, from an examination of the evidence and the verdict, it is reasonably certain that the jury was not misled, and that it allowed nothing on account of the element improperly submitted.—*Chicago, R. I. & P. R. Co. v. Archer* (Neb.) 65 N. W. 1043, 46 Neb. 907.

[e] (Wis.: 1896.)

Though a particular car of fruit be contracted for, defendant in an action for non-delivery cannot complain because damages are computed on the basis of the amount in an ordinary car, that being about the amount contained in the car contracted for.—*Seefeld v. Thacker*, 67 N. W. 1142, 93 Wis. 518.

§ 51. — Admitting evidence.

(Iowa: 1896.)

The admission of incompetent evidence as to speculative damages is harmless error, where the verdict for plaintiff is one for nominal damages.—*De Goey v. Van Wyk* (Iowa) 66 N. W. 787.

§ 52. Reversal for failure to assess nominal damages.

[a] (Iowa: 1896.)

Where an examination of the evidence in the record shows that a plaintiff would have

been entitled to recover nominal damages only, a judgment for defendant will not be reversed for error not affecting the merits of the case.—*Hathaway v. Burlington, C. R. & N. R. Co.* (Iowa) 66 N. W. 892.

[b] (Minn.: 1894.)

Where defendant sets up a counterclaim entitling him to nominal damages only, the fact that, in entering judgment, such nominal damages were not deducted, is harmless error.—*Singer Manuf'g Co. v. Potts*, 61 N. W. 23, 59 Minn. 240.

[c] (Minn.: 1894.)

A judgment will not be set aside for failure to assess merely nominal damages where no question of permanent right is involved.—*Knowles v. Steele* (Minn.) 61 N. W. 557. 59 Minn. 452.

[d] (S. D.: 1896.)

Where the principal issue in an action for conversion of crops was the right of possession of the land on which the crops were raised, and it was decided in favor of plaintiff, a judgment of dismissal because of plaintiff's failure to introduce evidence showing him entitled to damages would be reversed on appeal, with direction that a judgment be entered for plaintiff for nominal damages.—*Olson v. Huntimer* (S. D.) 66 N. W. 313.

[e] (S. D.: 1896.)

A trial court will not be reversed for a failure to award nominal damages, unless it be essential to the determination of some legal right clearly invaded or involved.—*Roberts v. Minneapolis Threshing-Mach. Co.* (S. D.) 67 N. W. 607.

DANGEROUS PREMISES.

See "Landlord and Tenant," § 13; "Negligence," §§ 17-23.

DEAD BODIES.

Disinterring and removing, see "Body Stealing."

DEADLY WEAPONS.

See "Assault and Battery," § 6.

DEATH.

Expert testimony as to cause of death, see "Evidence," §§ 62, 63, 65.

Of counsel as ground for continuance, see "Continuance," § 5.

Of partner, dissolution of firm, see "Partnership," § 49.

Of party, abatement of action, see "Abatement and Revival," §§ 9-12.

Termination of alimony by death, see "Divorce," § 36.

[a] (Iowa: 1894.)

Where a married man disappears, and is not heard from for seven years, and when last heard from was in good health, and showed no intention of returning, but assumed to be an unmarried man, there is no presumption of his death within two years of his disappearance, so as to render valid an insurance on his life, which expired two years after his disappearance because of nonpayment of assessments.—*Seeds v. Grand Lodge of Iowa, A. O. U. W.* (Iowa) 61 N. W. 411. 93 Iowa, 175.

[b] (Iowa: 1895.)

A child who, when last heard from, six years prior to the death of his father, was sick with consumption, will be presumed to have

died before his father.—*Leach v. Hall* (Iowa) 64 N. W. 790.

[*1st* (Minn.: 1895.)]

A finding that a person "left Duluth, and since the year 1878 his friends have had no information whatever concerning him, and during all of this time he has not been heard from by them," was not sufficient as a finding of death of such person.—*Rackus v. Burke* (Minn.) 65 N. W. 459.

63 Minn. 272.

DEATH BY WRONGFUL ACT.

- I. WHEN ACTION LIES, § 1.
- II. PLEADING AND EVIDENCE, §§ 2-5.
- III. DAMAGES, §§ 6-10.

I. WHEN ACTION LIES.

§ 1. Right of action.

[*1a*] (Wis.: 1896.)

An action for death by wrongful act, under Sanb. & B. Ann. St. § 4255, if brought for a death caused in the state, will lie whenever the wrongful act, negligence, or default causing death occurred in the state, irrespective of the place of death.—*Rudiger v. Chicago, St. P. & M. & O. Ry. Co.* (Wis.) 68 N. W. 661.

[*1b*] (Wis.: 1897.)

Rev. St. § 4255, providing that when a negligent act is such as would, if death had not ensued, have entitled the injured party to recover, the corporation which would have been liable had death not ensued is liable to an action for damages, notwithstanding the death, etc., gives a right of action against a railroad company to the personal representative of an employé injured by a co-employé under such circumstances as would have entitled deceased to recover under Laws 1893, c. 220.—*Fann v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 997.

II. PLEADING AND EVIDENCE.

Evidence as to damages, see post, § 7.

§ 2. Complaint or declaration—Allegation as to damages.

[*1a*] (Mich.: 1895.)

In an action under the statute for wrongful death, the declaration must set out the facts as to the existence of the wife and children of deceased, who would be entitled to damages.—*Walker v. Lake Shore & M. S. Ry. Co.* (Mich.) 62 N. W. 1032.

104 Mich. 606.

[*1b*] (Mich.: 1896.)

A complaint alleging that decedent received certain bruises, wounds, and contusions, and certain internal injuries, whereby he became immediately sick, and that as the immediate result of said injuries he died, is sufficiently specific as to the injuries received, when attacked for the first time on trial.—*Storrs v. City of Grand Rapids* (Mich.) 68 N. W. 258.

[*1c*] (Neb.: 1895.)

A petition in an action by a widow, as administratrix, under Comp. St. 1893, c. 21, against one whose negligence caused the death of her husband, which alleged that deceased left seven minor children, the oldest 13 years and the youngest 5 months of age, wholly dependent on deceased for their support and maintenance, was not insufficient, as failing to aver facts showing that the persons for whose benefit the suit was brought, sustained pecuniary injuries by reason of the death of deceased.—*Kearney Electric Co. v. Laughlin* (Neb.) 63 N. W. 941.

45 Neb. 390.

[*1d*] (Neb.: 1895.)

A petition, under Comp. St. c. 21, for damages for causing the death of plaintiff's intestate by defendant's wrongful act, which fails to show that the person for whose benefit the action is brought has sustained pecuniary injury by the death, will not support a judgment for any damages whatever.—*Orgall v. Burlington & M. R. R. Co.*, 61 N. W. 450, 46 Neb. 4.

§ 3. Evidence.

(Mich.: 1895.)

In an action for injuries alleged to have caused death, the results of a post mortem examination of the deceased are competent evidence to prove the result of such injuries.—*McClellan v. Ft. Wayne & B. I. Ry. Co.* (Mich.) 62 N. W. 1025.

105 Mich. 101.

§ 4. — Loss or injury resulting from death.

[*1a*] (Iowa: 1896.)

In an action for death by wrongful act, evidence that decedent was dependent upon his earnings is admissible, to show an inducement for industry on his part.—*Fish v. Illinois Cent. R. Co.* (Iowa) 65 N. W. 995.

[*1b*] (Iowa: 1896.)

In an action for injuries resulting in death of plaintiff's intestate, it was proper to show, by a member of his family, how much money he had sent her, and that he had invested his earnings in life insurance; such facts having a bearing on his ability to earn money.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 67 N. W. 227.

[*1c*] (Iowa: 1896.)

But it was not proper to allow the witness to testify as to the amount of insurance she had received from the policies on intestate's life, in the absence of anything to show the cost of the insurance.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 67 N. W. 227.

§ 5. — Sufficiency.

(Neb.: 1896.)

Where a company maintaining a bathing resort, and letting out its privileges to the public for hire, was notified of a bather's disappearance so soon after he had been seen as to warrant the inference that an immediate search in the water would have resulted in his rescue before death, and the company had no one present to watch bathers and rescue those in danger, and such agents of the company as were present failed to make a search in the water for the missing man, it was erroneous to instruct the jury to return a verdict for the defendant.—*Brotherton v. Manhattan Beach Imp. Co.* (Neb.) 67 N. W. 479.

48 Neb. 563.

III. DAMAGES.

Pleading, see ante, § 2.

§ 6. In general.

[*1a*] (Iowa: 1896.)

It was not error to refuse to instruct the jury that the plaintiff could recover for the death of his intestate only the amount which, at legal interest for the term of his probable duration of life, would equal the sum he would probably have left had he lived to the end of that term.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 67 N. W. 227.

[*1b*] (Iowa: 1896.)

It was proper for the court to instruct the jury that, in estimating the damages due for the death of plaintiff's intestate, they should allow the amount that will compensate his estate for the pecuniary loss due to his death, and no more; and that, in determining this amount, they should consider his age, occupation, the

wages he received, his ability to earn money, the amount he had accumulated, and the probable duration of his life.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co. (Iowa)* 67 N. W. 227.

[c] (Mich.: 1895.)

Under How. Ann. St. Mich. § 8314, allowing the jury, in actions for wrongful death, to give such damages as they may deem just with reference to the pecuniary injury to persons entitled to maintain such an action, the jury are not warranted in awarding damages for which there is no foundation in the evidence, and which are incapable of pecuniary computation.—*Walker v. Lake Shore & M. S. Ry. Co. (Mich.)* 62 N. W. 1032.

104 Mich. 606.

[d] (Mich.: 1897.)

It is error to allow the jury to consider damages sustained by decedent's children from the loss of nurture, instruction, and moral and physical training received from the father, of the value of which there was no evidence.—*Walker v. Lake Shore & M. S. Ry. Co. (Mich.)* 69 N. W. 1114.

§ 7. Evidence.

[a] (Iowa: 1897.)

In an action for the death of an engine wiper employed by defendant, evidence that before he worked for defendant he had been a plasterer, and that the average wages of plasterers at the time of his death was four dollars per day, was admissible.—*Grimmelmman v. Union Pac. Ry. Co. (Iowa)* 70 N. W. 90.

[b] (Mich.: 1895.)

Where the plaintiff in an action for injuries had introduced in evidence the mortality tables (How. Ann. St. § 4245), and had offered no other evidence to show that the probability of life of his decedent was greater or less than that shown by such tables, it was error to charge that the tables were not controlling, but should be given just such weight as the jury thought proper.—*Nelson v. Lake Shore & M. S. Ry. Co. (Mich.)* 62 N. W. 993.

104 Mich. 582.

[c] (Mich.: 1896.)

In an action for death by wrongful act, testimony as to the present worth of decedent's services, based on his expectancy of life, and on different assumptions as to his earning capacity, is admissible.—*Storrs v. City of Grand Rapids (Mich.)* 68 N. W. 258.

[d] (Wis.: 1896.)

In an action by a husband, as administrator of his wife's estate, to recover for the wrongful killing of intestate, evidence of plaintiff's circumstances and financial condition is competent, under Rev. St. § 4256, authorizing the jury to give such damages as they may deem just in reference to the pecuniary injury to plaintiff.—*Thoresen v. La Crosse City Ry. Co. (Wis.)* 68 N. W. 548.

§ 8. Death of wife—Loss to husband.

(Mich.: 1895.)

The recovery by a husband for injuries causing the death of his wife must be based on the value of her services, and it is incumbent upon the plaintiff to prove such services and their value.—*Nelson v. Lake Shore & M. S. Ry. Co. (Mich.)* 62 N. W. 993.

104 Mich. 582.

§ 9. Death of child—Loss to parent.

(S. D.: 1895.)

Where the "widow, heir, or personal representative of the deceased" may sue for the wrongful death of a person (Comp. Laws, § 5499), a parent, who is the only heir of deceased, suing for the latter's death, can only recover such damages as he sustained as parent.—*Smith v. Chicago, M. & St. P. Ry. Co. (S. D.)* 62 N. W. 967.

6 S. D. 583

§ 10. Excessive damages.

[a] (Mich.: 1895.)

A verdict of \$7,000 in favor of a husband for the death of a wife, aged 56 years, was excessive, when the only evidence of the pecuniary value of her services was that she paid \$360 per year as rent on the dwelling, and provided the husband and minor children with board and clothes, no estimate of the amount of such latter expenditures being given.—*Nelson v. Lake Shore & M. S. Ry. Co. (Mich.)* 62 N. W. 993.

104 Mich. 582.

[b] (Neb.: 1896.)

A verdict of \$2,400 is not so clearly excessive as to warrant a reversal, where the deceased was a boy 17 years old, a competent compositor, able to earn \$4 a day, and his next of kin his father, 46 years old, a poor man, with four younger children, although there was no evidence that the son had as yet supplied his father with any considerable amounts of money.—*Post v. Olmsted (Neb.)* 66 N. W. 828.

47 Neb. 893.

[c] (Neb.: 1896.)

A verdict for \$2,850 for the death of a boy 10 years of age who was drowned in a pond of water which defendant city negligently permitted to accumulate over a street, is not excessive.—*City of Omaha v. Richards (Neb.)* 68 N. W. 528.

DEBT.

Imprisonment for, see "Constitutional Law," § 60.

DEBTOR AND CREDITOR.

See "Assignment for Benefit of Creditors"; "Compositions with Creditors"; "Creditors' Bill"; "Fraudulent Conveyances"; "Insolvency."

DECEDENTS.

See "Executors and Administrators"; "Wills." Testimony as to transactions with, see "Witness," §§ 5-26.

DECEIT.

- I. WHEN ACTION LIES, §§ 1-5.
- II. EVIDENCE AND PRACTICE, §§ 6, 7.

Parol evidence of, see "Evidence," § 100.

Survival of cause of action, see "Abatement and Revival," § 10.

I. WHEN ACTION LIES.

§ 1. Right of action.

[a] (Iowa: 1896.)

Where a farm was exchanged for a stock of goods to be invoiced "at wholesale cost as shown by cost marks on said goods," the fact that the cost marks were higher than the wholesale price actually paid did not render the owner of the goods liable for deceit, where it appeared that the owner of the farm had placed an excessive valuation on his farm for the exchange, that the marks were placed on the goods before the parties met, and that the owner of the farm had knowledge of this fact when he closed the contract.—*Simpson v. Kane (Iowa)* 67 N. W. 247.

[b] (Minn.: 1895.)

Where a physician in charge of a sanitarium represented to an invalid, without knowing the truth or falsity of the representation, that if the latter would take treatment at the sanitarium he could be cured, and the invalid relied thereon, and entered the sanitarium, but was

not cured, the physician was liable in an action for deceit.—*Hedin v. Minneapolis Medical & Surgical Inst. (Minn.)* 64 N. W. 158, 62 Minn. 146.

§ 2. Representation or expression of opinion.

[a] (Mich.; 1895.)

Where an owner of lots, on asking one to buy some of them, tells him that they are worth \$100 apiece, it is a question for the jury whether his statements are mere expressions of opinion, or representations on which an action can be founded, though the purchaser views the lots; he having told the owner that he knew nothing of the value thereof, and must rely entirely on his representations, and the owner having also said that he had sold 50 of the lots at that price, when he had merely exchanged them for other property.—*Moon v. McKinstry (Mich.)* 65 N. W. 546.

[b] (Wis.; 1895.)

Representations by a vendor of mining stock that the vendee could not lose upon her investment, and that the mines would pay dividends in the near future, being a mere expression of opinion, or a promise of a future condition of things, will not form a ground of recovery by the vendee on the ground of false representations.—*Warner v. Benjamin (Wis.)* 62 N. W. 179, 89 Wis. 290.

[c] (Wis.; 1895.)

Where a vendee of mining stock sought to recover for false statements by the vendor that the stock was a good investment at the price paid, that the property represented by the stock was in good and promising condition, that the mines were being rapidly developed, and that ore had been sold or was ready to be sold from some of them, the question whether these statements were made and relied upon as statements of existing facts, or as mere expressions of opinion, was for the jury.—*Warner v. Benjamin*, 62 N. W. 179, 89 Wis. 290.

§ 3. Reliance on representations.

[a] (Neb.; 1895.)

In an action for deceit, it must appear that plaintiff justifiably relied on the false representations made by defendant, and that a direct loss to plaintiff resulted therefrom.—*Lorenzen v. Kansas City Inv. Co. (Neb.)* 62 N. W. 231, 44 Neb. 99.

[b] (Neb.; 1895.)

One seeking to recover damages resulting from a sale of his property for a sum less than its value, because of fraudulent representations by defendant, must show that he was influenced by such representations.—*McCreedy v. Phillips (Neb.)* 63 N. W. 7, 44 Neb. 790.

[c] (S. D.; 1895.)

To make false representations available as a cause of action for damages resulting therefrom, they must have been acted on, and have formed a part of the inducement for the transaction; that plaintiff believed the representations not being sufficient.—*Sioux Banking Co. v. Kendall (S. D.)* 62 N. W. 377.

[d] (Wis.; 1895.)

The vendee of a stock of goods may maintain deceit against the vendor for a false representation of the amount of current sales, where such representation formed one of the inducements for purchase, and the vendee had no opportunity to examine the books.—*Mosher v. Post*, 62 N. W. 516, 89 Wis. 602.

§ 4. — Duty to make inquiry.

[a] (Wis.; 1895.)

A vendee cannot maintain deceit against his vendor for a false representation of the value of a stock of goods, upon which he has relied, if he had an opportunity before the purchase to examine the goods himself.—*Mosher v. Post*, 62 N. W. 516, 89 Wis. 602.

[b] (Wis.; 1895.)

A special verdict, though finding that plaintiff, in the sale to defendant of a farm, made false and fraudulent representations as to the value of the farm, and the amount of hay it produced, which defendant believed and relied on, will not support a judgment for defendant, it also being found that defendant ought not, in the exercise of ordinary care and prudence, to have relied on, and accepted as true, the representations, without doing more than the testimony showed that he did do to ascertain the truth or falsity thereof.—*Farr v. Peterson*, 64 N. W. 863, 91 Wis. 182.

§ 5. Representations as to financial responsibility of another.

(Iowa; 1895.)

In response to a letter from plaintiff concerning a firm's credit, defendant, a bank, wrote that the firm was doing a good business; that the members were competent men; and that the bank did not anticipate any difficulty on its part in meeting obligations. The evidence showed that at the time the letter was written the firm was largely indebted to defendant; that its account with defendant for the past year had been overdrawn; and that 20 days afterwards it became insolvent. *Held*, that the evidence did not show knowledge on defendant's part of the falsity of the statements.—*Sylvester v. Henrich (Iowa)* 61 N. W. 942, 93 Iowa, 489.

II. EVIDENCE AND PRACTICE.

§ 6. Evidence.

[a] (Mich.; 1894.)

In an action against a partner, by the purchaser of his interest, for falsely representing as collectible certain firm accounts assigned to the purchaser, evidence that the other partner's interest was merely nominal is admissible.—*Totten v. Burhans (Mich.)* 61 N. W. 58, 103 Mich. 6.

[b] (Mich.; 1895.)

In an action for a fraudulent representation on the sale of stock, evidence of the breach by defendant of a promise made to plaintiff, which was no part of the inducement to purchase, is inadmissible.—*Hubbard v. Long (Mich.)* 63 N. W. 644, 105 Mich. 442.

[c] (Wis.; 1895.)

Where a vendee brings deceit for a false representation of the amount of current sales, the fact that the sales made by the vendee after purchase were much smaller than the vendor's represented sales is not evidence that the vendor's representation was false.—*Mosher v. Post*, 62 N. W. 516, 89 Wis. 602.

§ 7. Question for jury.

(Wis.; 1895.)

Where, in an action to recover damages for inducing plaintiff by fraudulent representations to purchase worthless mining stock, there is evidence that the plaintiff was informed of the condition of the mines before purchase of the stock, and that she was advised not to buy, it is error to refuse to submit to the jury the question whether she was so informed and advised.—*Warner v. Benjamin (Wis.)* 62 N. W. 179, 89 Wis. 290.

DECLARATIONS.

See "Pleading," §§ 5-15.

As evidence, see "Criminal Law," §§ 109-113; "Evidence," §§ 18-42; "Homicide," §§ 32-34.

DECREE.

See "Equity," § 61.

DEDICATION.

§ 1. What constitutes.

[a] (Iowa: 1896.)

That a landowner, over whose land a road on the county line had been used by the public, signed a petition consenting to the location of a highway on the county line, obtained by the county supervisors, who were endeavoring to secure the consent of all the persons along the county line to the location of a road thereon, does not constitute a dedication, where the project of the location of the road was never consummated.—Gray v. Haas (Iowa) 67 N. W. 394.

[b] (Neb.: 1897.)

The fact that an owner of land, in fencing the same, left a strip along the section line from 8 to 12 feet wide, which he permitted the public to use, was no proof of an intention to dedicate any land within his inclosure.—Oyler v. Ross (Neb.) 66 N. W. 1099.
48 Neb. 211.

[c] (Neb.: 1897.)

Comp. St. c. 14, art. 1, § 106, provides that the acknowledgment and recording of the plat of a subdivided tract of land is equivalent to a deed in fee of such part thereof as is on the plat set apart for streets or other public uses. *Held*, that a plat, properly acknowledged and recorded, showing the subdivision of land owned by E. into lots and blocks, with a block in the center, not traversed by a street or alley as in case of other blocks, and marked "E.'s Park," operated as a statutory dedication of such block for a public park.—Ehmen v. Village of Gothenburg (Neb.) 70 N. W. 237.

§ 2. Of streets and highways.

[a] (Iowa: 1895.)

The upper portion of the east line of a street in a block was by dedication located 31 feet further east than it was in the lower portion of the block. The city allowed the owners of lots fronting on the upper portion of the line to improve and occupy them for nearly 20 years to a line the south end of which was 19 feet 4 inches and the north end 7 feet 9 inches beyond said east line in that portion of the block, and during this time the city laid and maintained a sidewalk on said outer line. *Held*, that the city was estopped from claiming under the dedication the strip of land occupied by the lot owners beyond the original front lines of their lots, it never having accepted the dedication of such strip.—Johnson v. City of Burlington (Iowa) 63 N. W. 694.

[b] (Iowa: 1896.)

That the owner of land had knowledge of the use of a road over his land by the public, which was obstructed by gates and by ditches, one of which a person who used the road bridged, is insufficient to show a dedication of the road.—Gray v. Haas (Iowa) 67 N. W. 394.

[c] (Neb.: 1896.)

The plaintiff owned an unplatted tract of land in the limits of a city so situate that Sixth street of said city, if extended, would pass through it. Before said street was extended through his land he sold a part of the tract, conveying it by metes and bounds, one of the calls in the conveyance being so many feet to the west line of Sixth street. *Held*, that this act of the owner was not alone sufficient to sustain a finding that he had dedicated any part of his land to the public to be used as a part of said street.—City of Omaha v. Hawver (Neb.) 67 N. W. 891.

4 N.W.DIG.—18

[d] (Neb.: 1896.)

A proposition, made by the owner of property to a city, to change the location of a street across such property, and its acceptance by the city council, and the making of the proposed change, constitutes a dedication of the ground occupied by the street as relocated.—Sweatman v. City of Deadwood (S. D.) 69 N. W. 582.

[e] (Wis.: 1895.)

A promise by a grantor that the grantee might have a road over the grantor's premises if he fenced the road, was not a dedication of the land covered by the road, though the grantee fenced it.—Cunningham v. Hendricks (Wis.) 62 N. W. 410, 89 Wis. 632.

§ 3. Plats—Designation of streets.

(Minn.: 1895.)

Where a landowner executes a plat, designating streets thereon, and makes conveyances according to such plat, the streets so designated are irrevocably dedicated to the public use as streets.—Great Northern Ry. Co. v. City of St. Paul (Minn.) 63 N. W. 96.
61 Minn. 1.

§ 4. Acceptance of dedication.

[a] (Iowa: 1896.)

In an action by a town to enjoin defendant from maintaining obstructions in an alley, it appeared that, when the town was platted in 1856, an alley was run through the block; that the town was not incorporated until 1881; that the alley was never open to public use, but in 1866 an orchard was planted, covering the alley, and the whole block was fenced in; that in 1870 a barn was built covering the whole width of the alley at one end; that defendant, who purchased in 1870, maintained a fence across one end of the alley, and another through the block. *Held*, that there was nothing to show acceptance of the dedication, and the town, having acquired in the possession of defendant and his grantors for 30 years, is estopped from now opening the alley.—Incorporated Town of Cambridge v. Cook (Iowa) 66 N. W. 884.

[b] (Mich.: 1896.)

Where defendant, in an action for trespass, alleged that the locus in quo was a highway, an instruction that, if statutory labor was performed only upon certain portions of the land set apart by the owner for highway purposes, that portion only would become a highway, and the remainder of it would be simply an offer to dedicate, never accepted by the public authorities, was proper.—Alton v. Meeuwenberg (Mich.) 66 N. W. 571.

§ 5. Revocation of offer.

(Wis.: 1896.)

Where the public authorities refuse to approve a plat dedicating a street to public use, or to recognize the street, in the absence of a public user equivalent to an acceptance the intended dedication is revocable, as to any part of such street, at the pleasure of the proprietor and abutting owners.—Mahler v. Brumder (Wis.) 66 N. W. 502.
92 Wis. 477.

§ 6. Using property for purposes not intended.

[a] (Minn.: 1896.)

Where land has been dedicated to a specific, limited, and definite public use, the legislature has no power to destroy the trust, or divert the property to any other purpose inconsistent with the particular use to which it was dedicated.—City of St. Paul v. Chicago, M. & St. P. Ry. Co. (Minn.) 68 N. W. 458.
63 Minn. 330.

[b] (Minn.: 1896.)

The erection of a warehouse on land dedicated to public use as a levee is not necessarily a misuse of the property.—City of St. Paul v.

Chicago, M. & St. P. Ry. Co. (Minn.) 68 N. W. 458.

63 Minn. 330.

1c1 (Minn.; 1896.)

To give land dedicated for a public levee, or any part of it, to a railway company, as a permanent site for its general freight warehouse, without reference to its traffic with craft navigating the contiguous waters, would constitute a diversion of the property to a use foreign to, and inconsistent with, that to which it was dedicated.

City of St. Paul v. Chicago, M. & St. P. Ry. Co. (Minn.) 68 N. W. 458.

63 Minn. 330.

DEED.

I. REQUISITES AND VALIDITY, §§ 1-5.

II. DESCRIPTION, §§ 6-9.

III. ACKNOWLEDGMENT, see main head "Acknowledgment."

IV. DELIVERY, §§ 10-15.

V. RECORDING, §§ 16, 17.

VI. CONSTRUCTION AND EFFECT, §§ 18-20.

VII. LOST DEEDS, § 21.

See, also, "Covenants"; "Easements"; "Estates"; "Fraudulent Conveyances"; "Vendor and Purchaser."

Alteration, see "Alteration of Instruments."

As evidence, see "Evidence," §§ 75, 76.

As mortgage, see "Mortgages," §§ 4-6.

By assignee in bankruptcy, see "Bankruptcy."

Cancellation and rescission in equity, see "Equity," §§ 14-43.

Conveyance of remainder during life estate, see "Estates," § 5.

Estoppel by, see "Estoppel," §§ 1-3.

Of homestead, see "Homestead," §§ 17-22.

Parol evidence as to date, see "Evidence," § 86.

Payment of consideration for conveyance to another, resulting trust, see "Trusts," §§ 9, 10.

Reformation in equity, see "Equity," §§ 5-13.

Rights as against prior unrecorded deeds, see "Vendor and Purchaser," § 39.

Secondary evidence of execution and contents, see "Evidence," § 13.

Sheriff's deed, see "Execution," § 27.

—on mortgage foreclosure, see "Mortgages," § 88.

Tax deed, see "Taxation," §§ 94, 95, 106-109.

—as color of title, see "Adverse Possession," § 28.

Transfer of mortgaged property, see "Mortgages," §§ 34-36.

I. REQUISITES AND VALIDITY.

Proof of consideration of lost deed, see post, § 21.

Mental incapacity of grantor, ground for rescission, see "Equity," § 21.

§ 1. Names of parties.

(Minn.; 1895.)

A deed made by "A. B., Executor," and signed by him in the same form, sufficiently shows that it was made in his representative capacity.—Babcock v. Collins (Minn.) 61 N. W. 1020.

60 Minn. 73.

§ 2. Identity of parties.

1a1 (Mich.; 1895.)

Where plaintiff claims title from the mother of certain minor heirs, and conveyances to her from the minors are introduced, describing them as heirs of one P., proof of the identity of the grantors as such heirs is necessary, the recitals in the deed being insufficient.—Wolf v. Holton (Mich.) 62 N. W. 174.

104 Mich. 107.

1b1 (Neb.; 1896.)

A deed purporting to convey real estate standing in the name of Joel S. Smith, which, in its recitals and in the recitals of the acknowledgment, designated the grantor by that name, but which was signed "John S. Smith," was not competent evidence of a conveyance of the title of the former, in the absence of proof establishing the signer of the deed and the holder of the title to be the same person.

Omaha Real Estate & Trust Co. v. Reiter (Neb.) 66 N. W. 658.

47 Neb. 592.

§ 3. Execution.

1a1 (Neb.; 1896.)

An allegation in a pleading that the grantor "made and executed" a deed includes all acts essential to the completion of the muniment of title, the delivery of the instrument to the grantee, as well as the signature of the grantor.—Brown v. Westerfield (Neb.) 66 N. W. 439.

47 Neb. 399.

1b1 (Neb.; 1896.)

The genuineness of an unattested deed alleged to have been executed 20 years before trial was sustained by the positive corroborating testimony of the officer who took the acknowledgment, though the grantor's name was misspelled, and the grantor paid taxes on the land for several years following the recording of the deed; the latter fact being explained.—Thams v. Sharp (Neb.) 68 N. W. 474.

1c1 (Wis.; 1896.)

A deed purporting to have been signed by the grantor in presence of the subscribing witnesses, and bearing a certificate of a notary public in New York to the effect that the subscribing witnesses had, respectively, stated under oath, after the grantor's death, that they saw her sign, seal, and execute the instrument, is not proved, within Rev. St. § 2227, providing that "when any grantor shall die, * * * not having acknowledged his conveyance, the due execution thereof may be proved by any competent subscribing witness thereto before any court of record."—Shattuck v. Bates (Wis.) 65 N. W. 706.

92 Wis. 633.

§ 4. Attestation.

1a1 (Neb.; 1896.)

Any expression from which it appears that the subscriber in fact witnessed the execution by the grantor sufficiently answers the requirement of Comp. St. c. 73, § 1, relating to attestation of deeds; the use of the word "witness" not being necessary.—Link v. Connell (Neb.) 67 N. W. 475.

48 Neb. 574.

1b1 (Wis.; 1896.)

A deed purported to have been signed by 20 grantors, the last signature being that of H. C. H. The signatures of two witnesses, one of whom was the notary taking the acknowledgment of H. C. H., appeared, the one beneath the other, inclosed in brackets, and between them and the signature of H. C. H. were the words "Attest as to," so as to read, together with the signature, "Attest as to H. C. H." There were acknowledgments by other grantors before notaries in other states, but there were no other subscribing witnesses. Held, that the restricted character of the attestation was conclusive, and excluded any presumption that the deed was duly witnessed as to all the grantors, as required by Rev. St. § 2216.—Harrass v. Edwards (Wis.) 69 N. W. 69.

§ 5. Consideration.

(Iowa; 1896.)

A grantor conveyed to his stepdaughter certain real estate, and, by a collateral instrument, the grantee agreed to support and maintain grantor and his wife for life. Held, that the relationship between the grantor and grantee and the agreement for maintenance import-

ed consideration sufficient to support the conveyance.—*Schneitter v. Carman* (Iowa) 67 N. W. 249.

II. DESCRIPTION.

§ 6. Sufficiency.

(Minn.; 1895.)

A description, "14 acres of land, a part of the northeast quarter of the southwest quarter" of a certain section, town, range, county, and state, was insufficient.—*McRoberts v. McArthur* (Minn.) 64 N. W. 903.

62 Minn. 310.

§ 7. Conflicting descriptions.

(S. D.; 1896.)

Officers of a corporation were authorized to convey the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of lots 10 and 11. The officers, after so describing the land, added, without authority, a specific description by metes and bounds, which they supposed covered the same property. *Held*, that the first description prevailed.—*Novotny v. Danforth* (S. D.) 68 N. W. 749.

§ 8. Reference to other instruments.

(Mich.; 1895.)

Where a grantor conveys part of a lot by a deed describing it by metes and bounds, and subsequently conveys the balance of the lot to another, describing it as being bounded by the land previously conveyed, the grantee in the first conveyance is limited to the tract described in his deed by metes and bounds, though less than it was the intention of the parties thereto to convey.—*Probett v. Jenkinson* (Mich.) 63 N. W. 648.

105 Mich. 475.

§ 9. What property passes.

[a] (Mich.; 1895.)

The owner of a tract of land platted a portion of it, and on the recorded plat all that part adjoining a river was marked "Reserved." This reserve was platted into nine lots, three of which, by successive conveyances, became vested in defendants. On the plat, between the river and the platted lots, was a strip running parallel with the river, marked "Slab Dock," consisting of slabs with the ends resting on the shore and extending into the water. The meander line of the river was substantially coincident with the inside of the dock, but the lot lines, as marked in feet, carried the lots past the meander line, and, in some places on the plat, to within four or five feet of the river side of the dock. For many years defendants and their grantors treated this strip as part of the platted lots, without protest, and no way to such strip had been reserved; the only access being from the river, or other pieces of land not platted. *Held*, that the platted lots ran to the river, and included the slab dock.—*Sands v. Gambs* (Mich.) 64 N. W. 741.

[b] (Wis.; 1895.)

The fact that a deed reserved to the grantor a right of way across the northerly end of the parcel conveyed, for the purpose of repairing a mill race, and that the grantee was required to build an embankment on and across the northerly end of the premises along the southeasterly side of the mill race, and keep it in repair, did not extend the description, as given by distances and measurements in the deed, so as to convey land to the bank of the mill race.—*Gleason v. Burroughs* (Wis.) 63 N. W. 292.

90 Wis. 316.

III. ACKNOWLEDGMENT.

See main head "Acknowledgment."

IV. DELIVERY.

In escrow, see "Escrow."

§ 10. In general.

[a] (Iowa; 1896.)

The signing and acknowledgment of conveyances by a debtor to personal creditors, which he retained in his possession under an agreement that they were to be delivered if it became necessary to prefer such creditors above others to whom he was liable as surety only, did not vest the grantees therein with any interest or equity in the property covered thereby until delivery of the conveyances, as against another creditor recovering a judgment prior to such delivery.—*Guernsey v. Black Diamond Coal & Mining Co.* (Iowa) 68 N. W. 777.

[b] (Iowa; 1896.)

A conveyance as security, signed and acknowledged by a debtor under an unconditional agreement with the grantee for its delivery, will be effective from the date of such acknowledgment as against other creditors obtaining judgments against the grantor thereafter, but before actual delivery of the instrument.—*Guernsey v. Black Diamond Coal & Mining Co.* (Iowa) 68 N. W. 777.

[c] (Neb.; 1896.)

The loss or destruction of a deed, after delivery thereof, does not divest the title of the grantee.—*Brown v. Westerfield* (Neb.) 66 N. W. 439.

47 Neb. 399.

§ 11. What constitutes delivery.

[a] (Iowa; 1895.)

On an issue as to whether a deed was ever delivered to defendant by his father, defendant testified that his father, a few days before he died, walked across the room, and took the deed from a bureau, and delivered it to defendant; and defendant's uncle testified that he saw the father walk over to the bureau, and hand an envelope to defendant. The evidence, by a preponderance, showed that at that time the father was unable to get up or walk, and there was evidence that defendant was present while his father made his will, devising the property involved as if it were his own, and made no objection. *Held*, that there was no delivery of the deed.—*Foley v. McNamara* (Iowa) 62 N. W. 26.

93 Iowa, 707.

[b] (Iowa; 1896.)

Where the person to whom a deed was delivered testified that the grantor deposited the deed with him to be delivered to the grantor's son after the grantor's death, and the grantor's wife, who had joined in the deed, disclaimed any interest in the land, and a large number of witnesses testified that the grantor declared that he absolutely disposed of the property to his son, there was sufficient evidence to prove a legal delivery.—*Denzler v. Rieckhoff* (Iowa) 66 N. W. 147.

[c] (Iowa; 1896.)

Plaintiff executed a deed to his children, leaving it with the justice who took the acknowledgment. The deed was sent to the recorder by the justice, but was recalled by the plaintiff before it was recorded. The grantees did not know of it until about a year later, when plaintiff's wife, without his knowledge, gave it to one of the grantees, who had it recorded. *Held*, that there was no sufficient delivery by the grantor.—*O'Connor v. O'Connor* (Iowa) 69 N. W. 676.

§ 12. Placing in hands of third person.

[a] (Minn.; 1896.)

Where a grantee subsequently conveyed the land, it was immaterial that the deed to him was executed without his knowledge, and was not actually delivered to him, but, on the contrary, to the one who actually purchased the

land, and who procured the execution of the deed, whether or not the grantor knew that the purchaser was not named as grantee. — *Crowley v. C. N. Nelson Lumber Co.* (Minn.) 69 N. W. 321.

(Neb.; 1896.)

A mother executed a deed conveying land to her minor daughter, and delivered the deed to a justice for the use and benefit of the grantee, with the understanding that the justice should retain the custody of the instrument until the grantor's death, when he was to file it for record. *Held* a sufficient delivery to pass the title to the grantee at the date thereof. — *Brown v. Westerfield* (Neb.) 66 N. W. 439.

47 Neb. 399.

§ 13. Delivery procured by fraud.

(Iowa; 1895.)

Where a husband and his wife, being desirous of selling certain land, executed a deed thereto, wherein the name of the grantee was omitted at the instance of one who claimed to have a purchaser, to be inserted on delivery, and such person fraudulently obtained possession thereof on a pretense of examining it, one whose name he inserts as grantee acquires no title for want of delivery. — *Golden v. Hardesty* (Iowa) 61 N. W. 913.

93 Iowa, 622.

§ 14. Effect of record.

(Neb.; 1896.)

Where a mother executes a deed to her son, and voluntarily places the same upon record for the purpose and with the intent of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance. — *Issitt v. Dewey* (Neb.) 66 N. W. 288.

47 Neb. 196.

§ 15. Presumption and burden of proof of delivery.

(Iowa; 1895.)

The fact a grantee kept the deed without recording for a number of years, allowed the grantors to remain in possession, and made no claim to the property until after their deaths, does not alter the presumption of a delivery when the deed fully executed is in his possession. — *Magee v. Allison* (Iowa) 63 N. W. 322.

(Iowa; 1896.)

A deed of land within the city limits of Des Moines was dated May 19, and filed for record June 17, 1893. *Held*, that the facts that the grantee resided in Chicago and the grantor in Rock Island were not sufficient to overcome the presumption that the deed was delivered when it was made. — *Farwell v. Des Moines Brick Manuf'g Co.* (Iowa) 66 N. W. 176.

(Iowa; 1896.)

Where a deed, duly acknowledged, though not recorded, is shown to have been in the possession of the grantee, the presumption is that it was delivered, and that the date of delivery was the same as that of the acknowledgment. — *Nichols v. Sadler* (Iowa) 68 N. W. 709.

(Mich.; 1894.)

Where it is admitted, in a controversy over the delivery of a deed, that the grantee obtained the key of the box containing the deed from his father, the grantor, the day before his father's death, unlocked the box, and took out the deed, which he recorded two days later, it is not error to instruct that the burden was on the defendants, claiming under the grantee, to show the delivery. — *Jourdan v. Patterson* (Mich.) 61 N. W. 64.

102 Mich. 602.

V. RECORDING.

Effect of record on question of delivery, see ante, § 14.

§ 16. Right to record.

(Minn.; 1896.)

Where a deed purports to convey title to or affects an interest, legal or equitable, in several parcels of land, the taxes of some of which are delinquent, the county auditor has no authority, under Gen. St. 1894, § 1624, to indorse on the deed over his official signature, "Taxes paid and transfer entered," so as to entitle the deed to record. — *State v. Weld* (Minn.) 68 N. W. 1068.

§ 17. Necessity of record.

(Minn.; 1894.)

Gen. St. 1878, c. 40, § 21, providing that a conveyance not recorded shall be void as against any judgment obtained at the suit of another party, applies to any judgment affecting the title to real estate which appears of record in the name of the person against whom the judgment is rendered. — *Berryhill v. Smith* (Minn.) 61 N. W. 144.

59 Minn. 285.

VI. CONSTRUCTION AND EFFECT.

What property passes, see ante, § 9.

§ 18. Estates and interests created.

(Mich.; 1894.)

A deed which, by its granting clause, conveys "the right of way for a railroad, * * * and described as follows: 'A strip of land forty feet wide, * * * and being nine hundred and fifty-two feet in length,'" though in the usual form of a full warranty deed, conveys an easement therein only, and not a fee. — *Jones v. Van Bochove* (Mich.) 61 N. W. 342.

103 Mich. 98.

(Mich.; 1896.)

A deed does not create an estate in expectancy in the grantee by using the words "as well in possession as in expectancy," where the only estate owned by the grantor was title in fee simple to an undivided interest. — *Fenton v. Miller* (Mich.) 65 N. W. 966.

(Mich.; 1897.)

A grant to the living children of the grantor's son, subject to a life estate in the son, with a stipulation that, should he have more children at his death, they should share and share alike, gives the children in esse a vested remainder, subject to open and let in those afterwards born. — *Lariverre v. Rains* (Mich.) 70 N. W. 583.

(Mich.; 1897.)

An instrument conveying land to the grantor's grandchildren provided that her husband should have the life use of one-half thereof, "in case he lives with her as long as she shall live, and sees fit to occupy the same as a home," and that her son should use the other half "during his life, provided he sees fit" to occupy the same so long as a home, it being stipulated that these life estates should not be transferable. The life tenants, including the grantor, subsequently conveyed their interests to a stranger, and ceased to occupy the premises, and the grantor died. *Held*, that this terminated all the life estates, entitling the remaindermen to the present enjoyment of the property. — *Lariverre v. Rains* (Mich.) 70 N. W. 583.

(Mich.; 1897.)

A deed of property to "L., wife of E.," contained no words of inheritance in the granting clause, while the habendum clause read as follows: "To have and to hold the said lots to the said L., to the children of her body begotten by the said E., to her heirs, executors, and to the assigns of the said L. and E., forever." *Held*, that such deed conveyed a life estate to the grantee, L., with an estate in fee in expectancy to her or her heirs, or to the assigns of herself and E., subject to a contingent life estate in her

children begotten by E.—*Downing v. Birney* (Mich.) 70 N. W. 1006.

[F] (Wis.; 1896.)

A deed in which the description of the property is followed by a reservation of a portion of that described, to be used for a specified purpose, as an alley, operates as a conveyance of the fee of the portion reserved, subject only to the easement declared.—*Towne v. Salentine* (Wis.) 66 N. W. 395.

92 Wis. 404.

§ 19. Quitclaim.

(Mich.; 1895.)

A quitclaim deed by a mortgagee, purchaser at a foreclosure sale, and an assignment of the mortgage executed before the period of redemption had expired, convey all the interest of the mortgagee.—*Gage v. Sanborn* (Mich.) 64 N. W. 32.

§ 20. Reservations, exceptions, and restrictions.

[a] (Iowa; 1895.)

A reservation, in a grant for a county road of land which is being used as a pasture, of the right "to attach a fence to the bridge" to be built thereon over a ravine running through the tract, includes the right to a passage-way for stock under the bridge. 60 N. W. 483 (1894) reversed.—*Agne v. Seitsinger*, 64 N. W. 836.

[b] (Mich.; 1896.)

Violation of a provision in a deed that no store or saloon should be erected on the lot will be enjoined, though prior to the deed the grantor had leased a store opposite for a saloon, and thereafter conveyed adjoining lots without any restrictions.—*Reilly v. Otto* (Mich.) 66 N. W. 228.

[c] (Mich.; 1896.)

A deed conveyed a lot in defendant city, except so much thereof as was "set apart for sidewalk purposes." For 30 years there had been, on the lot, buildings which in fact encroached 2 feet on the platted street, the sidewalk extending 10 feet beyond the buildings. The plat did not designate any part for sidewalks, nor was there any corporate action setting apart the 2 feet with other land for sidewalks. All prior conveyances of the lot contained the same provision. *Held*, that the exception included only the land actually used for sidewalk purposes.—*Vincent v. City of Kalamazoo* (Mich.) 69 N. W. 501.

[d] (Wis.; 1896.)

A deed recited that, in consideration of the performance of its conditions, the grantors "have given, * * * conveyed," and "do give, grant, * * *" certain land, and provided that on the death of the grantors the absolute title should vest in the grantee, provided she had fulfilled the conditions, but on failure to perform such conditions all rights conveyed should revert to the grantors. *Held*, that the conditions were conditions subsequent, so as to authorize equity to relieve from a forfeiture in case of nonperformance.—*Donnelly v. Eastes* (Wis.) 69 N. W. 157.

[e] (Wis.; 1897.)

Where a clause in a deed from a mother to her daughter recited, as consideration, payment of a mortgage on the premises, and the support of the mother by the grantee during her lifetime, on breach of such condition subsequent and lawful re-entry by the grantor the legal title became revested in such grantor.—*Gilchrist v. Foxen* (Wis.) 70 N. W. 585.

VII. LOST DEEDS.

§ 21. Proof of consideration.

(Mich.; 1895.)

In an action to establish a lost deed, and to set aside a subsequent conveyance of

the premises by the grantor to his wife, the evidence tended to show that such a deed was made, the grantor retaining a life estate, and stipulating that the deed should be withheld from record until his death; but the only consideration shown was the payment by the grantee of the grantor's note two years after the deed was executed. *Held*, that the evidence did not establish the claim that the lost deed was given upon a consideration actually paid by the plaintiff, and that a proper inference was that it had been recalled and canceled upon the execution of the subsequent conveyance.—*Mosher v. Mosher* (Mich.) 62 N. W. 706.

104 Mich. 551.

DE FACTO CORPORATIONS.

See "Corporations," §§ 6, 7.

DE FACTO OFFICERS.

See "Office and Officer," §§ 14, 16, 17.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," §§ 12-21.

DEFEASANCE.

See "Chattel Mortgages"; "Mortgages."

DEFECTIVE.

Appliances, see "Master and Servant," §§ 35-45.
Bridges, see "Bridges," §§ 3-6.
Elevators, see "Negligence," § 8.
Highways, see "Highways," §§ 33-38.
Sidewalks, see "Municipal Corporations," §§ 83, 84.
Streets, see "Municipal Corporations," §§ 77-101.
Turnpikes, see "Turnpikes and Toll Roads," § 2.

DEFECT OF PARTIES.

See "Parties," §§ 4, 5.

DEFICIENCY.

Judgment on mortgage foreclosure, see "Mortgages," § 65.

DEFILEMENT.

See "Rape"; "Seduction."

DEFINITIONS.

See "Words and Phrases."

DELAY.

In transporting goods, see "Carriers," § 10.

DEL CREDERE COMMISSION.

See "Factors and Brokers," § 5.

DELEGATION.

Of legislative powers, see "Constitutional Law," §§ 10-15.

Of power of county board, see "Counties," § 30.
— to make assessments for local improvement, see "Municipal Corporations," § 130.

— to make assessments for highways, see "Highways," § 23.

Of trust, see "Trusts," § 22.

DELIVERY.

In escrow, see "Escrow."

Of bills and notes, see "Negotiable Instruments," §§ 2-4.

Of bonds, see "Bonds," § 1.

Of chattel mortgages, see "Chattel Mortgages," § 17.

Of corporate stock, see "Corporations," § 45.

Of deeds, see "Deed," §§ 10-15.

Of gifts, see "Gifts," § 1.

Of goods, see "Sale," §§ 20, 21, 23-26.

— by carrier, see "Carriers," §§ 5-7.

DEMAND.

Before suit, see "Mandamus," § 8; "Replevin," § 5; "Trove and Conversion," §§ 9-11.

— against county to recover money paid at wrongful tax sale, see "Taxation," § 120.

For interest, see "Interest," § 6.

For jury trial, see "Jury," § 27.

For payment of notes, see "Negotiable Instruments," § 63.

Starting running of interest, see "Interest," § 11.

— of limitations, see "Limitation of Actions," § 20.

DEMONSTRATIVE EVIDENCE.

See "Evidence," § 118.

Exhibiting injury to jury, see "Assault and Battery," § 8.

DEMONSTRATIVE LEGACIES.

See "Wills," § 56.

DEMURRER.

See "Pleading," §§ 18-30.

DENTISTS.

See "Physicians and Surgeons."

DEPARTURE.

See "Pleading," § 43.

DEPOSITARIES.

Abstracting deed from depository, see "Escrow."

Discharge of sureties on bond, see "Principal and Surety," § 11.

§ 1. Of state funds.

(Neb.; 1897.)

A deposit of public moneys by a state treasurer in a legally constituted depository for public funds, in compliance with the provisions of the "Depository Law," is in substance and legal effect a loan of the moneys so deposited.—In re State Treasurer's Settlement (Neb.) 70 N. W. 532.

§ 2. — Bonds.

[a] (Neb.; 1897.)

To constitute a bank a state depository of public funds, it must give a bond for the safe-keeping and payments of such deposits and the accretions thereof, as provided by the "Depository Law," conditioned as required by law, and approved by the governor, secretary of state, and attorney general, or any two of them, who were all present and conferred upon the subject.—In re State Treasurer's Settlement (Neb.) 70 N. W. 532.

[b] (Neb.; 1897.)

The depositing by a state treasurer of public funds in a state depository bank in excess of one-half of the amount of the penalty of the bond given by said bank, in violation of the "Depository Law," will not release either the principal or sureties from their obligation to repay the moneys deposited to the amount of 50 per centum of the bond and the accretions thereof.—In re State Treasurer's Settlement (Neb.) 70 N. W. 532.

§ 3. Of county funds.

[a] (Neb.; 1896.)

An agreement of a county treasurer that, if money is advanced by a bank for certain county purposes, such bank shall be relieved to a certain extent from liability to the county as a depository, is not enforceable.—Commercial State Bank v. Antelope County (Neb.) 67 N. W. 465.

48 Neb. 496.

[b] (Wis.; 1895.)

Sanb. & B. Ann. St. § 693 (Laws 1885, c. 87), provides that the county board may "annually," at their first meeting, or in the month of June, "and as often thereafter as they shall determine," select some bank with which county funds shall be deposited; that the board shall contract with the bank for payment of interest to the county, and "at any time" when, in their opinion, the safety or interest of the county requires it, direct all sums so deposited "to be paid into the county treasury, or to such other bank or banks as they may select." Section 664 requires the annual meeting of the board to be held in November. *Held*, that when the board selects a depository the selection is not for one year only, or until the next meeting of the board, unless it is so specified.—Manitowoc County v. Truman, 64 N. W. 307, 91 Wis. 1.

§ 4. — Bonds.

[a] (Minn.; 1896.)

The defendant bank executed a bond to the plaintiff, with its codefendants as sureties, in which it was recited that the bank had applied to be designated a depository of county funds. The condition of the bond was that if the bank was designated such depository, pursuant to the statute, it should pay on demand all funds deposited with it pursuant to such designation. The board of county commissioners designated the bank such depository, accepted and approved the bond, which was duly recorded; and the county treasurer, pursuant to such designation and bond, deposited county funds with the bank, as a county depository. *Held*, in an action upon the bond, that the answer of the sureties that the board of county auditors never considered the application of the bank, and never designated it as a county depository, and that they never knew that the bond had been approved, or that the funds had been deposited with

the bank in reliance thereon, does not state a defense.—Board of Com'rs of Hennepin County v. State Bank (Minn.) 66 N. W. 143.
64 Minn. 180.

[b] (Minn.: 1897.)

Gen. St. 1894, § 730, provides that the bond of a depository of county funds shall be made payable to the county. *Held*, that a bond made payable to the "board of county commissioners" was merely irregular, and not void.—Board of Com'rs of St. Louis County v. American Loan & Trust Co. (Minn.) 69 N. W. 704.

[c] (Minn.: 1897.)

A complaint on the bond of a trust company as county depository alleged the deposit of county funds with the company "at the time of the execution and delivery" of the bond, and "thereafter." It was not alleged that the company had been designated as depository, but a copy of the bond set out as an exhibit recited the fact that it had "been duly designated," etc. The bond was approved 18 days after its execution and delivery. *Held* that, as Gen. St. 1894, § 730, requires the bond to be approved before the depository is designated, the complaint did not state a cause of action, as it did not sufficiently allege the designation of the county as depository before, or the deposit of county funds after, the approval of the bond.—Board of Com'rs of St. Louis County v. American Loan & Trust Co. (Minn.) 69 N. W. 704.

[d] (Wis.: 1895.)

Sanb. & B. Ann. St. § 710, prescribes a form for the bond of a county treasurer, but such form contains several things inappropriate to the security to be given by a bank selected as a depository. *Held*, that a bond given by a bank and approved by the county board, which recites the fact of such selection "pursuant" to Rev. St. § 693, and the substance of the contract with the county, and is conditioned for the payment of the money by the bank to the county as required by such contract, is given substantially "in the same manner" as the treasurer's bond is given, as required by Sanb. & B. Ann. St. § 693, and is valid.—Manitowoc County v. Truman, 64 N. W. 307, 91 Wis. 1.

DEPOSITION.

§ 1. Notice.

[a] (Neb.: 1896.)

Under Code Civ. Proc. § 378, requiring notice of the taking of depositions to be served on the adverse party, his agent or attorney, or left at his place of residence, service on a station agent of a defendant railroad company is insufficient.—Atchison, T. & S. F. R. Co. v. Meek (Neb.) 68 N. W. 509.

[b] (Neb.: 1896.)

Under Code Civ. Proc. § 378, requiring a notice to take depositions to "specify the names of witnesses to be examined," a deposition of G. A. Hollem cannot be taken under a notice specifying the name of Gns Hahn or Gns Halin.—Miller v. Frey (Neb.) 68 N. W. 630.

[c] (N. D.: 1894.)

In the absence of a showing of prejudice, a deposition, taken in another state on notice, will not be suppressed because the notice did not locate by street and number the office of the notary before whom it was to be taken.—Moore v. Booker (N. D.) 62 N. W. 607.
4 N. D. 543.

[d] (N. D.: 1896.)

Comp. Laws, § 5289, requires a notice to take depositions to state the name of each witness to be examined.—Ashe v. Beasley (N. D.) 69 N. W. 188.

§ 2. Examination of witness.

(Mich.: 1895.)

Where the instructions annexed to a commission to take testimony required an oath to

be publicly administered, the commissioner's return, showing that the testimony was taken at his office, after the oath "prescribed by the instructions annexed to the commission" had been given, sufficiently shows that the oath was publicly administered, as required by How. Ann. St. § 7455.—Ford v. Cheever (Mich.) 63 N. W. 975.

105 Mich. 679.

§ 3. Certificate of taking.

[a] (Minn.: 1896.)

Gen. St. 1894, § 5689, relative to depositions, is substantially complied with by the certificate of a notary, to a deposition taken and returned by him, that testimony of the witness was carefully read over to him by the notary before being signed by the witness.—Beckett v. Gridley (Minn.) 69 N. W. 622.

[b] (N. D.: 1894.)

The certificate of a notary taking a deposition need not negative the notary's relationship to either of the parties, or his interest in the case.—Moore v. Booker (N. D.) 62 N. W. 607.
4 N. D. 543.

§ 4. Parties joined after taking.

(Wis.: 1895.)

The attorney of one of two defendants should not be allowed, on his argument of the case, and against objection, to read to the jury a part of a deposition taken before the other defendant was made a party to the suit as originally brought.—Smith v. Milwaukee Builders' & Traders' Exchange, 64 N. W. 1041, 91 Wis. 360.

§ 5. Cross-interrogatories.

(Neb.: 1895.)

The deposition of a witness was taken on behalf of plaintiff, on notice, defendant serving cross interrogatories. The officer who took the deposition, instead of transmitting it to the clerk, transmitted it to plaintiff's attorney, and the deposition was never filed. Afterwards, plaintiff served another notice to take the deposition of the same witness. No cross interrogatories were served, and the witness was not cross-examined. *Held*, that the court properly overruled a motion to suppress the deposition, based on the failure of the notary to propound the cross interrogatories served on the former notice.—City of Chadron v. Glover (Neb.) 62 N. W. 62, 43 Neb. 732.

§ 6. Presence of deponent at trial.

(Neb.: 1896.)

Where, from the deposition of a witness, it appears that he is a nonresident of the county, it is unnecessary for the party offering the deposition in evidence to prove that he is not present in court. *Sells v. Haggard* (1887) 21 Neb. 357, 32 N. W. 66, followed.—Lowe v. Vaughn, 67 N. W. 464, 48 Neb. 651.

§ 7. Correction.

(Iowa: 1897.)

An application at the commencement of a trial to have a deposition corrected on the ground that the stenographer had omitted certain statements by the witness is properly refused.—Graves v. Clark (Iowa) 69 N. W. 1046.

§ 8. Use on appeal.

(Neb.: 1896.)

Depositions taken in a cause pending before a justice, and by stipulation used in that cause, and also in another cause pending before the justice, may be used on the trial of both causes in the appellate court, providing the stipulation remains in force.—Keens v. Robertson 65 N. W. 897, 46 Neb. 837.

§ 9. Time and mode of making objections.**[a] (Iowa; 1895.)**

Where the record shows that plaintiff offered the deposition of certain witnesses, but did not announce that they "were taken in this case," and no objection was made to the introduction thereof, a motion to strike them from the record on the ground that they were not sufficiently identified was properly denied.—*Hood v. Chicago & N. W. Ry. Co. (Iowa)* 64 N. W. 261.

[b] (Mich.; 1894.)

Where a witness has made a deposition, in which she avers that she cannot tell the place of her seduction, and the deposition has been admitted in evidence, the question whether she, in the deposition, made such an avowment, was properly excluded by the court.—*People v. Keefer (Mich.)* 61 N. W. 338.

103 Mich. 83.

[c] (Neb.; 1895.)

It is not reversible error for the trial court to refuse to strike out a portion of the answer of a witness in a deposition, because it stated a conclusion as to the effect of language, instead of repeating the language, where the answer was probative in its character, and material to the issues, and the objection was not made until the deposition was read at the trial.—*Woodworth v. Thompson (Neb.)* 62 N. W. 450.

44 Neb. 311.

DEPOSITS.

See "Banks and Banking," §§ 8-17.

By guardian of ward's funds, see "Guardian and Ward," § 6.

With innkeeper, see "Innkeepers."

DEPOSITS IN COURT.

Necessity of payment into court by complainant in interpleader, see "Interpleader."

Payment by garnishee, see "Garnishment," § 37.

[a] (Neb.; 1896.)

A deposit in court made by defendant was not chargeable with fees for service of subpoenas at the instance of plaintiff.—*Van Etten v. Coburn (Neb.)* 66 N. W. 427.

47 Neb. 279.

[b] (Wis.; 1895.)

Where money was deposited with the clerk of the circuit court to redeem certain mortgaged premises, and the right to redeem was denied on appeal, the money being repaid on application to the clerk before the mortgagee had served him with notice of his claim of a lien thereon for costs, a motion made subsequently that the lien be established is properly overruled.—*Meehan v. Blodgett*, 64 N. W. 429, 91 Wis. 63.

DEPUTIES.

See "Sheriffs and Constables," §§ 15, 16

DESCENT AND DISTRIBUTION.**I. NEXT OF KIN, §§ 1-3.****II. CHILDREN OMITTED FROM WILL, § 4.****III. REALTY, § 5.****IV. RIGHTS OF HUSBAND AND WIFE, §§ 6, 7.****V. ADVANCEMENTS, §§ 8-11.****VI. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES, §§ 12-14.**

See, also, "Executors and Administrators"; "Wills."

Adverse possession between heirs, see "Adverse Possession," § 15.

Heirs and distributees as witnesses, see "Witnesses," § 18.

Right of aliens to inherit land, see "Aliens."

I. NEXT OF KIN.**§ 1. In general.****(Mich.; 1895.)**

In 3 How. Ann. St. § 5772a, providing that if deceased shall have no issue or parent the property shall descend to his or her brothers and sisters, and the children of the deceased brothers and sisters, by right of representation, the word "children" refers only to sons and daughters in the first degree, and the grandchildren of deceased brothers and sisters do not take by representation.—In re Chapoton's Estate (Mich.) 61 N. W. 892; Appeal of Phelps, Id.

104 Mich. 11.

§ 2. Taking per capita or per stirpes.**(Neb.; 1896.)**

A, died intestate, leaving surviving him neither issue, nor father, mother, brother, or sister. There were surviving four children of a deceased brother, eight children of a deceased sister, and three children of a deceased daughter of such sister. Held, that under Comp. St. c. 23, § 30, subd. 5, the twelve surviving nephews and nieces took each one-twelfth part of the intestate's land, per capita, and that the grand-nephews and grand-nieces took nothing.—*Douglas v. Cameron (Neb.)* 66 N. W. 430.

47 Neb. 358.

§ 3. Stepmother.**(Iowa; 1896.)**

Under Code, § 2455, providing that the surviving parents of an intestate, leaving surviving him neither wife nor child, shall each take one-half his estate; and section 2456, providing that in such a case, if one parent be dead, the surviving parent shall take the entire estate; and section 2457, providing that, if both parents be dead, their share shall be disposed of as if they had outlived the intestate, and died in possession and ownership of their shares,—a stepmother who survived her stepson was entitled, where he died unmarried after his father, to one-third of the share which would have gone to her husband, or one-sixth of the whole estate, though Code, §§ 2436, 2440, give a widow one-third of the real property "possessed" by her husband during marriage, and one-third of the personal property which he owned at his death.—In re Parker's Estate (Iowa) 66 N. W. 908; *Smith v. Parker*, Id.

II. CHILDREN OMITTED FROM WILL.**§ 4. Intention to disinherit.****(Iowa; 1895.)**

Under Code, § 2453, providing that a decedent's estate "shall, in the absence of other arrangements by will, descend in equal shares to the children," it is not necessary, in order to disinherit his children, that a decedent should express an intent to do so in his will, when he bequeaths his whole estate to a person not his child.—*Ileeb v. Ileeb (Iowa)* 61 N. W. 932.

93 Iowa, 416.

III. REALTY.**§ 5. Devolution.****(Wis.; 1895.)**

Under Ter. St. 1839, p. 184, § 33, declaring that the land of a person dying without chil-

dren shall descend equally to the next of kin in equal degree, the real estate of an intestate who left no children descended to his father and mother as tenants in common, and, upon the decease of the mother, her heirs were entitled to her share.—*Brown v. City of Baraboo* (Wis.) 62 N. W. 921.
90 Wis. 151.

IV. RIGHTS OF HUSBAND AND WIFE.

§ 6. Rights of husband.

(Iowa; 1895.)

Code, § 2008, provides that, if there be no survivor, the homestead shall descend to the issue of either husband or wife, exempt from any debt of their parents or their own. Id. § 2441, provides that the distributive share of the widow shall be so set off as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to her, unless she prefers a different arrangement, but no different arrangement shall be permitted where it would have the effect of prejudicing the rights of creditors. Id. § 2440, provides that the right of a surviving husband shall be the same as that of a surviving wife. *Held*, that a surviving husband is not obliged to take his distributive share so as to include the homestead, and the homestead will descend to the issue of the deceased free from the claims of her creditors. *Granger and Deemer, JJs.*, dissenting.—*In re Coulson's Estate* (Iowa) 64 N. W. 735.

§ 7. Rights of wife.

(Minn.; 1896.)

Under Gen. St. 1894, § 4471, providing that a surviving wife shall be entitled in fee to an undivided one-third of all land other than the homestead, "but subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate," and section 4477, subd. 6, providing that "the residue, if any, of the personal estate, shall be distributed in the same proportion, and to the same persons, and for the same purposes as prescribed for the descent and disposition of real estate," the surviving wife's distributive share, aside from the homestead, in her deceased husband's estate, is chargeable, under sections 5918-5925, with the debts of the husband, the same as the distributive shares of heirs and next of kin.—*Lake Phalen Land & Improvement Co. v. Lindeke* (Minn.) 68 N. W. 974.

V. ADVANCEMENTS.

§ 8. What constitute.

(Iowa; 1895.)

There was testimony that defendant's intestate, after the death of plaintiff's husband, his father, remained at home for nearly 2 years with plaintiff, his mother, assisted in the management of her farm and in the payment of debts against her husband; that plaintiff lived with him afterwards for 14 years out of 19, and had stated several times she gave him more than her other children, because he had cared for her more. *Held*, that an instruction to consider these facts in passing on the question whether money given her son was an advancement or a loan was correct.—*Murphy v. Murphy* (Iowa) 63 N. W. 697.

§ 9. Evidence.

[a] (Iowa; 1895.)

On an issue as to whether payment by a father of the son's debts created an advancement, or a debt merely, statements of the father made to a third person when the transaction took place that he would keep the notes given him by his son to show that the son had re-

ceived that much out of the estate are admissible as *res gestæ*.—*West v. Beck* (Iowa) 64 N. W. 599.

[b] (Wis.; 1896.)

Rev. St. § 3959, providing that all grants and gifts shall be considered advancements, if expressed in the grant or gift to have been so given, or if charged by the intestate or acknowledged by the donee in writing as such, impliedly excludes parol evidence of advancements.—*Pomeroy v. Pomeroy* (Wis.) 67 N. W. 430.

93 Wis. 262.

§ 10. — Presumption.

[a] (Iowa; 1895.)

Where it appeared that plaintiff, the mother of defendant's intestate, at various times furnished sums to each of her children, and the evidence was conflicting whether the money given to deceased was an advancement or a loan, an instruction that the presumption was that the money furnished was an advancement, and that the burden was on plaintiff to show that it was a loan, leaving it to the jury to determine the intent, is correct.—*Murphy v. Murphy* (Iowa) 63 N. W. 697.

[b] (Iowa; 1895.)

Where a father pays the debt of his son to a third person, it will be presumed, in the absence of a showing to the contrary, that the money so paid was intended as an advancement.—*West v. Beck* (Iowa) 64 N. W. 599.

§ 11. Effect.

(Iowa; 1895.)

The word "property," as used in Code 1873, § 2459, providing that property given by an intestate as an advancement shall be taken by the donee as part of his share in the estate, covers both real and personal property.—*West v. Beck* (Iowa) 64 N. W. 599.

VI. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

§ 12. In general.

[a] (Mich.; 1896.)

Purchasers of land from heirs of an estate, before administration, take it subject to debts and expenses of administration.—*Flood v. Strong* (Mich.) 66 N. W. 473.

[b] (Mich.; 1897.)

A bill in equity will lie to charge with the ancestor's debts property in the hands of heirs, devisees, or legatees.—*Allen v. Conklin* (Mich.) 70 N. W. 339.

[c] (Minn.; 1896.)

Where articles of incorporation provided that a certain portion of the amount subscribed for stock should "be paid in when called for by its board of directors," a claim for the unpaid amount was, before call made, a contingent claim merely, which could not be proved against the estate of a deceased subscriber; hence the distributees of the estate are liable for the amount of a call made after the distribution to the extent of assets received by them. Gen. St. 1894, §§ 5918-5925. *State v. Norton* (1894) 61 N. W. 458. 59 Minn. 424, distinguished.—*Lake Phalen Land & Improvement Co. v. Lindeke*, 68 N. W. 974.

[d] (Minn.; 1896.)

Where heirs and next of kin, sought to be held by a creditor of an intestate as distributees to the extent of assets received by them (Gen. St. 1894, §§ 5918-5925), are the same persons, it is immaterial what amount of personality and what amount of realty was received by them, so long as they received more than enough of both or either to satisfy the creditor's claim.—*Lake Phalen Land & Improvement Co. v. Lindeke* (Minn.) 68 N. W. 974.

§ 13. Action by heirs.

(1st (Neb.) 1896.)

An action to recover a debt due a deceased intestate cannot be maintained by the heirs, unless there be no demands against their ancestor, and there has been no administration, or the administration has been closed; the mere fact that the heirs, after erroneously bringing such an action, acquired title to the assets of the estate by the discharge of the administrator before the estate was fully administered, not entitling them to maintain the action.—*Cox v. Yeazel* (Neb.) 68 N. W. 483.

(1st (Neb.) 1896.)

Where an administrator refuses to bring an action on a claim due the estate, the heirs or creditors may maintain an action thereon in the circuit court, making the administrator and all others interested parties.—*Trotter v. Mutual Reserve Fund Life Ass'n* (S. D.) 70 N. W. 843.

§ 14. Liability on covenant of ancestor.
(S. D.; 1895.)

Under Comp. Laws, § 3254, providing that the heirs and devisees of a covenantor shall be answerable on the covenant to the extent of the lands descended or devised to them in the cases prescribed by law, an heir inheriting lands from a decedent whose personal estate was amply sufficient to pay his liabilities was not liable on a covenant of his ancestor to one who failed to present his claim for the breach against the estate within the time limited therefor, in the absence of excuse for such failure.—*Woods v. Ely* (S. D.) 64 N. W. 531.

DESCRIPTION.

In deed, see "Deed," §§ 6-9.

In mortgage, see "Chattel Mortgages," §§ 10-13; "Mortgages," § 11.

Of candidate in ballot, see "Elections and Voters," § 11.

Of devisees and legatees, see "Wills," § 41.

Of offense in indictment, see "Indictment and Information," §§ 12-17.

Of persons and property in indictment, see "Indictment and Information," §§ 18-20.

Of property in notice of lien claim, see "Mechanics' Liens," § 26.

— in petition for condemnation, see "Eminent Domain," § 12.

— in tax assessment, see "Taxation," § 30.

— in tax books, see "Taxation," § 64.

— in will, see "Wills," § 42.

DESCRIPTIO PERSONAE.

See "Pleading," § 9.

DESERTION.

As ground for divorce, see "Divorce," § 7.

DETACHMENT.

Of territory from city, see "Municipal Corporations," § 21.

DETINUE.

See "Replevin."

DEVISE AND LEGACY.

See "Wills."

In lieu of dower, see "Dower," §§ 5, 6.

DEVOLUTION.

Of realty, see "Descent and Distribution," § 5.

DIES NON JURIDICUS.

See "Holidays."

DILATORY PLEAS.

See "Pleading."

DILIGENCE.

In procuring evidence or witnesses, see "Continuance," § 4; "Criminal Law," § 199; "New Trial," § 36.

Of complainant, see "Specific Performance," §§ 7-9.

DIRECTING VERDICT.

See "Trial," §§ 90, 91.

DISABILITIES.

See "Husband and Wife"; "Infancy"; "Insanity."

DISAFFIRMANCE.Of contract by infant, see "Infancy," § 3.
— by insane person, see "Insanity," § 6.**DISBARMENT.**

Of attorney, see "Attorney and Client," §§ 10-12.

DISCHARGE.

See "Accord and Satisfaction"; "Release and Discharge."

From arrest, see "Arrest," § 3.

Of administrator, see "Executors and Administrators," § 5.

Of city officer, see "Municipal Corporations," §§ 45, 46.

Of debt by voluntary assignment, see "Assignment for Benefit of Creditors," § 25.

Of execution on judgment of justice, see "Justices of the Peace," § 27.

Of insolvent, see "Insolvency," §§ 15-17.

Of judgment, see "Judgment," §§ 81-83.

Of juror, see "Jury," §§ 19, 20.

Of mortgage, see "Chattel Mortgages," §§ 33-37.

Of receiver, see "Receivers," § 11.

— appointed in mortgage foreclosure, see "Mortgages," § 48.

Of servant, see "Master and Servant," § 6.

Of surety, see "Principal and Surety," §§ 11-19.

Of teacher, see "Schools and School Districts," § 27.

Right of accused to discharge for delay in commencing trial, see "Criminal Law," § 46.

DISCLAIMER.

Estoppel by, see "Estoppel," § 28.

DISCLOSURE.

By garnishee, see "Garnishment," § 28.

DISCONTINUANCE.

See "Practice in Civil Cases," § 8.

Of highway, see "Highways," § 18.

Of suit in equity, see "Equity," § 60.

DISCOUNTS.

See "Banks and Banking," § 6.

DISCOVERY.

Contempt for failure to obey order, see "Contempt," § 6.

Physical examination of person injured, see "Damages," § 44.

§ 1. Constitutionality of act.

(Mich.; 1897.)

Pub. Acts 1895, No. 181, authorizing proceedings in the nature of proceedings for discovery, is not unconstitutional as discriminating between suitors because it denies the party who testifies the right to introduce the testimony, while it permits his adversary to do so.—*Mulhern v. Grove* (Mich.) 70 N. W. 15.

§ 2. Bill of discovery.

(Minn.; 1895.)

Bills of discovery are abrogated by the Code of Civil Procedure and the statute giving a party the right to call his adversary as a witness and to compel the production of books and documents.—*Turnbull v. Crick* (Minn.) 65 N. W. 135.

63 Minn. 91.

§ 3. Examination of adverse party before trial.

(Wis.; 1896.)

Where an administrator, after the commencement of an action to recover for the negligent killing of his intestate under circumstances not presumptively within plaintiff's knowledge, files an affidavit for the examination of defendant in order to obtain the information necessary to frame a suitable complaint, as provided by Sanb. & B. Ann St. § 4096, the court may, in its discretion, limit the subjects of inquiry, but cannot absolutely deny the examination, though a complaint in general terms might be framed without it.—*Schmidt v. Menasha Wooden-Ware Co.* (Wis.) 66 N. W. 695.

92 Wis. 529.

§ 4. Annexing interrogatories to pleadings.

(Iowa; 1896.)

In an action for personal injuries caused by a defective sidewalk, interrogatories attached to the answer, directed to plaintiff, concerning her place of birth, localities in which she had lived since a child, names of her different employers, residence and occupation of her parents if living, do not concern "material matters in issue" (Code, § 2693), and therefore exceptions thereto are properly sustained.—*McFarland v. City of Muscatine* (Iowa) 67 N. W. 233.

§ 5. Procedure.

(Mich.; 1897.)

Pub. Acts 1895, No. 181, provides for proceedings in the nature of discovery in all actions and proceedings, and for the examination of parties on matters relevant to the controversy, and the production of books and papers; au-

thorizes an examination either before issue joined to enable a party to plead, or after the joining of issue; and provides that the depositions taken may, at the option of the party taking them, be used as evidence. *Held*, that proceedings under the act are limited by the rules applying to discovery.—*Mulhern v. Grove* (Mich.) 70 N. W. 15.

DISCRETION OF COURT.

See "Appeal," §§ 202-208; "Criminal Law," §§ 217, 218.

Allowing experiments at trial, see "Trial," § 19.

Awarding costs, see "Costs," § 2.

Form of special verdict, see "Trial," § 100.

Granting motion to make pleading more definite, see "Pleading," § 52.

Setting aside default, see "Judgment," § 17.

DISCRIMINATION.

By carrier, see "Carriers," § 26.

By telegraph company, see "Telegraph Companies," § 1.

In license ordinances, see "Municipal Corporations," § 29.

DISINHERITANCE.

See "Descent and Distribution," § 4.

DISMISSAL.

Of appeal, see "Appeal," §§ 278-284; "Criminal Law," §§ 235, 236.

—from justice, see "Appeal," § 176.

Of policeman, see "Municipal Corporations," § 51.

Of prosecution for delay in bringing defendant to trial, see "Criminal Law," § 46.

DISMISSAL AND NONSUIT.

See "Practice in Civil Cases," §§ 4-10.

DISORDERLY CONDUCT.

[a] (Mich.; 1896.)

In a prosecution of defendant for being a disorderly person, in that he "pretended to tell fortunes," advertisements, inserted by him in newspapers, wherein he professed his ability to foretell future events, and offered his services to the public for that purpose, together with evidence of persons who visited him that he pretended to go into a trance and tell them what would happen to them in the future, were sufficient to establish the act charged.—*People v. Elmer* (Mich.) 67 N. W. 550.

[b] (Mich.; 1897.)

A complaint alleging that defendant was guilty of indecent, insulting, and immoral conduct, "by peering in the window of a house" then and there occupied, and which was not his residence, charges violation of an ordinance against "indecent, insulting, or immoral conduct."—*City of Grand Rapids v. Williams* (Mich.) 70 N. W. 547.

DISORDERLY HOUSE.**§ 1. What constitutes.**

(Wis.; 1897.)

Under an ordinance providing for the punishment of any person found in a disorderly

house or place, or a house of ill fame, or a place resorted to for purposes of prostitution, the term "disorderly house" denotes a house in which people abide, or to which they resort, disturbing by their noise the order and tranquility of the neighbors, not necessarily a house of prostitution.—*Hawkins v. Lutton* (Wis.) 70 N. W. 483.

§ 2. Keeping disorderly house.

[a] (Iowa; 1895.)

A man may be guilty of keeping a house of ill fame, though the illicit intercourse is had only with his wife, and she is the only female inmate. *State v. Lee* (1890) 45 N. W. 545, 80 Iowa, 83, distinguished.—*State v. Young*, 65 N. W. 160.

[b] (Mich.; 1896.)

It is not necessary to prove the bad reputation of the men resorting to the house, if they resorted to the place for the purpose prohibited by the statute.—*People v. Russell* (Mich.) 67 N. W. 1099.

[c] (Neb.; 1895.)

Where the character of the house, as one for prostitution, and defendant's former proprietorship, is established, and there is evidence that defendant continues to furnish provisions therefor, a conviction of keeping a disorderly house will not be defeated by the fact that defendant had contracted to sell the premises to an inmate of the house.—*Wright v. State* (Neb.) 63 N. W. 147, 45 Neb. 44.

§ 3. Indictment.

(Mich.; 1896.)

An indictment for keeping a house of ill fame may charge the offense as committed on a particular day, and divers days between that and another day previous thereto.—*People v. Russell* (Mich.) 67 N. W. 1099.

§ 4. Evidence.

[a] (Mich.; 1896.)

In a prosecution for keeping a house of ill fame, evidence that one of the inmates bore the reputation of being a common prostitute is admissible.—*People v. Russell* (Mich.) 67 N. W. 1099.

[b] (Mich.; 1896.)

The evil reputation of an inmate three years previous, and covering the time up to the day charged, is admissible in evidence.—*People v. Russell* (Mich.) 67 N. W. 1099.

[c] (Minn.; 1894.)

On a trial for keeping a house of assignation, evidence of the reputation of the house as a house of assignation is competent, at least in corroboration of other evidence.—*State v. Bresland*, 61 N. W. 450, 59 Minn. 281.

§ 5. Instructions.

(Mich.; 1896.)

An instruction that if the inmates of the house were prostitutes, and if males were seen frequenting the house at night, the jury might convict, is not ground for reversing a conviction, where the court also instructed that the males must have resorted to the house for the purpose of prostitution or lewdness, and that it was the use of the house, and not merely the reputation of its inmates, that the statute was intended to reach.—*People v. Russell* (Mich.) 67 N. W. 1099.

DISORGANIZATION.

Of county, see "Counties," § 10.

DISSEISIN.

Of tenant in common, see "Tenancy in Common," §§ 3, 4.

DISSOLUTION.

Of attachment, see "Attachment," §§ 49-58.
Of corporation, see "Corporations," §§ 98-104.
Of firm, see "Partnership," § 22.
Of injunction, see "Injunction," §§ 27, 28.
Of marriage, see "Marriage," § 6.
Of municipal corporation, see "Municipal Corporations," § 17.
Of voluntary association, see "Associations," § 3.

DISTRESS.

For taxes, see "Taxation," § 71.

DISTRIBUTION.

See "Descent and Distribution."

DISTRICT AND PROSECUTING ATTORNEYS.

Admissions as evidence, see "Criminal Law," § 111.
Argument and remarks during trial, see "Criminal Law," §§ 84-87.
Misconduct as ground for new trial, see "Criminal Law," § 195.
Signature to indictment, see "Indictment and Information," § 8.
Who may act as attorney for state, see "Criminal Law," §§ 53-56.

[a] (Iowa; 1894.)

Code, § 782, subd. 4, provides for the resignations of all "county officers" to be tendered to the board of supervisors. Subdivision 2 requires the resignations of "district attorneys" to be tendered to the governor. Acts 21st Gen. Assem., creating the office of county attorney, provides that, whenever the term "district attorney" appears in the laws, it shall mean "county attorney," and repeals all inconsistent acts. *Held*, that the resignation of a county attorney is properly tendered to the board of supervisors.—*State v. Kovolosky* (Iowa) 61 N. W. 223, 92 Iowa, 498.

[b] (Iowa; 1895.)

The office of county attorney is a county office. *State v. Kovolosky* (1894) 61 N. W. 223, 92 Iowa, 498, followed.—*Clark v. Tracy* (Iowa) 64 N. W. 290.

[c] (Wis.; 1897.)

Under Sanb. & B. Ann. St. § 752a, authorizing the appointment by the court of counsel to assist the district attorney in a criminal case, and providing that such counsel "shall be paid in the same manner as is now provided by law for the payment of counsel for indigent criminals"; and Rev. St. § 4713, providing for the payment of counsel for indigent criminals, by the terms of which a county is liable to pay only such sum as the court in which the services are performed shall, "by an order, to be entered in the minutes thereof, certify to be a reasonable compensation,"—an attorney appointed to assist the district attorney cannot maintain an action against the county for his services unless an order of court has been entered certifying the amount of his reasonable compensation.—*Williams v. Dodge County* (Wis.) 70 N. W. 821.

DISTRICT COURTS.

See "Courts," § 12.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

(Iowa; 1896.)

Under Code, § 4023, providing for the punishment of any person who shall "willfully disturb or disquiet any assembly of persons met for religious worship, by * * * making a noise," etc., an information which charges defendant with disturbing religious services, by loud talking and laughing, "contrary to the statute," etc., without alleging that it was "willfully" done, is fatally defective.—*State v. Stroud* (Iowa) 68 N. W. 450.

DITCHES.

See "Drainage."

DIVERSION.

Of water courses, see "Waters and Water Courses," § 5.

DIVISION.

Of counties, see "Counties," §§ 4-7.
Of school districts, see "Schools and School Districts," §§ 5, 6.

DIVORCE.

- I. IN GENERAL, §§ 1, 2.
- II. JURISDICTION, §§ 3-5.
- III. GROUNDS, §§ 6-11.
- IV. DEFENSES, § 12.
- V. PLEADING AND PRACTICE, §§ 13-19.
- VI. ALIMONY AND COSTS—DIVISION OF PROPERTY, §§ 20-40.
- VII. CUSTODY AND SUPPORT OF CHILDREN, §§ 41, 42.

See, also, "Marriage."

Estoppel by acquiescence in judgment, see "Estoppel," § 22.

Revocation of will by, see "Wills," § 17.

I. IN GENERAL.

§ 1. Legislative divorce.

(Wis.; 1895.)

Rev. St. § 2355, providing that a sentence of imprisonment for life shall dissolve the marriage of the person sentenced, without any judgment of divorce, or other legal process, is not in conflict with Const. art. 4, § 24, providing that the legislature shall not grant any divorce.—*State v. Duket* (Wis.) 63 N. W. 83.

90 Wis. 272.

See, also, "Marriage," § 6.

§ 2. Rights of divorced persons.

(Iowa; 1895.)

A divorced wife has no interest in the lands of her late husband.—*Winch v. Bolton* (Iowa) 63 N. W. 330.

To claim homestead, see "Homestead," § 4.

II. JURISDICTION.

§ 3. In general.

[a] (Mich.; 1896.)

Under Pub. Acts 1895, No. 202, providing that no decree of divorce shall be granted unless defendant be domiciled within the state, or shall have been domiciled therein when the

cause for divorce arose, or unless he shall have been personally served with process in the state, or with a copy of the order of publication, etc., the court has no jurisdiction of proceedings for divorce on the ground of desertion, where defendant was a nonresident when the cause of action arose, and was not personally served with the order of publication.—*Bentley v. Hosmer* (Mich.) 68 N. W. 650.

[b] (Mich.; 1896.)

Under Pub. Acts 1895, No. 202, where one of the causes of divorce was a failure to support, which arose when the defendant was domiciled within the state, it is not necessary that he should be personally served with process, or with a copy of the order of publication.—*Bentley v. Hosmer* (Mich.) 69 N. W. 660.

§ 4. Domicile.

[a] (Mich.; 1896.)

How. Ann. St. § 6231, provides that no divorce shall be granted when the cause therefor occurred without the state, unless the complainant or defendant have resided in the state two years immediately preceding the suit. *Held* that, where the complainant has resided in the state the full statutory period, and defendant is a nonresident, the defendant may make her answer a cross bill for divorce and alimony.—*Clutton v. Clutton* (Mich.) 66 N. W. 52.

[b] (S. D.; 1896.)

At a time when only 90 days' residence was required to enable a party to institute proceedings for a divorce, plaintiff's uncontroverted testimony that he commenced to reside at Sioux Falls early in April, 1891; that it had been his home since he arrived here, and that he came for the purpose of becoming a resident,—was sufficient to justify a finding that he was a resident in good faith at the time of commencing an action for divorce in the latter part of July, 1891.—*Pollock v. Pollock* (S. D.) 68 N. W. 176.

§ 5. Divorce in another state.

(Iowa; 1894.)

On an application for temporary alimony, where defendant alleged a prior divorce in another state, the allegations of the reply that defendant was never a bona fide resident of that state, and that said divorce was procured through fraud, do not overcome the allegations of defendant's answer, and the presumptions of his bona fide residence and of the validity of the divorce, which arise from the foreign decree.—*Shaw v. Shaw* (Iowa) 61 N. W. 368.

92 Iowa, 722.

III. GROUNDS.

Condonation of cruelty, see post, § 12.

§ 6. Conviction of crime.

(Wis.; 1895.)

Rev. St. § 2355, providing that a sentence of imprisonment for life shall dissolve the marriage of the person sentenced, without any judgment of divorce or other legal process, operates to absolutely dissolve the marriage when either party is sentenced for life.—*State v. Duket* (Wis.) 63 N. W. 83.

90 Wis. 272.

See, also, ante, § 1.

§ 7. Desertion.

(Minn.; 1896.)

In an action for divorce, it appeared that the parties had no private residence, and that they lived with the family of the husband, that it was impossible for the wife to live there peaceably, not alone through her fault, and that she frequently requested the husband to provide a home elsewhere; that he was fully able to do so, and lived at hotels part of the time

alone, but that he denied her request; and that both parties preferred living apart than together. *Held*, that the wife was not guilty of desertion.—*Grant v. Grant* (Minn.) 66 N. W. 983.
64 Minn. 234.

§ 8. Adultery—Sufficiency of proof.

[a] (Iowa; 1896.)

In an action by a wife for a divorce on the ground of adultery, it appeared that the parties had been living unhappily together; that a separation was probable; that defendant, having arranged a meeting in another town with one H., an unmarried woman, to whom he had formerly been engaged, left his home on Saturday, registered at an hotel in the town selected, and procured a room adjoining his own for H., who arrived the next morning; that defendant and H. were seen several times on Sunday sitting together, holding hands; that one of the servants saw defendant sitting on the bed with his arm around the waist of H., and that they were again seen in a somewhat similar position; that on Monday evening defendant paid the hotel bills of both, and accompanied H. to the train, where he kissed her good-bye; that plaintiff afterwards found a telegram to defendant, dated the day after he and H. left the hotel, which read: "Here safely. Tired out. Served well last night. Fancy past two days. Will write to-day." Defendant and H. both denied the charge of adultery. *Held*, that the circumstances were insufficient to sustain the charge of adultery. Rothrock, C. J., dissenting.—*Aitchison v. Aitchison* (Iowa) 68 N. W. 573.

[b] (Iowa; 1896.)

In an action against C. for divorce, a witness testified that she had seen plaintiff act very unbecomingly with other men; that "I have seen her lie on a bed with another man, with his arms around her. I have known the same man to spend a half a day at a time at her house, when C. wasn't at home, day after day." *Held* insufficient to show adultery by plaintiff.—*Carlisle v. Carlisle* (Iowa) 68 N. W. 651.

§ 9. Cruelty and inhuman treatment.

[a] (Iowa; 1895.)

A wife is not entitled to a divorce on the ground of cruel treatment, endangering her life, where, although her husband admits that he struck her on one occasion, two years before they separated, he was generally industrious, and kind to his family, and their difficulties were largely due to her quarrelsome disposition, and there is no evidence that her health was impaired or her life endangered by his conduct towards her.—*Felton v. Felton* (Iowa) 62 N. W. 677.

[b] (Minn.; 1895.)

A systematic course of ill treatment, persisted in by the husband for 10 years, consisting of continual scolding and fault-finding, using unkind language, studied contempt, and many petty acts of a malicious nature, which seriously impaired the wife's health, constituted cruel treatment, entitling her to a divorce.—*Marks v. Marks* (Minn.) 64 N. W. 561.
62 Minn. 212.

§ 10. — Sufficiency of proof.

[a] (Iowa; 1896.)

There was evidence that defendant was in the habit of absenting himself in the evening from home and the society of plaintiff, his wife, who was in ill health; that he was neglectful of his children, and harsh in his language; that he often did and said things that caused his wife distress; that on two occasions he called her a liar, and told her his friends wondered why he had married her, and that they thought it must have been for money; that once, after having requested his wife not to buy from his merchant on credit until he had paid what he already owed, defendant threatened, on learning that she had purchased certain necessities, for which she had no money to pay, to tell the merchant to refuse her credit; that plaintiff had found certain

telegrams which aroused her suspicion, and led to her finding out that defendant and an unmarried woman, to whom he had formerly been engaged, had stayed at the same hotel for two days, occupying adjoining rooms, and conducting themselves as lovers. *Held*, that defendant's acts justified a decree of divorce for inhuman treatment.—*Aitchison v. Aitchison* (Iowa) 68 N. W. 573.

[b] (Iowa; 1896.)

In an action by a wife for divorce, there was evidence that defendant was ill tempered, and once threatened to kick her out of the house. He testified that there was a bad woman at his house, and he told his wife that, if she was going to harbor that dirty thing there, he would kick them both into the road. Plaintiff testified that he threatened three different times to kick her into the road, but there was no evidence that he ever attempted to do so, or did any violence to her person. *Held* insufficient to entitle her to a divorce.—*Carlisle v. Carlisle* (Iowa) 68 N. W. 651.

[c] (Iowa; 1896.)

In an action for divorce brought by the wife on the ground of cruel and inhuman treatment, the defendant filed a cross bill, basing his prayer for divorce on the same ground. It appeared that the husband and the wife had both been guilty of using violent and abusive language to each other, and had on certain occasions resorted to blows. But it appeared further that plaintiff's conduct was in a measure induced by the fact that she had seen defendant commit an unnatural crime. *Held*, that the evidence was sufficient to justify a decree for the plaintiff.—*Prather v. Prather* (Iowa) 68 N. W. 806.

§ 11. Ill treatment and failure to support.

[a] (Mich.; 1895.)

Evidence that defendant, a man worth from eight to ten thousand dollars, had since his marriage with plaintiff, over a year before, purchased no more clothing for her than one pair of shoes and rubbers; had compelled her at times to live in an attic, with no conveniences whatever; and had left her for six weeks without means to pay her board, besides using insulting and abusive language towards her,—is sufficient to support a decree awarding her a divorce for cruel and inhuman treatment. Grant, J., dissenting.—*Cary v. Cary* (Mich.) 64 N. W. 510.

[b] (Wis.; 1895.)

It appeared that defendant had neglected to properly care for and support plaintiff, though able to do so; that angry altercations had occurred between them; that plaintiff had, on several occasions, been ill treated by defendant's children, without objection on his part; that her life with defendant had been an unhappy one; and that the relations between the parties had been further imbibed by the incidents occurring at the trial. *Held*, that an absolute divorce from bed and board was warranted.—*Hacker v. Hacker* (Wis.) 63 N. W. 278.
90 Wis. 325.

IV. DEFENSES.

§ 12. Condonation.

[a] (Minn.; 1897.)

In action for divorce on the ground of desertion, the defendant asked for a divorce on the ground of plaintiff's cruel and inhuman treatment; alleging that she had brought a prior action against him for a divorce on the same ground, which was determined against her, because she had condoned his conduct, but that, subsequent to such condonation and the determination of that action, plaintiff had repeated his cruel treatment. After defendant had introduced evidence thereof, she offered evidence of the alleged prior cruel treatment, which had been litigated in the first action, on the ground

that plaintiff's breach of the implied condition of the condonation revived the original right of action; but no evidence was offered to show that condonation was an issue in the former action. *Held*, that the exclusion of the offered evidence was not error.—*Peterson v. Peterson* (Minn.) 70 N. W. 865.

[b] (Neb.; 1896.)

Condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets.—*Heist v. Heist* (Neb.) 67 N. W. 790.

48 Neb. 794.

[c] (N. D.; 1895.)

Where, 11 months after the wife condoned the husband's acts of cruelty, the husband, without provocation, seized a neck yoke, and, with threats against the wife's life, ran at her, and stopped only on her seeking refuge behind another person, condonation was revoked, under Comp. Laws, § 2571, providing that condonation shall be revoked, and the original cause of divorce revived, when the condonee commits acts constituting a like or other cause of divorce, or shall be guilty of great conjugal unkindness, not amounting to a cause of divorce.—*Taylor v. Taylor* (N. D.) 63 N. W. 893.

5 N. D. 58.

[d] (N. D.; 1895.)

Pending the wife's action for divorce for cruelty, the parties signed an agreement whereby the husband was to pay the wife \$100 per year for the support of the children, and was to have the use of certain buildings on the homestead "until after seeding next spring," the agreement having been made in December, and was to have the bed and bedding used by him. On the trial the husband testified that the agreement was made on the wife's promise to condone, and dismiss her action, and that she subsequently cohabited with him. The wife denied the condonation, and testified, without contradiction, that she was forced to cohabit with the husband, and that the agreement was a final settlement of property questions; and she was corroborated. *Held*, that there was no condonation, within Comp. Laws, §§ 2569, 2570.—*Taylor v. Taylor* (N. D.) 63 N. W. 893.

5 N. D. 58.

V. PLEADING AND PRACTICE.

Decree for alimony, see post, §§ 29-32.

Effect of dismissal on right to alimony and costs, see post, § 26.

Enforcing alimony by execution against land, see post, § 38.

Evidence of adultery, see ante, § 8.

— of cruelty, see ante, § 10.

Judgment as res judicata, see "Judgment," § 60.

§ 13. Pleading.

(Mich.; 1896.)

A nonresident defendant, in an action for divorce, should be allowed to amend her answer, made a cross bill for divorce, by adding to the verification thereof the statutory noncollusion clause.—*Clutton v. Clutton* (Mich.) 66 N. W. 52.

§ 14. Action by guardian of insane person.

(Iowa; 1895.)

Under Code, § 2222, providing that a petition for divorce "must be verified by the oath of the plaintiff," and there being no provision for substituted verification, a guardian of an insane person cannot maintain an action in his behalf for a divorce.—*Mohler v. Shank's Estate*, 61 N. W. 981, 93 Iowa, 273; *Shank v. Mohler*, Id.

§ 15. Findings and decree.

[a] (Iowa; 1895.)

A circuit court having no jurisdiction to entertain an action brought by a guardian in behalf of his insane ward for divorce, its decree entered in such a suit is void.—*Mohler v. Shank's Estate*, 61 N. W. 981, 93 Iowa, 273; *Shank v. Mohler*, Id.

[b] (Minn.; 1897.)

Where issue is joined in divorce, though a party waives a jury, by failing to appear, he does not waive findings of fact by the trial court.—*Newman v. Newman* (Minn.) 70 N. W. 776.

§ 16. Dismissal.

(Neb.; 1896.)

In an action by a wife for divorce, where in the husband did not appear, plaintiff filed a dismissal which was entered of record pending an application by her attorney for the allowance of an attorney's fee, and an order requiring defendant to pay the same. *Held*, that the litigation was thereby ended, so that plaintiff's attorney had no standing to move to set the order of dismissal aside in order that his motion might be passed upon.—*Sims v. Davis* (Neb.) 67 N. W. 765.

48 Neb. 720.

§ 17. Setting decree aside.

[a] (Minn.; 1896.)

Where an action for divorce was fraudulent from its inception, the decree setting the same aside because of the fraud should simply annul it, and not permit the defendant in the action for divorce to answer and defend the same as if the judgment had never been entered.—*Colby v. Colby* (Minn.) 67 N. W. 663.

64 Minn. 549.

[b] (Neb.; 1897.)

A bill to set aside a decree of divorce on the ground that there was no personal service upon plaintiff, that she was never notified of such proceeding, that the testimony given in support of divorce was false and perjured, and that she had been driven from home by cruelty of the defendant, states a sufficient cause of action when assailed by general demurrer.—*Hard v. Hard* (Neb.) 70 N. W. 1122.

§ 18. — Laches.

(Minn.; 1896.)

In an action by a wife to set aside a divorce for fraud, it appeared that at the time the papers were served the wife was sick in Denmark; that on her way home she was taken sick, while she had but \$2, and was obliged to pawn her clothes for board and medicine; that the husband sent her \$25, which she used to redeem her clothes; that as soon as able she worked 17 months before being able to save enough money to return home. *Held*, that she was not guilty of laches in having delayed for one year and seven months after the suit was commenced, and until the husband had remarried.—*Colby v. Colby* (Minn.) 67 N. W. 663.

64 Minn. 549.

§ 19. Review on appeal.

[a] (Neb.; 1896.)

Where the testimony in an action for divorce is weak, and open to suspicion, a decree denying a divorce will not be set aside, though the evidence may have been such that it would have sustained a divorce, and though defendant failed to appear.—*Cummins v. Cummins* (Neb.) 66 N. W. 858.

47 Neb. 872.

[b] (S. D.; 1896.)

Under Comp. Laws, § 2562, subd. 3, which provides that departure or absence from the family dwelling place, caused by cruelty or by threats of bodily harm, is not desertion by the absent party, but it is desertion by the other party, whether there were such threats in

a given case is a question of fact for the trial court, and its decision thereon will not be disturbed unless there is a clear preponderance of the evidence against the findings.—*Pollock v. Pollock* (S. D.) 68 N. W. 176.

[1c] (Wis.; 1896.)

A finding for defendant in an action for divorce for cruel and inhuman treatment, not being against the clear preponderance of evidence, cannot be disturbed.—*Stone v. Stone* (Wis.) 68 N. W. 350.

VI. ALIMONY AND COSTS—DIVISION OF PROPERTY.

Imprisonment for nonpayment of alimony, see "Constitutional Law," § 60.

§ 20. When alimony and costs allowed.

[a] (Mich.; 1895.)

Where the court grants an absolute divorce, reserving the question of permanent alimony, and defendant does not appeal, the omission in the bill of any allegation of defendant's pecuniary ability will not preclude a subsequent decree for alimony.—*Seibly v. Ingham* Circuit Judge (Mich.) 63 N. W. 528.
105 Mich. 584.

[b] (Mich.; 1895.)

An underwriting in a subpoena which reads: "A personal decree is sought against defendant for divorce, and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of defendant," is sufficient to indicate a claim for alimony.—*Seibly v. Ingham* Circuit Judge (Mich.) 63 N. W. 528.
105 Mich. 584.

§ 21. — After husband's death.

[a] (Mich.; 1895.)

The court may grant an absolute divorce, reserving the question of permanent alimony; and the subsequent death of defendant will not oust the court of jurisdiction to award such alimony out of decedent's estate.—*Seibly v. Ingham* Circuit Judge (Mich.) 63 N. W. 528.
105 Mich. 584.

[b] (Mich.; 1895.)

Where the court grants a decree of absolute divorce, reserving the question of permanent alimony, and defendant thereafter dies, his heirs and legatees must be made parties to the subsequent proceedings for alimony.—*Seibly v. Ingham* Circuit Judge (Mich.) 63 N. W. 528.
105 Mich. 584.

§ 22. — Pending appeal.

(S. D.; 1895.)

On an application for alimony pending appeal, where appellant is without means other than a monthly allowance ordered by the trial court, which she refused on advice of counsel, and respondent is in good health, and having permanent business, the application will be granted.—*Pollock v. Pollock* (S. D.) 64 N. W. 165.

§ 23. Exemption of income from professional services.

(Minn.; 1897.)

In estimating the value of the husband's personal property, one-third of which may, under Gen. St. 1894, § 4807, be granted as an allowance to the wife, the husband's income from professional services cannot be considered.—*Wilson v. Wilson* (Minn.) 70 N. W. 154.

§ 24. Right of husband.

[a] (Neb.; 1896.)

In the absence of legislation, a husband cannot, whether he or the wife be granted a divorce, recover alimony, to be paid out of the

wife's separate estate.—*Green v. Green* (Neb.) 68 N. W. 917.

[b] (Neb.; 1896.)

Comp. St. c. 25, § 10, providing that a petition for "divorce, alimony, and maintenance, may be exhibited by a wife in her own name, as well as a husband," being intended only to confer on the wife the right to sue in her own name, without the intervention of a next friend, does not authorize the granting of alimony or maintenance to the husband out of the estate of the wife.—*Green v. Green* (Neb.) 68 N. W. 917.

§ 25. Alimony pendente lite.

[a] (Iowa; 1894.)

Unless the marital relation be admitted or proved, temporary alimony cannot be allowed.—*Shaw v. Shaw* (Iowa) 61 N. W. 368.
92 Iowa, 722.

[b] (Iowa; 1894.)

On an application for temporary alimony, the court is not bound to the allegations and denials of the pleadings in passing on the existence of the marital relation, if other proofs raise a presumption of its existence.—*Shaw v. Shaw* (Iowa) 61 N. W. 368.
92 Iowa, 722.

[c] (Iowa; 1894.)

An application for temporary alimony in an action for divorce, wherein the answer alleged a previous divorce in another state, will not be granted until the foreign decree is modified, set aside, or adjudged unavailable as a defense, unless facts are established which presumptively show the invalidity of the decree.—*Shaw v. Shaw* (Iowa) 61 N. W. 368.
92 Iowa, 722.

[d] (Iowa; 1896.)

Defendant filed an answer to her husband's bill for divorce, alleging that plaintiff's conduct had compelled her to leave him, and moved for an allowance for temporary alimony. Plaintiff thereupon dismissed his bill. Defendant moved for judgment for costs and for attorney's fees. *Held*, that the sustaining of a motion by plaintiff to strike out the second part of defendant's motion would not bar an allowance for attorney's fees on hearing the motion for temporary alimony.—*O'Neil v. O'Neil* (Iowa) 69 N. W. 523.

§ 26. Effect of dismissal of petition for divorce.

[a] (Iowa; 1896.)

Where the filing of a bill by the husband causes the wife to incur expenses, the dismissal by the husband of his bill does not deprive the court of jurisdiction to grant a motion previously filed by the wife for an allowance for such expenses.—*O'Neil v. O'Neil* (Iowa) 69 N. W. 523.

[b] (Neb.; 1896.)

Though the court has dismissed the wife's action for divorce, it may render judgment against the husband for costs and expenses incurred by the wife; Comp. St. c. 25, § 12, authorizing the court to award the wife's costs and expenses at any time during the "pendency" of the suit.—*Brasch v. Brasch* (Neb.) 69 N. W. 392.

§ 27. Amount of allowance.

[a] (Iowa; 1896.)

In granting a divorce to a wife on the ground of cruelty, \$750 per annum, payable quarterly, is a proper allowance, when the plaintiff is given the custody of two children, aged four and five, respectively, and defendant is a competent business man, earning \$1,500 a year.—*Aitchison v. Aitchison* (Iowa) 68 N. W. 573.

[b] (Mich.; 1896.)

Where defendant owns personalty valued at \$6,000 and realty valued at \$10,000, an award of alimony in the amount of \$2,500 out of the personalty, and the further sum of \$2,000 condition-

ed on complainant's releasing her right of dower, is a proper and reasonable allowance.—Kirkland v. Kirkland (Mich.) 69 N. W. 233.

[c] (Minn.: 1896.)

Where the wife's affidavit charged that the husband was in receipt of an income of \$8,000 per year from his business, and the affidavits of the husband and his business manager denied merely that the income was \$8,000, without stating what it was, and, though alleging that the income was no more than sufficient to pay the expenses of his business and the necessary expenses of living, did not state the nature of such expenses, the burden on the husband of showing his inability to pay alimony was not sustained.—Hurd v. Hurd (Minn.) 65 N. W. 728.

63 Minn. 443.

[d] (Neb.: 1896.)

Where a wife was granted a divorce, and the custody of the children was awarded her, and the husband's property was worth \$4,500, and it did not appear that the wife had any property, a decree awarding the wife as alimony \$2,250, payable in six annual installments, was proper.—Heist v. Heist (Neb.) 67 N. W. 790.

48 Neb. 794.

[e] (Neb.: 1896.)

What sum a husband may be required to pay to support the wife during the suit, and for her costs and expenses in prosecuting it, (Comp. St. c. 25, § 12), is within the discretion of the trial court.—Brasch v. Brasch (Neb.) 69 N. W. 392.

[f] (S. D.: 1894.)

Where it appears that the property of the husband does not exceed \$56,700 in value, an allowance as alimony to the wife, without children, of \$30,000, to be paid to her in a gross sum, in addition to \$3,000 temporary alimony is excessive.—Williams v. Williams (S. D.) 61 N. W. 38.

6 S. D. 284.

[g] (Wis.: 1895.)

On a suit for divorce, where the husband had a quarter interest (valued at \$16,000) in farm lands, subject to dower, and personal property of his father, whose estate had not been settled, from which \$1,000, as expenses incurred in the suit and already paid, had to be deducted, a judgment allowing plaintiff \$7,000, and \$200 per year for the support of three children during their minority, was excessive.—McChesney v. McChesney (Wis.) 64 N. W. 856.

91 Wis. 268.

§ 28. Award in gross or in installments.

[a] (Mich.: 1895.)

In fixing a gross sum for alimony, it was error to exclude from consideration a lumbering contract held by the husband's firm, which had several years to run, and which was a source of great profit to the firm, where the wife was required to relinquish her dower.—Horning v. Horning (Mich.) 65 N. W. 555.

[b] (Neb.: 1895.)

Alimony should not be awarded a wife, in installments, during her life.—McGechie v. McGechie, 61 N. W. 692, 43 Neb. 523.

[c] (S. D.: 1894.)

Under Comp. Laws, § 2584, providing that where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of his children, make suitable allowance to the wife for her support during her life, or for a shorter period, and from time to time modify its orders, the court may make an allowance to be paid to the wife in a gross sum, instead of monthly or annual payments.—Williams v. Williams (S. D.) 61 N. W. 38.

6 S. D. 284.

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§ 29. Judgment or decree.

[a] (Mich.: 1895.)

The fact that an application for alimony had been partially heard before one judge will not render an order by another judge allowing it void where plaintiff made an application for discontinuance of his suit before the latter, and his attorneys were present when the application for alimony was called up, and made no objection to its consideration by him.—Clutton v. Clutton (Mich.) 64 N. W. 744; Same v. Donovan, Id.

[b] (Wis.: 1896.)

A decree in a divorce judgment for payment of a specific sum absolutely as alimony, having the effect in the state where rendered of a judgment at law for payment of money, may be enforced by action at law in another state.—Kunze v. Kunze (Wis.) 68 N. W. 391.

§ 30. — Lien.

[a] (Mich.: 1896.)

Equity will protect the lien of a wife, adjudged in divorce proceedings, on land held by the husband under contract of purchase, to secure the payment of alimony for the maintenance of a minor child who was placed in the custody of the wife, as against an assignee of the contract of purchase, taking with knowledge of the wife's claim, and with intent to defraud her.—Glick v. Glick (Mich.) 68 N. W. 153.

[b] (Minn.: 1894.)

Under Gen. St. 1878, c. 62, § 23, providing that on a divorce the court may award to the wife such alimony out of the estate of the husband as it may deem just, and by its decree make the same a specific lien on any specified real estate of the husband, a specific lien on the homestead for alimony may be decreed.—Mahoney v. Mahoney (Minn.) 61 N. W. 334.

59 Minn. 347.

§ 31. — Modification.

[a] (S. D.: 1894.)

A husband who refuses to pay temporary alimony and counsel fees as ordered cannot ask for a reversal or modification of the judgment for permanent alimony.—Williams v. Williams (S. D.) 61 N. W. 38.

6 S. D. 284.

[b] (S. D.: 1894.)

Under Civ. Code §§ 2583, 2584, authorizing the court to subsequently modify a decree of divorce as to the allowance for the support of the wife and minor children, such allowance may be entirely vacated, where the changed condition of defendant's estate and the advanced age of the children justify it.—Greenleaf v. Greenleaf (S. D.) 61 N. W. 42.

6 S. D. 348.

[c] (S. D.: 1896.)

A modification of the judgment of divorce as to alimony may be made by the supreme court without a reversal where all the facts necessary to enable it to do so are contained in the record on appeal.—Pollock v. Pollock (S. D.) 68 N. W. 176.

§ 32. Personal judgment on service by publication.

(Neb.: 1895.)

A personal judgment for alimony cannot be rendered against a nonresident defendant, where jurisdiction was acquired only by publication.—Dillon v. Starin (Neb.) 63 N. W. 12.

44 Neb. 881.

§ 33. Acceptance of payment—Estoppel to appeal.

(N. D.: 1896.)

When, as part of the order of court for judgment for plaintiff in a divorce suit, the court directs plaintiff to pay a certain sum in full for all claims for alimony, costs, etc., whether for the past or the future, and it is apparent that the payment was ordered on the theory that the

marital relations were to stand forever severed by the decree, and because of that fact, though the final judgment contained no provision as to the matter, defendant is precluded from appealing therefrom by accepting said sum.—*Williams v. Williams* (N. D.) 69 N. W. 47.

§ 34. Failure to pay alimony.

(S. D.; 1896.)

To authorize a dismissal of an action for divorce or to annul a marriage, brought by a husband, because of a failure of plaintiff to comply with an order for the payment of temporary alimony, such order must have been served on plaintiff personally.—*Scott v. Scott* (S. D.) 68 N. W. 194.

§ 35. — Contempt.

[a] (Minn.; 1896.)

The burden is on a husband who fails to comply with an order directing payment of alimony to satisfy the court that his failure to pay is due solely to his inability to do so.—*Hurd v. Hurd* (Minn.) 65 N. W. 728.

63 Minn. 443.

[b] (S. D.; 1896.)

It is error in a divorce suit to order defendant's answer and cross bill to be dismissed because of his noncompliance with an order directing him to pay counsel fees and temporary alimony to plaintiff, the order directing such payment having been served only on defendant's counsel; *Comp. Laws*, §§ 5112, 5337, requiring personal service on defendant of such an order, to render him in contempt for non-compliance.—*Larson v. Larson* (S. D.) 67 N. W. 842.

§ 36. Termination of alimony by death.

[a] (Wis.; 1895.)

Alimony continues only during the joint lives of the parties.—*Maxwell v. Sawyer* (Wis.) 63 N. W. 283.

90 Wis. 352.

[b] (Wis.; 1895.)

Where a testator bequeathed to a woman from whom he had secured a divorce the same amount which he had during his life paid to her as alimony, she will take the amount left her by the will, and her right to alimony ceases.—*Maxwell v. Sawyer* (Wis.) 63 N. W. 283.

90 Wis. 352.

§ 37. Division of property.

[a] (Wis.; 1895.)

Under Rev. St. § 2364, which provides that on rendering a judgment for divorce the court may divide the estate of the husband, and so much of that "of the wife as shall have been derived from the husband," lands purchased with the proceeds of farming operations, in which husband and wife were together engaged, on lands purchased with money derived from the sale of the husband's property, title to which was taken in the wife's name, are subject to equitable division.—*Gallagher v. Gallagher* 61 N. W. 1104, 89 Wis. 461.

[b] (Wis.; 1895.)

The power residing in a court of equity to adjudge a division of real property between the parties in granting a divorce, under Rev. St. § 2364, is a power to subject the title of the wife to those lands set apart to her to an incumbrance running to the husband.—*Gallagher v. Gallagher*, 61 N. W. 1104, 89 Wis. 461.

§ 38. — Execution to enforce charge thereon.

(Wis.; 1895.)

Under Rev. St. § 2364, conferring upon a court granting a decree of divorce the power of dividing their realty between the parties, and impliedly conferring authority to charge the estate adjudged one of them with a payment decreed the other, no authority is granted to direct issuance of execution in case that charge is

not liquidated within a prescribed time.—*Gallagher v. Gallagher*, 61 N. W. 1104, 89 Wis. 461.

§ 39. Restoring property obtained by marriage.

(Neb.; 1895.)

Comp. St. c. 25, § 18, relating to the restoration of the wife's property on granting her a divorce, refers only to property which the law gives the husband by reason of the marriage, and not property obtained from the wife by gift or contract.—*Dillon v. Starin* (Neb.) 63 N. W. 12.

41 Neb. 881.

§ 40. Action against husband for attorney's fees.

(Neb.; 1897.)

Under *Comp. St. c. 25, § 12*, the allowance of attorney's fees to the wife's counsel is ancillary to or an incident of the suit for divorce, and he cannot maintain a separate suit against the husband for his services.—*Yeiser v. Lowe* (Neb.) 69 N. W. 847.

VII. CUSTODY AND SUPPORT OF CHILDREN.

§ 41. Custody of children.

[a] (Iowa; 1896.)

In granting a divorce to a wife on the ground of cruelty, the custody of two boys, aged four and five, respectively, should be given to the wife, on a showing that she will be able to keep them with her at the home of her parents, and that such home is a suitable place.—*Aitchison v. Aitchison* (Iowa) 68 N. W. 573.

[b] (Mich.; 1895.)

Where a divorce was granted to a wife on the ground of extreme cruelty, it was proper to award her the custody of the children under 14 years of age, and to allow the others to elect which parent they would live with.—*Horning v. Horning* (Mich.) 65 N. W. 555.

§ 42. Support of children.

[a] (Mich.; 1895.)

Under *How. Ann. St. § 6245*, providing that where a divorce is granted to a wife the court may decree to her such part of the husband's estate as is reasonable for the support of children committed to her care, the court cannot direct that an amount awarded for the support of a child be paid to the guardian of the child instead of to the wife.—*Swiney v. Swiney* (Mich.) 65 N. W. 287.

[b] (Mich.; 1895.)

Where a wife granted a divorce and the custody of a minor child has property worth \$3,000, and the husband has property worth \$5,500, an allowance of \$1,000 to the wife for the child's support is proper.—*Swiney v. Swiney* (Mich.) 65 N. W. 287.

[c] (S. D.; 1896.)

Where there is a finding that, owing to the tender years of the children, the mother, defendant, is the proper custodian of them, and that she has no property, a decree that plaintiff pay to defendant \$50 a month for their maintenance, should definitely fix the term for which said monthly payments should be made, and require plaintiff to give security for their prompt payment.—*Pollock v. Pollock* (S. D.) 68 N. W. 176.

DOCKET.

See "Practice in Civil Cases," §§ 19-21.
Of justice, see "Justices of the Peace," § 29.

DOCTOR.

See "Physicians and Surgeons."

DOCUMENTS.

As evidence, see "Evidence," §§ 70-85.
Setting out in pleading, see "Pleading," § 6.

DOGS.

See "Animals," §§ 3, 4.

DOMICILE.

See, also, "Divorce," § 4.

(Neb.; 1895.)

A resident of Nebraska moved to New York with his family in 1894, to establish certain institutes, leaving his household goods with a servant in a house for which he paid rent until the following June. Some time after leaving he sent winter clothing to his former home and caused summer clothing to be forwarded to him, and thereafter wrote his landlord for a lease of the house, remarking that it might be some weeks before he returned. The servant was not advised of any intention of the family to reside permanently in New York, and, in the spring, put the house in order for their return. *Held*, that there was no change of domicile.—Wood v. Roeder (Neb.) 63 N. W. 553.

45 Neb. 311.

DONATIO CAUSA MORTIS.

See "Gifts," §§ 4-6.

DONATION.

See "Gifts."

DOTAL PROPERTY.

See "Husband and Wife."

DOUBLE APPEAL.

See "Appeal," § 274.

DOUBLE LIABILITY.

Of stockholders in banks, see "Banks and Banking," § 39.

— in corporations, see "Corporations," § 69.

DOUBLE TAXATION.

See "Taxation," §§ 33, 48.

DOWER.

- I. RIGHT TO DOWER. §§ 1, 2.
- II. DIVESTITURE OF RIGHT BY ACTS OF WIFE, §§ 3, 4.
- III. DEVISE IN LIEU OF DOWER, §§ 5, 6.
- IV. REMEDIES, §§ 7-9.

Adverse possession by widow as against remainderman, see "Adverse Possession," § 22.

I. RIGHT TO DOWER.

Assignability of right, see post, § 8.

§ 1. Statutory modification or abolition of dower.

[a] (Iowa; 1896.)

Where a husband conveyed land in 1857 without joining his wife, the latter's dower right being then, as at common law, a life interest in one-third the husband's real estate, the fact that Code 1873, § 2440, in force at the time the husband died, provided that "estates of dower and curtesy are hereby abolished," did not prevent the widow from recovering her interest in the land conveyed by the husband, as fixed by the statute in force when the same was alienated.—Purcell v. Lang (Iowa) 66 N. W. 887.

[b] (Iowa; 1896.)

Code 1873, § 2440, giving the surviving spouse a fee-simple interest in one-third the real estate of deceased, and providing that "estates of dower and curtesy are hereby abolished," merely abolished the use of the words "dower" and "curtesy" as descriptive of the enlarged estate.—Purcell v. Lang (Iowa) 66 N. W. 887.

§ 2. Sale of land on execution against husband.

[a] (Neb.; 1895.)

The sale of the husband's land under execution against him alone, followed by confirmation and conveyance, does not extinguish the inchoate dower right of the wife, and on the death of the husband the wife is entitled to have her dower assigned out of such land.—Butler v. Fitzgerald, 61 N. W. 640, 43 Neb. 192.

[b] (Neb.; 1895.)

Land sold under execution on a judgment against the husband alone, followed by a conveyance, is land "aliened by the husband," within Comp. St. 1893, c. 23, § 7, which entitles his widow to dower in such land.—Butler v. Fitzgerald, 61 N. W. 640, 43 Neb. 192.

II. DIVESTITURE OF RIGHT BY ACTS OF WIFE.**§ 3. By power of attorney.**

(Wis.; 1895.)

Rev. St. §§ 2222, 2223, provide that a wife, by joining with her husband in the execution of a deed, bars her dower without any other words therein, and that she may, by power of attorney, authorize her attorney to bar her dower in the same manner as she could personally do. *Held*, that a joint power of attorney by a husband and wife reciting that the attorney is empowered to convey all lands of which "we, or either of us, are seised," and providing that the surplus, after paying certain debts, shall be paid to the wife "in satisfaction of her dower or rights" in the land, empowers the attorney to bar the wife's dower.—Bertschy v. Bank of Sheboygan, 61 N. W. 1115, 89 Wis. 473.

§ 4. By stipulation.

(Mich.; 1897.)

A bill by a wife for divorce and alimony prayed that defendant be required to deed to her an interest she had deeded to him, before their marriage, in certain land. It was stipulated between them that she would accept such deed and a certain sum of money in full of expenses and alimony, and she understood it was in full of all claims on him. *Held*, that she was not entitled to dower in his other lands, though dower was not mentioned in such stipulation.—McKelvey v. McKelvey (Mich.) 70 N. W. 582.

III. DEVISE IN LIEU OF DOWER.

Effect of widow's election on rights of devisees and legatees, see "Wills," § 62.

§ 5. What constitutes.

(Wis.; 1891.)

A condition attached to a devise in trust, that the devisee shall give bond to support testator's widow during life, followed by the filing of such bond by him, and his performance of the conditions thereof, is a provision for the widow which deprives her of dower, unless she commence proceedings for the assignment of the latter within the time provided by Rev. St. 1858, c. 89, § 18.—*Turner v. Oberheu*, 61 N. W. 280, 89 Wis. 1.

§ 6. Election by widow.

[a] (Iowa; 1895.)

Where a will devises a life estate in land to a wife, with remainder over to another, and does not prohibit the taking of dower, or provide that such devise is in lieu of dower, the wife, on death of the husband, is entitled both to take under the will and to her dower right in the land.—*Hunter v. Hunter* (Iowa) 64 N. W. 656.

[b] (Iowa; 1895.)

Where a widow is entitled under a will to a life estate in land, part of which is a homestead, the fact that she has occupied the entire tract during life, and has not had her dower set apart, will not estop her heirs from claiming her dower interest therein, on the ground that by such occupation she elected to take under the will.—*Hunter v. Hunter* (Iowa) 64 N. W. 656.

[c] (Iowa; 1895.)

A widow who accepts benefits under a will must conform to all of its provisions, and renounce every right inconsistent therewith.—*Godman v. Converse*, 61 N. W. 756, 43 Neb. 463.

[d] (Iowa; 1896.)

Under Code, § 2452, providing that the widow's share cannot be affected by any will of her husband, unless she consent thereto, and the consent is entered in the proper probate record, where the provisions of testator's will in favor of his widow do not purport to be in lieu of dower, and there is nothing in the will which is inconsistent with her right to take under the will and also take dower, her right to dower is not affected by her consent to take under the will.—*Baldwin v. Hill* (Iowa) 66 N. W. 889.

[e] (Iowa; 1896.)

Where the will of a testator, to which his widow has consented, gives her the use of the homestead during her life, her occupancy of it thereafter will be held to be under such provision, and will not constitute an election by her to take the homestead in lieu of her distributive share of the estate.—*In re Franke's Estate* (Iowa) 66 N. W. 918; *Franke v. Wiegand*, Id.

[f] (Iowa; 1896.)

Where a widow received from the executor of the will of her deceased husband all the personal property and money remaining after settlement of the estate, in accordance with the terms of the will, she will be held to have consented to take under the will, and in the absence of proof it will be presumed that such consent was properly entered on the records of the court, as provided by Code, § 2452.—*In re Franke's Estate* (Iowa) 66 N. W. 918; *Franke v. Wiegand*, Id.

[g] (Iowa; 1896.)

The acceptance by a widow of the provisions in the will of her deceased husband does not bar her right of dower unless it is so expressed in the will, or unless the allowance of dower will defeat some of its provisions.—*In re Franke's Estate* (Iowa) 66 N. W. 918; *Franke v. Wiegand*, Id.

[h] (Iowa; 1896.)

Where testator devised "all the remainder" of his estate, both real and personal, to his wife for life, directing that, on her death, "all * * * said property" be distributed among his children, the life estate so devised to the widow was not in lieu of dower. *Franke*

v. Wiegand (1896) 66 N. W. 918, followed.—*Watson v. Watson*, 67 N. W. 83.

[i] (Iowa; 1896.)

The widow is entitled to dower though she accepts a devise under the will, unless there be an express provision to the contrary, or the claim of dower be inconsistent with, and, if allowed, would defeat, some provision of the will.—*Watson v. Watson* (Iowa) 67 N. W. 83.

IV. REMEDIES.

§ 7. Assignment.

(Neb.; 1895.)

In the assignment of dower in land aliened by the husband during marriage, the value of the land is to be estimated as it is at the time of the assignment, excluding the increase in value resulting from improvements made thereon by the alienee subsequent to the date of alienation.—*Butler v. Fitzgerald* (Neb.) 61 N. W. 640, 43 Neb. 192.

§ 8. Rights before assignment of dower.

[a] (Minn.; 1896.)

A consummate right of dower, though unmeasured, may be assigned.—*Dobberstein v. Murphy* (Minn.) 66 N. W. 204.

64 Minn. 127.

[b] (Minn.; 1896.)

The execution by the widow of a quitclaim deed of the land to which her dower, though unmeasured, had attached, constituted an assignment of the dower.—*Dobberstein v. Murphy* (Minn.) 66 N. W. 204.

64 Minn. 127.

[c] (Minn.; 1896.)

The rights of the assignee of an unmeasured right of dower are not affected by the fact that the probate court subsequently assigns the dower to the widow.—*Dobberstein v. Murphy* (Minn.) 66 N. W. 204.

64 Minn. 127.

§ 9. Liabilities of dowress.

(Mich.; 1895.)

Where a tract of land, exclusive of the mortgage on it, is valued as one-third of the estate of a decedent, and assigned as dower, the dowress is bound to pay one-third of the interest on the mortgage debt.—*Hodges v. Phinney* (Mich.) 64 N. W. 477.

DRAINAGE.

See, also, "Surface Water."

Liability of city for defective drains, see "Municipal Corporations," §§ 102–108.

§ 1. Establishment of drain.

(Iowa; 1896.)

The fact that the county supervisors rejected that portion of a petition made under Acts 20th Gen. Assem. c. 186, which sought the issuance of bonds for payment of the cost of a drain, does not show that they also rejected that portion which sought the establishment of the drain, or abandoned the proceedings under such portion.—*Butts v. Monona County* (Iowa) 69 N. W. 284.

§ 2. Jurisdiction of proceedings.

[a] (Iowa; 1894.)

Acts 20th Gen. Assem. c. 186, § 2, provides that when the petition of 100 voters of the county, setting forth that any district of land is subject to overflow or too wet for cultivation, shall be filed with the county auditor, he shall appoint an engineer or commissioner to examine the land and locate such ditches, etc., as may be necessary for its reclamation. Code, § 1208, provides that after the commissioner files his report showing that

the improvement is necessary, the auditor shall give notice to the landowners interested of the time the petition will be heard by the board of supervisors. Code, § 1209, provides that if on the hearing the supervisors find the improvement necessary, they shall locate and establish it. *Held*, that jurisdiction to make the improvement is acquired when the petition is filed with the auditor, and cannot be impaired by the withdrawal of some of the names from the petition on the hearing before the supervisors.—*Seibert v. Lovell* (Iowa) 61 N. W. 197. 92 Iowa, 507.

[b] (Mich.; 1895.)

3 How. Ann. St. § 1740a7, limits the jurisdiction of "township" drain commissioners to drains lying entirely within the township, and provides that the county drain commissioners shall have concurrent jurisdiction with the township commissioners. Id. § 1740a8, provides that, "in case it is proposed to run a part of a drain through an incorporated city, the whole of such drain shall be constructed * * * by the county commissioners, and wherever the word 'township' is used in this act, it shall be construed to mean 'city,' as the case may be." *Held*, that the county commissioners have no jurisdiction to construct a drain lying wholly within a city whose charter gives it jurisdiction over its drainage.—*Mason v. Detroit, G. H. & M. Ry. Co.* (Mich.) 62 N. W. 989. 104 Mich. 631.

[c] (Mich.; 1895.)

Where a petition was presented to the town drain commissioner to clean out a drain, pursuant to Acts 1885, No. 227, as amended, but before the commissioner made his first order, Act No. 203, Pub. Acts 1893, took effect, which said act was enacted without a saving clause, but as amendatory of the act of 1885, and the petition was so framed as to comply with both acts, the drain commissioner was not ousted of jurisdiction to complete the proceedings and assess a tax therefor.—*Dennison v. Allen* (Mich.) 64 N. W. 38.

[d] (Neb.; 1897.)

In a proceeding to establish a drainage ditch under Comp. St. c. 89, art. 1, providing that on petition for a ditch the county board shall find and enter upon its journal whether the line described in the petition for the proposed ditch is the best route for the improvement, such a finding is jurisdictional.—*State v. Board of Com'rs of Colfax County* (Neb.) 70 N. W. 500.

§ 3. Petition.

[a] (Iowa; 1894.)

It is not necessary that the petitioners for a drainage improvement, under Acts 20th Gen. Assem. c. 186, should reside near or be interested in the proposed improvement, it being sufficient if they are legal voters of the county.—*Seibert v. Lovell* (Iowa) 61 N. W. 197. 92 Iowa, 507.

[b] (Iowa; 1896.)

A petition for a drain which is signed by more than the 100 voters of the county required by Acts 20th Gen. Assem. c. 186, § 2, cannot be impeached by testimony that the names of certain unqualified persons were signed to the petition, and that, if they were deducted, there would be less than the required number, if the witness fails to designate the names.—*Butts v. Monona County* (Iowa) 69 N. W. 284.

§ 4. Notice or citation.

[a] (Mich.; 1895.)

Under a statute providing that in proceedings to establish a drain the citation shall be served by the commissioner, "or some other competent person," no special appointment is required; and a return, showing that it was served by a competent person, is conclusive.—*Wolpert v. Newcomb* (Mich.) 64 N. W. 326.

[b] (Mich.; 1895.)

The citation in proceedings to establish a drain need not be issued under the seal of the court, nor "in the name of the people."—*Wolpert v. Newcomb* (Mich.) 64 N. W. 326.

[c] (Mich.; 1895.)

Under 3 How. Ann. St. § 1740e1, providing that in proceedings to establish a drain the citation shall set forth that lands owned by the persons to whom it is addressed will be "crossed" by such drains, the exact language of the statute need not be used if it appears from the description of the land and the course of the proposed drain that the drain will in fact cross the land of the person to whom the citation is addressed.—*Wolpert v. Newcomb* (Mich.) 64 N. W. 326.

[d] (Mich.; 1895.)

One who has been properly served with a citation in proceedings for establishing a drain cannot raise the objection of a defective service on others, who, having assented, and released their right of way, are themselves not in a position to complain.—*Wolpert v. Newcomb* (Mich.) 64 N. W. 326.

§ 5. — To nonresidents.

(Mich.; 1895.)

In proceedings for the appointment of special commissioners to determine the necessity of a drain and the taking of private property for the same, where the name and residence of a nonresident owner, who refused to release, are known, notice by publication from which said owner's name was left out is insufficient to give jurisdiction under Pub. Acts 1893, § 7, requiring the citation to be addressed to such owner.—*Campau v. Charbeneau* (Mich.) 63 N. W. 435. 105 Mich. 422.

§ 6. Repairs and alterations.

[a] (Mich.; 1896.)

In proceedings to review the action of a drain commissioner in deepening and widening the B. drain, it appeared that plaintiff's land was assessed for the P. drain, previously established, which has a creek for an outlet, and is crossed by the B. drain; and that the latter is 18 inches deeper, and, if deepened as proposed, will be 28 inches deeper, than the former at the intersection, and 18 inches deeper than the E. drain, which empties into the P. drain below such intersection, and was also established before the B. drain. *Held*, that the action of such commissioner was proper, as against the objection that such deepening and widening will have the effect to destroy the P. and E. drains from the point of intersection by diverting the flow of water.—*Berry v. Tinsman* (Mich.) 66 N. W. 579.

[b] (Mich.; 1896.)

An application for cleaning a drain, which is signed by eight persons, and recites that five of them (giving the names) are owners of lands that were assessed for benefits in the construction of the drain, and are owners of land liable to be assessed for the cleaning, and that the drain needs cleaning, is sufficient, under Pub. Acts 1893, No. 203, c. 8, § 1, providing that any five freeholders of the township, one or more of whom shall be owners of land liable to assessment for the cleaning, may make the application setting forth the necessity for the cleaning.—*Angell v. Cortright* (Mich.) 69 N. W. 486.

§ 7. Assessments.

[a] (Iowa; 1896.)

A tax levied to cover the expenses of building a drainage ditch (Acts 20th Gen. Assem. c. 186) is not invalid because a change was made in the survey as originally fixed upon by the supervisors, and the survey as accepted did not occupy the line of the original survey, if it appears that the two surveys corresponded in length, and were

on substantially the same line.—*Butts v. Monona County* (Iowa) 69 N. W. 284.

[b] (Mich.; 1895.)

Under Act 1885, No. 227, c. 6, §§ 6, 7, 14, drainage taxes, when reassessed, are to follow the course of other taxes, and be collected in the same manner; if necessary, by sale for nonpayment.—*Bump v. Jepson* (Mich.) 64 N. W. 509.

[c] (Mich.; 1895.)

The acceptance by the board of supervisors of the report of its committee, recommending that authority be granted the township supervisors to reassess unpaid taxes reported as properly returned, sufficiently authorizes such reassessment.—*Bump v. Jepson* (Mich.) 64 N. W. 509.

[d] (Mich.; 1896.)

Landowners cannot defeat a tax for cleaning a drain where the contract was simply for the cleaning, on the ground that in performing the work the contractors increased the width of the drain.—*Angell v. Cortright* (Mich.) 69 N. W. 486.

§ 8. — Penalty for nonpayment.

(Mich.; 1895.)

An excessive interest charge of 1 per cent. per month on a delinquent drainage tax cannot be validated by a showing that the amount for which the land was sold was not in excess of what it would lawfully have been, had a valid collection fee, which was omitted, been added.—*Bump v. Jepson* (Mich.) 64 N. W. 509.

§ 9. — Mandamus to compel levy.

(Mich.; 1895.)

3 How. Ann. St. §§ 1740f, 1740g, 1740h, provide that the drainage commissioners shall make a special assessment roll, and file it in the office of the township clerk, who shall, on or before October 1st, make and deliver to the supervisor a certified statement of the taxes to be raised on the respective descriptions of land, and require the supervisor to lay the matters certified before the board of supervisors. *Held*, that the township clerk and township supervisor cannot refuse to perform the duties prescribed by such statute on the ground that, in their opinion, the assessments would be invalid, because of irregularities in the proceedings to lay out the drain.—*Laubach v. O'Meara* (Mich.) 64 N. W. 865.

§ 10. Appeal.

(Mich.; 1895.)

The probate court has no power to review and set aside the verdict of a jury finding that a proposed drain is not necessary.—*Palmer v. Willett* (Mich.) 62 N. W. 1027.
105 Mich. 86.

DRIVING LOGS.

See "Logs and logging," § 6.

DRUGGISTS.

Keeping liquor for sale, see "Intoxicating Liquors," § 28.

(Iowa; 1895.)

In an action against a druggist for negligently giving an injurious medicine, it was error to refuse to charge to the effect that if the medicine was not the proximate cause of the illness complained of, or if the plaintiff was ill at the time, and taking the drug did not increase his illness, plaintiff is not entitled to recover.—*Rabe v. Sommerbeck* (Iowa) 63 N. W. 458.

DRUNKARDS.

Conviction of drunkenness as evidence in action under civil damage laws, see "Intoxicating Liquors," §§ 62, 63.

Intoxication as affecting capacity to commit crime, see "Criminal Law," § 6.

— as contributory negligence, see "Negligence," § 24.

Providing treatment for inebriates, police power, see "Constitutional Law," § 44.

(Minn.; 1896.)

The proceedings authorized by Gen. Laws 1895, c. 156, providing for the treatment of inebriates by counties, do not amount to a commitment of an inebriate to the guardianship of any one, within the general jurisdiction of the probate court over "persons under guardianship," conferred by the constitution; and the act is hence unconstitutional.—*Foreman v. Board of Com'rs of Hennepin County* (Minn.) 67 N. W. 207.
64 Minn. 371.

DUE PROCESS OF LAW.

See "Constitutional Law," §§ 40-43.

DUPLICITY.

See "Indictment and Information," §§ 23-25.

DURESS.

As ground for rescission of contract, see "Equity," § 30.

Committing crime under, see "Criminal Law," § 3.

In procuring note, see "Negotiable Instruments," § 4.

— settlement of action, see "Compromise," §§ 3, 5.

Payment under, see "Payment," §§ 14, 15.

[a] (Mich.; 1895.)

Defendant, while sheriff, took a note for collection against plaintiff's husband, under an agreement that he was to have one-half for collecting it. He sued out a writ of attachment in the name of the payee, and, under threats of a levy, a mortgage was given by the husband on plaintiff's steers. *Held*, under How. Ann. St. § 7050, providing that no constable shall buy any note for the purpose of commencing a suit before a justice; section 590, providing that no sheriff shall appear in any court for or on behalf of any party to a suit; and section 596, authorizing sheriffs to exercise all the powers of constables,—that the mortgage was obtained by fraud and coercion.—*Van Dusen v. King* (Mich.) 64 N. W. 9.

[b] (Neb.; 1895.)

Threats of prosecution and imprisonment of the husband, when used to induce him and his wife to execute a mortgage on their homestead to secure the payment of a judgment against him, which they would not otherwise have done, constitutes duress, rendering the mortgage void.—*Hargreaves v. Korcek* (Neb.) 62 N. W. 1086.
44 Neb. 660.

[c] (Neb.; 1896.)

Pending an appeal by defendant from a judgment against him, a consent order was entered that a debtor of defendant, whom plaintiff had garnished, should pay the debt into court, and that part of it, less in amount than the judgment, should be paid plaintiff, and the remainder be paid defendant. On plaintiff's motion to dismiss the appeal, on the ground

that the judgment was thereby satisfied, defendant claimed the right to have the judgment reviewed, for the reason that he allowed said order to be entered because of duress, in that he feared that, by failing to consent thereto, he would lose the entire debt due him, through delay. It appeared, however, that, after the garnishee had paid the money into court, defendant elected to receive his share as fixed by

the order, and receipted therefor without protest. *Held*, that there was a valid satisfaction. —Boatright v. Enewold (Neb.) 68 N. W. 472.

DYING DECLARATIONS.

See "Homicide," §§ 32-34.

E.

EASEMENTS.

I. IN GENERAL, §§ 1-3.

II. CREATION, §§ 4-6.

III. ABANDONMENT AND EXTINGUISHMENT, §§ 7, 8.

See, also, "Dedication"; "License"; "Party Walls."

Construction of deed, creation of easement or fee, see "Deed," § 18.

Lateral support, see "Adjoining Landowners," § 1.

Light and air, see "Adjoining Landowners," § 3.

I. IN GENERAL.

Operation of statute of frauds, see "Frauds, Statute of," § 16.

§ 1. What constitute.

(Iowa; 1895.)

The right to discharge smoke and soot on the premises of another is an easement, within Code, § 2031, providing that, in suits in which title to an easement in land is claimed through adverse possession, the use of the same shall not be admitted as evidence that the party claimed the easement as his right.—Churchill v. Burlington Water Co. (Iowa) 62 N. W. 646.

§ 2. Extent of right.

(Wis.; 1896.)

An owner of land platted it into lots, designating a strip in the center, connecting with a public street at one end, and terminating within his own land at the other, as a street or "Place," and a number of the lots fronted on this place. The city authorities refused to accept his plat or recognize the street, but he improved and graded the same, and sold lots thereon. *Held* that, while the owner of a lot fronting on such place had the right to use it for access to his property from the public street, he had no right in that portion of it beyond his lot, towards the closed end, and no standing to enjoin its inclosure. Winslow and Marshall, JJ., dissenting.—Mahler v. Brumder (Wis.) 66 N. W. 502.

92 Wis. 477.

§ 3. Transfer.

(Wis.; 1896.)

Under Rev. St. § 2204, providing that no covenant shall be implied in any conveyance of real estate, only such easements pass with a conveyance as are appurtenant to the property conveyed, by being necessarily connected with its use and enjoyment.—Mahler v. Brumder (Wis.) 66 N. W. 502.

92 Wis. 477.

II. CREATION.

§ 4. Express grant or reservation.

[a] (Mich.; 1897.)

A contract reciting that in consideration that the grantees were erecting a sawmill near defendants' mill, and a payment of cash, the defendants do "grant, bargain, sell, etc., to the parties of the second part, their heirs and assigns, forever," the undivided one-half of a railroad side track, "to the sole and only proper use, benefit, and behoof of the said parties of the second part, their heirs and assigns, forever," is a conveyance of a right of way appurtenant to the grantees' mill, and not a mere license.—Kent Furniture Manuf'g Co. v. Long (Mich.) 69 N. W. 657.

[b] (Neb.; 1896.)

Where adjoining proprietors, pursuant to agreement, construct a dam across a draw at a place where the latter crosses the division line between their lands, and also a ditch along that line, for the purpose of drainage, and both ditch and dam are maintained for seven years, though, by mistake as to location of the division line, the ditch did not follow it, but lay mostly on the land of one owner, an injunction should not issue, at the instance of that owner, to restrain the maintenance of the dam and ditch.—Gilmore v. Armstrong (Neb.) 66 N. W. 998.

48 Neb. 92.

§ 5. By implication.

(Neb.; 1896.)

The plaintiff and defendant, owners in severalty of adjoining lots, pursuant to a mutual agreement erected thereon buildings corresponding in size, having the stairs, hallways, skylight, and heating apparatus in common. *Held* a grant to each of an easement in so much of the stairs, halls, and skylight as is situated upon the lot of the other; that the easement of each in the property of the other is owned in severalty.—Barr v. Lamaster (Neb.) 66 N. W. 1110.

48 Neb. 114.

§ 6. By prescription.

[a] (Mich.; 1895.)

One whose lands abut on a strip acquired by a railroad company as its right of way has no rights over such strip, though it was used for passage to the lands for over 30 years, where the railway company actually and continuously occupied it, and maintained notices that the property was private.—Andries v. Detroit, G. H. & M. Ry. Co. (Mich.) 63 N. W. 526.

105 Mich. 537.

[b] (Wis.; 1895.)

The fact that one who owns and controls a dam and canal for the purpose of navigation diverts an inconsiderable amount of water from the stream to create a water power is not per se notice of an adverse claim of right to so use said water.—Green Bay & M. Canal Co. v.

Kaukauna Water-Power Co. (Wis.) 61 N. W. 1121.

90 Wis. 370.

III. ABANDONMENT AND EXTINGUISHMENT.

§ 7. Abandonment.

[a] (Mich.; 1891.)

Evidence that a railroad was taken up, the rails and ties removed, the fences taken away, and the bridge across an intersecting river torn down, and all with a view of abandonment, is sufficient to show an abandonment of the easement of the right of way.—*Jones v. Van Bochove* (Mich.) 61 N. W. 342.

103 Mich. 98.

[b] (Mich.; 1897.)

A right of way covered by a side track, which has been the subject of a grant, is not abandoned by the subsequent removal, and reconstruction on another line, of a portion of the side track, by the consent of the assignee of the original grantee, under an agreement that its rights should not be thereby affected.—*Kent Furniture Manuf'g Co. v. Long* (Mich.) 69 N. W. 657.

§ 8. Extinguishment.

[a] (Mich.; 1895.)

Where an abutting owner conveys all his interest in a street, with consent to the grantee to close the street, the latter may close it, as against one thereafter receiving a deed from the grantor of his abutting lots.—*Comstock v. Sharp* (Mich.) 64 N. W. 22.

[b] (Wis.; 1895.)

Where one owning an easement in a wall which forms a side of his building, after the destruction of the wall and building, erects a new building on a different foundation, he thereby abandons and extinguishes the easement.—*Duncan v. Rodecker* (Wis.) 62 N. W. 533.

90 Wis. 1.

EDUCATION.

See "School and School Districts."

EJECTION.

Of passenger, see "Carriers," §§ 63-70.

EJECTMENT.

I. WHEN LIES, § 1.

II. TITLE TO SUPPORT, § 2.

III. DEFENSES, § 3.

IV. PLEADING, EVIDENCE, AND PRACTICE. §§ 4-11.

V. TAXES AND IMPROVEMENTS, §§ 12-14.

See, also, "Adverse Possession."

Application of statute of limitations, see "Limitation of Actions," § 2.

Between co-tenants, see "Tenancy in Common," § 9.

Jurisdiction of justice in actions concerning land, see "Justices of the Peace," § 7.

Statutory new trial as of right in actions involving title to land, see "New Trial," § 37.

Venue of actions concerning land, see "Venue in Civil Cases," § 4.

I. WHEN LIES.

§ 1. Against person claiming title.

(Mich.; 1896.)

In ejectment, the defendants, instead of disclaiming, employed counsel to defend the action, and, a short time before trial, stated that they claimed an interest in the lands in controversy, under a will which had been probated several months before suit was brought. *Held*, that the facts were sufficient to justify a finding that defendants claimed title to the lands at the time suit was brought, within How. Ann. St. § 7791, authorizing ejectment in such case.—*Whiteley v. Whiteley* (Mich.) 68 N. W. 241.

II. TITLE TO SUPPORT.

§ 2. Title in general.

[a] (Neb.; 1896.)

Plaintiff in ejectment is not required to prove title as against the whole world, it being sufficient if he prove it as against defendant. *Carson v. Dundas* (1894) 58 N. W. 141, 39 Neb. 503, followed.—*Lantry v. Wolff*, 68 N. W. 494.

[b] (Neb.; 1896.)

Plaintiff in ejectment may show title by adverse possession.—*Lantry v. Wolff* (Neb.) 68 N. W. 494.

[c] (Wis.; 1895.)

Actual possession is sufficient evidence of title to support ejectment until defendant shows a better title.—*Elofrson v. Lindsay* (Wis.) 63 N. W. 89.

90 Wis. 203.

III. DEFENSES.

§ 3. What defenses may be interposed.

[a] (Neb.; 1895.)

Defendant in ejectment may interpose an equitable defense.—*Wanser v. Lucas* (Neb.) 62 N. W. 1108.

44 Neb. 759.

[b] (Wis.; 1895.)

In ejectment against a tenant, defendant cannot set up by way of counterclaim or cross complaint that the deed under which plaintiff claims is a cloud on the landlord's title.—*Moore v. Smead*, 62 N. W. 426, 89 Wis. 558.

IV. PLEADING, EVIDENCE, AND PRACTICE.

§ 4. Declaration or complaint—Allegation of wrongful entry and detainer.

[a] (Neb.; 1896.)

An allegation in a complaint in ejectment that defendant "has unlawfully kept and still keeps the plaintiff out of possession" of the premises in suit, is not sufficient as an allegation that plaintiff is entitled to possession of the premises.—*George v. McCullough* (Neb.) 67 N. W. 758.

48 Neb. 680.

[b] (S. D.; 1896.)

A complaint alleging that plaintiff was the owner and seised in fee of certain premises; that, while such owner and seised and possessed of the premises, defendant unlawfully entered upon the second story thereof, and ousted and ejected plaintiff therefrom, and has ever since withheld possession from plaintiff, to his damage; concluding with demand for judgment for possession and damages,—is sufficient as a complaint for the recovery of possession of real property.—*Brady v. Kreuger* (S. D.) 66 N. W. 1083.

§ 5. Answer.

[a] (Neb.: 1897.)

An answer in ejectment alleged that K., through whom both parties claimed title, died in Germany, leaving a will which was probated both in Germany and Nebraska. A copy of the minutes of the court in Germany was set out, showing that K. appeared on July 9, 1876, and "asked leave to deposit his last will in writing"; that, nothing appearing against it, "the applicant declared," etc., the instrument following being signed by K. and two others, and the clerk of the court; that on July 5, 1879, K.'s widow appeared and asked for the publication of the will; and that the will "was taken from the document safe and read" to her. *Held* sufficient, on general demurrer, to show the existence and probate of a written will.—*Koopman v. Carroll* (Neb.) 70 N. W. 395.

[b] (S. D.: 1896.)

In ejectment by a corporation, an answer alleging that plaintiff's title rests upon a contract and deed which were obtained from defendants by fraud; that plaintiff is not a legal corporation, is insolvent, and has failed to carry out its part of the contract; that there has been an utter failure of consideration for such contract; and that defendants have peaceably regained possession of the property which was abandoned by plaintiff,—should not be set aside as frivolous.—*Catholicon Hot Springs Co. v. Ferguson* (S. D.) 67 N. W. 615.

§ 6. Evidence.

(Minn.: 1897.)

In an action by one claiming under a mortgage which has been foreclosed, to recover the land, neither party connected himself with the government title, but the plaintiff proved that the mortgagor was in possession when he made the mortgage, and it appeared that he subsequently conveyed and delivered possession to defendant, who applied to the land office to enter the land as a homestead, and his application was pending at the time of the trial. *Held*, that there was no presumption that the title was in the United States.—*Preiner v. Meyer* (Minn.) 69 N. W. 887.

§ 7. — Documents.

[a] (Mich.: 1895.)

Proceedings under How. Ann. St. § 5990 et seq., for the determination of the heirs of a person deceased before the passage of the act, may be given in evidence to prove title in an action of ejectment.—*Miller v. Davis* (Mich.) 64 N. W. 338.

[b] (Mich.: 1896.)

In an action to recover an undivided interest in land to which defendants claimed title by adverse possession, it appeared that after R., a predecessor of defendants, obtained title to a portion of claim No. 42, through one of the heirs of plaintiff's ancestor, the original owner, he exercised acts of ownership over the entire tract, and subsequently procured a tax deed in which the land was described as a part of claim No. 45, but which was in fact in claim No. 42; that on R.'s death this land was inventoried as part of his estate, surveyed into lots, and a lot assigned to each child; and that one of these lots embraced the land in controversy. *Held*, that the tax deed, the assessment rolls, and the proceedings of the probate court were admissible.—*Chabert v. Russell* (Mich.) 67 N. W. 902.

§ 8. Instructions.

(Wis.: 1895.)

Failure of the court to give a requested instruction on the issue of adverse possession, stating on whom is the burden of proof, what is the presumption in the absence of proof, and the character and amount of evidence necessary to overcome the presumption, is error.—*Fuller v. Worth*, 64 N. W. 995, 91 Wis. 406.

§ 9. Question for jury.

(Wis.: 1895.)

Where there was a conflict in the evidence as to whether the premises were occupied at the time the defendant entered under a tax title, and as to whether he entered with the consent of the plaintiff, these questions should have been submitted to the jury.—*Elofrson v. Lindsay* (Wis.) 63 N. W. 89, 90 Wis. 203.

§ 10. Judgment.

(Wis.: 1895.)

Where the defense in ejectment is that defendant went on plaintiff's land only to build a wall thereon, to prevent plaintiff's building from falling, and defendant does not claim any title to the land, it is error to direct a general verdict for defendant, and to enter a judgment in his favor on the merits, as this concludes the question of title against plaintiff.—*Zander v. Valentine Blatz Brewing Co.* (Wis.) 61 N. W. 763, 89 Wis. 164.

§ 11. — Recovery by one co-tenant.

(Neb.: 1895.)

In ejectment by a tenant in common against a person in possession without right, plaintiff can recover only to the extent of his title. *Crook v. Vandevort* (1882) 14 N. W. 470, 13 Neb. 505, overruled.—*Johnson v. Hardy*, 61 N. W. 624, 43 Neb. 368.

V. TAXES AND IMPROVEMENTS.

§ 12. Taxes barred by limitations.

(Neb.: 1895.)

The statute of limitations, relating to the foreclosure of tax liens, is no bar to the recovery of taxes paid by defendant in ejectment against whom judgment is rendered.—*Lothrop v. Michelson* (Neb.) 63 N. W. 28, 44 Neb. 633.

§ 13. Improvements.

[a] (Neb.: 1895.)

The measure of recovery by defendant in ejectment for improvements is the value of such improvements, and not the cost of making them.—*Lothrop v. Michelson* (Neb.) 63 N. W. 28, 44 Neb. 633.

[b] (S. D.: 1896.)

One who takes possession of land under a contract of purchase, and a bond for a deed executed by the vendor, does not hold under color of title, nor adversely to the claim of the vendor, in good faith, within Comp. Laws, § 5455, providing that in an action for recovery of land on which permanent improvements have been made by defendant, "holding under color of title adversely to the claim of plaintiff, in good faith, the value of such improvements must be allowed as a counterclaim."—*Seymour v. Cleveland* (S. D.) 68 N. W. 171.

[c] (Wis.: 1894.)

In ejectment the grantee of a life tenant by quitclaim deed cannot counterclaim for the value of improvements made and taxes paid by him while holding under such deed, as against the owner of the fee, where the statute only allows such claims when such expenditures are made while "holding adversely" by color of title asserted in good faith, and founded on descent, or any written instrument. *Rev. St. § 3096.*—*Falck v. Marsh*, 61 N. W. 287, 88 Wis. 680.

[d] (Wis.: 1895.)

Possession under a deed which is afterwards set aside on the ground that there was no delivery thereof may constitute a possession while "holding adversely by color of title asserted in good faith, founded on a written instrument," within *Rev. St. §§ 3096, 3098*, allowing recovery for improvement to a person so in possession, where a recovery of the land is had of

him. *Stewart v. Stewart* (Wis.) 63 N. W. 886, 90 Wis. 516.

§ 14. — Appraisalment of value.

[a] (Neb.; 1895.)

The appraisalment, under Comp. St. c. 63, of improvements by defendant in ejectment must be made from a view of the premises, the appraisers not having authority to hear the testimony of witnesses. — *Lothrop v. Michelson* (Neb.) 63 N. W. 28.

44 Neb. 633.

[b] (Neb.; 1895.)

Objection to the report of appraisers on the value of improvements, made under the occupying claimant's act (Comp. St. c. 63), should be filed on or before the second day of the term next after the filing of the appraisalment, when the report is filed in vacation. — *Lothrop v. Michelson* (Neb.) 63 N. W. 28.

44 Neb. 633.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 28; "Intoxicating Liquors," § 34.

— counts in pleading, see "Pleading," §§ 54, 55.

— homestead and distributive share, see "Homestead," § 13.

By widow to take devise in lieu of dower, see "Dower," § 6.

To declare mortgage debt due, see "Mortgages," § 54.

To rescind contract, see "Equity," § 29.

— sale, see "Sale," § 48.

ELECTION OF REMEDIES.

By buyer, see "Sale," § 72.

By seller, see "Sale," §§ 69, 70.

Waiver of right to appeal by pursuing other remedies, see "Appeal," § 13.

§ 1. What constitutes.

[a] (Iowa; 1896.)

One selling goods conditionally, by bringing an action for the price, makes an election of remedies, of which other creditors of the purchaser may avail themselves. — *Richards v. Schreiber, Conchar & Westphal Co.* (Iowa) 67 N. W. 569.

[b] (Iowa; 1897.)

The bringing of an action for fraud in an exchange of land is not an election to affirm the contract, which will prevent plaintiff, on subsequently discovering that there was no fraud, but a mistake as to the tract which he was to receive, from amending the complaint so as to seek a rescission for such mistake. — *Clapp v. Greenlee* (Iowa) 69 N. W. 1049.

[c] (Mich.; 1894.)

Owners of land on which plaintiff cut logs, of which he sold part, are not, by filing a bill to restrain further cutting, for an accounting as to the logs already sold, and for the sale under order of court of the unsold logs, estopped to set up title to the latter logs in a replevin suit against them by plaintiff. — *Hogan v. Hogan* (Mich.) 61 N. W. 73.

102 Mich. 641.

[d] (Mich.; 1895.)

In an action to recover for work and labor on a building under an alleged contract with the owner, the fact that, under a mistake as to his remedy, plaintiff filed a notice of lien as a subcontractor, is not a bar. — *McLaughlin v. Austin* (Mich.) 62 N. W. 719.

104 Mich. 489.

[e] (Minn.; 1895.)

Where a husband and wife made a mortgage in which the wife alone covenanted to pay

the debt and the husband alone executed the note representing the debt, the mortgagee, by suing on one instrument to recover personal judgment, did not waive his right to sue on the other. — *Maccomb Sewer-Pipe Co. v. Hanley* (Minn.) 63 N. W. 741.

61 Minn. 350.

[f] (Wis.; 1895.)

Plaintiff sold a quantity of standing timber under a contract, retaining title until the payment of the purchase price. Her vendee manufactured the same into lumber, and, becoming insolvent, assigned for the benefit of his creditors. Plaintiff brought replevin, recovering lumber nearly equal in value to the balance of her claim, having traced her property to the mass in possession of the insolvent. At the time of his assignment, there still remained a sufficient portion of this traced property, not seized under her writ of replevin, to meet the balance due her. This the assignee sold, and plaintiff brings an action against him to recover the assignor's indebtedness to her. *Held*, that the partial relief secured by plaintiff in the replevin action did not prejudice her right to resort to an action against the assignee for the balance. — *Bent v. Barnes* (Wis.) 64 N. W. 428, 90 Wis. 631.

§ 2. Right of election and necessity to elect.

[a] (Iowa; 1895.)

It is no defense to a suit on notes, brought upon a default in the payment of interest, that a chattel mortgage was given to secure such interest, and that this has not been foreclosed, there being no waiver of the right to sue on such default. — *Winch v. Bolton* (Iowa) 63 N. W. 330.

[b] (Mich.; 1895.)

One induced by fraud to sell her interest in an estate for less than its actual value cannot, in the same action, affirm the contract, and, waiving the tort, recover in assumpsit, on an implied promise, the difference between the amount received and its actual value. — *Bedier v. Fuller* (Mich.) 64 N. W. 331.

§ 3. Inconsistent remedies.

[a] (Iowa; 1896.)

In replevin of window sash it appeared that plaintiffs manufactured them for a certain building, and delivered them to defendant, who furnished the glass for them and did the glazing under a contract with plaintiffs; and that defendant refused to deliver the sash until he was paid for his work. *Held*, that the fact that pending suit defendant sought and failed to establish a mechanic's lien on such building did not bar his right to judgment. — *McMeekin v. Worcestor* (Iowa) 68 N. W. 680.

[b] (Mich.; 1895.)

Assumpsit for the surplus which should have arisen on the proper sale of mortgaged chattels is a bar to an action for the conversion of the chattels, though the action in assumpsit was dismissed for failure to file security for costs. — *Thomas v. Watt* (Mich.) 62 N. W. 345.

104 Mich. 201.

[c] (Mich.; 1896.)

After bringing assumpsit for the purchase price of chattels, plaintiff cannot bring replevin for the same articles, though the action in assumpsit has been voluntarily discontinued. — *Cooper v. Smith* (Mich.) 67 N. W. 516.

[d] (Mich.; 1897.)

Where a creditor has taken a chattel mortgage for goods sold by him, and has brought suit in chancery for a receiver, and has recovered a judgment at law, he cannot then sue for a conversion of the goods, on the ground that title had not passed. — *McDonald v. Preston Nat. Bank* (Mich.) 70 N. W. 143.

[e] (Wis.; 1895.)

A judgment in replevin by a vendor enforcing against the property sold the special interest reserved therein by him, as security

for notes, to the full amount of the unpaid price, is not, till satisfied, a bar to an action on one of the notes.—*Hyland v. Bohn Manuf'g Co.*, 65 N. W. 369, 91 Wis. 574.

§ 4. Effect of election.

(Neb.: 1895.)

Under Code Civ. Proc. §§ 847–851, which, when construed together, show that it was the intention of the legislature not to allow two actions for one debt to be pending or prosecuted concurrently, one whose debt is secured by mortgage may either prosecute an action at law to recover the debt, or enforce its payment by foreclosure, but must exhaust the remedy chosen.—*Meehan v. First Nat. Bank* (Neb.) 62 N. W. 490, 44 Neb. 213.

ELECTIONS AND VOTERS.

I. IN GENERAL, §§ 1–3.

II. QUALIFICATIONS OF VOTERS, § 4.

III. NOMINATIONS, §§ 5–9.

IV. BALLOTS AND VOTING, §§ 10–14.

V. ELECTION PRECINCTS AND VOTING PLACES, § 15.

VI. COUNT, RETURN, AND CANVASS OF VOTES, §§ 16–24.

VII. CONTEST, §§ 25–32.

VIII. OFFICERS, § 33.

Submitting questions to voters, see “Counties,”

§§ 3–6; “Municipal Corporations,” §§ 190–194. To adopt local option, see “Intoxicating Liquors,” §§ 3–7.

To determine amount of license, see “Intoxicating Liquors,” § 12.

To fix or change location of county seat, see “Counties,” §§ 13–16.

I. IN GENERAL.

§ 1. Validity—Corruption of voters.

(Mich.: 1895.)

An election determining that a county building shall be built is not invalid on the ground of corruption because workmen were urged to vote for it on the ground that it would furnish them employment.—*Board of Sup'rs of Wayne County v. Judges of Wayne Circuit Court* (Mich.) 64 N. W. 42.

§ 2. Constitutionality of laws regulating.

(Mich.: 1895.)

Act March 14, 1895, prohibiting the printing on the official ballot of the name of a candidate receiving the nomination of two or more parties in more than one column, is a valid exercise of the constitutional power (Const. art. 7, § 6) “to pass laws to preserve the purity of elections and guard against abuses of the elective franchise.”—*Todd v. Board of Election Com'rs of Kalamazoo, Calhoun, Branch, Eaton, and Hillsdale Counties*, 62 N. W. 564, 104 Mich. 474; *Id.*, 64 N. W. 496, 104 Mich. 474.

§ 3. Notice of election.

(a) (Mich.: 1894.)

The mere fact that the posted notice of a village election was in conformity to the law of 1891, instead of the law of 1893, does not render the election void.—*People v. Avery* (Mich.) 61 N. W. 4, 102 Mich. 572.

(b) (Neb.: 1895.)

An election for an office which had become vacant for failure of the person elected to file his official bond was not vitiated by the fact that the filling of that office was not included in the notice of election, where the electors generally were apprised of the fact that the office

was to be filled, and voted for a candidate.—*State v. Lansing*, 64 N. W. 1104, 46 Neb. 514.

II. QUALIFICATIONS OF VOTERS.

Evidence as to qualification, see post, §§ 30, 31.

§ 4. Residence—Students.

(Neb.: 1895.)

Students at a university, who are not dependent on their parents, and have no intention of returning home on the completion of their studies, who go away in vacation, and find employment and return to the university when the term opens, regarding the seat of the university as their home, and have no defined purpose as to their movements after completing their studies, can vote at the seat of the university.—*Berry v. Wilcox* (Neb.) 62 N. W. 249, 44 Neb. 82.

III. NOMINATIONS.

§ 5. Tie vote at caucus.

(Mich.: 1894.)

In case of a tie vote at a caucus neither the election officers nor candidates can determine the result by lot, in the absence of a statute authorizing the same.—*Beck v. Board of Election Com'rs* (Mich.) 61 N. W. 346, 103 Mich. 192.

§ 6. Meetings or conventions for nominating candidates.

(a) (Mich.: 1894.)

In a convention for the nomination of candidates for public offices, the question whether certain delegates are entitled to vote is properly submitted to a committee on credentials.—*Beck v. Board of Election Com'rs* (Mich.) 61 N. W. 346, 103 Mich. 192.

(b) (Mich.: 1894.)

A petition attacking the validity of the nomination of a candidate for a public office, in that V. was improperly allowed to vote as a delegate to the convention, which merely alleges that the “proxy held by V. was irregular and void,” is insufficient on which to base a finding that V. was improperly allowed a seat in the convention.—*Beck v. Board of Election Com'rs* (Mich.) 61 N. W. 346, 103 Mich. 192.

(c) (Mich.: 1896.)

The regularly called Democratic party convention having joined with the conventions of the People's party and the Union Silver party, and nominated a joint ticket, a mass meeting composed wholly of Democrats was held, at which presidential electors and candidates for state offices were placed in nomination as a Democratic ticket. The mass meeting was not called or held under the auspices of any previous state organization. *Held*, that the ticket so nominated was not entitled to the place on the ballot belonging to the regular Democratic ticket, under the provisions of Laws 1895, Act No. 271, §§ 10–14.—*Baker v. Board of Election Com'rs of Wayne County* (Mich.) 68 N. W. 752; *Russell v. Same, Id.*; *Shelby v. Same, Id.*

(d) (Mich.: 1896.)

The regularly called Democratic state convention met at the same time and place with the People's party and Union Silver party. The three conventions arranged to sit as one body, and nominated a fusion ticket, which it was agreed would be called the “Democratic People's Union Silver Ticket,” and they also adopted a new and distinctive vignette. In this joint convention, the People's party and the Union Silver party were together accorded the same number of votes as the Democratic party. *Held*, that the ticket so nominated was not the Democratic ticket, and not, as such,

entitled to the place on the ballot belonging to the ticket of the Democratic party.—*Baker v. Board of Election Commrs of Wayne County* (Mich.) 68 N. W. 752; *Russell v. Same, Id.*; *Shelby v. Same, Id.*

[e] (Neb.; 1896.)

Where a call for a party convention was issued by a person having no authority, only three days' notice of the date thereof being given, and the notice omitted to name the building in which the convention was to be held, and the precise place of meeting was concealed from the voters of said party and the general public, notwithstanding diligent inquiry in regard thereto, and the nominations were made in a private room by not over 50 persons, none of whom had been chosen or delegated to attend by any political party, it was not a rival convention of a convention regularly called and held by the party according to party usages.—*State v. Piper* (Neb.) 69 N. W. 384.

§ 7. By petition.

(Iowa; 1897.)

Under Acts 24th Gen. Assem. c. 33, § 4, authorizing any convention representing a political party which at the last election polled 2 per cent. of all the votes to make one nomination for each office, by filing a certificate of nomination; and section 5, providing that nominations for any office may be made by nomination papers signed by a certain number of voters; and section 6, providing that nomination papers shall specify the party or political principle which the candidate represents; and section 14, providing that the names of all candidates shall be printed on one ballot, all nominations of any political party or group of petitioners being placed under the party appellation or title of such party or group, as designated by them in their certificate of nomination or petitions, or, if none be designated, then under some suitable title, and the list of candidates for the several parties and groups of petitioners shall be placed in separate columns on the ballots, in such order as the authorities charged with the printing of the ballots shall decide,—though one nominated by petition, stating that his is the Republican party, file his nominating petition before the filing of certificate of nomination of one nominated by a convention of the Republican party, he is not entitled to have his name on the ballot in the column under the title of the Republican party, but he is entitled to have it thereon under a suitable title, to be designated by the election officers.—*Lowery v. Davis* (Iowa) 70 N. W. 190.

§ 8. Who to determine regularity of nominating convention.

[a] (Neb.; 1895.)

Under Act March 4, 1891 (Australian Ballot Law), where two factions of a political party nominate candidates, and certify such nominations to the secretary of state in due form, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each.—*State v. Allen*, 62 N. W. 35, 43 Neb. 651.

[b] (Neb.; 1896.)

Where two factions of a political party nominate candidates and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot. *State v. Allen* (1895) 62 N. W. 35, 43 Neb. 651, followed. *Phelps v. Piper*, 67 N. W. 753, 48 Neb. 724.

§ 9. Certificate of nomination—Hearing of objections.

[a] (Neb.; 1895.)

Act March 4, 1891 (Australian Ballot Law), § 11, provides that all certificates of nomination which are in apparent conformity therewith shall be deemed valid unless objection is made thereto; that, in case objections are made, candidates shall be notified, and the officer with whom the certificate is filed shall pass on such objections, and his decision will be final, unless a further order is made by the county court, a judge of the district court, or a justice of the supreme court. *Held*, that such officer, in the consideration of objections, is not confined to mere formal matters relating to the certificate of nomination, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by convention or assemblage of voters or delegates claiming to represent a party which cast the requisite number of votes at the last election.—*State v. Allen*, 62 N. W. 35, 43 Neb. 651.

[b] (Neb.; 1896.)

Comp. St. c. 26, § 136 (Australian Ballot Law, § 11), requiring objections to a certificate of nomination of candidates to be filed within three days after the filing of the certificate with the secretary of state, is mandatory.—*State v. Piper* (Neb.) 69 N. W. 383.

[c] (Neb.; 1896.)

It is neither the province of the secretary of state nor the courts, on considering objections to certificates of nomination filed pursuant to Comp. St. c. 26, § 136, to determine which of two state conventions of the same party, called and held according to party usages, is entitled to recognition as the regular convention.—*State v. Piper* (Neb.) 69 N. W. 378.

[d] (Neb.; 1896.)

The secretary of state, in passing on objections to a certificate of nomination, is not confined alone to the consideration of objections as to matters of form, but may decide from extrinsic evidence whether the candidates named in the certificate were in fact nominated by a convention called and held according to the usages of a political party which cast the requisite number of votes at the last previous election, or by a faction of a party in good faith claiming to represent a party casting the required number of votes.—*State v. Piper* (Neb.) 69 N. W. 378; *Id.* 384.

[e] (Neb.; 1896.)

The law provides that the officer with whom the original certificate of nomination is filed shall, in the first instance, pass on the validity of objections thereto, and that his decision shall be final unless an order shall be made in the matter by certain judicial officers before a certain time. *Held*, that rulings of the secretary of state as such officer on objections are final only when not reviewed by said judicial officers, and only when he properly determines such questions alone as he is by law empowered to decide.—*State v. Piper* (Neb.) 69 N. W. 378.

[f] (Neb.; 1896.)

An appeal or a proceeding in error will not lie to the supreme court to review the decision of the secretary of state under Comp. St. c. 26, § 136, on objections to a certificate of nomination.—*State v. Piper* (Neb.) 69 N. W. 378.

IV. BALLOTS AND VOTING.

Candidate acting as inspector, see post, § 33.
Evidence as to genuineness of ballots, see post, § 31.
Method of voting on proposition to create new county, see "Counties," § 5.

§ 10. In general.

[a] (Iowa; 1895.)

Certificates of nomination were filed by two parties who had not cast 2 per cent. of the

vote at the last general election. The recorder indorsed each certificate as insufficient, and sent notice of this action to the chairman of one party, but not to that of the other, nor to any of the nominees. He then prepared a ballot with the names of persons nominated by a third party, and offered them to the judges of election, who refused to accept them. The mayor then ordered ballots printed with the names of the nominees of the two certificates held insufficient, and these were the only ballots used at the election. *Held*, that the election was illegal, under Act 24th Gen. Assem. c. 33, regulating elections. — *State v. Smith* (Iowa) 63 N. W. 453.

[b] (Mich.; 1894.)

Where the attorney general, in a letter of instruction to inspectors of election and electors, gives a practical construction by the state government as to the manner of marking ballots of the class referred to in such instructions under Laws 1891, Act No. 190, ballots cast nearly two years after such instructions were given, and in accordance with them, should not be declared illegal. — *Ellis v. Glaser* (Mich.) 61 N. W. 648.

102 Mich. 396, 405.

[c] (Mich.; 1895.)

The commissioners of election provided for by the Australian ballot law may provide the ballots for a local option election held under Acts 1889, No. 207, previously passed, which provided for the printing of the ballots by the county clerk. — *Thomas v. Abbott* (Mich.) 63 N. W. 984.

105 Mich. 687.

[d] (Mich.; 1896.)

The provisions of Laws 1895, Act No. 271, § 14, directing that, in arranging the ballots to be voted at any election, it shall be the duty of the election commissioners of each county to place the ticket of the party having the greatest number of votes within the county at the last preceding election first on the ballot, the other tickets to follow in relative order, are not merely directory, but must be observed in making up the ballot. — *Baker v. Board of Election Com'rs of Wayne County* (Mich.) 68 N. W. 752; *Russell v. Same, Id.*; *Shelby v. Same, Id.*

[e] (Mich.; 1896.)

Laws 1895, Act No. 271, § 11, requires the state committee of each party, before each election, to adopt a vignette to be printed at the top of the column of the ballot assigned to the party. The city charter of Detroit, as amended by Laws 1895, Act No. 468, provides for a board of election commissioners for the city, who shall prepare the ballots for the election of city officers, and that no vignette shall be printed on any ballot. *Held*, that the provisions of the charter that no vignette shall be printed did not apply to the ballots used for the state, county, and congressional officers. — *Baker v. Board of Election Com'rs of Wayne County* (Mich.) 68 N. W. 752; *Russell v. Same, Id.*; *Shelby v. Same, Id.*

[f] (Minn.; 1896.)

The placing of the words "Yes" and "No" after the proposition for the issuance of water and light bonds, which was to be voted on at a municipal election, did not render the election void because of indefiniteness of the ballots. — *Janeway v. City of Duluth* (Minn.) 68 N. W. 24.

[g] (Neb.; 1896.)

The additional expense of printing a candidate's name on a ballot according to law is no reason for excluding his name therefrom. — *State v. Piper* (Neb.) 69 N. W. 378.

[h] (Wis.; 1895.)

As the Australian ballot law (Laws 1893, c. 288) only provides for the form of ballots at elections of officers, the form of ballot prescribed by Laws 1885, c. 296, at a special election to determine the amount of a liquor license, is not affected by such act. — *State v. City of Janesville* (Wis.) 62 N. W. 933.

90 Wis. 157.

§ 11. Names and description of candidates.

[a] (Iowa; 1896.)

Acts 24th Gen. Assem. c. 33 (providing with particularity the manner in which official ballots shall be prepared, corrected, furnished, and used, and that no other ballots shall be used or counted), though mandatory in so far as it requires certain officers to prepare and issue them in the prescribed manner, cannot be construed as mandatory on voters in so far as it provides that no other ballots shall be used or counted, so as to deprive them of their right to vote because the officer, in printing the ballots, has made a technical mistake in printing the name of a candidate on the ballot. — *Cook v. Fisher* (Iowa) 69 N. W. 264.

[b] (Neb.; 1895.)

Act March 4, 1891 (Australian Ballot Law), contemplates that the name of each candidate shall be printed once only on the official and sample ballot, accompanied by such political or other designations as correspond with the nomination papers on file with the officers charged with the duty of printing and distributing such ballots. *State v. Stein* (1892) 53 N. W. 999, 35 Neb. 848, distinguished. — *State v. Allen*, 62 N. W. 35, 43 Neb. 651.

[c] (Neb.; 1895.)

Maudamus will not lie to direct the arrangement, by the county clerk, of the names of candidates on the official ballot provided for by Act March 4, 1891, § 14, as discretion in such arrangement is conferred on that officer. — *Woods v. Mc Nerney* (Neb.) 63 N. W. 23.

44 Neb. 430.

[d] (Wis.; 1896.)

Where there are two men in a town bearing the same name, usually designated "C., Sr.," and "C., Jr.," and both are eligible to a certain office for which the senior was a candidate, parol evidence is inadmissible, in an action to contest the election, to show that certain ballots bearing the name "C., Jr.," were in fact intended for "C., Sr." — *State v. Steinborn* (Wis.) 66 N. W. 798.

92 Wis. 605.

§ 12. Method of indicating voter's choice.

[a] (S. D.; 1895.)

The erasure of a name on a ticket marked with a cross in the circle at the head thereof, and the writing thereon of the name of another candidate for the same office, do not constitute a vote for the latter candidate. — *Vallier v. Brakke* (S. D.) 64 N. W. 180.

[b] (S. D.; 1895.)

Under Laws 1893, c. 80, § 1, a ballot on which the name of one of the candidates is erased, and on which is written, in place of the erased name, the name of a candidate on another ticket, can be counted as a vote for neither candidate. — *Parmley v. Healy* (S. D.) 64 N. W. 186.

[c] (S. D.; 1895.)

When the elector makes a mark in the circle in the head of a party ticket, and erases no name on such ticket, the vote must be counted for the entire party ticket, though a cross be made opposite the name of a candidate on another ticket. — *McKittrick v. Pardee* (S. D.) 65 N. W. 23.

[d] (S. D.; 1895.)

An elector who erases the names of all the candidates on all the tickets except one does not thereby vote the latter ticket, unless he makes a cross in the circle at its head, or at the left of the names of the candidates thereon. — *McKittrick v. Pardee* (S. D.) 65 N. W. 23.

§ 13. — "Making cross."

[a] (Mich.; 1894.)

A ballot which has a cross in the square under the heading of one ticket, and the name of the candidate for alderman on the ward tick-

et erased, and only the surname of the candidate on the opposing ticket written in, should be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 618. 102 Mich. 396, 405.

[b] (Mich.; 1894.)

A ballot with a cross in the square at the head of one ticket, and the name of one candidate thereon erased, and the name of his opposing candidate written in such ticket, should be counted for such opposing candidate.—*Ellis v. Glaser* (Mich.) 61 N. W. 618.

102 Mich. 396, 405.

[c] (Mich.; 1894.)

A ballot with a cross in the square under the head of one ticket, and the name of one of the candidates for a ward office partially erased, and the name of another person written in with a lead pencil, should be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 618.

102 Mich. 396, 405.

[d] (Mich.; 1894.)

Under Pub. Acts 1893, No. 202, relating to elections, ballots having a name erased under the party ticket, and the name of an opposing candidate marked by a cross, should be counted.—*Attorney General v. Glaser*, 64 N. W. 828, 102 Mich. 396.

[e] (Minn.; 1895.)

Gen. Laws 1893, c. 4, § 136, subsec. 7, provides that if any elector, marking his ballot, shall use any mark clearly indicating an intent to mark against the name of any candidate, it shall be a sufficient vote for the candidate, provided the cross mark is not used elsewhere on the ballot. *Held*, that any mark which it is apparent was honestly intended for a cross mark, and for nothing else, must be given effect as such.—*Pennington v. Hare* (Minn.) 62 N. W. 116.

60 Minn. 146.

[f] (Neb.; 1896.)

The provision of Act 1891, § 20, for the expression of the voter's intention by a cross opposite the name of the candidate of his choice, must be complied with, whether the name of the candidate be printed on the ballot or written thereon by the voter.—*Martin v. Miles* (Neb.) 65 N. W. 889, 46 Neb. 772.

[g] (S. D.; 1895.)

Where the elector made a cross in the circle at the head of two party tickets, and placed a cross at the left of the name of one of the candidates, it constituted a vote for such candidate, since the crosses at the heads of the party tickets neutralized each other.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

[h] (S. D.; 1895.)

A cross at the right of a candidate's name is of no effect whatever, since the statute requires it to be made at the left.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

[i] (S. D.; 1895.)

A cross at the head of a party ticket, but not within the circle, is a nullity.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

[j] (S. D.; 1895.)

Where the intention of the elector to make a cross is apparent, any informality in making the cross should be disregarded, it being immaterial whether it is made with a stamp or otherwise.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

[k] (S. D.; 1895.)

One or more circles within the circle at the head of a party ticket should be disregarded, as not constituting a cross therein.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

[l] (S. D.; 1895.)

A straight diagonal line at the left of the name of the candidate does not constitute a cross, and should be disregarded.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

[m] (S. D.; 1895.)

When it is apparent that a voter intended to erase the name of a candidate, and at-

tempted to do so, any informality in the manner of doing it should be disregarded, it being immaterial whether it is done by drawing a line, or by making a succession of crosses, through the name.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

[n] (S. D.; 1895.)

When an elector makes a cross in the circle at the head of the party ticket, and erases no name thereon, the ticket must be counted for the party ticket throughout, though a cross was made opposite the name of a candidate on another party ticket.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

[o] (S. D.; 1895.)

Where the name of a candidate on one party ticket was erased, and written on another party ticket, and a cross placed to the left thereof, it was a nullity.—*McKittrick v. Pardee* (S. D.) 65 N. W. 23.

[p] (S. D.; 1895.)

Crosses in the circles at the heads of two party tickets neutralize each other.—*McKittrick v. Pardee* (S. D.) 65 N. W. 23.

[q] (S. D.; 1895.)

Where the voter made a cross in the circle at the head of a party ticket, and also at the left of the name of each candidate on that ticket, except appellant, and made a cross to the left of the name of appellant's rival on another ticket, it constituted a vote for appellant.—*McKittrick v. Pardee* (S. D.) 65 N. W. 23.

[r] (S. D.; 1895.)

A cross to the right of a candidate's name is a nullity.—*McKittrick v. Pardee* (S. D.) 65 N. W. 23.

[s] (S. D.; 1895.)

A cross made at the head of a party ticket, but not in the circle printed for that purpose, is a nullity.—*McKittrick v. Pardee* (S. D.) 65 N. W. 23.

§ 14. Prohibition of distinguishing marks.

[a] (Iowa; 1896.)

The initial of a candidate on ballots being printed as "R." instead of "A.," some of them were corrected by the judges of election by writing "A." before the "R.," and others by writing "A." over the "R.," in pencil, and the balance by stamping "A." over the "R." with a rubber stamp; the change thus created by the different methods of correction being distinguishable, but no ballot in any one of the classes bearing any marks which would distinguish it from other ballots of the same class. *Held*, that the ballots did not bear identifying marks, so as to render them illegal, under Acts 24th Gen. Assem, c. 33, § 27.—*Cook v. Fisher* (Iowa) 69 N. W. 264.

[b] (Iowa; 1896.)

Acts 24th Gen. Assem, c. 33, providing with particularity the manner in which the official ballot shall be prepared, corrected, furnished, and used, and that no other ballots shall be used or counted, did not require the rejection of the vote of the township on the ground that the change made by the judges prevented the ballots from being "official ballots," and therefore rendered them illegal.—*Cook v. Fisher* (Iowa) 69 N. W. 264.

[c] (Mich.; 1894.)

Under Laws 1891, Act No. 190, any mark on the ballot, other than the one appropriate and necessary, under the law, to designate the intention of the voter, is a distinguishing mark, and the ballot cannot be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 618.

102 Mich. 396, 405.

[d] (Mich.; 1894.)

A ballot which has a straight line under the heading of one ticket, and no cross upon it, should not be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 618.

102 Mich. 396, 405.

[e] (Mich.: 1894.)

A ballot which has a blot in the center of the ticket, and no cross upon it, should not be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 648.

102 Mich. 396, 405.

[f] (Mich.: 1894.)

A ballot which has a cross under the heading of one ticket with a half circle around it, and a figure written in the square under the heading of another ticket, should not be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 648.

102 Mich. 396, 405.

[g] (Mich.: 1894.)

A ballot which has a cross under the heading of one ticket outside the square, and the square inclosed in a large circle, should not be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 648.

102 Mich. 396, 405.

[h] (Mich.: 1894.)

A ballot which has a cross in the square under the heading of one ticket, and two marks similar to commas in the square under the heading of another ticket, should not be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 648.

102 Mich. 396, 405.

[i] (Mich.: 1894.)

Ballots which have under the heading more than one cross should not be counted.—*Ellis v. Glaser* (Mich.) 61 N. W. 648.

102 Mich. 396, 405.

[j] (Mich.: 1894.)

A ballot which has a cross under the heading of one ticket, with a mark under the name of a certain candidate on such ticket, and a cross opposite the name of the opposing candidate on another ticket, should not be counted for either of such candidates.—*Ellis v. Glaser* (Mich.) 61 N. W. 648.

102 Mich. 396, 405.

[k] (Mich.: 1895.)

Ballots are legal notwithstanding distinguishing marks fraudulently placed thereon after they are deposited in the ballot box.—*Attorney General v. Howcroft* (Mich.) 64 N. W. 954.

[l] (Minn.: 1895.)

Where electors intentionally write their names on their ballots, for identification, and so cast them, such ballots cannot be counted for either party.—*Pennington v. Hare* (Minn.) 62 N. W. 116.

60 Minn. 146.

[m] (S. D.: 1895.)

A ballot on which the elector writes his name is void.—*Vallier v. Brakke* (S. D.) 64 N. W. 180.

V. ELECTION PRECINCTS AND VOTING PLACES.

§ 15. Establishment.

[a] (Minn.: 1897.)

Gen. St. 1894, §§ 10, 11, do not authorize the formation of an election precinct out of portions of two counties.—*Brattland v. Calkins* (Minn.) 69 N. W. 699.

[b] (Minn.: 1897.)

The provisions of Gen. St. 1894, §§ 10, 11, as to petitions for the establishment of election precincts, and the publication of lists of precincts established, are mandatory.—*Brattland v. Calkins* (Minn.) 69 N. W. 699.

VI. COUNT, RETURN, AND CANVASS OF VOTES.

§ 16. Count of votes.

(Mich.: 1894.)

Laws 1891, Act No. 190, §§ 36, 38, provide that "immediately on closing the polls the board shall proceed to canvass the votes," and

that, "after the count of the tickets or ballots has been completed, the result shall be immediately publicly declared." *Held*, that returns should not be thrown out because the board do not complete the canvass on the night of election, and such returns bear date the next day.—*Ellis v. Glaser* (Mich.) 61 N. W. 648.

102 Mich. 396, 405.

§ 17. Canvass of election returns.

[a] (Neb.: 1896.)

The tally list of the number of votes cast for the different candidates is part of the returns of an election, and must be considered by the canvassers in making the abstract of the vote.—*State v. McFadden*, 65 N. W. 800, 46 Neb. 668; *Same v. Eastman*, 65 N. W. 805, 46 Neb. 675.

[b] (Neb.: 1896.)

When a discrepancy exists between the certificates and tally list the canvassers must determine which is correct, after comparison with the list of votes, and declare the result.—*State v. McFadden*, 65 N. W. 800, 46 Neb. 668; *Same v. Eastman*, 65 N. W. 805, 46 Neb. 675.

[c] (S. D.: 1896.)

Laws 1890, c. 84, § 3, requiring a state board of canvassers of election returns for members of congress and presidential electors to determine the number of votes received by each candidate, and declaring that the candidates respectively receiving the highest vote shall be deemed elected, impliedly requires the board to canvass all the votes cast in every county in the state if duly authenticated returns are obtainable.—*Woods v. Sheldon* (S. D.) 69 N. W. 602.

[d] (S. D.: 1896.)

Laws 1890, c. 84, provides that the state board of canvassers shall, within 30 days after election, open the returns, and "forthwith" determine the number of votes given for each candidate, and that those respectively receiving the highest vote shall be deemed elected. *Held*, that the board may adjourn to a day certain, or take a recess from day to day, for a reasonable time, to enable them to obtain properly authenticated returns, by sending a messenger for them, in place of those improperly authenticated.—*Woods v. Sheldon* (S. D.) 69 N. W. 602.

§ 18. Throwing out entire vote of township.

(Mich.: 1896.)

Sess. Laws 1891, No. 190, § 21, provides that no person shall be allowed within the railing of an election room except to vote, or to assist an elector. Section 31 provides that, "in case of necessity," an interpreter may be employed. *Held*, that where an interpreter hostile to one of the candidates was allowed within the railing, and conversed freely with foreigners, who only understood their own language, although they had not applied for an interpreter, the vote of the entire township should be excluded.—*Maynard v. Stillson* (Mich.) 66 N. W. 388.

§ 19. Going behind returns of inspectors.

(Neb.: 1896.)

On an application for mandamus to compel the removal of a county seat in pursuance of the declared result of a canvass of the vote on the question of relocation, the court cannot go behind the returns to investigate issues of fraud and illegality in the manner of conducting the election.—*State v. Roper* (Neb.) 65 N. W. 802, 46 Neb. 730.

§ 20. Recount.

[a] (Mich.: 1895.)

Under Pub. Acts 1887, No. 208, providing that in the contest of an election the petition for a recount shall be made on or before the last day of the session of the canvassing board, contest-

ant cannot, by filing a protest, which the law does not recognize, on what would be, in the usual course of the session, the last day of the board, and thus inducing an unlawful adjournment of the board, extend the time within which to file his petition for a recount.—*Drennan v. Common Council of Wyandotte* (Mich.) 63 N. W. 898.

[b] (Mich.: 1897.)

A petition by a candidate alleged that, by the original returns, petitioner was elected, and that on the recount the council had, in a certain precinct, wrongfully thrown out votes sufficient to defeat petitioner, and asked for mandamus requiring the council to issue him his certificate, based on the original returns. *Held*, that petitioner was not estopped to deny the validity of the recount because he himself had applied for a recount in other precincts than that specified.—*Hilton v. Common Council of City of Grand Rapids* (Mich.) 70 N. W. 1043.

§ 21. Compelling count of rejected votes.

(Mich.: 1896.)

Mandamus will not issue to compel a state board of canvassers of election returns to credit candidates with votes which they have rejected as irregular, so that the party to which the candidate belongs may take its proper position on the next official ballot, where neither the election of any of the candidates, nor the position to which the party would be entitled on the next ballot, would be affected by the votes being counted, and it does not appear that the votes are not credited to the parties in tabulated statements thereof in the county clerk's office, which control in determining the position of the different parties on succeeding official ballots.—*Baker v. Board of State Canvassers* (Mich.) 69 N. W. 656.

§ 22. Compelling recanvass.

(Neb.: 1896.)

If on the canvass the board of canvassers fails to perform its duty, mandamus will lie to compel it to reconvene, and make a correct canvass of all the returns before it.—*State v. McFadden*, 65 N. W. 800, 46 Neb. 668.

§ 23. Determination of tie vote.

(Neb.: 1895.)

Mandamus will not issue to compel the judges of election in a ward of a city of the second class to determine by lot which of three candidates for councilman who received the same number of votes was elected.—*State v. Bowman*, 64 N. W. 223, 45 Neb. 752.

§ 24. Voting wrongfully prevented—Intention of voters.

(Minn.: 1895.)

Where qualified electors were prevented from voting by an erroneous decision of the election judges, their ballots cannot be counted for the candidate the electors subsequently declared they intended to have voted for.—*Pennington v. Hare* (Minn.) 62 N. W. 116.
60 Minn. 146.

VII. CONTEST.

Determination of contest by legislature, see "State Legislature."

Of election to fix or change location of county seat, see "Counties," § 15.

§ 25. In general.

[a] (Iowa: 1896.)

A party to an election contest is not estopped from objecting that the entire vote of a township is illegal, because the ballots cast therein are all illegal, by offering in evidence ballots cast therein for himself, to be counted for him only in case the ballots are declared legal, and the vote of the

township held valid.—*Cook v. Fisher* (Iowa) 69 N. W. 261.

[b] (Mich.: 1897.)

Laws 1887, Act No. 208, providing for correction of mistakes in election returns, on petition of a candidate aggrieved, does not apply to a contest for membership in the common council of Grand Rapids, which body, under the charter, is "judge of the election and qualification of its own members."—*Hilton v. Common Council of City of Grand Rapids* (Mich.) 70 N. W. 1043.

[c] (Mich.: 1897.)

Under Grand Rapids City Charter 1877, tit. 10, § 4, making the common council judge of the election and qualification of its own members, and authorizing it to determine contested elections, such duty falls on the new body; title 2, § 20, providing that the council of the preceding year shall meet after election, and determine what persons are duly elected, referring only to officers, the determination of whose election is not vested elsewhere.—*Hilton v. Common Council of City of Grand Rapids* (Mich.) 70 N. W. 1043.

[d] (Minn.: 1894.)

Gen. Laws 1893, c. 4, § 188, providing for the appointment of three persons to inspect the ballots after the institution of an election contest, applies to contests for legislative offices.—*In re Election Contest* (Minn.) 61 N. W. 553, 59 Minn. 489; *State v. District Court Seventh Judicial District*, 1d.

§ 26. Municipal elections.

(Minn.: 1895.)

Gen. Laws 1893, c. 4 ("Election Law"), providing for election contests, includes a special municipal election on the question of issuing bonds.—*Truelson v. City of Duluth* (Minn.) 61 N. W. 911.
60 Minn. 132.

§ 27. Time of filing statement of intention.

[a] (Iowa: 1895.)

Code, § 697, requiring statement of contest in the case of an election to a county office to be filed within 20 days after the votes are canvassed, refers not to the canvass of the result by judges of election required by section 622, but to the canvass of the returns by the board of supervisors required by section 635.—*Clark v. Tracy* (Iowa) 64 N. W. 290.

[b] (Iowa: 1895.)

Under Code, § 697, requiring a contestant, within 20 days after the votes have been canvassed, to file statement of intention to contest, the canvass of votes referred to is not that by the judge of election from the ballots (section 622), but the subsequent canvass thereof by the board of supervisors from the returns (section 633).—*Ferguson v. Henry* (Iowa) 64 N. W. 292.

§ 28. Notice of contest—Municipal election.

(Minn.: 1895.)

The notice of contest of a municipal bond election, under Gen. Laws 1893, c. 4, § 190, may be served on a member of the city council.—*Truelson v. City of Duluth* (Minn.) 61 N. W. 911.
60 Minn. 132.

§ 29. Pleading and proof.

(Iowa: 1895.)

The genuineness of ballots put in evidence by contestant as having been returned may be attacked by incumbent by testimony that they were not as they were voted or counred, without any allegation in his pleading of alteration of the ballots.—*Ferguson v. Henry* (Iowa) 64 N. W. 292.

§ 30. Evidence.

(S. D.; 1895.)

On an issue whether witness was a qualified elector, he could be asked on direct examination the general question for whom he voted. —Vallier v. Brakke (S. D.) 64 N. W. 180.

§ 31. — As to genuineness of ballots.

(Iowa; 1895.)

Parol testimony that certain ballots offered on a contest were not as they were voted or counted by the judges is not conclusive against their genuineness, but with evidence as to the observance of Acts 24th Gen. Assem. c. 33, § 25, requiring the ballots, before separation of the judges, to be strung on a wire, the wire to be sealed, and the ballots to be then put in an envelope, so sealed that it cannot be opened without breaking the seal, and to be then returned to and kept by the proper officer, presents a question for the jury. —Ferguson v. Henry (Iowa) 64 N. W. 292.

(Iowa; 1895.)

Where contestant puts in evidence ballots as returned from the different voting precincts, incumbent may introduce testimony that certain of them are not as they were voted or counted by the judges; the fact that they have been in the custody of the proper officers being but prima facie evidence that they have not been altered. —Ferguson v. Henry (Iowa) 64 N. W. 292.

§ 32. Appeal.

(S. D.; 1896.)

An appeal in an election contest case will be dismissed unless taken within 60 days after entry of final judgment, as required by Comp. Laws, § 1498, though such period may not have elapsed since the denial of a motion for new trial. —Murray v. Whitmore (S. D.) 68 N. W. 745.

VIII. OFFICERS.**§ 33. Candidate acting as inspector.**

(Mich.; 1894.)

The mere fact that a candidate at a village election acted as an inspector of election, in violation of Laws 1893, Act 202, does not render the election void. —People v. Avery (Mich.) 61 N. W. 4.
102 Mich. 572.

ELECTRICITY.

Power of city to supply inhabitants with electric lights, see "Municipal Corporations," § 8.

ELEVATORS.

See "Warehousemen."

Carrier by elevator, see "Carriers," § 45.

ELIGIBILITY.

To office, see "Office and Officer," § 6.

EMBEZZLEMENT.

See, also, "False Pretenses"; "Larceny."

§ 1. What constitutes offense.

(Mich.; 1895.)

The fact that complainant, at the time he left with defendant a draft for collection, took from him a receipt to account for the proceeds, does not show that complainant parted with his interest in the draft, so as to prevent the conviction of defendant for embezzling the
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proceeds of the draft. —People v. Hanaw (Mich.) 65 N. W. 231.

(Neb.; 1895.)

To constitute embezzlement under Crim. Code, § 121, it is essential that the money or thing charged to have been embezzled should have come into defendant's possession or care through his employment. —McAleer v. State 64 N. W. 358, 46 Neb. 116.

(Neb.; 1895.)

A secreting with intent to convert to one's own use does not constitute actual embezzlement, within Crim. Code, § 121. —McAleer v. State, 64 N. W. 358, 46 Neb. 116.

(Neb.; 1896.)

It is essential to the crime of embezzlement that the owner be deprived of the property alleged to have been embezzled by an adverse use or holding. —State v. Hill (Neb.) 66 N. W. 541. 47 Neb. 456.

§ 2. — By agents.

(Mich.; 1895.)

A person employed to collect a bill who receives therefor a draft payable to his own order, from which he is entitled to take his own commissions, and sells the draft with intent to misappropriate the whole proceeds, may be convicted under 3 How. Ann. St. § 9176a, of embezzling the same. —People v. Hanaw (Mich.) 65 N. W. 231.

(Neb.; 1895.)

The facts that the relation of debtor and creditor existed between a principal and his agent, and that on balancing the account the agent was found indebted to the principal, were not sufficient to sustain a conviction of embezzlement by the agent of property of the principal, in the absence of evidence of a felonious intent so to do. —Hamilton v. State (Neb.) 64 N. W. 965, 46 Neb. 284.

§ 3. — By corporate agent or officer.

(Mich.; 1895.)

Even though a statute prohibits foreign corporations from doing business in the state without compliance with certain provisions, so that, without such compliance, they cannot make enforceable contracts in the state, yet one who has undertaken to make a contract of agency with such a corporation, and has acted as its agent, and received money for it paid on unenforceable contracts, may be convicted of embezzling, as its agent, such money. McGrath, J., dissenting. —People v. Hawkins (Mich.) 64 N. W. 736.

(Neb.; 1895.)

Crim. Code, § 121, provides the punishment for embezzlement by any clerk, agent, attorney at law, or servant of any private person or copartnership, except apprentices and persons within 18 years of age, and by any clerk, officer, attorney at law, agent, or servant of any corporation. *Held*, that the exception as to apprentices and those under 18 years of age does not apply to an employé of a corporation. —McAleer v. State, 64 N. W. 358, 46 Neb. 116.

(Neb.; 1895.)

Under Crim. Code, § 121, defining embezzlement by any clerk, agent, attorney at law, or servant of any private person, or any copartnership, except apprentices and persons under 18 years of age, or by any officer, attorney at law, agent, clerk, or servant of any incorporated company, the corporate character of the employer is an essential element of the offense, when employment by a corporation is charged in the information, unless it is charged and proved that defendant is not an apprentice, or within 18 years of age. —McAleer v. State 64 N. W. 358, 46 Neb. 116.

§ 4. — By banker or bank officer.

(Minn.; 1895.)

If a bank officer appropriates to his use the funds of the bank intrusted to his custody,

with intent to deprive the bank of its property, it is embezzlement, though done under the guise of a loan to himself or an overdraft of his account.—*State v. Kortgaard* (Minn.) 64 N. W. 51, 62 Minn. 7.

[a] (Minn.: 1895.)

An officer of a bank having no discount committee, who had general management of the bank's affairs, and controlled the making of loans and discounts, had such possession, custody, and control of the funds of the bank that an appropriation of them by him with intent to deprive the bank of its property constituted embezzlement or statutory larceny, under Pen. Code, § 415, subd. 2, making it an element of statutory larceny that the accused should have had property in his possession, custody, or control.—*State v. Kortgaard* (Minn.) 64 N. W. 51, 62 Minn. 7.

§ 5. — By public official.

[a] (Neb.: 1896.)

So much of section 124, Cr. Code, 1873, defining embezzlement of public funds, as provides that if any officer charged with the collection, safe-keeping, or disbursement of public funds "shall loan, with or without interest, * * * any portion of the public money, * * * every such act shall be deemed * * * embezzlement of so much of the said moneys * * * as shall be thus * * * loaned" (Gen. St. 1873, p. 749, § 124), was intended to prevent the unlawful use by officers, and others with their knowledge and consent, of money committed to their custody, and not as an amendment of existing statutes regulating the means of preserving and accounting for public funds.—*State v. Hill* (Neb.) 66 N. W. 541, 47 Neb. 456.

[b] (S. D.: 1895.)

Comp. Laws, § 1665, providing that, if any officer charged with the collection, safe-keeping, or disbursement of public money belonging to the state "shall convert to his own use, every such act shall be deemed an embezzlement," is ineffectual for any purpose.—*State v. Taylor* (S. D.) 64 N. W. 548.

[c] (S. D.: 1895.)

A state treasurer who unlawfully appropriated to his own use money belonging to the state, which came into his custody by operation of law, was not liable to indictment under Comp. Laws, § 6796, relating to embezzlement, or section 6797, relating to embezzlement by an officer of an association, society, or corporation, nor section 6799, relating to embezzlement by a trustee.—*State v. Taylor* (S. D.) 64 N. W. 548.

§ 6. Indictment and information.

[a] (Mich.: 1895.)

An indictment for embezzlement, alleging the embezzled property to have belonged to complainant, and its receipt by defendant as his agent, may be amended by adding the words "for the use of" complainant.—*People v. Hanaw* (Mich.) 65 N. W. 231.

[b] (Minn.: 1895.)

Gen. St. 1894, § 7262, providing that in a prosecution for embezzlement by a clerk, agent, or servant, it shall be sufficient to allege generally in the indictment an embezzlement of a certain sum, without specifying the particulars, applies to bank officers indicted for embezzlement or statutory larceny, under Pen. Code, § 415, subd. 2.—*State v. Kortgaard* (Minn.) 64 N. W. 51, 62 Minn. 7.

§ 7. — Allegation of time.

(Mich.: 1895.)

An information charging embezzlement between July 1, 1893, and December 31, 1893, is sufficient, as to an allegation of time; 2 How. Ann. St. § 9421, providing that evidence may be given of any embezzlement committed within six months after the time stated in the indictment,

and section 9534 providing that no indictment shall be held insufficient for omitting to state the time at which an offense was committed, where time is not of the essence of the offense, or for stating the time imperfectly, and section 9535 requiring objections for formal defects to be made before the jury is sworn.—*People v. Hawkins* (Mich.) 64 N. W. 736.

§ 8. — Allegation of ownership.

(Neb.: 1895.)

Where a sheriff collected the bid of a purchaser at foreclosure sale and converted the same to his own use before the making of the order by the court directing to whom the amount should be paid, an information against the sheriff need not allege to whom the money belonged; hence an allegation of ownership is surplusage.—*Conley v. State*, 64 N. W. 708, 46 Neb. 187.

§ 9. — Variance between allegations and proof.

[a] (Minn.: 1895.)

Where the complaint for larceny by the embezzlement of money, under Gen. St. 1894, § 6709, alleged that the money came into defendant's possession as agent, and the evidence shows that he was an attorney, and misappropriated moneys collected, there is no variance.—*State v. Prame* (Minn.) 63 N. W. 250, 61 Minn. 101.

[b] (Minn.: 1896.)

Under an indictment for statutory larceny or embezzlement in the general form authorized by Gen. St. 1894, § 7262, providing that the state may prove any and all acts of embezzlement by the defendant in the same employment committed within six months next after the time stated in the indictment, evidence of acts of embezzlement committed prior to the time stated in the indictment is inadmissible as evidence of the substantive offense.—*State v. Holmes* (Minn.) 68 N. W. 11.

[c] (Minn.: 1896.)

Gen. St. 1894, § 7262, providing that the state may prove any acts of embezzlement committed within six months next after the time stated in the indictment, is permissive, and not mandatory; and, if the state frames an indictment which is sufficient, and limits itself to evidence which is admissible, irrespective of that section, the six-months limitation will not apply, and the indictment can be sustained by evidence of an act of embezzlement committed prior to the time stated therein.—*State v. Holmes* (Minn.) 68 N. W. 11.

[d] (N. D.: 1895.)

In a prosecution under Comp. Laws, § 6796, defining embezzlement as "the fraudulent appropriation of property by a person to whom it has been intrusted," it is necessary to allege and prove the ownership of the property embezzled.—*State v. Collins* (N. D.) 61 N. W. 467, 4 N. D. 433.

§ 10. Evidence.

(Minn.: 1895.)

Under Gen. St. 1894, § 7262, providing that on the trial of an indictment for embezzlement evidence may be given of any such embezzlement within six months "next after" the time stated in the indictment, evidence may be given, in support of the substantive offense, of an act of embezzlement committed on the date alleged in the indictment.—*State v. Kortgaard* (Minn.) 64 N. W. 51, 62 Minn. 7.

§ 11. — Sufficiency.

[a] (Neb.: 1896.)

On trial of the secretary of a board of education, who was also county treasurer, for embezzlement of school funds, the records of the county treasurer's office, showing that defendant, as secretary, had on a certain date received to himself, as treasurer, for a certain sum belonging

to the school district, were not conclusive as to the amount paid.—*Hockenberger v. State* (Neb.) 68 N. W. 1037.

[b] (Wis.: 1895.)

Evidence that defendant was in A. county at a certain time, and there failed to pay over money collected by him as agent, and payable there according to his contract, without evidence that the collections were made in that county, or that a demand had there been made for the money so retained, will not sustain a conviction for embezzlement in such county.—*Dix v. State*, 61 N. W. 760, 89 Wis. 250.

§ 12. Instructions.

[a] (Mich.: 1895.)

A charge that the mere retention of money by defendant employé, or its expenditure for the purposes of the employer in excess of the amount agreed upon for expenses, was sufficient to authorize a conviction, without reference to the necessity of a criminal intent on defendant's part, was erroneous.—*People v. Bauman* (Mich.) 63 N. W. 516.

105 Mich. 543.

[b] (Mich.: 1895.)

The facts being undisputed, and sufficient to warrant it, the court may charge that they amount to embezzlement, if the jury find the intent.—*People v. Hawkins* (Mich.) 64 N. W. 736.

[c] (S. D.: 1895.)

In a prosecution for embezzlement it was not error to charge in the words of the statute that "the fact that the accused intended to restore the property embezzled, is no ground of defense, or of mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, charging the commission of the offense," though there was no evidence that an information was laid before a magistrate.—*State v. Serenson* (S. D.) 64 N. W. 130.

EMBLEMMENTS.

Rights as between tenant and purchaser of premises, see "Landlord and Tenant," § 5.

EMBRACERY.

Offering bribe to juror, see "Bribery."

EMINENT DOMAIN.

I. THE POWER, §§ 1-9.

II. CONDEMNATION PROCEEDINGS, §§ 10-24.

III. COMPENSATION, §§ 25-40.

1. Right to Compensation—What Constitutes Taking or Damaging, §§ 25-27.
2. Who Entitled to Award—Payment as Affected by Mortgage or Change of Title, §§ 28-32.
3. Measure of Damages, §§ 33-40.

IV. REMEDIES OF LANDOWNERS, §§ 41, 42.

Condemnation of land for erection of public warehouse, class legislation, see "Constitutional Law," § 24.

I. THE POWER.

What constitutes appropriation, see post, § 32.

§ 1. Public use.

[a] (Minn.: 1896.)

Laws 1893, c. 64 (Gen. St. 1894, §§ 7724-7729), is entitled "An act providing for the erection of grain warehouses and grain ele-

vators on or near the right of way of railroads, and providing for condemnation proceedings in connection therewith," and provides that any person desiring to erect and operate at any railroad siding a warehouse or elevator for the purchase, sale, shipment, or storage of grain for the public, for hire, may apply for the site therefor, and have the same condemned. *Held*, that it does not authorize the condemnation of an elevator for the purchase and sale of grain solely on the account of the applicant, so that the applicant may, at his option, use the elevator for the storage of grain for the public, for hire, and hence it is constitutional.—*Stewart v. Great Northern Ry. Co.* (Minn.) 68 N. W. 208.

[b] (Neb.: 1895.)

The use of water for irrigation, under Act March 27, 1889, is a public use, within Bill of Rights, § 21, permitting private property to be taken for such use on compensation being made therefor.—*Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 64 N. W. 343, 45 Neb. 884.

[c] (Wis.: 1895.)

Laws 1891, c. 401, provides for the construction of drains for agricultural, sanitary, or mining purposes across the lands of others, and for payment of damages to owners of lands injured by the construction thereof. The act does not declare that such drains are necessary or desirable to promote any public interest, convenience, or welfare. *Held*, that the advantages resulting therefrom are not of such a public character as to authorize the taking of private property for their construction.—*In re Theresa Drainage Dist.*, 63 N. W. 288, 90 Wis. 301; *Johnson v. Schmidt*, *Id.*

[d] (Wis.: 1895.)

The legislature must specify the use and purpose for which it authorizes private property to be taken.—*In re Theresa Drainage Dist.* (Wis.) 63 N. W. 288, 90 Wis. 301; *Johnson v. Schmidt*, *Id.*

§ 2. Necessity for taking.

[a] (Mich.: 1896.)

That a railway has sold a number of car-loads of gravel will not prevent it from condemning land necessary for the more convenient removal of gravel from its gravel pits.—*Saginaw, T. & H. R. Co. v. Bordner* (Mich.) 66 N. W. 62.

[b] (N. D.: 1896.)

Where property is needed by a railroad company to increase the safety of its roadbed at points where it is unsafe at a particular time of the year, a legal necessity arises for condemning the property.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

§ 3. Necessity of paying or providing for adequate compensation.

[a] (Neb.: 1895.)

The provision of Act March 27, 1889, as amended by Act 1893, abolishing riparian rights in all streams over 20 feet in width, without making compensation to the riparian owners, is invalid.—*Clark v. Cambridge & A. Irr. & Imp. Co.*, 64 N. W. 239, 45 Neb. 798.

[b] (Neb.: 1896.)

Const. art. 1, § 21, under which one may insist on compensation for the taking of his land as a condition precedent to the taking, applies to counties exercising the right of eminent domain.—*Hodges v. Board of Sup'rs of Seward County* (Neb.) 68 N. W. 1027.

[c] (Neb.: 1896.)

The failure of one over whose land a road is proposed to be laid out to file his claim for damages for the taking of the land within the time fixed in the notice to file claims does not bar him of the right (Const. art. 1, § 21) to insist on compensation for the taking as a condition precedent to opening the road.—*Hodges v. Board of Sup'rs of Seward County* (Neb.) 68 N. W. 1027.

§ 4. — Determination by jury.

(S. D.; 1895.)

Since Comp. Laws, § 1324, gives a landowner the right to appeal to a jury from the assessment by township supervisors of damages occasioned by the laying out, alteration, or discontinuance of a road, Id. § 1302, providing that the assessment of such damages shall be made by township supervisors, is not in conflict with Const. art. 6, § 13, which provides that private property shall not be taken for public use or damaged without just compensation, as determined by a jury.—*Town of Dell Rapids v. Irving* (S. D.) 64 N. W. 149.

§ 5. Who authorized to condemn.

[a] (Minn.; 1895.)

A receiver of an insolvent railroad corporation cannot condemn lands in behalf of the company without authority of court.—*Minneapolis & St. L. Ry. Co. v. Minneapolis Western Ry. Co.* (Minn.) 63 N. W. 1035, 61 Minn. 502; *Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co.*, Id.

[b] (Minn.; 1896.)

Laws 1893, c. 64 (Gen. St. 1894, §§ 7724-7729), providing for the erection of public grain warehouses and grain elevators on or near the right of way of railroads, and for the condemnation of sites therefor, by any person desirous of operating the elevator or warehouse, authorizes a party who has erected a public elevator, and is operating it on the site sought to be condemned, under a license from the railroad company, which has been revoked, to take effect in the near future, to acquire the easement to continue for a fixed term to maintain and operate the elevator on such site.—*Stewart v. Great Northern Ry. Co.* (Minn.) 68 N. W. 208.

[c] (Neb.; 1895.)

Act March 26, 1895, relating to irrigation districts, is not in conflict with the provision of the constitution against the taking of private property for private use, since an irrigation district is a public corporation.—*Board of Directors of Alfalfa Irrigation Dist. v. Collins* 64 N. W. 1086, 46 Neb. 411.

§ 6. Property subject to.

[a] (Mich.; 1895.)

How. Ann. St. § 4772, providing that no street, highway, etc., shall be opened through the grounds of a cemetery association without consent of the board of directors, only exempts such associations from condemnation proceedings under the general law.—*Woodmere Cemetery v. Roulo* (Mich.) 62 N. W. 1010, 104 Mich. 595.

[b] (Minn.; 1895.)

The fact that a railway company occupied premises sought to be condemned, under a revocable license, before another company purchased them, gave it no right to condemn the premises after the latter company acquired them.—*Minneapolis & St. L. Ry. Co. v. Minneapolis Western Ry. Co.* (Minn.) 63 N. W. 1035, 61 Minn. 502; *Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co.*, Id.

[c] (N. D.; 1896.)

Under Rev. Code, § 2947, subd. 3, and section 5958, subd. 6, relative to the condemnation of property, the right of a riparian owner to a natural stream flowing over his land may be condemned.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

[d] (N. D.; 1896.)

Const. § 210, providing that flowing streams and natural water courses shall remain the property of the state for mining, irrigation, and manufacturing purposes, does not prohibit the diversion of part of a nonnavigable water course for a public use, the integrity of the stream not being thereby impaired.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

§ 7. Extent of power.

(Minn.; 1897.)

Gen. St. 1894, § 2750, providing that any railroad corporation may alter its line whenever the line can be thereby improved, and conferring on the corporation "the same rights and privileges to build such road as altered as if it were the original line," authorizes the condemnation of land for the new line.—*Fletcher v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 1085.

§ 8. Property already in public use.

[a] (Iowa; 1896.)

Under Code, § 1270, authorizing cities and incorporated towns to take private property for streets, a town may extend a street across the depot grounds of a railway company, where such taking, though it interferes with, does not deprive the railroad company of, the right to operate its road.—*Chicago, M. & St. P. Ry. Co. v. Starkweather* (Iowa) 66 N. W. 87.

[b] (Minn.; 1895.)

One railroad company cannot, under the statute, condemn the lands of another company occupied or necessary for the prosecution of its railroad business, except for crossing purposes.—*Minneapolis & St. L. Ry. Co. v. Minneapolis Western Ry. Co.* (Minn.) 63 N. W. 1035, 61 Minn. 502; *Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co.*, Id.

[c] (Neb.; 1896.)

A railroad company which has, by ordinance, acquired a permanent easement in the streets of a city, is not entitled to compensation from a street-railway company as a condition to the crossing of its tracks by the latter, under a grant of power from the city.—*Chicago, B. & Q. R. Co. v. Beatrice Rapid-Transit & Power Co.* (Neb.) 66 N. W. 830, 47 Neb. 741.

§ 9. Rights acquired by condemnation proceedings.

(Minn.; 1895.)

A railroad company, condemning lands under a charter authorizing it to take an absolute fee in lands condemned for public purposes, acquired a perpetual easement in the lands.—*Garney v. Minneapolis Union Elevator Co.* (Minn.) 65 N. W. 136, 63 Minn. 70.

II. CONDEMNATION PROCEEDINGS.

Compelling institution of proceedings, see post, § 41.

Evidence as to damages, see post, § 39.

Rights acquired, see ante, § 9.

— of purchaser as to compensation, see post, § 30.

§ 10. Procedure.

[a] (Mich.; 1895.)

Where the allegation, in a petition by a railroad company for condemnation of land, of the filing of a map and survey of its line is not denied, proof of such filing is unnecessary.—*Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co.* (Mich.) 64 N. W. 471.

[b] (N. D.; 1896.)

Condemnation proceedings by a railroad company should be brought in the company's name, though its property be in the hands of a receiver.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

[c] (N. D.; 1896.)

Where condemnation proceedings by a railroad company are brought in the name of its receiver, the court may, after verdict, amend all proceedings by inserting the name of the company.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

§ 11. Petition.

[a] (Mich.; 1895.)

An allegation, in a petition for condemnation of land, that the petitioner had not been able to acquire title to the land by purchase because the owner refused to sell, sufficiently alleges a bona fide effort to first obtain the property by purchase.—*Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co.* (Mich.) 64 N. W. 471.

[b] (Minn.; 1897.)

The petition to condemn lands for railroad purposes need not specify the particular public use to which each tract is to be put.—*Fletcher v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 1085.

[c] (Minn.; 1897.)

The petitioner in condemnation proceedings may, by leave of court, amend his petition by striking therefrom land as to which he does not wish to continue the proceedings, the landowner not objecting.—*Fletcher v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 1085.

§ 12. — Description of property.

[a] (Mich.; 1895.)

Where the fee of lots abutting a public street extends to the center of the street, a petition by a railroad company with a track on one side of such street asking for the condemnation of the lots, describing them by lot, block, and plat adjacent and contiguous to its track on such side, is not bad for ambiguity of description.—*Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co.* (Mich.) 64 N. W. 471.

[b] (Mich.; 1897.)

An owner of land sought to be taken for street purposes cannot object to the sufficiency of a petition in condemnation because the land of each owner is not separately described, where his own is sufficiently described, and the other owners assent to the taking; nor because it fails to describe his interest in a strip of land over which he has a right of way in common with others, such right not being affected by appropriating the land for street purposes.—*City of Pontiac v. Lull* (Mich.) 69 N. W. 1110.

§ 13. Notice to landowner.

(Mich.; 1896.)

Under 3 How. Ann. St. § 3332, relating to service of notice in condemnation proceedings on a nonresident landowner, and providing that, if he has an agent within the state, service may be made on such agent or upon him personally, out of or within the state, the notice may be served on him personally without the state, though he has an agent within the state.—*Saginaw, T. & H. R. Co. v. Bordner* (Mich.) 66 N. W. 62.

§ 14. Tribunals to determine issues.

[a] (Mich.; 1894.)

Saginaw City Charter, § 8, tit. 15, which provides that jurors must be qualified electors, and people of fair character and sound mind, freeholders in the city, and understanding English, is not in conflict with the provisions of the constitution that in condemnation proceedings the issues shall be passed on by "a jury of freeholders" (Const. art. 18, §§ 2, 14, and article 15, § 15).—*City of Saginaw v. Campan* (Mich.) 61 N. W. 65.

102 Mich. 594.

[b] (Mich.; 1895.)

Const. art. 18, § 2, provides that, when private property is taken for public use, the necessity for using such property, and the just compensation therefor, except when to be made by the state, shall be ascertained by a jury of 12 freeholders, or by not less than 3 commissioners appointed by a court of record, as shall be prescribed by law. How. Ann. St. § 2, par. 3, provides that all words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving

such authority to a majority, unless otherwise expressly declared in the law giving the authority. *Held*, that a majority of such commissioners may determine the necessity for taking such property. *Kress v. Hammond* (1892) 52 N. W. 728, 92 Mich. 372, distinguished.—*Serrell v. Oakland Probate Judge*, 65 N. W. 107.

[c] (N. D.; 1896.)

The question of the necessity of condemnation is triable by the court.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

[d] (N. D.; 1896.)

All issues except that of compensation are triable by the court.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

§ 15. Issues raised.

(Mich.; 1895.)

The objection that proceedings condemning property of a railroad company are void because they included its track, and were in violation of How. Ann. St. § 3331, cannot be urged where the issue as to whether it is exempt is not raised by the pleadings.—*Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co.* (Mich.) 64 N. W. 471.

§ 16. Adjournment.

(Mich.; 1896.)

In condemnation proceedings, the fact that the court granted an adjournment before the sheriff returned his list of jurors—such adjournment being with the consent of the parties—cannot be assigned as error.—*Ann Arbor R. Co. v. Beach* (Mich.) 68 N. W. 124.

§ 17. Attendance of judge upon jury.

(Mich.; 1895.)

A circuit judge may be present and preside over a proceeding by a jury to condemn land for union depot purposes, by virtue of How. Ann. St. § 3466, providing that he "may attend said jury to decide questions of law and administer oaths to witnesses."—*Fort St. Union Depot Co. v. Backus* (Mich.) 61 N. W. 787.

103 Mich. 556.

§ 18. Evidence.

[a] (Mich.; 1895.)

In a proceeding to open a street, it is error to allow opinion evidence as to the necessity thereof.—*City of Grand Rapids v. Bennett* (Mich.) 64 N. W. 585.

[b] (Minn.; 1897.)

In a proceeding to condemn land for a change of the line of a railroad through a city, an ordinance authorizing the change is admissible to show the consent of the city thereto required by Gen. St. 1894, § 2750, though objected to on the ground that its provisions as to the rights it purports to grant in the streets are invalid; no question of the company's right to use any street by virtue of the ordinance being involved.—*Fletcher v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 1085.

§ 19. Verdict and judgment.

[a] (Mich.; 1895.)

In condemnation proceedings, the jury cannot be required to itemize the damages.—*City of Grand Rapids v. Bennett* (Mich.) 64 N. W. 585.

[b] (Mich.; 1896.)

A judgment confirming an award of damages for private land taken by the city of Detroit, under Pub. Acts 1883, No. 124, as amended by Pub. Acts 1887, No. 48, which became final in the absence of an appeal therefrom, gave the landowner a vested right to the compensation, though the title or right to use the land could not vest in the public until payment should be made, which right to compensation was not taken away by Local Acts 1895, No. 467, providing that all proceedings to take private property on the part of said city should be governed by its provisions, and repealing,

without saving clause, all acts in conflict with it; so that the landowner was entitled to compel the city to levy an assessment under the general law for the payment of his judgment.—*Balch v. City of Detroit* (Mich.) 67 N. W. 122.

[c] (Mich.; 1897.)

In a proceeding to open a street across a railroad, where the evidence was conclusive that precautions for the safety of the public would be necessary, the jury were not justified in finding, from their view of the premises alone, that a gate and flagman would not be necessary.—*City of Detroit v. Detroit, G. H. & M. Ry. Co.* (Mich.) 70 N. W. 573.

[d] (N. D.; 1896.)

Though the jury has taken a view, under the statute, of premises which it is claimed will be damaged by diversion of a water course, the verdict must be within the evidence as to the value. It cannot be based solely upon their own judgment from the inspection of the property.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

§ 20. Costs.

(Mich.; 1895.)

Under How. Ann. St. § 3468, providing that if, on the second trial of a proceeding by a union depot company to condemn land, the amount of the award is diminished, the difference shall be refunded, "and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing," the successful party is entitled to costs of such second trial.—*Fort St. Union Depot Co. v. Backus* (Mich.) 61 N. W. 787.

103 Mich. 556.

§ 21. New trial.

(Mich.; 1897.)

Under Pub. Acts 1882, No. 26, § 11, authorizing cities and villages to take private property for public use, and providing that if a motion for new trial is overruled, the court shall enter judgment confirming the verdict, and that such judgment, unless reversed, shall be final, the court has no power to grant a new trial after a motion therefor has once been denied, and the verdict confirmed.—*Zoltowski v. Chambers* (Mich.) 70 N. W. 1018.

§ 22. Right of appeal.

[a] (Iowa; 1897.)

Where there is an appeal from an assessment of damages by a sheriff's jury in condemnation proceedings, after the assessment has been paid to the sheriff, Code, § 1255, provides that the sheriff shall retain the money till the appeal is determined. Section 1256 provides that "acceptance by the landowner of the damages awarded by the commissioners shall bar his right to appeal." After an assessment of damages, the defendant paid the amount to the sheriff, and both parties appealed. Without the knowledge of defendant, plaintiff accepted the money from the sheriff. *Held* that, while plaintiff's appeal was defeated thereby, the court had jurisdiction on defendant's appeal, and plaintiff had the right to contest the amount of recovery.—*Burns v. Chicago, Ft. M. & D. M. Ry. Co.* (Iowa) 70 N. W. 728.

[b] (Mich.; 1895.)

A petitioner in condemnation proceedings, who, after appealing from an award, pays the damages under the order of confirmation, and takes possession of the condemned property, does not thereby lose his right of appeal.—*Fort St. Union Depot Co. v. Peninsular Stove Co.* (Mich.) 61 N. W. 1007.

103 Mich. 637.

[c] (Minn.; 1897.)

An order denying a motion to set aside the report of commissioners in condemnation proceedings is not appealable.—*Fletcher v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 1085.

§ 23. Review.

[a] (Mich.; 1896.)

When the return on certiorari in condemnation proceedings recites that only a small portion of the testimony is incorporated in the return or record of the cause, an objection that the testimony of a juror shows that he was not a freeholder, and therefore was incompetent as a juror, is not ground for reversal, though such juror's testimony, as returned, does show such fact.—*Ann Arbor R. Co. v. Beach* (Mich.) 68 N. W. 124.

[b] (Mich.; 1897.)

While the opinions of witnesses as to the necessity of taking land for street purposes are incompetent in condemnation proceedings, the admission of such testimony is not a substantial error, warranting a reversal of the judgment, where the facts on which it was based, and the other facts bearing on the question, were fully shown, and the jury viewed the premises.—*City of Pontiac v. Lull* (Mich.) 69 N. W. 1110.

[c] (Mich.; 1897.)

The fact that counsel for a city in condemnation proceedings for opening a street, in his opening statement, stated to the jury that they might consider benefits, in arriving at the damages of a property owner, does not constitute reversible error, where no evidence as to benefits was given, and the jury were properly instructed.—*City of Pontiac v. Lull* (Mich.) 69 N. W. 1110.

§ 24. — Decision.

[a] (Mich.; 1896.)

Under How. Ann. St. §§ 1302, 1303, the decision of a township board, on an appeal by a property owner from the action of the commissioners of highways in locating a road, and awarding compensation for land taken, is final and conclusive.—*Brown v. Township Board of Greenfield Tp.* (Mich.) 67 N. W. 566.

[b] (N. D.; 1896.)

An order of condemnation in proceedings under the statute may be reversed as to one of the parties, and affirmed as to others.—*Bigelow v. Draper* (N. D.) 69 N. W. 570.

III. COMPENSATION.

Necessity of first paying or providing for adequate compensation, see ante, §§ 3, 4.

Damages from change of grade of street, see

"Municipal Corporations," §§ 164-168.

—resulting from public improvements, see

"Municipal Corporations," §§ 164-168.

I. RIGHT TO COMPENSATION—WHAT CONSTITUTES TAKING OR DAMAGING.

§ 25. Right to compensation.

[a] (Minn.; 1895.)

Sp. Laws 1872, c. 93, requiring the C. M. & St. P. Ry. Co. to maintain a continuous connection through the city of St. Paul between certain lines already built, and authorizing it to enter on and cross any streets or lands necessary in forming such connection, but forbidding it to enter on such streets "so long as said company have the right to use the public levee for such connection, and can accomplish such connection by the use of such levee," confers on the company the right to place its tracks, necessary for such connection, on the public levee without condemnation proceedings.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.* (Minn.) 63 N. W. 267.

[b] (Neb.; 1897.)

One whose property is taken or damaged for public use may recover compensation therefor, regardless of what name is given the ac-

tion, or whether his petition states a cause of action *ex delicto* or *ex contractu*.—*County of Douglas v. Taylor* (Neb.) 70 N. W. 27.

§ 26. Rights of abutting owners in streets.

[a] (Minn.: 1895.)

The construction of a telephone line on a highway, as authorized by Gen. St. 1894, § 2641, does not impose an additional servitude on the highway. Start, C. J., and Buck, J., dissenting. —*Cater v. Northwestern Tel. Exch. Co.* (Minn.) 63 N. W. 111.

[b] (Wis.: 1895.)

Where the owner of land abutting on a street permits a railway company to construct on the street its track, and occupy the same for railroad purposes, without objection, he waives all remedies except his statutory right to have his damages assessed.—*Frey v. Duluth, S. S. & A. Ry. Co.*, 64 N. W. 1038, 91 Wis. 309.

[c] (Wis.: 1897.)

The construction and operation, on a public street, of an electric railroad extending between two or more cities and towns, for the transportation of merchandise, personal baggage, mail, and express matter, as well as passengers, imposes an additional burden, for which the abutting owner is entitled to compensation, and is not merely an exercise of the public easement previously acquired by the construction of the street.—*Chicago & N. W. Ry. Co. v. Milwaukee, R. & K. Electric Ry. Co.* (Wis.) 70 N. W. 678.

§ 27. What constitutes appropriation.

(Neb.: 1895.)

To constitute an appropriation of land, it is not necessary that the owner be deprived of the fee; a deprivation of the use is sufficient.—*Martin v. Fillmore County* (Neb.) 62 N. W. 863.

44 Neb. 719.

2. WHO ENTITLED TO AWARD—PAYMENT AS AFFECTED BY MORTGAGE OR CHANGE OF TITLE.

§ 28. Who entitled to award.

[a] (Minn.: 1896.)

The charter of the defendant, relating to the condemnation of land for public purposes, provides that before payment of the award to the landowner he shall furnish an abstract of title showing his right thereto, and on his failure so to do the city council shall pay the award to the city treasurer for the owner, or, in case the city attorney shall certify that the title is doubtful, the award shall be paid to the clerk of the district court for such persons as show themselves entitled to it. *Held*, that these provisions are valid, and that, in an action against the defendant to recover the amount of the award, the complaint does not state a cause of action if it fails to show a compliance with them on the part of the plaintiff, or any reason for not doing so.—*Coles v. City of Stillwater* (Minn.) 66 N. W. 138.

64 Minn. 105.

[b] (Wis.: 1896.)

Where there are conflicting claims of mortgagees and subsequent grantees as to an award for an easement condemned, an order of the court determining that issue must recite all the facts necessary to show that the successful party is entitled to the award.—*Grady v. Northwestern Loan & Investment Co.* (Wis.) 67 N. W. 34.

93 Wis. 229.

§ 29. Apportionment of award.

(Mich.: 1895.)

Under How. Ann. St. § 3338, providing that money due as compensation for land taken

in condemnation proceedings shall, when there is doubt as to whom it belongs, be paid into and apportioned by the court, it is proper for commissioners in condemnation proceedings, when unable to apportion the damage, to award the damages in gross, subject to be apportioned by the court.—*Cincinnati, S. & M. R. Co. v. Bay City & B. C. R. Co.* (Mich.) 64 N. W. 471.

§ 30. Rights of tenants in common.

(Wis.: 1895.)

A tenant in common, to whom his cotenants have assigned all their interest in demands against a railroad company for the occupation of land for railroad purposes without purchase or condemnation, may recover of the railroad the entire demand for damages.—*Tucker v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 65 N. W. 515, 91 Wis. 576.

§ 31. Rights of purchaser.

[a] (Iowa: 1896.)

A cause of action accruing to the owner of a lot by reason of the building of a railroad on the street adjacent does not pass by a conveyance of the lot.—*Flickinger v. Omaha Bridge & Terminal Ry. Co.* (Iowa) 67 N. W. 372.

[b] (Minn.: 1895.)

Where greater rights were acquired in land under condemnation proceedings than were previously conveyed by the owner by a deed of boomage and shore rights, it was error to pay the whole award to the grantee in that deed.—*Farrand v. Clarke* (Minn.) 65 N. W. 361.

63 Minn. 181.

[c] (Wis.: 1895.)

A subsequent purchaser, to whom has been sold the right of his vendor to institute legal proceedings and to recover damages therein for such demands as would have accrued to such vendor, may recover of a railroad company which has occupied the street on which the property abutted without instituting condemnation proceedings or settling with the owners for damages resulting to abutting property.—*Frey v. Duluth, S. S. & A. Ry. Co.*, 64 N. W. 1038, 91 Wis. 309.

§ 32. Rights of mortgagee.

[a] (Minn.: 1894.)

Under Minneapolis City Charter (Sp. Laws 1881, c. 76), subc. 10, making proceedings to condemn land for public improvements binding on all persons interested in the land, where no appeal is taken from the confirmation of the award in such proceedings the title vests in the city, when the amount of award is set apart by the council, and such amount becomes collateral security for the payment of any mortgage debt on the land.—*Boutelle v. City of Minneapolis* (Minn.) 61 N. W. 554.

59 Minn. 493.

[b] (Minn.: 1894.)

Where a part of mortgaged premises is condemned for public improvements, and the mortgagee resorts to the land not affected by the condemnation proceedings, and through foreclosure satisfies the debt, his lien on the award is terminated.—*Boutelle v. City of Minneapolis* (Minn.) 61 N. W. 554.

59 Minn. 493.

3. MEASURE OF DAMAGES.

§ 33. Measure in general.

[a] (Neb.: 1895.)

Where land is appropriated by the construction of a county ditch, the owner is entitled to the value of the land taken without any deduction for benefits, and to any damages to his land not appropriated, in excess of benefits.—*Martin v. Fillmore County* (Neb.) 62 N. W. 863.

44 Neb. 719.

[b] (Neb.: 1890.)

In assessing damages in favor of a property owner upon the appropriation of land by a railroad company for right of way, the contingencies of the frightening of horses and the injury to persons and property by passing trains may be considered by the jury in determining to what extent, if at all, the value of the owner's remaining property is impaired by the construction and operation of the road, though they cannot be considered as a distinct element of damage.—*Chicago, B. & Q. R. Co. v. Shafer* (Neb.) 68 N. W. 342.

[c] (Wis.: 1897.)

In determining the value of agricultural land taken, its worth at some future time is not to be considered, but the fair market value for any purpose for which it might reasonably be used in the immediate future; and, if it could be platted into lots, the resulting increase in value is properly allowable.—*Alexian Bros. v. City of Oshkosh* (Wis.) 70 N. W. 162.

§ 34. Jurisdiction of freeholders to assess damages.**[a] (Iowa: 1896.)**

Code, tit. 10, c. 4, § 1244, provides that if the owner of land necessary for a railroad right of way refuses to grant the same to the company, or if he cannot agree with such company on the amount of compensation to be paid, the sheriff of the county in which it is situated shall, on application of either party, appoint six disinterested freeholders, who shall inspect the property and assess the damages; and section 1245 provides that the application to the sheriff shall be in writing, and that the applicant shall give the other party five days' notice of the time when the freeholders would view the premises. *Held*, that from a showing that the application and notice were duly made; that the notice stated that the landowner had refused to grant the right of way, and that the parties could not agree on the compensation to be paid therefor; and that the landowner was present when the freeholders viewed the premises, and took part in the proceedings, and made statements as to the value of the land,—it affirmatively appears that the freeholders had jurisdiction to assess the damages.—*Carlile v. Des Moines & K. C. Ry. Co.* (Iowa) 68 N. W. 784.

[b] (Iowa: 1896.)

The proceedings of freeholders appointed under Code, tit. 10, c. 4, § 1244, to assess damages for the taking of land for a right of way, cannot be collaterally attacked in an action of trespass by the landowner against the company, if the freeholders had jurisdiction under the act.—*Carlile v. Des Moines & K. C. Ry. Co.* (Iowa) 68 N. W. 784.

§ 35. Injury to property not taken.**(Wis.: 1896.)**

A city having condemned one of plaintiff's lots for the purpose of building a viaduct which would pass over said lot, plaintiff is entitled to compensation for the value of said lot, and for the depreciation in the value of his adjoining lots; it appearing that the plans for said viaduct had been made before the condemnation, and the erection thereof completed before the trial of the action for damages.—*Orth v. City of Milwaukee* (Wis.) 65 N. W. 1029.
92 Wis. 230.

§ 36. Railway land taken for street.**[a] (Mich.: 1895.)**

A railroad company cannot claim as damages, for the crossing of its tracks and side tracks by a street, the full value of the parcels of land crossed.—*City of Grand Rapids v. Bennett* (Mich.) 64 N. W. 585.

[b] (Mich.: 1895.)

A railroad company is entitled, as part of its damages for the crossing of its tracks by a street, to the cost of erecting and maintaining

safety gates or towers, or the employment of flagmen; the jury being satisfied that either is necessary for the protection of the public.—*McGrath, C. J., dissenting.*—*City of Grand Rapids v. Bennett* (Mich.) 64 N. W. 585.

§ 37. Inadequate damages.**(Mich.: 1895.)**

On an issue as to the amount of damage sustained by the taking of land to widen a street it appeared that a strip 31 feet deep was taken from the front of a lot 59 feet deep, and fronting on the street 527 feet. There was evidence that the original lot, when platted, would be worth from \$6 to \$10 per front foot, and that the part remaining after the street was widened would be worth practically nothing; but there was also evidence that by running courts through the remaining strip at right angles to the street, and platting the lot to front on the courts, its proportionate value would not be materially affected by the taking of the land; and evidence was introduced that the land was worth \$3,000 per acre, at which rate the strip taken was worth \$1,134. *Held*, that an award of \$1,164.80 would not be set aside as insufficient.—*City of Detroit v. Bruder* (Mich.) 62 N. W. 350.
104 Mich. 221.

§ 38. Interest on damages.**[a] (Minn.: 1895.)**

Where the condemnation of land was confirmed after possession was taken by the petitioner, and the order of confirmation was sustained on appeal to the district court, petitioner was liable for interest on the amount of the award from the date of confirmation.—*Weide v. City of St. Paul* (Minn.) 64 N. W. 65.
62 Minn. 67.

[b] (Neb.: 1896.)

Where landowners signed a petition for street improvements, and waived the right to payment of damages awarded them by appraisers in condemnation proceedings of their property taken in the course of the improvement, until a fund therefor accrued from the payment of assessments or special taxes, they were not entitled to interest on the amount of the award from the date of the appropriation of the property to the time of the payment from said fund.—*West v. City of Omaha* (Neb.) 67 N. W. 439.
48 Neb. 466.

[c] (Wis.: 1895.)

Where, on appeal, the amount of damages allowed in condemnation proceedings by a railroad, and paid by it into court, is increased, interest should be allowed on the amount from the date of the original award to the date of judgment.—*Neilson v. Chicago & N. W. Ry. Co.* 64 N. W. 849, 91 Wis. 557.

[d] (Wis.: 1895.)

Where an appeal from an award in condemnation proceedings, which has been paid by it into court, is prosecuted by only one of the owners of the land condemned, the fact that the amount of damages awarded him was decreased will not prevent him from recovering interest on the new amount allowed him from the date of the original award, if the damages allowed all the owners exceeded the original award.—*Neilson v. Chicago & N. W. Ry. Co.* 64 N. W. 849, 91 Wis. 557.

§ 39. Evidence.**[a] (Mich.: 1895.)**

In proceedings to condemn land for street purposes, where all the testimony was based upon the conceded depth of the land, the omission of the map submitted to the jury to show the line between the property remaining and that of the adjoining owner was not misleading.—*City of Detroit v. Bruder* (Mich.) 62 N. W. 350.
104 Mich. 221.

[b] (Neb.; 1895.)

On an issue of damages in condemnation proceedings, it was proper to prove the value of the property immediately before the taking and its value immediately after.—*Atchison & N. R. Co. v. Boerner* (Neb.) 63 N. W. 787.

45 Neb. 453.

[c] (Neb.; 1896.)

On an issue as to the depreciation in value of property abutting on a business street on which a viaduct had been erected, tenants of an abutting property owner could testify how much traffic had fallen off by reason of the structure.—*City of Omaha v. McGavock* (Neb.) 66 N. W. 415.

47 Neb. 313.

§ 40. Payment by predecessor of defendant.

(Wis.; 1895.)

In an action against a railroad company for damages for the occupation of land without condemnation, payments by a railroad company, of which defendant does not show itself to be assignee, of damages on condemnation of the land in suit, are admissible.—*Tucker v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 65 N. W. 515, 91 Wis. 576.

IV. REMEDIES OF LANDOWNERS.

§ 41. Compelling institution of proceedings.

(Wis.; 1895.)

An assignee of a demand against a railroad company for occupation of land without purchase or condemnation is a party "interested in such land," within Rev. St. § 1852, which authorizes such parties to institute proceedings for condemnation of the land where the company fails to do so.—*Tucker v. Chicago, St. P., M. & O. Ry. Co.*, 65 N. W. 515, 91 Wis. 576.

§ 42. Proof of title.

(Wis.; 1895.)

A decree in partition between tenants in common of land, as heirs of a grantee in a deed from a county judge as trustee of town-site lands, under Laws 1856, c. 95, is competent to show title in part of the heirs in actions by them against a railroad for damages for the occupation of the land for railroad purposes without purchase or condemnation.—*Tucker v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 65 N. W. 515, 91 Wis. 576.

ENACTMENT.

Of statute, see "Statutes," §§ 1-5.

ENCROACHMENT.

Extending wall upon property of adjoining landowner, see "Adjoining Landowners," § 2.

ENDOWMENT INSURANCE.

See "Insurance," §§ 156-158.

ENTICEMENT.

Of spouse, see "Husband and Wife," §§ 38-41.

ENTIRE CONTRACTS.

See "Sale," § 14.

ENTRY.

Of judgment, see "Judgment," §§ 22-35.

ENTRY, WRIT OF.

See "Ejectment."

EQUALIZATION.

Of taxes, see "Taxation," §§ 38-44.

EQUITY.

I. JURISDICTION IN GENERAL, §§

1-4.

II. REFORMATION OF CONTRACTS, §§

5-13.

III. RESCISSION AND CANCELLATION OF CONTRACTS, §§ 14-43.

1. In General, §§ 14-20.

2. Incapacity of Contracting Party, § 21.

3. Mistake, §§ 22, 23.

4. Fraud and False Representations, §§ 24-29.

5. Duress, Undue Influence, and Confidential Relations, §§ 30-35.

6. Failure or Inadequacy of Consideration, §§ 36, 37.

7. Restoring Consideration and Placing Parties in Statu Quo, §§ 38-40.

8. Pleading and Practice, §§ 41-43.

IV. ACCOUNTING, §§ 44-48.

V. MARSHALING ASSETS, see main head "Marshaling Assets and Securities."

VI. LACHES, §§ 49, 50.

VII. PLEADING, §§ 51-53.

VIII. PARTIES, §§ 54-56.

IX. PRACTICE, §§ 57-62.

X. BILL OF REVIEW, § 63.

See, also, "Charities"; "Contribution"; "Creditors' Bill"; "Discovery"; "Divorce"; "Fraud"; "Fraudulent Conveyances"; "Injunction"; "Interpleader"; "Marshaling Assets and Securities"; "Mortgages"; "Partition"; "Partnership"; "Quieting Title—Removal of Cloud"; "Receivers"; "Reference"; "Specific Performance"; "Subrogation"; "Trusts."

Attachment of equitable interest in land, see "Attachment," § 9.

Equitable assignment, see "Assignment," § 8.

— mortgage, see "Mortgages," § 3.

— pledge of stock, see "Corporations," § 61.

— set-off, see "Set-Off and Counterclaim," § 3.

Joinder of legal and equitable causes of action, see "Action," § 6.

Relief against execution, see "Execution," §§ 35-37.

— against judgment, see "Judgment," §§ 106-112.

I. JURISDICTION IN GENERAL.

See, also, "Injunction," §§ 1, 2; "Mandamus," §§ 1-9; "Specific Performance," § 1.

Over trusts, see "Trusts," § 32.

To dissolve corporation, see "Corporations," § 98.

§ 1. Nature and subjects of jurisdiction.

[a] (Iowa; 1895.)

The owner of property filed a bill in equity against a contractor who had agreed to furnish material for and build a house thereon, alleging that the contractor had broken the con-

tract, that thereby liens had been filed and foreclosed against the property, and that the petitioner had no knowledge as to the accuracy of the amounts claimed therein, and asking for an accounting and direction as to how the liens should be discharged, and damages for defective materials used. On the following day the contractor began an action at law on the contract, which the owner answered, raising the same issues as were presented by his bill in equity. *Held*, that it was proper to try the consolidated case in equity.—*Evans v. McConnell* (Iowa) 63 N. W. 570; *McConnell v. Evans*, *Id.*

[D] (Mich.: 1894.)

A court of equity has jurisdiction to construe a will, or declare any of its provisions invalid, at the suit of a mere legatee, where the executors answer, and in terms submit the question of construction to the court.—*Dean v. Mumford* (Mich.) 61 N. W. 7.

[E] (Mich.: 1897.)

Where one insured in a benefit association by a writing provided that his beneficiary should pay a certain debt, the creditor need not present his claim in the probate court, but may enforce his lien in equity.—*Woodruff v. Tilman* (Mich.) 70 N. W. 420.

[D] (Neb.: 1895.)

In the absence of a statutory provision therefor, a court of equity has no jurisdiction of an action to detach territory from a municipality at the suit of property owners.—*City of Hastings v. Hansen* (Neb.) 63 N. W. 34. 44 Neb. 701.

[E] (Wis.: 1896.)

A penalty for failure to furnish title, greater than the value of the land involved, will not be enforced.—*Gates v. Parnly* (Wis.) 66 N. W. 253, 93 Wis. 294.

[F] (Wis.: 1896.)

Though there has been a rightful entry after condition subsequent broken, so that the estate has reverted under the terms of the deed, yet equity may relieve the grantee from the consequences thereof, where compensation may be had in money, and the grantee is willing to perform.—*Donnelly v. Eastes* (Wis.) 69 N. W. 157.

§ 2. Adequate remedy at law.

[A] (Iowa: 1895.)

In an action on a duebill, defendant asked to have the instrument reformed so as to show that he was to pay said bill only in case he had the amount thereof in his hands after he procured a certain loan for plaintiff, and alleged that he did not procure the loan. *Held*, there was no error in refusing to transfer the cause to the equity side of the docket, as the facts that would reform the instrument would defeat a recovery on it.—*Smith v. Griswold* (Iowa) 64 N. W. 624.

[B] (Iowa: 1896.)

Where a contract of insurance by mutual mistake limited the concurrent insurance permitted, the insured, after taking other insurance beyond such limit, and the occurrence of a loss, had no adequate remedy at law.—*Fitchner v. Fidelity Mut. Fire Ass'n* (Iowa) 68 N. W. 710.

[C] (Mich.: 1895.)

Plaintiff gave his note to defendant bank for money used in buying land for a company of which he was a member, and indorsed notes of the other members to the bank for like amounts. He sold his interest in the company to the bank through its cashier, and was released by him from liability as indorser. Thereafter ample funds were given the cashier for the bank to liquidate the company's debt to the bank, including plaintiff's note; but the funds were not so applied, and the bank sued on the note, and refused to disclose whether it claimed to hold plaintiff as indorser on the other notes. *Held*, that plaintiff was entitled to equitable relief,—

Wing v. Commercial & Sav. Bank (Mich.) 61 N. W. 1009.

103 Mich. 565.

[D] (Mich.: 1895.)

How. Ann. St. § 5881, directs a personal representative, in case of a deficiency of assets, to sue, in equity or at law, to recover, for the benefit of creditors, real estate and personal property fraudulently conveyed, whatever may have been the manner of the conveyance. *Held*, that where one conveys land on which is a growing crop, in fraud of creditors, and after his death the grantee harvests or sells the crop, the personal representative of the grantor must proceed at law, and not in equity, to have the crop or proceeds thereof declared assets of the estate.—*Bresnahan v. Nugent* (Mich.) 64 N. W. 458.

[E] (Mich.: 1896.)

Though How. Ann. St. § 6611, confers on the court of chancery power "to hear and determine all cases of encroachments upon the public highways" in townships, villages, and cities, such court will not, in the absence of special circumstances, assume jurisdiction of an alleged encroachment on a township highway, as by sections 1371-1378 an adequate remedy at law is provided for such cases.—*Township of Greenfield v. Norton* (Mich.) 69 N. W. 95.

[F] (Mich.: 1897.)

Equity has jurisdiction of a bill to quiet title to certain land in possession of complainant, and to enjoin defendant from entering upon the same and building a driveway thereon, where plaintiff has no adequate remedy at law, and alleges the damages to be irreparable, though the question of fixing a boundary line is in issue.—*Campbell v. Adsit* (Mich.) 70 N. W. 141.

[G] (Neb.: 1895.)

To recover public money collected and embezzled by him, a county brought action against its defaulting treasurer and all the sureties on his two official bonds; he having held the office two terms, with different sureties on each bond. The petition alleged that the principal defendant was insolvent, and that plaintiff was unable to prosecute an action at law on either bond because the books and records kept by such treasurer did not disclose when the defalcation occurred, and that there was no evidence known to plaintiff by which it could prove in an action at law, whether such defalcation occurred during the first or second term. *Held* not to state a case for equitable relief.—*Kuhl v. Pierce County* (Neb.) 62 N. W. 1066. 44 Neb. 584.

[H] (Wis.: 1896.)

The objection that a bill in equity fails to show equitable jurisdiction, because an adequate remedy exists at law, cannot be raised for the first time on trial by a demurrer *ore tenus*.—*Meyer v. Garthwaite* (Wis.) 66 N. W. 704.

See, also, "Specific Performance," § 1.

Enforcing subscription to stock, see "Corporations," § 56.

§ 3. Jurisdictional amount.

(Mich.: 1896.)

Where a bill for an injunction avers that complainant is remediless at law, the court has jurisdiction, though it is not alleged that the damages complained of amount to \$100.—*Mastenbrook v. Alger* (Mich.) 68 N. W. 213.

§ 4. Jurisdiction once acquired—Granting full relief.

[A] (Iowa.)

A court of equity, having obtained jurisdiction of an action for the purpose of foreclosing a lien for building material, may render a judgment for the amount due, though the lien proves invalid.—(1895) *Green Bay Lumber Co. v. Miller*, 62 N. W. 742; (1896) *Id.*, 67 N. W. 383.

[h] (Mich.; 1895.)

When a court, having all the facts and the necessary parties before it, had declared a contract between a city and an electric light company void, it should also have required an accounting by the company for moneys shown to have been paid to it by the city under such contract.—*George v. Wyandotte Electric Light Co.* (Mich.) 62 N. W. 985; *Campbell v. City of Wyandotte*, Id.

105 Mich. 1.

[e] (Neb.; 1895.)

When a court of equity has acquired jurisdiction for any purpose, it may retain it for all purposes, and determine all matters in issue.—*Disher v. Disher* (Neb.) 63 N. W. 368.

45 Neb. 100.

[d] (Neb.; 1895.)

One who submits to the determination of a court of equity his claim of a right to employ the designation of himself as trustee to the disadvantage of the beneficiary cannot complain if such court administers complete relief as between all the parties.—*Tulleys v. Keller* (Neb.) 63 N. W. 388.

45 Neb. 220.

[e] (Neb.; 1896.)

As a rule, a court of equity will not interpose an objection to its own jurisdiction on the ground that plaintiff has an adequate remedy at law, but will retain the cause, and award the relief which the parties could have obtained at law.—*Taylor v. Ainsworth* (Neb.) 68 N. W. 1045.

II. REFORMATION OF CONTRACTS.

§ 5. When right of action exists.

[a] (Iowa; 1895.)

Where a party fails to show that anything agreed upon was omitted from the writing through fraud, accident, or mistake, he is not entitled to a reformation thereof.—*Breja v. Pryne* (Iowa) 64 N. W. 669.

[b] (Iowa; 1897.)

Plaintiff and defendant made a joint purchase of 140 acres, being the S. W. $\frac{1}{4}$ of a section, less the N. $\frac{1}{2}$ of the N. $\frac{1}{4}$ thereof, and then divided it, receiving separate deeds from the vendor,—defendant, a deed for the S. $\frac{1}{2}$ of the $\frac{1}{4}$ section; plaintiff, a deed for the remainder. The western and southern boundaries were highways. Close to the eastern boundary were a house and a barn,—the house, on plaintiff's land; the barn, on that of defendant; the barnyard extending to the dividing line between their lands, and to the eastern boundary. On defendant's land, extending along the eastern boundary, from the highway on the south to the barnyard, was a lane, which the vendor had used, with gates at the ends, as his exit to the highway on the south. *Held*, that reformation of the deed to defendant, so as to reserve to plaintiff right to use the lane, was properly denied, there being no such right unless there was an agreement therefore; it being conceded that before the division the parties had a conversation as to such use, and the testimony of the parties and their witnesses being contradictory as to whether the right was conceded; and it appearing that plaintiff's tenant, for three years after execution of the deeds, used the land under express license from defendant, on condition that the gates be kept closed (defendant at the time using it as an inclosure for stock), and the testimony of the tenant being that when he broke the bridge in the lane, and spoke to plaintiff about it, he said he had nothing to do with the bridge.—*Hoyer v. King* (Iowa) 70 N. W. 695.

[c] (Mich.; 1896.)

Equity will not reform a voluntary deed without the consent of the parties. *Redding v. Rozell* (1886) 26 N. W. 677, 59 Mich. 476, followed.—*Shears v. Westover* (Mich.) 68 N. W. 266.

§ 6. What instruments will be reformed.

(Minn.; 1896.)

By the terms of an executory contract the vendor agreed to convey more land than he subsequently conveyed by the deed made in fulfillment thereof. The executory contract expresses the agreement the vendee intended to make and supposed he had made. The deed expresses the contract the vendor intended to make and supposed he had made. Both parties acted in good faith, and neither did anything to mislead the other. *Held*, the minds of the parties never met, and an action to reform the deed cannot be maintained.—*Blanchard v. Patterson* (Minn.) 67 N. W. 356.

61 Minn. 454.

§ 7. Intention of the parties.

[a] (Iowa; 1896.)

Where a contract for the exchange of a farm for a stock of goods at invoice value provided for invoice "at wholesale cost as shown by cost marks on said goods," the owner of the farm was not entitled to have it reformed so as to require the invoice to be at wholesale cost without reference to the marked price, where there was a preponderance of evidence that the parties intended that the value of the goods was to be determined by the cost marks.—*Simpson v. Kane* (Iowa) 67 N. W. 247.

[b] (Iowa; 1896.)

The contract cannot be reformed on the ground of mistake as to efficacy of the words used to express the intent of the parties to make an agreement in accordance with the original negotiations, there having been no mutual agreement at that time, and the written contract being in effect a new and independent agreement, not a conclusion of the original negotiations.—*Marshall v. Westrope* (Iowa) 67 N. W. 257.

[c] (Neb.; 1896.)

A court of equity will reform a deed so as to comply with the intention of the parties.—*Beall v. Martin* (Neb.) 67 N. W. 433.

[d] (Wis.; 1896.)

An instrument leasing property with privilege to purchase during the term at a certain price, and open only to the construction that rent should not apply on purchase price, cannot be reformed to allow such application; the parties knowing that the words which would permit it were omitted, and consent of the lessee to their omission having been given on the parol assurance of the lessor that it should make no difference.—*Braun v. Wisconsin Rendering Co.* (Wis.) 66 N. W. 196.

92 Wis. 245.

[e] (Wis.; 1896.)

An insurance policy was issued on a house, under construction by a contractor, to the owner of the building, who had agreed, in the contract for the construction of the building, to insure the building during construction for the benefit of the contractor, as his interest might appear. The owner of the building, in negotiating for the insurance, did not request that the interest of the contractor be insured, nor was the insurance agent, to whom the owner left the matter as to the form of the policy, aware that the owner desired to have the interest of the contractor insured. *Held*, that a reformation of the policy so as to insure the interest of the contractor was not authorized.—*Trustees of St. Clara Female Academy v. Delaware Ins. Co.* (Wis.) 66 N. W. 1140; *Same v. Milwaukee Mechanics' Ins. Co.*, Id.; *Same v. Northwestern Nat. Ins. Co.*, Id.; *Same v. Rockford Ins. Co.*, Id.

93 Wis. 57.

§ 8. Mistake.

[a] (Iowa; 1895.)

Plaintiff made a certain payment to defendant bank, and received in exchange a note

signed by a firm composed of the officers of the bank, and the business of which was transacted in the bank's office. He subsequently gave a check to his wife, which was also exchanged at the bank office for a similar note. Plaintiff and his wife could both read and write, and had transacted considerable business with banks. Plaintiff retained the notes for two years, and, upon failure of the firm, began suit to reform the notes and change them into certificates of deposit of the bank, on the ground that he intended to deposit his money with the bank. *Held*, that plaintiff was not entitled to a decree. — *Murphy v. First Nat. Bank (Iowa)* 63 N. W. 702.

[b] (Iowa; 1896.)

Reformation of a deed, making it subject to a mortgage, cannot be had, on the ground of omission by mistake, where the grantor, though he executed the mortgage himself, had forgotten it when he made the deed. — *Moore v. Graves (Iowa)* 65 N. W. 1008.

[c] (Iowa; 1896.)

A party who seeks to reform an instrument on the ground of mistake must establish the issue by clear and satisfactory evidence, which shall be free from reasonable doubt. — *Jurgensen v. Carlsen (Iowa)* 66 N. W. 877.

[d] (Iowa; 1896.)

Plaintiff's debtor agreed that, if plaintiff would pay off his indebtedness to a bank and give him an extension of time, he would assign to him a land contract previously transferred to the bank as security for its claim, telling him that his debt to the bank was but \$1,500, though plaintiff had previously been told by the cashier that it was much larger. Subsequently the bank agreed to assign to plaintiff the land contract on payment by him of a specified sum, which was intended to include its entire claim against the debtor, but by mistake one note which was not then in the bank was omitted from the computation, and plaintiff neglected to inform the bank what the debtor had said as to the amount of his indebtedness. When the bank discovered the mistake, it informed plaintiff, and told him it would expect him to pay the omitted note also before he received the land contract; but plaintiff took no steps to protect himself, and the debtor soon afterwards left the state. *Held*, that plaintiff could not demand specific performance of the bank's contract with him until it was reformed so as to include the omitted note, plaintiff having parted with no right by reason of the mistake. — *Parker v. Schaller Sav. Bank (Iowa)* 67 N. W. 245.

[e] (Iowa; 1896.)

Plaintiffs having the same means of knowledge as to the legal effect of the words used in the contract sought to be avoided as defendant, they cannot, because of their ignorance of the meaning of the words, in the absence of misrepresentation on part of defendant, obtain relief on the ground of fraud, from their own negligence in signing the agreement. — *Marshall v. Westrope (Iowa)* 67 N. W. 257.

[f] (Mich.; 1896.)

A contract for the sale of land on which a cash payment was made, the balance to be paid in installments, provided that, in case the land was platted in a certain way, the grantee should be entitled to conveyances of lots which would be paid for in full by the payments "heretofore" made, at certain valuations, and, in case the land was platted differently, that the grantee should have the right to have lots released on payment of proportionate amounts of the sum due on the contract. If the grantee was given releases for the cash payment, the land would have all been released before it had been paid for. The grantee and his agent testified that they were not aware, at the time of the transaction, that the grantee was entitled to releases for the cash payment. *Held*, that the word "heretofore" was used by mistake in-

stead of the word "hereafter." — *Johnson v. Wilson (Mich.)* 69 N. W. 149.

[g] (Minn.; 1895.)

In an action to foreclose a mortgage, against a subsequent purchaser of the mortgaged premises, defendant's undisputed testimony in support of his answer showed that, by the mutual mistake of plaintiff's assignor and defendant's agent, who represented defendant, in taking the conveyance, the deed provided that defendant assumed and agreed to pay the mortgage; that defendant did not know of the provision in the deed until a short time before the action for foreclosure was commenced; and that the installments of interest paid on the mortgage by defendant were made while in ignorance of the provision in the deed. *Held* sufficient to warrant a judgment reforming the deed so as to relieve defendant from personal liability on the mortgage debt. — *Martine v. Christensen (Minn.)* 62 N. W. 1127.

60 Minn. 491.

[h] (Minn.; 1895.)

A written contract will not be reformed because of a mistake therein, unless the mistake was mutual, or occurred because of the fraud of the party asserting rights thereunder. — *Martine v. Christensen (Minn.)* 62 N. W. 1127.

60 Minn. 491.

[i] (Wis.; 1895.)

The proper remedy for the correction of a mistake in a deed is by suit in equity. — *Elofrson v. Lindsay*, 63 N. W. 89, 90 Wis. 203.

§ 9. — Mutual mistake.

[a] (Iowa; 1896.)

Defendant negotiated with plaintiffs for the purchase of machinery, offering to assign, in payment, accounts for the services of a stallion; and to guaranty the accounts. It was the custom that such accounts should not be paid unless the mares proved to be with foal. No agreement was concluded, as defendant wished to look elsewhere before purchasing. Later, defendant wrote plaintiffs to ship the machinery, sending an assignment of the accounts, and a contract for plaintiffs' signature, which provided that plaintiffs should take the accounts in full satisfaction, defendant agreeing "that all foals not paid for * * * he will pay such accounts remaining unpaid." A number of the accounts being uncollectible, as the mares were not with foal, and defendant refusing to pay them, plaintiffs brought action to reform the contract, alleging mistake in the use of the word "foals" in the guaranty, instead of "accounts." *Held*, that in the absence of evidence to show that there was a mutual mistake, in that words were used which it was not intended to use, there could be no reformation of the contract on the ground of mistake as to facts. — *Marshall v. Westrope (Iowa)* 67 N. W. 257.

[b] (Neb.; 1897.)

A mutual mistake in the description of property mortgaged is sufficient to justify the reformation of the instrument, not only as against the mortgagors, but also as against purchasers under them chargeable with notice of the mistake. — *Carpenter Paper Co. v. Wilcox (Neb.)* 70 N. W. 228.

[c] (Wis.; 1896.)

To authorize the reformation of an insurance policy on the ground of mistake, the mistake must have been mutual. — *Trustees of St. Clara Female Academy v. Delaware Ins. Co. (Wis.)* 66 N. W. 1140; *Same v. Milwaukee Mechanics' Ins. Co., Id.*; *Same v. Northwestern Nat. Ins. Co., Id.*; *Same v. Rockford Ins. Co., Id.*

93 Wis. 57.

§ 10. Fraud.

(Iowa; 1896.)

In an action in which one of defendants asked the reformation of an antenuptial contract

with her former husband on the ground of false and fraudulent statements as to its contents, she averred that she could not read it, and that it was not read over to her. The person who drew it, and another who was present, testified that it was read to her in English, and explained to her in the Dutch language, which she understood. Her brother testified that it was read to her in English, but was not explained in Dutch. Defendant denied that it was explained to her before she signed it, but afterwards admitted that it was read to her in the German or Dutch language, and that she could understand the person who explained its contents, though she insisted that the explanation was fraudulent. *Held*, that the evidence did not justify a decree reforming the contract.—*Rensink v. Wiggers* (Iowa) 68 N. W. 569.

§ 11. Conditions of contract.

(Iowa; 1895.)

The words "from and after April 1st," as used in a bill of sale of a stock of goods allowing the vendee the proceeds of all sales after that date, are exclusive of that date, and, in the absence of fraud or mutual mistake, will not be altered so as to include it.—*Chicago Title & Trust Co. v. Smyth* (Iowa) 62 N. W. 792.

§ 12. Description in conveyance.

(Minn.; 1895.)

In an action to recover a portion of a tract of land, wherein defendant sought to reform a deed of the tract from plaintiff to his mother, under which defendant claimed through mesne conveyances, so as to include the portion of land in suit, evidence that the mother formerly conveyed the tract to plaintiff in consideration of his agreement to support her and another; that this agreement was abandoned, and the deed in question made; that plaintiff paid no taxes on, and made no claim to, any portion of the tract, for more than nine years after such reconveyance,—*held* to support a decree for defendant.—*Layman v. Minneapolis Realty Co.* (Minn.) 62 N. W. 113.
60 Minn. 136.

§ 13. Insurance policy.

[a] (Iowa; 1894.)

A former insurance policy was on two buildings, described as a frame house, "16 by 18," and a log house, "16 by 18." Before the new policy was issued, the log house was torn away, and a frame addition was built to the frame house. In a letter asking for a renewal, the agents stated that "the house is 16x18, one story, and kitchen, 12x18"; but in the new policy the property was described as in the old. *Held*, that the policy was properly reformed as to description.—*Thomason v. Capital Ins. Co.*, 61 N. W. 843, 92 Iowa, 72.

[b] (Iowa; 1894.)

The new policy contained a warranty by the assured that no stovepipe ran through the building, before entering the chimney, but its existence was not in fact known to such firm or plaintiff until after the loss. The old policy contained no such warranty, but insured the building with the stovepipe passing through the floor, as the company knew, when plaintiff, through such firm, asked for a renewal and received the new policy. The company retained the premium for the new policy, and did not call attention to any change in its conditions. *Held*, that the policy was properly reformed as to such warranty. *Stephens v. Insurance Co.* (1893) 54 N. W. 139, 87 Iowa, 283, distinguished.—*Thomason v. Capital Ins. Co.*, 61 N. W. 843, 92 Iowa, 72.

[c] (Iowa; 1894.)

A firm sold land to M. C. T., and took a mortgage for the price. It also assigned in blank a policy on the buildings, and the agents of the insurance company put in the blank by mistake the name D. M. T., and the company

made the policy payable to such firm as its interest might appear. The firm, when the policy expired, took it to the agents for renewal, and the company issued to D. M. T. a new policy, payable to such firm as its interest might appear. No such person as D. M. T. was known. *Held*, that the policy was properly reformed as to the name of the assured.—*Thomason v. Capital Ins. Co.* (Iowa) 61 N. W. 843.
92 Iowa, 72.

[d] (Iowa; 1896.)

Where the insurance was solicited by an agent of the company, and insured did not read the application or the policy, the fact that he did not discover a mistake in the latter until after a loss occurred, two months after the policy was delivered, did not constitute such want of reasonable care as would defeat his right to a reformation of the instrument.—*Pitchner v. Fidelity Mut. Fire Ass'n* (Iowa) 68 N. W. 710.

[e] (Neb.; 1895.)

In an action on an accident policy, for the loss of a foot, evidence that plaintiff's policy, containing a stipulation that one-third was to be paid in case of such loss, had been canceled, and that the company's agent had given him a short time ticket policy, not containing such provision, with a circular representing, without qualification, that the company issued policies providing for payment of one-third for loss of a foot, and that both plaintiff and the agent believed that the ticket policy contained such provision, will support a finding that plaintiff was entitled to a reformation of the ticket policy.—*Frank v. Pacific Mt. Life Ins. Co. of California* (Neb.) 62 N. W. 454.
44 Neb. 320.

[f] (Neb.; 1897.)

A mistake in a policy, to justify its reformation, must be mutual and clearly established.—*Home Fire Ins. Co. v. Wood* (Neb.) 69 N. W. 941.

III. RESCISSION AND CANCELLATION OF CONTRACTS.

Laches of complainant, see post, § 49.
Multifariousness in bill, see post, § 52.
Parties to bill, see post, § 54.
Cancellation of discharge of mortgage, see "Mortgages," § 43.

1. IN GENERAL.

§ 14. In general.

[a] (Mich.; 1895.)

About a month before his death, deceased, wishing to distribute his property between his wife and six children, so as to avoid proceedings in the probate court, sent for an attorney, who drew up two deeds conveying a homestead and another farm to plaintiff, a deed of a farm to G., and a deed of a village lot to R.; also assignments of mortgages to deceased's wife. At the same time plaintiff gave a bond secured by mortgage on the homestead to secure the support of the wife, and G. gave deceased a mortgage on the farm conveyed to him. Deceased postponed the disposition of his personal property to another time, but died without disposing of it. R. and G. took their deeds with them. The deeds to plaintiff and the assignment of the mortgages were never delivered. *Held* that, as the intended disposal of deceased's property was never completed, all the deeds, including those to R. and G., should be set aside.—*McGee v. McGee* (Mich.) 63 N. W. 763.
105 Mich. 602.

[b] (Minn.; 1895.)

An action could not be maintained to cancel the records of scales and measurements of logs of a certain mark in the office of the surveyor general of logs and lumber, or his certificate thereof, on the ground that they were

entire and fraudulent.—*Turnbull v. Crick* (Minn.) 65 N. W. 135.
63 Minn. 91.

§ 15. Time of bringing action.

(a) (Mich.; 1895.)

A contract will not be set aside, after the lapse of 17 years, when both parties and witnesses are dead, on the ground that one of the parties to the transaction was mentally incompetent, and was overreached by the other, except on the clearest and most convincing testimony.—*Richardson v. Medbury* (Mich.) 65 N. W. 4.

(b) (S. D.; 1896.)

An action to rescind a contract may be brought at any time within the statutory limitation, by one who offered to rescind in the manner provided by statute, and with reasonable promptness after the discovery of facts which entitled him to a rescission.—*Hilton v. Advance Thresher Co.* (S. D.) 66 N. W. 816.

§ 16. Signing in ignorance of contents.

(Mich.; 1895.)

Where one joins her husband in the execution of a paper which she knows is to secure his debt, and which she has advised him to secure, and makes no inquiry as to its form or contents, she cannot afterwards have it set aside on the ground that she did not know its purport.—*Sanborn v. Sanborn* (Mich.) 62 N. W. 371.
104 Mich. 180.

§ 17. Unconscionableness of contract.

(Mich.; 1896.)

In an action to cancel a pledge it appeared that complainant had been induced to execute a pledge note for an amount in excess of the true amount owing by him; that he had been further induced to pledge, as security for said note, a mortgage, the value of which was largely in excess of the amount of the note, giving the pledgee the right to sell the mortgage, in default of payment of the note, at public or private sale, without notice. It appeared, too, that complainant was a man of little education, ignorant, and improvident in business, and of a yielding and confiding nature. *Held*, that the evidence justified a decree canceling the pledge and reducing the amount of the note to the amount actually owing by complainant.—*Groesbeck v. Bennett* (Mich.) 66 N. W. 664.

§ 18. Placing party in possession pending determination of merits.

(Mich.; 1895.)

Where an action is brought, by one in possession whose husband has abjured the realm, to have a deed executed by herself and her husband before he fled set aside on the ground of fraud, or to have it decreed a mortgage, it is error for the court, on refusing to pass upon the merits of the controversy until the husband is made a party by publication, to decree that defendant be placed in possession of the premises.—*Sanborn v. Sanborn* (Mich.) 62 N. W. 371.
104 Mich. 180.

§ 19. Rights of subsequent purchaser.

(S. D.; 1895.)

Under Comp. Laws, §§ 3589, 4515, relating to the rescission of contracts procured through fraud, one induced to purchase bank stock by fraudulent representations as to its value may rescind the purchase, and recover his notes given therefor, against a holder of the notes having notice of the fraud.—*Taylor v. National Bank* (S. D.) 62 N. W. 99.
6 S. D. 511.

§ 20. Action by party in default.

(Wis.; 1891.)

Where plaintiff conveys the land on which he is living, with his daughter-in-law and

her husband, to his daughter-in-law in consideration of support for life, and leaves the premises without fault on her part, the conveyance will not be set aside, the grantee being ready to perform.—*Scott v. Scott* (Wis.) 61 N. W. 286, 89 Wis. 93.

2. INCAPACITY OF CONTRACTING PARTY.

Estoppel to deny capacity of contracting party, see "Estoppel," § 14.

§ 21. Mental weakness or insanity.

(a) (Iowa; 1895.)

In an action by heirs to set aside a deed from a father, 86 years old, to his son, it appeared that when the deed was made the son agreed that he should pay to the father a sum of money, which should be a lien on the land, and should support the father during his life. There was evidence that the father was feeble, that his hearing and sight were poor, that he was extremely nervous, that his wife and son attended to some of his business, and that he seemed incompetent to do business. A daughter testified that, shortly before the deed was made, her father talked about disposing of his property among his children, and told her what he would give each, and that he was going to make the deed in suit. When the deed was made, he disposed of other property among his children, and the lawyer who drew the papers testified that he discussed the different dispositions, and was competent to make a will. The doctor called in to attend him a few weeks later testified that he did not see anything about him that was not rational. *Held*, that a finding that there was no evidence of undue influence or mental incapacity was proper.—*Davis v. Latta* (Iowa) 62 N. W. 17.

(b) (Iowa; 1896.)

In an action by a husband to avoid a deed to his wife's brother in trust for her, for mental incapacity due to illness, plaintiff testified that he first knew that he had made it when told after recovery. Plaintiff's physician testified that his illness rendered him mentally incompetent on the date of the deed. A nurse, who was with plaintiff on that date, shortly before and after the deed was executed, testified that he was weak and not in his right mind. On the other hand, the grantee testified that he saw plaintiff frequently during his illness, and discovered no mental weakness; that when he signed the deed he stated that it was his voluntary act, and his reasons for making it. Evidence of others who saw plaintiff, either on the date, or shortly before or after it, and talked with him, and in some cases received directions as to him, showed mental capacity. *Held*, that a finding that plaintiff was sound of mind on the date of the deed was warranted by the evidence.—*Caldwell v. Finch* (Iowa) 65 N. W. 994.

(c) (Iowa; 1896.)

In an action to set aside a deed on the ground of mental incapacity of the grantor, it appeared that the grantor had always been superstitious, believing in witches; that he was not in very good health, but that he was able to manage his farm; that, as a rule, he allowed his wife to bargain for him, but was able to do all the necessary figuring, and to keep the time of his employees. It appeared that, when the deed was made, he had instructed the attorney who drew it as to his wishes, stating that he made the deed in order to secure the support of his wife. It was shown that, in various matters occurring about the time the deed was made, he had shown himself capable of transacting business. *Held*, that the evidence was sufficient to justify a finding that the grantor had mental capacity to execute the deed.—*Schneitter v. Carman* (Iowa) 67 N. W. 249.

[d] (Iowa; 1897.)

Where a contract for the conveyance of property has been fully executed, and the grantee cannot be placed in statu quo, the fact that the grantor was at times prior to the transaction erratic, or even mentally unbalanced, is not sufficient ground for setting it aside, when such fact was not known to the grantee, and the price paid was not so inadequate as to charge him with notice of any mental weakness of the grantor.—*Harrison v. Odley* (Iowa) 70 N. W. 724.

[e] (Mich.; 1895.)

A deed by a person non compos mentis, executed before a guardian has been appointed for him, is voidable merely; and therefore he cannot sue in ejectment to recover the land conveyed, but must first sue in equity to annul the deed.—*Moran v. Moran* (Mich.) 63 N. W. 989.

[f] (Neb.; 1896.)

While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects. *Dewey v. Allgire* (1893) 55 N. W. 276, 37 Neb. 6, followed.—*Hay v. Miller*, 66 N. W. 1115, 48 Neb. 156.

[g] (Wis.; 1895.)

A man 79 years old, infirm in mind and body, nearly blind, and very hard of hearing, who had had a stroke of paralysis, and did not recognize any one until informed who the person was, executed to his son, with whom he lived, a satisfaction of a mortgage, which was nearly all his property. The satisfaction was filed immediately, but his other children, who were frequently at the house, knew nothing of it till after his death, eight months later. The notary, who was the only disinterested witness of the transaction, told the son at the time that he doubted if his father was not too weak in mind for transaction of such business, but the son wanted it done. His opinion at the time of the transaction as well as at the time of testifying was that the father's mind was "a little short of doing that kind of business." The testimony of the other witnesses against the son was that the father "was not right in his sense any more." The witnesses for the son testified that the father's mental condition was very fair, and, in their opinion, he could understand common business transactions. *Held*, that the evidence showed want of mental capacity.—*Henrizi v. Kehr* (Wis.) 63 N. W. 285. 90 Wis. 344.

3. MISTAKE.

Laches of complainant, see post, § 50.

§ 22. Of law.**(Wis.; 1896.)**

A mistaken belief that certain mortgages were valid securities is a mistake of law, and an action to set aside a conveyance made under such belief cannot be maintained in the absence of an allegation that the grantor was ignorant of the facts invalidating such securities.—*Kyes v. Merrill Furniture Co.* (Wis.) 65 N. W. 735. 92 Wis. 32.

§ 23. Of fact.**[a] (Iowa; 1897.)**

It is no defense, to a bill to rescind a deed for mistake as to the subject-matter, that the tract actually conveyed is worth as much as the one plaintiff contracted to buy.—*Clapp v. Greenlee* (Iowa) 69 N. W. 1049.

[b] (Iowa; 1897.)

It is no defense, to a bill to rescind a deed for mistake as to subject-matter, that plaintiff allowed the land to go to tax sale, and had mortgaged it, where the complaint tendered a recon-

veyance free from incumbrances.—*Clapp v. Greenlee* (Iowa) 69 N. W. 1049.

[c] (Neb.; 1896.)

The jurisdiction of equity to relieve against mutual mistakes will not be exercised because of misapprehensions in regard to a collateral matter, as in regard to a fact incidentally affecting the value of the subject-matter of the contract, there being no deception or wrongful concealment.—*Moore v. Scott* (Neb.) 66 N. W. 441.

47 Neb. 346.

4. FRAUD AND FALSE REPRESENTATIONS.

Laches of complainant, see post, § 49.

§ 24. Fraud.**[a] (Iowa; 1896.)**

An action to rescind a conveyance for fraud cannot be maintained by a tenant to whom, in consideration of said conveyance, a mortgage was given by a certain person on land occupied by the tenant, and also a deed in escrow thereto, in order that having an outstanding title to said land he might compel his landlord, for a surrender thereof, to purchase at an increased price a building erected by the tenant on said land, where the tenant, after he knew that said person had conveyed the same title to his landlord, and that the deed in escrow had been destroyed, relied upon having a better title than his landlord and thereafter advanced money to said person for the prosecution of outstanding titles to other lands, and did not bring his action to set aside the conveyance until three years afterwards.—*Blackman v. Wright* (Iowa) 65 N. W. 843.

[b] (Mich.; 1896.)

A court may grant relief from a voluntary conveyance where induced by the active fraud of the grantee.—*Tiffany v. Tiffany* (Mich.) 68 N. W. 127.

[c] (Wis.; 1896.)

Defendant wrote plaintiff, an Indian, who owned a one-fourth interest in a farm of 58 acres, valued at \$986, 56 acres of which was mortgaged for about \$600, and 40 acres of which was incumbered with a life estate in a woman 46 years of age, stating that 56 acres of the farm was soon to be sold on foreclosure, and that he would give her \$5 for her one-fourth interest in the 3 acres not covered by the mortgage, in response to which plaintiff wrote that she would deed him "everything" for \$5 and a new dress, the consideration which defendant had agreed to give her co-tenants for their interest. Defendant sent a quitclaim deed conveying the entire 58 acres, which was executed by plaintiff, as she claimed, without the same being read to her, and with the understanding on her part that only the 3-acre strip was conveyed. The entire farm was purchased by defendant at the foreclosure sale. *Held*, that the rescission of the deed on the ground that it was procured by fraud was unauthorized.—*Doxtater v. Connell* (Wis.) 66 N. W. 1135.

93 Wis. 113.

§ 25. Matters of opinion or statements of facts.**[a] (Iowa; 1896.)**

Relief may be had against one for fraudulent representations, he not believing his representations true, though he did not actually know they were false.—*Hunter v. French League Safety Cure Co. of Sioux City* (Iowa) 65 N. W. 828.

[b] (Neb.; 1896.)

One who, as an inducement to a sale of land, in good faith states to the vendee that reliable third persons had represented the land to him as being of a certain character, and who at the same time states that he has no personal

knowledge in regard to the land, does not thereby adopt such representations as his own, and rescission cannot be had merely because they prove false.—*Moore v. Scott* (Neb.) 66 N. W. 441.
47 Neb. 346.

§ 26. — Reliance on representations.

(Neb.; 1896.)

Misrepresentations as to the location, quality, and value of real estate, by a vendor, are sufficient grounds for rescission, when relied upon by the vendee, and he is unacquainted with its value and condition, and has been prevented by the fraud of the vendor from making an examination of the property.—*Stochl v. Caley* (Neb.) 67 N. W. 783.
48 Neb. 786.

§ 27. False or fraudulent representations.

[a] (Iowa; 1896.)

Plaintiff's representation to defendant that he was a man of means and owned certain lands, and was able to clear the title to other lands mortgaged by plaintiff to defendant, was not disproved by evidence that plaintiff often borrowed money, there being nothing to show that he did not own said lands.—*Blackman v. Wright* (Iowa) 65 N. W. 843.

[b] (Iowa; 1896.)

Defendant's contention that plaintiff represented that he owned a greater per cent. of the title to land mortgaged by plaintiff to defendant than in fact he did have was not proved where plaintiff denied said representations, and the only other evidence in defendant's favor was the testimony of plaintiff's attorney as to matters acquired in his professional capacity.—*Blackman v. Wright* (Iowa) 65 N. W. 843.

[c] (Iowa; 1896.)

The fact that an agent had misrepresented the rental demanded by his principal for land, and obtained an agreement from the lessee to pay an excessive rental, and also misrepresented the character and quality of the land, where the lessee examined the land and might have ascertained the facts, does not constitute sufficient grounds for a rescission of the lease.—*Merritt v. Dufur* (Iowa) 68 N. W. 553.

[d] (Iowa; 1896.)

A representation by an agent that two tracts of land, owned by different persons, were owned by the same person, and the leasing of them together as one farm, is a matter of which the lessee cannot complain, where the lease is assented to by the owners.—*Merritt v. Dufur* (Iowa) 68 N. W. 553.

[e] (Neb.; 1894.)

Where defendant, in selling stock in a corporation, used a report of the secretary as to the profits earned by the corporation, knowing that the report was false, he adopted such false report and made it his own representation. 59 N. W. 781. 41 Neb. 563 (1894) reversed.—*Holtry v. Foley*, 61 N. W. 120, 43 Neb. 133.

§ 28. Fraudulent concealment.

[a] (Minn.; 1896.)

Where a husband alone conveyed land with a covenant against incumbrances, a subsequent grantee, in procuring the execution of a quitclaim deed by husband and wife, was not guilty of fraud, as against the husband, because he concealed and misrepresented to him the increased value of the land, since the husband was bound by his covenant to procure a release of the wife's dower.—*Crowley v. C. N. Nelson Lumber Co.* (Minn.) 69 N. W. 321.

[b] (Wis.; 1895.)

Where the indorser of a note for the price of land allows the contract of purchase to be made out in his name as security for his indorsement, and is fully informed of the nature of such contract, and of his liability in

case of default of a purchaser, by the maker of the note, he is not entitled to rescission of the contract on the ground that an agreement between the vendor and such maker for a discount to the latter on his procuring a purchaser was not disclosed.—*Spence v. Geilfuss*, 62 N. W. 529, 89 Wis. 499.

§ 29. Election to rescind.

(S. D.; 1895.)

As against a demurrer, the allegation of a complaint to rescind a purchase of bank stock, that plaintiff gave notice of his election to rescind "as soon as he learned the true condition of the bank," shows a full discharge of plaintiff's duty, as to time.—*Taylor v. National Bank* (S. D.) 62 N. W. 99.
6 S. D. 511.

5. DURESS, UNDUE INFLUENCE, AND CONFIDENTIAL RELATIONS.

§ 30. Duress.

(Mich.; 1895.)

A mortgage by the wife to secure the repayment of money embezzled by her husband, executed at the time she was first informed of her husband's crime, and after she had been told by the one whose money had been appropriated that he "must have the money or the security, or there are the papers," and "I shall go on with the proceedings," may be set aside as having been obtained by duress.—*Benedict v. Roome* (Mich.) 64 N. W. 193.

§ 31. Compulsion not amounting to duress.

(Neb.; 1895.)

When money is paid or concessions exacted through necessity, in order to obtain property illegally withheld, where its detention is accompanied by immediate hardship or irreparable injury, such transaction may be avoided on the ground of compulsion, though not amounting to duress.—*Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.) 62 N. W. 899.
44 Neb. 463.

§ 32. Presumption of fraud and burden of proof.

[a] (Wis.; 1891.)

In a proceeding by beneficiaries under a will to set aside a conveyance of their interests to the administrator, where it appears that he made misrepresentations as to the value and condition of the property, and that plaintiffs lived at great distances from the property, the burden is on defendant to show that, at the time of the transfer, plaintiffs knew all the facts relating to its value, and their rights therein.—*Creamer v. Ingalls*, 61 N. W. 82, 89 Wis. 112.

[b] (Wis.; 1895.)

In an action against a vendee to set aside a sale on the ground of fraud and undue influence, where no fiduciary relations existed between the parties, the burden of proof is on plaintiff.—*Cooper v. Reilly* (Wis.) 63 N. W. 885.
90 Wis. 427.

§ 33. Undue influence.

[a] (Iowa; 1896.)

In an action to set aside a deed on the ground of undue influence, it appeared that the grantor had had trouble with his daughter's husband, and had expressed the intention to deed the property to his stepdaughter, binding her to support him and his wife as long as they lived. It also appeared that the grantee was not present at the time the deed was made. *Held*, that the fact that the grantor was superstitious, and harbored delusions regarding witchcraft, was not, in view of the circumstances, evidence of undue influence.—*Schneitter v. Carman* (Iowa) 67 N. W. 249.

[b] (Iowa; 1897.)

In a suit to cancel a deed for undue influence, the fact that a part of the premises was allowed to be sold for taxes in order to bar certain mineral claims, and the tax purchaser conveyed to the defendant, gives defendant no equity against plaintiffs, except for repayment of the consideration paid the tax purchaser.—*King v. Carmody* (Iowa) 70 N. W. 734.

§ 34. Guardian and ward.**(Iowa; 1896.)**

The purchase of land by an uncle from his niece, living in his family, who had barely attained her majority, and whose guardian he had been, for an inadequate price, will be set aside as fraudulent, although the uncle advised his niece against selling, the relations between the parties being such as to require him, if he purchased, to pay the fair value of the land.—*Earhart v. Holmes* (Iowa) 66 N. W. 898.

§ 35. Parent and child.**[a] (Iowa; 1895.)**

Parents of sound mind, in the absence of undue influence, may deed their property to some of their children to the exclusion of others, though there was no money consideration for the conveyance, and the grantors reserved the right of possession during their lives.—*Hester v. Sample* (Iowa) 63 N. W. 463.

[b] (Iowa; 1896.)

In an action for cancellation of a deed from a mother to her son, made 11 days before her death, on the ground of undue influence, defendant claimed that it was given in pursuance of an agreement to do so if he made a home for her, took care of her, and paid certain sums of money to each of the plaintiffs and one of the defendants. Evidence for plaintiffs that defendant, by threats of taking his own life (which he denied), and harsh treatment, induced her to make the deed, was their own testimony, and only sufficient to place on defendant the burden of proving that the deed was valid. Disinterested witnesses testified for defendant that his mother offered to give him the farm if he would live with and take care of her. The evidence showed that, to accept her offer, he got a release from a contract of hiring, made a home for her, and treated her well, and supplied her needs; that she kept house and did the work when able, and that, when unable, he hired help; that they used dairy products and poultry to support the family, and that he took the farm products; that he paid two of the plaintiffs the amount specified, and offered to pay the others. *Held*, that the deed was valid.—*Davis v. Miller* (Iowa) 67 N. W. 387.

[c] (Iowa; 1896.)

A deed made by a father and mother to their daughter, of property of the value of \$6,000 to \$7,000 on a consideration approximating \$3,000, and a further agreement to support the grantors, both over 74 years old, during their lives, will not be set aside at the suit of another heir of the grantors, in the absence of other evidence of fraud or undue influence, or of the incapacity of the grantors.—*Hemstreet v. Wheeler* (Iowa) 69 N. W. 518.

[d] (Iowa; 1897.)

Inference of undue influence from the fact of an aged parent conveying all his property to two children, with whom he lived, to exclusion of a third child, is overcome by evidence that he stated to a lawyer what he wanted, saying that he did not want to make a will, and did not need to make any provision for future support, as he could trust his children; that, after executing the deed, he gave it to his daughter, and requested her to record it; that thereafter, to an assessor and others, he explained the matter, and said that he wanted the grantees, who had been very good to him, to have the property for taking care of him; and that he objected to the marriage contracted by the

child not provided for.—*Chambers v. Brady* (Iowa) 69 N. W. 1015.

[e] (Iowa; 1897.)

A conveyance of land by an aged woman to her son, in consideration that he would pay her debts and provide a home for her during her life, will not be set aside, in the absence of fraud or undue influence, though it proved a bad bargain for her, and was not observed in good faith by the son.—*Wheatley v. Wheatley* (Iowa) 70 N. W. 689.

[f] (Iowa; 1897.)

A decree setting aside deeds because of fraud and undue influence is warranted where it appears: That the grantors were husband and wife. That the husband had loaned \$7,000 to D., a son-in-law, with whom he was associated in business, but to whom he had left its entire control. That the grantee, a married daughter, who had received no assistance from her parents, claimed to be alarmed lest they should come to want; that D. would never return the money he had received; that he was in poor health, was going away, and on his return would want more money. That she advised her parents to convey the land to her without consideration, so that they could not loan to D., and that she would reconvey it whenever they wished. That at her suggestion her mother went with her to investigate D.'s business, and that afterwards the grantee claimed that the stock was run down and little business done, and wept because, as she said, D. would deceive and ruin them. And that, while the grantee contended that the grantors voluntarily conveyed the land to her so that it could not be subjected to the debts of D.'s firm, there was no indebtedness of the firm prior to the execution of the deeds, and the husband grantor had other real property, and the wife owned over three-fourths of the land conveyed.—*King v. Carmody* (Iowa) 70 N. W. 734.

[g] (Mich.; 1895.)

Arguments addressed by a daughter to her mother, or appeals to her conviction of right doing, do not constitute undue influence so as to invalidate a deed from the mother to her daughter.—*Hammond v. Welton* (Mich.) 64 N. W. 25.

6. FAILURE OR INADEQUACY OF CONSIDERATION.**§ 36. Failure to perform conditions of contract.****[a] (Iowa; 1894.)**

That one of the parties to a contract to exchange certain parcels of land, after securing a removal of the incumbrances thereon, borrowed the amount necessary to do this, as to his parcel, from himself, as guardian, without first obtaining the court's consent so to do, is no ground upon which the other can base an action to cancel the contract for failure to perform.—*Kraner v. Chambers* (Iowa) 61 N. W. 373.

92 Iowa, 681.

[b] (Iowa; 1894.)

K. and C. entered into a written contract to exchange certain parcels of land, each to be freed from incumbrances before transfer. K. performed his part, and deposited a deed to his parcel with a third person, to be delivered upon C.'s doing the same. C.'s wife fell ill, and required his whole attention, and he then became ill himself, dying before he had done anything under the contract,—two months after it was made. A month later, K. notified C.'s wife that, unless she freed C.'s parcel from incumbrances "at once," he would rescind the contract; and, receiving no answer, he filed a bill in equity for such rescission. At several times within the following four months, K. declared to C.'s wife his willingness to settle that action and carry out the original agreement,

and at length the taking of depositions in the cause was stopped, C's wife promising to free her parcel and fulfill the contract. Subsequent to her having done this,—within a month thereafter,—K. refused to proceed further, and continued his action for a cancellation. *Held*, that equity would not interfere to cancel the contract, there having been no unreasonable delay in its performance, thus far, which had not been waived.—*Kraner v. Chambers* (Iowa) 61 N. W. 373.
92 Iowa, 681.

§ 37. Inadequacy of consideration.

[a] (Mich.; 1895.)
In an action to set aside a sale for fraud, it appeared that, during the litigation over decedent's estate, defendants purchased complainant's interest in the residue of such estate after the payment of legacies, for \$2,000; that complainant had heard the will read, knew the amount of the legacies, and had opportunity to know the value of the estate; and that he had offered to sell his share for \$1,500, to save the expense of litigation. *Held*, that such sale was valid, and it was immaterial that defendants were heavy gainers by the transaction.—*Dakin v. Rumsey* (Mich.) 62 N. W. 990.
104 Mich. 636.

[b] (Wis.; 1895.)
Where no fiduciary relations existed between the parties to a sale, and there was no pecuniary distress, or any lack of mental capacity on the part of the vendor, who had an equal opportunity with the vendee to know the value of the property, mere inadequacy of consideration is not ground for rescission.—*Cooper v. Reilly* (Wis.) 63 N. W. 885.
90 Wis. 427.

7. RESTORING CONSIDERATION AND PLACING PARTIES IN STATU QUO.

§ 38. Restoring consideration and doing equity.

[a] (Neb.; 1896.)
A mortgage will not be canceled, upon the application of the mortgagor, no creditor being interested, without a tender or requirement that the mortgagee be reimbursed for such expenditures as he has made, and indemnified as to such liabilities as, in good faith, he has incurred, on the faith of such mortgage.—*Miller v. Gunderson* (Neb.) 67 N. W. 769.
48 Neb. 715.

[b] (S. D.; 1896.)
An action will not lie to rescind for fraud a contract under which part of the consideration has been received, unless the plaintiff has restored or offers to restore the consideration he has received, as required by Comp. Laws, § 3591.—*Lovell v. McCaughey* (S. D.) 66 N. W. 1085.

[c] (Wis.; 1896.)
A mortgagor of real estate is not entitled to have the mortgage set aside, though not witnessed nor acknowledged, nor to have the foreclosure thereof vacated, though irregular or defective, except upon paying or offering to pay the indebtedness secured thereby.—*Welsh v. Blackburn* (Wis.) 66 N. W. 528.
92 Wis. 562.

§ 39. Necessity of tender.

(Iowa; 1895.)
In an action to cancel a deed which was delivered in escrow, and fraudulently abstracted from the depository by the grantee, the grantor is not bound to tender back land conveyed to him by the grantee in exchange, which was to be forfeited on the grantee's failure to perform the contract on which his deed was to be delivered to him by the depository.—*Jackson v. Lynn* (Iowa) 62 N. W. 704.

§ 40. Placing parties in statu quo.

[a] (Minn.; 1895.)
Where a party to a contract has partly performed it, unless he can be placed in statu quo the other party cannot rescind for default in further performance, but is limited to an action at law for the breach of the contract.—*Hunter v. Holmes* (Minn.) 62 N. W. 1131.
60 Minn. 496.

[b] (S. D.; 1896.)
Where the right to rescind is based upon the wrongful act of one of the parties to a contract, by reason of which the consideration has failed in whole or in part, inability to restore such party to his former condition, when occasioned solely by such wrongful act, is not alone sufficient to defeat an action to rescind such contract and recover the consideration paid thereunder.—*Hilton v. Advance Thresher Co.* (S. D.) 66 N. W. 816.

8. PLEADING AND PRACTICE.

§ 41. Pleading.

(Wis.; 1896.)
A complaint alleging that two of the defendants held school-land certificates belonging to plaintiff, as security, and, fraudulently refusing to accept payment of the debt, procured patents to be issued to themselves, and then sold the land to two other defendants, after having granted a right to cut timber, under which valuable timber had been cut, and asking that the patent title be vested in plaintiff, that defendants be enjoined from cutting and carrying away timber, and for damages for trespass already committed, states a cause of action in equity.—*Swihart v. Harless* (Wis.) 67 N. W. 413.
93 Wis. 211.

§ 42. Parties.

[a] (Iowa; 1895.)
Plaintiff conveyed land to her son, for which he gave her a contract for support during life. Afterwards she commenced a suit to set aside the deed. A settlement of this suit was made, in the absence of plaintiff, by which defendant received from the son a deed of the land, defendant paying a sum of money and agreeing to support plaintiff. *Held*, that in an action by plaintiff against defendant to set aside the settlement on the ground of fraud, wherein plaintiff offered to repay defendant the consideration paid by him, the son was not a proper party.—*Kinney v. Kinney* (Iowa) 63 N. W. 452.

[b] (Wis.; 1896.)
In an action against a husband for cancellation of paper title procured by fraud, the wife, though a proper, is not a necessary, party defendant.—*Swihart v. Harless* (Wis.) 67 N. W. 413.
93 Wis. 211.

§ 43. Decree.

(Iowa; 1896.)
Where, in an action to set aside a conveyance as fraudulent, it appeared that there was a mistake in the description of the land, it was proper, on cross petition, to correct the description in the decree declaring the conveyance valid.—*Wheeler & Wilson Manuf'g Co. v. Bjel-land* (Iowa) 66 N. W. 885.

IV. ACCOUNTING.

By agent, see "Principal and Agent," § 21.

§ 44. Jurisdiction.

[a] (Mich.; 1895.)
Under a contract by which several persons agreed that if D. would build an hotel they would subscribe towards the expense, and that D. might have the use of the hotel as long as

he should pay each subscriber 7 per cent. per annum on the amount of the subscription. D., on discontinuing the use of the hotel, may maintain a bill to determine the respective rights of the parties therein.—*Murray v. Near* (Mich.) 63 N. W. 980.

[b] (Neb.; 1895.)

The fact that a defaulting county treasurer failed to keep his accounts so that it could be ascertained under which of his separate official bonds the defalcation occurred does not entitle the county to an accounting in equity against the sureties on the several bonds, as such sureties are entitled to a trial by jury.—*Kuhl v. Pierce County* (Neb.) 62 N. W. 1066.

44 Neb. 584.

§ 45. Complaint.

(Wis.; 1896.)

A complaint by an administrator de bonis non alleged that his intestate bequeathed his personality to his widow for life, remainder to their son, who, though he was named and qualified as executor, never did anything about the administration, but lived with his mother, and that together they "controlled and managed" the property; that on the death of the son his widow and mother took possession and assumed the control of the estate of plaintiff's intestate; that his mother subsequently remarried, and that she and her husband gave part of the personality to the son's wife, and kept the remainder, the respective amounts being unknown to plaintiff; that on the mother's death her husband retained possession of the remainder, the amount or form of which plaintiff did not know. *Held*, that the complaint stated a cause of action against the surviving husband for an accounting.—*Meyer v. Garthwaite* (Wis.) 66 N. W. 704.

92 Wis. 571.

§ 46. Cross bill.

[a] (Mich.; 1897.)

On a bill for accounting between partners, one of the defendants might properly file a cross bill, alleging that, by a contract with her co-defendant, she was entitled to an interest in the partnership; that, by the contract between complainant and said co-defendant, her rights were recognized; but that complainant and her co-defendant had sold the partnership property, which stood in their names, without protecting her, as required by the contracts; and praying an accounting.—*Feige v. Babcock* (Mich.) 70 N. W. 7; *Babcock v. Feige*, Id.

[b] (Mich.; 1897.)

A bill for an accounting alleged a partnership between plaintiff and defendant. Defendant, after denying the partnership by answer, filed a cross bill admitting that the parties had dealings, and incorporating a detailed statement of his dealings with complainant and with complainant's wife in connection therewith, which he alleged were the same transactions referred to in the bill, and constituted them his trustees as to property therein mentioned. He prayed for an accounting, and the wife was brought in as a party defendant. *Held*, that the cross bill was not subject to demurrer by the wife on the ground that it was not germane to the original bill.—*Griffin v. Griffin* (Mich.) 70 N. W. 129.

§ 47. Defense.

(Iowa; 1895.)

It is no defense to an action for an accounting of profits on the sale of land that some of the notes taken have not matured, where it appears that all of the notes have been paid or sold.—*Purslow v. Jackson* (Iowa) 62 N. W. 12.

93 Iowa, 694.

§ 48. Decree.

[a] (Mich.; 1896.)

Where a complainant has properly brought an action in equity for an accounting

in regard to partnership property of defendants, and on such accounting it appears that there is no property to which he has a claim, but that he is entitled to a personal judgment against defendants as partners, he may properly be given such judgment by the chancery court.—*McLean v. McLean* (Mich.) 67 N. W. 118.

[b] (Mich.; 1897.)

When a bill for accounting had been pending six years, and ample opportunity given to introduce evidence, it was proper in the decree for the account to prohibit the introduction of further proof before the commissioner.—*Feige v. Babcock* (Mich.) 70 N. W. 7; *Babcock v. Feige*, Id.

V. MARSHALING ASSETS.

See main head "Marshaling Assets and Securities."

VI. LACHES.

In bringing creditors' bill, see "Creditors' Bill," § 3.

In moving for new trial, see "New Trial," § 7.

In proceeding to sell decedent's lands for debts, see "Executors and Administrators," §§ 41, 42.

In seeking specific performance, see "Specific Performance," § 9.

— to set aside decree of divorce, see "Divorce," § 18.

§ 49. What constitutes.

[a] (Iowa; 1896.)

Plaintiff came into being as a separate organization in 1884. Defendants were at that time doing business under the name originally conferred on them by the supreme lodge, and continued, with plaintiff's knowledge and acquiescence, to use the name "G. L. A. O. U. W. of Iowa," till the beginning of plaintiff's suit in 1893. *Held*, that plaintiff's right of action to restrain defendants from using the name, or from doing business under it, accrued in 1884, and was barred after five years by laches and acquiescence.—*Grand Lodge A. O. U. W. of Iowa v. Graham* (Iowa) 65 N. W. 837.

[b] (Iowa; 1896.)

The fact that the grantor, after the deed was recorded, took no steps to cancel it for nearly four years, and during that time at several times stated he had no property, did not estop him to maintain an action to cancel the deed as never having been delivered.—*O'Connor v. O'Connor* (Iowa) 69 N. W. 676.

[c] (Mich.; 1896.)

The statute having provided for a review of proceedings for laying out a drain by certiorari, and the common-law remedy by certiorari being open to objectors where the proceedings are without jurisdiction, a property owner having knowledge of the proceedings cannot maintain an action in equity to set them aside after more than half the tax for the improvement has been paid, and a large proportion of the work done.—*Moore v. McIntyre* (Mich.) 68 N. W. 130.

[d] (Minn.; 1894.)

Where an insolvent bank increases its capital stock, one purchasing the stock, and holding it five months before examining into the condition of the bank, is guilty of laches, and not entitled to have his stock canceled.—*Dunn v. State Bank* (Minn.) 61 N. W. 27.

59 Minn. 221.

[e] (Minn.; 1894.)

Where a husband sent his wife to a foreign country for the fraudulent purpose of procuring a divorce from her in her absence, a delay of one year and seven months from the commencement of that suit before commencing a suit to vacate the decree therein is not, as a mat-

ter of law, laches. *Colby v. Colby* (Minn.) 61 N. W. 460.

59 Minn. 432.

[f] (Neb.; 1895.)

More lapse of time, unaffected by other circumstances, will not bar the right to rescind a voidable transaction.—*Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.) 62 N. W. 899.

41 Neb. 463.

[g] (Neb.; 1896.)

Where an agent sells his own property to his principal under general instructions requiring him to do the best he can for the principal, and evidencing a special trust reposed in the agent, no lapse of time, short of the period of limitation fixed by statute, will bar the principal of his right of action to hold the agent to account for the difference between the real value of the property and the price at which it was sold.—*Oliver v. Lansing* (Neb.) 67 N. W. 195.

48 Neb. 338.

§ 50. Knowledge or ignorance of facts.

[a] (Iowa; 1896.)

Where an interest in land was inherited by residents of another state, who are not shown to have known of the land, or its location, and no demand for taxes appears to have been made on them by their co-tenants, they will not be barred of the right to maintain an action for its recovery, against their co-tenants, by the fact that they paid no taxes thereon for 18 years.—*Phillips v. Wilmarth* (Iowa) 66 N. W. 1053.

[b] (Iowa; 1896.)

In an action to quiet title to land which had belonged to plaintiff's husband, it appeared that upon his death papers describing the land had been turned over to his administrator; that afterwards plaintiff, and others for her, had at various times from 1862 to 1893 written to the administrator and others for information regarding the location of the land, but could learn nothing; that they had applied to the general land office and to the state land office without success, and finally had obtained the description by writing to county officials in that portion of the state where the land was supposed to lie. *Held*, that there had not been laches on the part of plaintiff estopping her from maintaining her action.—*Dice v. Brown* (Iowa) 67 N. W. 253.

[c] (Iowa; 1896.)

An adult heir was aware that his intestate owned land in the state, part of which was sold by the administrator, to pay debts, to a purchaser in good faith, and for an adequate consideration, believing that the administrator had authority to sell. The heir acquiesced in the sale for 26 years, during which time the purchaser, though not in actual possession, paid the taxes, and, at great expense, defended his title against the claim of a railroad company under a congressional grant. The land during such time increased in value from \$710 to \$32,000. *Held*, that the heir was precluded by laches from attacking the validity of the administrator's sale.—*Horr v. French* (Iowa) 68 N. W. 581.

[d] (Iowa; 1897.)

A suit to rescind a deed for mistake in the subject-matter is not barred by laches, where the transaction took place in 1887, and plaintiff did not discover that he had received the wrong land until 1890, and, after fruitless negotiations with defendant for a settlement, brought action in April, 1891, for fraud, and did not discover the mistake until defendant filed his answer, in October, 1891, and amended the complaint in the following November so as to seek a rescission for the mistake.—*Clapp v. Greenlee* (Iowa) 69 N. W. 1049.

[e] (Mich.; 1896.)

A bill to set aside the probate of a will will be denied, on the ground of laches, where it appears that complainant, who was a devisee, knew of the execution of the will, and had re-

quested a sale of the land devised to her thereunder, and had acquiesced in the disposition of the property under the will for 20 years.—*Corby v. Trombley* (Mich.) 68 N. W. 129.

[f] (Mich.; 1896.)

Evidence that a devisee under a will resided near the other devisees, and frequently visited them; that the disposition made by testator was frequently talked over by all the devisees; and that such devisee had applied for a sale of land as devised to her under the will,—sufficiently shows that she had notice that a will had been made, so as not to excuse laches in seeking to have the probate set aside.—*Corby v. Trombley* (Mich.) 68 N. W. 129.

[g] (Wis.; 1896.)

Real estate of a decedent was sold by his executors and bought in at a nominal price, in reality for the benefit of the widow, who was an executrix, and who furnished the consideration. The property was sold and conveyed by the nominal purchaser to third persons having no knowledge of the facts, and from the transaction the widow realized several thousand dollars, from which she supported and educated her children, who were also heirs of the decedent. The estate was insolvent, and had the property brought its full value, the proceeds would have been insufficient to pay the indebtedness. *Held*, that an action by the children against the purchaser to set aside the sale, begun 20 years thereafter, and some years after the youngest heir reached majority, could not be maintained, the property having increased largely in value, and there appearing no reason why the plaintiffs did not know, or could not have known, all the facts many years before.—*Melms v. Pabst Brewing Co.* (Wis.) 66 N. W. 518.

93 Wis. 153.

[h] (Wis.; 1897.)

In 1883, defendant, being in possession of the common premises, which were mortgaged to secure his individual debt, and acknowledging the title of plaintiff, his co-tenant, who was an ignorant woman, living in another state, procured a third person to bid in the property at foreclosure sale, and then took a deed to himself, plaintiff having no notice of the foreclosure proceedings, or that defendant thereafter claimed to be exclusive owner, till 1893, shortly before she sued to cancel the sale. *Held*, that she was not chargeable with laches.—*Saladin v. Kraayvanger* (Wis.) 70 N. W. 1113.

VII. PLEADING.

In suit for accounting, see ante, §§ 45, 46.

— to rescind contract, see ante, § 41.

Serving notice of cross bill, see post, § 57.

Cross bill in action to enforce lien, see "Mechanics' Liens," § 55.

§ 51. Demurrer.

(Mich.; 1897.)

Defendants in a suit to foreclose a contract for the sale of land cannot disclaim in a demurrer to the bill.—*Proctor v. Plumer* (Mich.) 70 N. W. 1028.

§ 52. Multifariousness.

[a] (Mich.; 1895.)

The objection that a bill is multifarious should be raised by demurrer, and not at the hearing on bill and answer.—*Miner v. Wilson* (Mich.) 64 N. W. 874.

[b] (Mich.; 1896.)

The fact that a bill asks for different kinds of specific relief in relation to the same subject-matter against the same parties and in favor of the same persons does not make it multifarious.—*Densmore v. Savage* (Mich.) 67 N. W. 1103.

[c] (Mich.; 1897.)

A bill to enforce a contract to buy land, and to foreclose a vendor's lien, showed that the

widow and children of the deceased vendee, and also a railroad company, respectively occupied distinct portions of the land; that the company's occupancy commenced after the sale and delivery of possession to the vendee; and that complainant did not know whether the vendee had acted for himself, or as agent for the company; and set out all the facts relating to such question and the sale, and asked to have determined the respective relations of defendants to the contract. *Held*, that the bill was not multifarious.—*Proctor v. Plumer* (Mich.) 70 N. W. 1028.

[a] (Wis.: 1896.)

A complaint asking cancellation of paper title procured by fraud, and for damages for trespass by defendants acting on the strength of the fraudulent title, is not multifarious.—*Swihart v. Harless* (Wis.) 67 N. W. 413. 93 Wis. 211.

See, also, "Creditors' Bill," § 6.

§ 53. Waiver of objections.

[a] (Mich.: 1897.)

On a bill against an insolvent bank, with which complainant had deposited, as collateral for a debt, certain bonds, which defendant's cashier had appropriated, and wrongfully pledged to the bank as his own, to compel defendant to restore the same, subject to its lien thereon, defendant, by going to trial on its claim of title, waived the objection that complainant's remedy was at law, or that complainant should have filed a bill to redeem, averring willingness to pay its debt to defendant.—*Detroit Motor Co. v. Third Nat. Bank* (Mich.) 69 N. W. 726.

[b] (Mich.: 1897.)

Where the only objections stated in a demurrer to the bill were want of equity and multifariousness, an objection that the bill was not properly framed to obtain the relief desired cannot be considered on appeal.—*Proctor v. Plumer* (Mich.) 70 N. W. 1028.

VIII. PARTIES.

In suit to rescind contract, see ante, § 42.
To creditors' bill, see "Creditors' Bill," § 4.
To foreclosure proceedings, see "Mortgages," §§ 56-58.

§ 54. Necessary parties.

(Minn.: 1894.)

In an action against an insolvent bank and its receiver by a purchaser of stock, said to have been fraudulently issued, to have the same canceled, the creditors of the bank are necessary parties.—*Dunn v. State Bank* (Minn.) 61 N. W. 27.

59 Minn. 221.

§ 55. Proper parties.

(Mich.: 1897.)

A bill to enforce a contract to buy land, and to foreclose a vendor's lien, showed that the widow and children of the deceased vendee, and also a railroad company, respectively occupied distinct portions of the land; that the company's occupancy commenced after the sale and delivery of possession to the vendee; and that complainant did not know whether the vendee had acted for himself, or as agent for the company; and set out all the facts relating to such question and the sale, and asked to have determined the respective relations of defendants to the contract. *Held*, that the company was a proper party defendant.—*Proctor v. Plumer* (Mich.) 70 N. W. 1028.

§ 56. Defect of parties.

(Mich.: 1895.)

A bill to subject land to the payment of a legacy, averring that defendant had assumed the payment of certain other legacies, is not subject to demurrer for failure to make the

other legatees parties.—*Chase v. Warner* (Mich.) 64 N. W. 730.

IX. PRACTICE.

Decree for alimony, see "Divorce," §§ 29-31.

— for foreclosure, see "Mortgages," §§ 62-66.

— for injunction, see "Injunction," § 24.

— for specific performance, see "Specific Performance," §§ 12, 13.

— in suit to quiet title, see "Quieting Title—Removal of Cloud."

Dismissal of suit for specific performance, see "Specific Performance," § 13.

Transfer of cause from equity to law docket, see "Practice in Civil Cases," § 19.

§ 57. Service of notice of cross bill.

(Minn.: 1896.)

The provisions of the mechanic's lien law for filing pleadings instead of serving them apply only to issues tendered by the complaint, or expressly authorized by the statute, so that a defendant mortgagee, in an action to enforce a mechanic's lien, cannot have a decree against the defendant mortgagor upon a cross bill demanding foreclosure of the mortgage, which covers other land besides that described in the complaint, without proper notice to the mortgagor.—*Jewett v. Iowa Land Co.* (Minn.) 67 N. W. 639.

64 Minn. 531.

§ 58. Joining issues on pleas.

(Mich.: 1896.)

Chancery rule 25 provides that, when defendant pleads to a bill, the complainant shall have 20 days to file a replication to the plea, or amend his bill; that, if he does not take issue on the plea or amend the bill within that time, either party may notice the plea for argument; and that if, on argument, the plea is allowed, the complainant may, within 10 days, take issue on the plea, on payment of costs. *Held*, that such rule contemplates that the truth of the plea shall be determined after issue joined.—*Detroit, L. & N. R. Co. v. McCammon* (Mich.) 66 N. W. 471.

§ 59. Submission of issues to jury.

[a] (Neb.: 1897.)

Under the Code, the court may impanel a jury in an equity case, in its discretion.—*Omaha Fire Ins. Co. v. Thompson* (Neb.) 70 N. W. 30.

[b] (S. D.: 1895.)

Answers to special interrogatories submitted to a jury by a court of equity, which are in direct conflict with the undisputed evidence, should be disregarded.—*Upton v. Hugos* (S. D.) 64 N. W. 523.

Effect of verdict in will contest, see "Wills," § 28.

Right to jury trial in equitable actions, and on equitable issues, see "Jury," § 25.

§ 60. Discontinuance.

(Mich.: 1896.)

Where a judgment had been rendered against an insurance company in a suit by an assignee of the policy for the purpose of collection, and the insured thereafter sued such assignee, charging conspiracy to defraud complainant out of part of the judgment, and made the company a nominal party defendant, a decree entered in the latter suit by consent of complainant and the assignee, which completely settled their rights, operated as a discontinuance of the suit as to the company, so that it could not thereafter file a cross bill therein.—*Cartwright v. Johnston* (Mich.) 68 N. W. 144.

§ 61. Decree.

[a] (Iowa: 1895.)

In an action to set aside a deed, where defendant pleads no counterclaim, and prays

only that the case be dismissed, it is error to give him a judgment for money expended on the premises, where defendant merely pleaded such expenditure in connection with other facts which he alleged estopped plaintiff to deny the validity of the deed, and gave evidence thereof only in connection with such claim of estoppel.—*Walker v. Walker* (Iowa) 61 N. W. 930. 93 Iowa, 643.

[b] (Iowa; 1895.)

A personal judgment cannot be allowed under the general prayer for "such other and further relief as equity may require."—*Rees v. Shepherdson* (Iowa) 64 N. W. 286.

[c] (Mich.; 1897.)

Laws 1893, No. 206, § 67, which provides that in proceedings in chancery the county clerk shall make a certified copy of the decree and annex it to the tax record, and deliver such record to the county treasurer, in whose office it shall remain, "except as needed in the office of the county clerk," is not unconstitutional, as relieving the court of the necessity of entering a complete decree, to be retained in its own custody, since the court may at any time repossess itself of the tax record.—*Mersereau v. Miller* (Mich.) 70 N. W. 341.

[d] (Neb.; 1895.)

A decree based on the cross bill of a single defendant, disclosing his interest in the subject-matter of the suit, filed after answer day, his codefendants having made no appearance, is merely irregular, and not void for want of jurisdiction.—*Patten v. Lane* (Neb.) 63 N. W. 938.

45 Neb. 333.

[e] (Neb.; 1897.)

A decree in equity need not comply with the verdict of the jury, the latter being only advisory.—*Omaha Fire Ins. Co. v. Thompson* (Neb.) 70 N. W. 30.

In suit for accounting, see ante, § 48.

— to rescind contract, see ante, § 43.

§ 62. Rehearing.

(Mich.; 1895.)

After the affirmance of an order by the supreme court, a petition to permit an application to the trial court for a rehearing will be denied, when the evidence sought to be introduced was within the knowledge of petitioner, and should have been suggested by the testimony of the adverse party.—In re *Johnson* (Mich.) 62 N. W. 294; *Sherwood v. Central Michigan Sav. Bank, Id.*

104 Mich. 65.

X. BILL OF REVIEW.

§ 63. When lies.

(Mich.; 1896.)

Where, after final judgment and the denial on appeal of motions for rehearing and for leave to introduce further testimony, the defeated party presents new affidavits, containing material evidence, discovered since the cause was heard in the court below, and shows that he was not at fault in not producing the same on the former hearing, leave will be granted to file a bill of review on payment of costs in the supreme court.—*Mosher v. Mosher* (Mich.) 66 N. W. 486.

ERROR, WRIT OF.

See, also, "Appeal"; "Certiorari"; "Exceptions, Bill of"; "New Trial."

Nature of proceeding, appeal or error, see "Appeal," §§ 5, 6.

Remedy by, see "Certiorari," § 4; "Mandamus," § 8.

Review of contempt proceedings, see "Contempt," §§ 17, 18.

Review of decision of secretary of state on objections to certificate of nomination, see "Elections and Voters," § 9.

§ 1. Jurisdiction.

[a] (Mich.; 1895.)

A writ of error will not lie to review an order of the circuit court affirming one of the probate court requiring an executor to furnish a further bond and to render an account.—In re *Sauborn* (Mich.) 65 N. W. 209.

[b] (Mich.; 1895.)

A writ of error will not lie to review an order overruling or sustaining a demurrer and granting time in which to plead.—*Perry v. Church* (Mich.) 65 N. W. 273.

[c] (Neb.; 1895.)

An order of the district court setting aside a verdict and granting a new trial during the term at which the verdict was returned and before judgment, is not a final order, and hence not reviewable in error.—*Johnson v. Parrotte* 64 N. W. 363, 46 Neb. 51.

[d] (Neb.; 1896.)

A petition in error will be dismissed where it is prosecuted by one who has no interest in the controversy, and against whom no judgment has been entered.—*Burlington & M. R. R. Co. v. Martin* (Neb.) 66 N. W. 15.

47 Neb. 56.

[e] (Neb.; 1896.)

An order of a district court, made in an error proceeding, setting aside the judgment of a county court, is a final order, which may be reviewed on error by the supreme court before the final disposition of the original case by the district court.—*Dane County Bank v. Garrett* (Neb.) 67 N. W. 884.

48 Neb. 916.

[f] (Wis.; 1897.)

Laws 1895, c. 215, providing that no appeal can be taken to the supreme court when the amount involved, excluding costs, is less than \$100, does not apply to writs of error.—*Bumbalek v. Peehl* (Wis.) 70 N. W. 71.

§ 2. Time of making application or issuing writ.

[a] (Neb.; 1895.)

The commencement of error proceedings, within Code Civ. Proc. § 592, limiting the time after judgment within which such proceedings should be commenced, is the filing in the office of the clerk of the supreme court of a petition of error.—*Hansen v. Kinney* (Neb.) 63 N. W. 926.

[b] (Neb.; 1896.)

Proceedings in error may be commenced in the supreme court at any time within one year from the rendition of the judgment or decree or final order sought to be reviewed.—*Scarborough v. Myrick* (Neb.) 66 N. W. 867.

47 Neb. 794.

[c] (Neb.; 1897.)

A judgment cannot be reviewed which was rendered more than one year prior to the commencement of proceedings in error.—*Hogue v. Ogle* (Neb.) 70 N. W. 940.

§ 3. Petition for writ.

[a] (Neb.; 1895.)

The filing with a transcript of a paper containing assignments of error will not require the court to treat the proceeding as one in error, and not as an appeal, in the absence of an instrument having the essential elements of a petition in error.—*Chadron Banking Co. v. Mahoney*, 61 N. W. 594, 43 Neb. 214.

[b] (Neb.; 1897.)

No point will be considered which is not presented by the petition in error, though argued in the brief.—*Clarke v. Nebraska Sav. & Exch. Bank* (Neb.) 70 N. W. 237.

[c] (Neb.; 1897.)

A petition in error can be amended to cover a point which the record shows was presented in the trial court.—*Robinson v. Kilpatrick-Koch Dry-Goods Co. (Neb.)* 70 N. W. 378.

[d] (Neb.; 1897.)

Where the grounds of a motion for a new trial are alleged in the language of Code, § 314, and the assignments in the petition in error are based upon those grounds, the court is not without jurisdiction to review the case on error simply because the petition in error does not specifically allege that the court below erred in overruling the motion for a new trial.—*Chicago, B. & Q. R. Co. v. Cass County (Neb.)* 70 N. W. 955.

§ 4. Assignments of error.**[a] (Neb.; 1895.)**

An assignment in a petition in error that the district court erred in not granting a new trial on account of "accident or surprise" must be sustained by affidavits showing the truth of the assignment. Code Civ. Proc. § 317.—*Omaha Fire Ins. Co. v. Dierks (Neb.)* 61 N. W. 740, 43 Neb. 473.

[b] (Neb.; 1896.)

An assignment of "errors of law occurring at the trial, and duly excepted to at the time," is insufficient in a petition in error.—*Fremont, E. & M. V. R. Co. v. Root (Neb.)* 69 N. W. 397.

[c] (Neb.; 1897.)

A question discussed in the brief of counsel, but not raised by any assignment in the petition in error, will not be considered.—*Raker v. State (Neb.)* 69 N. W. 749.

§ 5. Necessity of motion for new trial.**[a] (Neb.; 1895.)**

No motion for a new trial is necessary, in a cause taken from a justice court by proceedings in error, in order to have the judgment reviewed in the supreme court.—*Dreyfus v. Moline, Milburn & Stoddard Co. (Neb.)* 61 N. W. 599, 43 Neb. 233.

[b] (Neb.; 1895.)

To obtain a review of alleged errors occurring during trial, the attention of the trial court must be called to the same in a motion for a new trial, and such alleged errors specifically assigned in the petition in error.—*Madsen v. State (Neb.)* 62 N. W. 1081, 44 Neb. 631.

[c] (Neb.; 1895.)

A motion for a new trial is as essential to a review by petition in error where the judgment or order complained of is based on findings of the court as on the verdict of a jury.—*Weber v. Kirkendall (Neb.)* 63 N. W. 35, 44 Neb. 766.

[d] (Neb.; 1896.)

A motion for a new trial is not necessary to obtain a review on error of an order refusing to permit a third person to intervene in an action, such refusal being based on a consideration of the petition alone, without issues joined or trial.—*Deere, Wells & Co. v. Eagle Manuf'g Co. (Neb.)* 68 N. W. 504.

§ 6. Necessity of raising objection on motion for new trial.**(Neb.; 1896.)**

Where no complaint was made in the motion for new trial as to a ruling in admitting or excluding evidence, either specifically or in the language of the statute (Comp. St. 1893, p. 896, § 314), an assignment in a petition in error that the court erred in admitting or excluding certain evidence will not be considered.—*Burke v. Brown (Neb.)* 68 N. W. 1026.

§ 7. Record.**[a] (Neb.; 1894.)**

A transcript containing the judgment sought to be reversed must be filed with the

petition in error, and prior to the issuing of the summons in error; that being substantially the provision of Code Civ. Proc. § 586.—*Garneau v. Omaha Printing Co.,* 61 N. W. 100, 42 Neb. 847.

[b] (Neb.; 1895.)

A transcript of the proceedings, containing the final judgment sought to be reviewed, must be filed with the petition in error.—*Jandt v. Derauleau,* 61 N. W. 632, 43 Neb. 422.

[c] (Neb.; 1895.)

To review the judgment of the district court reversing the judgment of the county court, the petition in error on which the district court acted must be incorporated into the record.—*Jandt v. Derauleau (Neb.)* 61 N. W. 632, 43 Neb. 422.

[d] (Neb.; 1896.)

Affidavits used on motion for new trial cannot be considered on error unless made part of the record by bill of exceptions.—*Rosecrans v. Asay (Neb.)* 68 N. W. 627.

[e] (Neb.; 1896.)

A petition in error will be dismissed when the transcript is not authenticated by the clerk of the trial court.—*Einspahr v. Exchange Nat. Bank (Neb.)* 68 N. W. 933.

§ 8. Decision.**(Neb.; 1896.)**

A proceeding in error by a justice of the peace for the reversal of a judgment requiring him to exercise his functions within a certain precinct will be dismissed where the justice's term of office has expired.—*Edgerton v. State (Neb.)* 69 N. W. 302.

ESCAPE

Evidence as to escape of co-defendants, see "Criminal Law," § 118.

— of attempt, see "Criminal Law," § 105.
Manslaughter in preventing, see "Homicide," § 11.

Of defendant pending appeal, dismissal of appeal, see "Criminal Law," § 236.

(Mich.; 1895.)

An information under How. Ann. St. § 9245, making it a penal offense to "convey into any jail" any instrument adapted to aid any person lawfully committed in escaping, with intent to facilitate his escape, which alleges that the instrument was conveyed "unto" the jail, is fatally defective, and cannot be amended under How. Ann. St. § 9537, permitting an indictment to be amended in all cases where the variance between the facts alleged in the indictment and those proven are not material to the merits of the case. Grant, J., dissenting.—*People v. Rathbun (Mich.)* 63 N. W. 973, 105 Mich. 699.

ESCROW.**[a] (Iowa; 1895.)**

A deed delivered in escrow that is fraudulently abstracted from the depository by the grantee without performing the conditions on which it was to be delivered to him is void even in the hands of a bona fide purchaser of the land.—*Jackson v. Lynn (Iowa)* 62 N. W. 704.

[b] (Iowa; 1895.)

The grantor in a deed delivered in escrow under a contract that it shall not be delivered to the grantee until the discharge by the latter of certain incumbrances on other lands conveyed to the grantor in exchange does not, by recording the deed to him, and occupying the lands, ratify the grantee's wrongful act in surreptitiously abstracting the deed to him from the depository, where the grantor was entitled under the

contract to take immediate possession of the lands taken in exchange.—*Jackson v. Lynn* (Iowa) 62 N. W. 704.

[c] (Mich.; 1894.)

The delivery of a contract signed and placed in escrow, without fulfillment of the conditions of the escrow, is void.—*Davis v. Kneale* (Mich.) 61 N. W. 508.
103 Mich. 323.

ESTATES.

See, also, "Joint Tenancy"; "Tenancy in Common."

Adverse possession against remainder-man, see "Adverse Possession," § 22.

Created by deed, see "Deed," § 18.

— by mortgage, see "Mortgages," § 16.

— by will, see "Wills," §§ 45-47.

Separate estate of married woman, see "Husband and Wife," §§ 11-20.

Waste by life tenant, see "Waste."

§ 1. Relation of life tenant to remainder-man.

[a] (Mich.; 1896.)

A second life tenant, whose term is to follow that of another life tenant who accepts under the devise, cannot obtain a tax title during the incumbency of the first life tenant which can be set up against the remaindermen.—*Defreese v. Lake* (Mich.) 67 N. W. 505.

[b] (Wis.; 1896.)

Where a widow, who had only a life estate in a homestead, conveyed the same to grantees, who agreed to extinguish sheriff's certificates issued on foreclosure sale thereof, but said grantees took an assignment of said certificates, and afterwards obtained a sheriff's deed to the premises, they cannot assert the title so acquired against the remaindermen.—*Melms v. Pabst Brewing Co.* (Wis.) 66 N. W. 244.
93 Wis. 140.

§ 2. Possession and use of real property.

(Mich.; 1896.)

A bond recited that defendant, being indebted to plaintiff for certain lots, would pay a sum stated, within five years, and, further, that plaintiff "may occupy any room that is in the house on said lots, * * * during the remainder of her natural life." Plaintiff selected a room, and took possession of it. Afterwards defendant asked plaintiff to take a room in another part of the city. Plaintiff refused, and defendant leased the house and grounds for three years, without any reservation of plaintiff's room. During plaintiff's absence, afterwards, defendant told the lessee that she might use the room. On plaintiff's return the lessee refused to allow her to go to her room. *Held*, that the facts showed an eviction of plaintiff by procurement of defendant.—*Grove v. Yonell* (Mich.) 68 N. W. 132.

§ 3. Rights and liabilities of life tenants—Incumbrances and taxes.

[a] (Mich.; 1896.)

One who deeded property to another subject to a mortgage, reserving a life estate, was under obligation to pay interest on the mortgage during his life.—*Welbon v. Welbon* (Mich.) 67 N. W. 338.

[b] (Mich.; 1896.)

Plaintiff owned a present life estate, and the fee in remainder, subject to an expectant life estate in defendant, contingent on plaintiff's death. Defendant's life estate and the fee were subject to a mortgage which was purchased by the plaintiff. *Held*, that the defendant was liable to the plaintiff for a share of the interest on the mortgage debt due or to become due during the expectancy, proportionate to the relative values of the estates.—*Damm v. Damm* (Mich.) 67 N. W. 984.

[c] (Mich.; 1896.)

Upon the vesting of the life estate in defendant, she becomes liable for the whole of the interest, and the amount of the present payment of it should be computed upon the basis of the expectancy of life of both plaintiff and defendant.—*Damm v. Damm* (Mich.) 67 N. W. 984.

[d] (Neb.; 1895.)

As between a tenant for life and the reversioner, the former is required to pay taxes.—*Disher v. Dishar* (Neb.) 63 N. W. 368.
45 Neb. 100.

[e] (Wis.; 1896.)

Though the grantees of one who appeared of record to be a life tenant supposed that they acquired the fee to the premises conveyed, and paid off incumbrances on the property, pursuant to agreement with the life tenant, they cannot recover any portion of the sum so paid from the remaindermen. *Marshall, J., dissenting.*—*Melms v. Pabst Brewing Co.* (Wis.) 66 N. W. 244.
93 Wis. 140.

§ 4. — Improvements and repairs.

(Minn.; 1896.)

A. was the owner of a life estate in a city lot, and B. was the owner of the reversion. They were erecting the first and second stories of a building on the lot, and C., under a license from them, was erecting the third story. Thereupon A. and B. joined in a conveyance in fee to C. of such third story. In the conveyance B. covenanted to build and maintain forever the roof of the building, and C. covenanted to pay a perpetual rent of \$25 per annum. B. built the roof, and thereafter A. and B. joined in a conveyance in fee of the rest of the premises except the third story to certain of the defendants. In time the roof became decayed, and C. was compelled to erect a new one, and brought this action to have the whole cost of the same declared a lien on the interest of such defendants in the building and lot. A. is still living. *Held*, A. not having joined in the covenant to maintain the roof, the covenant of B. to do so does not run with the life estate of A., or incumber the same, either in law or equity, with the whole burden of maintaining the roof; that such defendants are still enjoying possession under that life estate, and not under the reversion; and, so far as plaintiff's present claim is concerned, it can only compel contribution from such defendants of their equitable share of the cost of maintaining the roof.—*Rochester Lodge No. 21, Ancient Free & Accepted Masons, v. Graham* (Minn.) 68 N. W. 79.

§ 5. Conveyance of remainder during life estate.

(Mich.; 1896.)

A remainder after a life estate is a future estate, which, under How. Ann. St. § 5551, is alienable by a conveyance executed during the lifetime of the life tenant.—*Defreese v. Lake* (Mich.) 67 N. W. 505.

§ 6. Remedies of and against life tenants.

[a] (Mich.; 1896.)

Where one having a right to occupy a room during the remainder of her natural life was evicted, the measure of damages from the date of eviction to the commencement of the action is the fair rental value of the room, and from that time forward the rental value thereof, computed on the expectation of the life of the tenant, based upon the mortality tables.—*Grove v. Yonell* (Mich.) 68 N. W. 132.

[b] (Minn.; 1896.)

The life tenant in a homestead estate neglected and refused to pay taxes or make repairs thereon for many years, and to save the estate from entire loss to the reversioners the taxes were paid by the administrator with the will annexed, having the power so to do by the express terms of the will. *Held*, that such ad-

ministrator might proceed in equity to have a receiver appointed to take charge of the premises, collect the income or rentals of the property, and apply the proceeds to pay the taxes and necessary expense of repairs, and reimburse the administrator for such taxes and expenses so paid, and also pay from such income any unpaid taxes or necessary expense for repairs necessarily made to save the property; and that, if such rental is insufficient, the receiver may, under authority and direction of the trial court, proceed to sell the life estate of the defendant, in the premises, or so much thereof as may be sufficient for such purpose.—*St. Paul Trust Co. v. Mintzer* (Minn.) 67 N. W. 657.

ESTOPPEL.

- I. BY DEED, §§ 1-3.
- II. BY RECORD, §§ 4, 5.
- III. IN PAIS, §§ 6-30.
 1. In General, § 6.
 2. By and Against Whom Estoppel Invoked, §§ 7, 8.
 3. Inconsistent Positions and Claims, §§ 9-12.
 4. By Contracts, §§ 13, 14.
 5. By Representations, Acts, and Admissions—Clothing Person With Title, §§ 15-18.
 6. Acquiescence, §§ 19-25.
 7. To Assert or Deny Title and Liens, §§ 26-30.
- IV. PLEADING AND EVIDENCE, §§ 31, 32.

I. BY DEED.

From asserting title as bona fide holder, see "Vendor and Purchaser," § 40.

§ 1. Assertion of after-acquired title.

[a] (Iowa: 1896.)
Code, § 1931 (providing that, when a deed purports to convey greater interests than the grantor at the time possessed, an after-acquired interest inures to the benefit of the grantee), does not apply where a mortgagor holding an undivided four-sevenths of a tract of land, and intending to convey only his interests, it being so understood by the grantee, by mistake conveys the whole estate, and the title to the remaining three-sevenths is afterwards acquired by him.—*Cook v. Prindle* (Iowa) 66 N. W. 781.

[b] (S. D.: 1896.)
Comp. Laws, § 3401, subd. 2, provides that, "if decedent leave no issue, the estate goes in equal shares to the surviving husband or wife and to decedent's father." *Held*, that where a father conveyed, by warranty, land in which he held only a third interest as tenant in common with his children, the interest which he acquired upon the subsequent death of a son leaving a wife and no children immediately passed to his grantee.—*Johnson v. Brauch* (S. D.) 68 N. W. 173.

[c] (Wis.: 1895.)
Title subsequently acquired by a grantor does not inure to the benefit of a grantee holding under a quitclaim deed.—*Jourdain v. Fox* (Wis.) 62 N. W. 936.
90 Wis. 99.

§ 2. Of grantee.

[a] (Minn.: 1897.)
A grantee of a mortgagor may connect himself with a paramount title, and set it up to defeat the title of the mortgagee.—*Preiner v. Meyer* (Minn.) 69 N. W. 887.

[b] (Wis.: 1895.)
A grantee is not estopped, by accepting his deed and going into possession, from setting up as a defense to an action of ejectment that his grantor's title was divested by a paramount

title, and that he is holding as tenant under the owner of such paramount title.—*Moore v. Smead* 62 N. W. 426, 89 Wis. 558.

[c] (Wis.: 1895.)

The heirs of a grantee who, having acquired title by deed, accepts from his grantor a new deed in the place of and as a substitute for the old one, are estopped to claim title to land described in the old deed not included in the substitute deed.—*Chloupek v. Perotka* (Wis.) 62 N. W. 537, 89 Wis. 551.

§ 3. Of obligor in bond.

(Minn.: 1896.)

The obligors in a bond given to procure the discharge of a garnishee, under Gen. St. 1894, § 5342, in which it was admitted that plaintiff had garnished money, property, and effects of defendant in the hands of the garnishee, are estopped, in an action on the bond, to assert the contrary.—*Greengard v. Fretz* (Minn.) 65 N. W. 949.

64 Minn. 10.

II. BY RECORD.

By judgment, res judicata, see "Judgment," §§ 39-61.

§ 4. When estoppel arises.

[a] (Iowa: 1895.)

The fact that a garnishee testified that the money attached was given him by the debtor to pay a certain claim does not estop him to deny obligation to pay the claim in a suit against him on the claim.—*Walker v. Irwin* (Iowa) 62 N. W. 785.

[b] (Mich.: 1896.)

A person who takes a real-estate mortgage on a house and lot subject to a prior mortgage, and records his instrument as a real-estate mortgage, and later files a bill to foreclose it as such, is estopped from treating his mortgage, at and after its foreclosure, as a chattel mortgage on the house, which was not attached to the lot.—*Miles v. McNaughton* (Mich.) 69 N. W. 481.

[c] (Mich.: 1897.)

Testimony of one, in a suit against him by a creditor, that he had received \$20,000 from his wife, while competent evidence against him in a suit by a daughter to compel him to account for the money as received in trust for her, does not estop him to show that he received a smaller amount.—*Hebard v. Reeves* (Mich.) 70 N. W. 418.

§ 5. Pleadings.

[a] (Neb.: 1894.)

Plaintiff is not estopped by an averment in his petition, immaterial at that stage of the pleadings, but notwithstanding such averment may, in his reply, aver a different state of facts. 59 N. W. 781, reversed.—*Holtry v. Foley*, 61 N. W. 120, 43 Neb. 133.

[b] (Neb.: 1895.)

Where a writ of garnishment is issued in an action of attachment on plaintiff's allegations that the garnishee had property in his possession belonging to defendant, plaintiff is estopped from resisting a motion to dissolve the attachment on the ground that defendant has no interest in the property levied on.—*Kilpatrick-Koch Dry-Goods Co. v. Bremers* (Neb.) 62 N. W. 1105.

44 Neb. 863.

III. IN PAIS.

Evidence, see post, § 32.

Pleading, see post, § 31.

Acquiescence in unauthorized act of agent, see "Principal and Agent," § 17.

Of sureties on appeal bond, see "Appeal," § 307.

Operation of statute of frauds through estoppel, see "Frauds, Statute of," § 28.
 Partnership by, see "Partnership," § 6.
 To allege error, see "Appeal," § 189.
 To appeal, see "Appeal," §§ 12-14.
 — from decree for alimony, see "Divorce," § 32.
 To assert invalidity of assignment, see "Assignment for Benefit of Creditors," § 11.
 — shortage in land conveyed, see "Vendor and Purchaser," § 20.
 To attack appointment of receiver, see "Receivers," § 8.
 — report of referee, see "Reference," § 6.
 To claim damages for public improvement, see "Municipal Corporations," § 168.
 — forfeiture for breach of conditions in policy, see "Insurance," §§ 64-71.
 — forfeiture of mutual benefit policy, see "Insurance," § 177.
 To contest will, see "Wills," § 32.
 To deny authority of agent, see "Insurance," § 101.
 — authority of cashier, see "Banks and Banking," § 27.
 — corporate existence, see "Corporations," § 9.
 To dispute boundary, see "Boundaries," § 8.
 To enforce tax, see "Taxation," § 19.
 To object to defect of parties, see "Parties," § 5.
 — to evidence in criminal cases, see "Criminal Law," § 76.
 — to instructions, see "Trial," § 87.
 To resist annexation of territory to city, see "Municipal Corporations," § 20.
 — assessment for public improvement, see "Municipal Corporations," § 147.
 Waiver of right to appeal by accepting benefits of judgment, see "Appeal," § 14.

1. IN GENERAL.

§ 6. Of corporation to question tax assessment.

(Iowa; 1896.)

Where a corporation authorized to make and sell loans was abandoned without having issued any stock, or owned property other than blank applications for loans, notes, and mortgages, which were assigned in blank by the corporation, and divided among the promoters, it was not estopped from claiming that the assessment upon its property for purposes of taxation was invalid.—*Farmers' Loan & Trust Co. v. City of Newton* (Iowa) 66 N. W. 784.

2. BY AND AGAINST WHOM ESTOPPEL INVOKED.

§ 7. By married woman.

(Mich.; 1896.)

The fact that a maker of a note, in declining to pay the same, made no reference to her coverture at the time of making the note, does not estop her to set up that defense as against one who knew of her coverture before he brought suit.—*Belding Manuf'g Co. v. Drury* (Mich.) 69 N. W. 77.

§ 8. Against city.

(Wis.; 1895.)

Fifteen years after dedication of a street by plat, and three years after rededication by a replat, the city council refused to open it. Thereafter the owners of the abutting land, all of which, including the street, was low and marshy, filled it up at considerable expense, and erected buildings on the street in connection with their lumber yard, and thus used it for 17 years, all this being done openly, and to the knowledge of the city officers. Held that, there being no public necessity for the street, the city was estopped to open it.—*Paine Lumber Co. v. City of Oshkosh*, 61 N. W. 1108, 89 Wis. 449.

3. INCONSISTENT POSITIONS AND CLAIMS.

§ 9. In general.

[a] (Mich.; 1896.)

A bank president, trustee of property, to prefer claims of his own bank and a note due another bank on which he was liable as indorser, on maturity of the note notified said other bank to send it through the clearing house, and that his own bank would pay it. The note was so sent and paid, and the trustee subsequently paid his own bank the amount thereof out of the trust funds. Held that, the trust funds proving insufficient to pay the preferred claims in full, the trustee's own bank was estopped from claiming that its co-claimant had received more than its share of the fund.—*Fifth Nat. Bank v. Dunham* (Mich.) 66 N. W. 870.

[b] (Mich.; 1896.)

The fact that a mortgagee is a stockholder in a mortgage company to which she was accustomed to send interest coupons for collection does not estop her to deny that the company was thereby empowered to receive payment of the principal debt for her.—*Wilson v. Campbell* (Mich.) 68 N. W. 278.

[c] (Neb.; 1895.)

A property owner, by petitioning a city to grade and pave a street, is not estopped from claiming damages for the negligent omission of the city to provide suitable outlets for carrying off the water from a ditch dammed up by such grading.—*City of Beatrice v. Leary* (Neb.) 63 N. W. 370.

45 Neb. 149.

[d] (Neb.; 1896.)

A conveyance was made which was void as against creditors, and, as a part of the same transaction, a purchase-money mortgage was executed on the same land. A creditor caused the land to be subjected to the payment of his judgment. A portion of the land was sold, completely satisfying the judgment. The former creditor afterwards became the assignee of the mortgage. Held, that he was not estopped by the creditors' bill and proceedings thereon from foreclosing the mortgage upon that portion of the land which had not been subjected to the payment of his judgment.—*Hall v. Hooper* (Neb.) 66 N. W. 33.

47 Neb. 111.

§ 10. Claiming under and against instruments.

(Mich.; 1896.)

A party cannot affirm a mortgage in part by seeking foreclosure, and disaffirm it in part by asking that liens established by prior mortgages, and recognized in the mortgage sought to be foreclosed, be set aside.—*Gow v. Collin & Parker Lumber Co.* (Mich.) 66 N. W. 676.

§ 11. Denying attachment debtor's ownership of goods attached.

(Neb.; 1895.)

Where the property is levied on as that of a defendant, plaintiff is estopped to deny defendant's interest therein.—*Standard Stamping Co. v. Hetzel* (Neb.) 62 N. W. 247.

44 Neb. 105.

§ 12. Alleging unconstitutionality of statute relied on.

(N. D.; 1896.)

A creditor of an insolvent debtor, whose claim accrued before the enactment of the insolvency law under which such debtor is seeking discharge from his debts, may prove his claim and receive his dividends without waiving his right to insist that the discharge feature of such statute is, as to his claim, a law impairing the obligation of his contract in so far as it assumes to discharge his claim without full payment.—*Elton v. O'Connor* (N. D.) 68 N. W. 84.

4. BY CONTRACTS.

§ 13. Particular agreements creating estoppel.

[a] (Iowa; 1894.)

Where a second mortgagee agrees to keep all interest on the first mortgage paid, provided the third mortgagee will forbear to foreclose for a specified time, he cannot, by purchasing unpaid interest coupons of the first mortgagee, acquire a lien on the land against the interest of the third mortgagee.—*Burke v. Diliin* (Iowa) 61 N. W. 370.
92 Iowa, 557.

[b] (Iowa; 1896.)

Where importers accept an order from jobbers for goods to be delivered at a particular time, and the importers fail to fill the order, the jobbers are not estopped to claim damages for breach of such contract by subsequently giving the importers an order for goods of like character.—*Blumenthal v. Stahle* (Iowa) 68 N. W. 447.

§ 14. Denial of capacity of contracting party.

[a] (Mich.; 1895.)

In an action to compel defendant to deed to plaintiff a one-half interest in land, it appeared that plaintiff, who was weak mentally, had a contract to purchase the land, and agreed with defendant that, if she would contribute a small part of the purchase price, the deed should be in their joint names. Defendant took plaintiff's share of the price, and had the deed made in her own name. *Held*, that defendant could not question plaintiff's capacity to make the land contract.—*McWilliams v. Doran* (Mich.) 61 N. W. 881.
103 Mich. 588.

[b] (Minn.; 1896.)

The fact that a purchase of goods by a corporation was ultra vires, and made a criminal offense by statute, did not entitle the seller to rescind after delivery of the goods.—*Erh v. Yoerg* (Minn.) 67 N. W. 355.
64 Minn. 463.

5. BY REPRESENTATIONS, ACTS, AND ADMISSIONS—CLOTHING PERSON WITH TITLE.

§ 15. Representations and admissions in general.

[a] (Iowa; 1895.)

In response to a letter from plaintiff concerning a firm's credit, defendant, a bank, wrote that the firm was doing a good business; that the members were competent men; and that the bank did not anticipate any difficulty on its part in meeting obligations. The evidence showed that at the time the letter was written the firm was largely indebted to defendant; that its account with defendant for the past year had been overdrawn; and that 20 days afterwards it became insolvent. *Held*, that such letter did not estop defendant from claiming proceeds arising from the sale of the firm's assets, and assigned to defendant in satisfaction of the debt due it.—*Sylvester v. Henrich* (Iowa) 61 N. W. 942.
93 Iowa, 489.

[b] (Mich.; 1895.)

The fact that a mortgagee of a stock of goods states to other creditors of the mortgagor, on inquiry, that the mortgagor is doing a good business, and will be able to meet his obligations, does not disentitle him to possession as against the mortgagor's receiver, where there is nothing to show that the opinions were not given in good faith.—*Chafey v. Mathews* (Mich.) 62 N. W. 141.
104 Mich. 103.

[c] (Minn.; 1896.)

B., as attorney for R. & D., obtained a judgment against C. for a large sum. The judgment and attorney's services not being paid, all of the parties met, and made a settlement, whereby R. agreed to satisfy his half interest in the judgment by accepting from C., in payment therefor, a much less sum than the face value of his interest, and C. promised to pay B. the share of his attorney's fees against R., which B. agreed to accept in lieu of R.'s indebtedness to him. R. performed his part of the terms of the settlement, and C. paid him his half of the judgment, less the discount. *Held*, that whether there were all of the essential requisites of a novation of parties was immaterial; that B., by his conduct and agreement, was estopped from maintaining an action against R. for his services.—*Berryhill v. Resser* (Minn.) 67 N. W. 542.
64 Minn. 479.

[d] (Neb.; 1896.)

The estoppel contended for would not arise, beyond forbidding B. & F. to apply to the payment of the earlier draft shipments of stock of which they could not reasonably have known at the time for accepting such draft.—*Burke v. Utah Nat. Bank* (Neb.) 66 N. W. 295.
47 Neb. 247.

[e] (Neb.; 1896.)

B. & F., live-stock commission merchants at South Omaha, wrote to the U. Bank a letter, saying, "We will pay H. & M.'s drafts, until further notice, for the cost or value of stock shipped to us here, with or without bill of lading attached." Thereafter a draft was drawn, which was accepted October 29th. On October 29th a large shipment of stock was made. November 8th another draft was drawn, not covered by stock shipped, unless the shipment of October 29th should be applied thereto. There was no evidence that the bank, in receiving the last draft, relied on the acceptance of the former as not including the shipment of October 29th. *Held*, that B. & F., in defense of an action based on their refusal to accept the last draft were not estopped from showing that the earlier draft had been covered in part by the shipment of October 29th, the day of its acceptance.—*Burke v. Utah Nat. Bank* (Neb.) 66 N. W. 295.
47 Neb. 247.

[f] (S. D.; 1896.)

Where an execution defendant tells his debtor to pay the amount due him to an officer, and he does so, such defendant is estopped from afterwards claiming the money so paid.—*Bedford v. Kissick* (S. D.) 67 N. W. 609.

§ 16. Relying and acting on statement and admission.

[a] (Mich.; 1894.)

In an action against persons as copartners for goods sold and delivered, they are not estopped to deny the partnership by the fact that one of them introduced the other as his partner to a person who subsequently told plaintiff of the partnership.—*Armstrong v. Potter* (Mich.) 61 N. W. 657.
103 Mich. 409.

[b] (Mich.; 1895.)

Defendant, after obtaining an attachment against his debtor's property, bought from him his stock of goods, the price to be credited on the debt, and then represented to plaintiff (another creditor) that he took the goods under the attachment, whereupon the latter induced the debtor to assign to him the part of the stock exempt. *Held*, that defendant was not estopped to claim the exempt stock under the sale, since defendant's representations in no way affected plaintiff's conduct.—*Meisel v. Welles* (Mich.) 65 N. W. 289.

[c] (Minn.; 1896.)

An agent with whom land was listed for sale on the agreement that he should take as commission all the price above \$2,400, bought

the land himself for \$2,400, on procuring a purchaser at \$2,500, making his first payment on the price with \$100 earnest money paid him by said purchaser. *Held*, the purchaser being otherwise entitled to rescind because of a mistake as to identity of the property, he was not estopped from rescinding on the ground that the agent on the faith of the purchase had changed his situation.—*Stong v. Lane* (Minn.) 68 N. W. 765.

[d] (Neb.; 1895.)

To create an estoppel in pais, the party in whose favor it operates must have altered his position through reliance on the words or conduct of the party estopped.—*Lingonner v. Ambler* (Neb.) 62 N. W. 486.

41 Neb. 316.

[e] (Neb.; 1897.)

Defendant insurance company alleged that, after the loss, it had settled with the insured by agreeing to pay a certain sum in 60 days, and that, relying on such settlement, it had accepted the insured's orders in favor of third persons for part of the amount, and had admitted indebtedness in garnishment proceedings resulting in a judgment against it for another part; the aggregate amount assumed being less than the amount of the settlement. It was not alleged that these obligations had been paid. *Held*, that plaintiff was not estopped to rescind the agreement for fraud.—*Omaha Fire Ins. Co. v. Thompson* (Neb.) 70 N. W. 30.

[f] (S. D.; 1895.)

Where, before assigning for the benefit of his creditors, a debtor advised one of his creditors to attach his property, he could not, after the assignment, cause the attachment to be vacated.—*Tolerton & Stetson Co. v. Casperson* (S. D.) 63 N. W. 908.

§ 17. As to value of property in replevin bond and affidavit.

(Minn.; 1895.)

Statements as to the value of the property, made in plaintiff's bond and affidavit, estop him from asserting a different value at the trial, save in exceptional cases.—*Weyerhauser v. Foster* (Minn.) 61 N. W. 1129.

60 Minn. 223.

§ 18. Negligence—Clothing person with title and authority.

[a] (Iowa; 1896.)

Where the wife allows her husband to take title to land purchased with her money, and to contract debts on the strength of the title, without openly claiming the same or notifying his creditors that she claimed an equitable interest therein, she is estopped to claim such an interest as against creditors of the husband who dealt with him on the strength of his apparent title to the land.—*Iseminger v. Criswell* (Iowa) 67 N. W. 289; *First Nat. Bank v. Same*, *Id.*; *Romans v. Same*, *Id.*

[b] (Mich.; 1895.)

Where a son bought a horse, and mortgaged a horse owned by his father to secure the price, the fact that before the son made the purchase the father told the mortgagee that the son had a horse like the mortgagee's, wanted another, and would give the mortgagee a good deal, is not sufficient to estop the father to set up title against one taking his horse under the mortgage.—*Barney v. Rutledge* (Mich.) 62 N. W. 369.

104 Mich. 289.

[c] (Mich.; 1895.)

One who allows his daughter to conduct a business in her own name, and to be held out to commercial agencies and persons with whom dealings were had as owner thereof, is estopped to assert title to the stock in trade as against one to whom she mortgaged it without notice of the father's interest.—*Rogers v. Robinson* (Mich.) 62 N. W. 402.

104 Mich. 329.

[d] (N. D.; 1896.)

Where A., who furnished the money to buy a stock of goods, bought them in the name of B., and thereafter carried on the business in B.'s name as manager, ordering and paying for goods in his name, signing his name to checks, making credit statements in his name, having his name printed on the paper on which letters were written to merchants who sold goods to the business, and in every way created the false appearance that B. was the owner of the stock and the business; and attaching creditors, who seized the property as B.'s property, had sold the goods for the unpaid portion of the purchase price of which they attached, relying upon the appearance of B.'s ownership of the stock and of the business so created by A., a portion of the goods being the identical goods so sold by them to B., A. was estopped, as against such creditors, from setting up ownership of the goods.—*Peabody v. Lloyds Bankers* (N. D.) 68 N. W. 92.

[e] (N. D.; 1896.)

The same estoppel was operative against a receiver of a creditor of A. who accepted a pledge of the goods from A. as his property before the attachments were levied, no value having been parted with by the pledgee at the time of accepting the pledge, and it appearing that he knew at that time that A. had created this false appearance of B.'s ownership of the property, so that he, the pledgee, was chargeable with knowledge of the fact that, owing to A.'s conduct, estoppels might have arisen in favor of B.'s creditors.—*Peabody v. Lloyds Bankers* (N. D.) 68 N. W. 92.

Pleading, see post, § 31.

6. ACQUIESCENCE.

§ 19. In general.

[a] (Iowa; 1894.)

A bank is not estopped from denying liability to pay a tax levied on its capital stock as the personal property of the bank by the fact that for several years it had paid taxes so levied.—*Farmers' & Traders' Nat. Bank v. Hoffmann* (Iowa) 61 N. W. 418.

93 Iowa, 119.

[b] (Iowa; 1891.)

Articles of incorporation provided that the corporate directors should make assessments for the unpaid capital stock. In answer to a letter by the president of the corporation as to the making of such an assessment, defendant, a subscriber to the capital stock, wrote: "I see no necessity for calling a meeting of the directors. When you need money, levy the assessments,"—and thereafter certain assessments were levied by the president without action of the directors. Several months later a statement of the amount due from defendant on his stock subscription was presented to him, and he made no objection thereto, but promised to pay such amount. Defendant knew that the payment of the capital stock was necessary to pay the corporation's debts, and that it had no resources except the stock subscriptions. *Held*, that a finding that defendant was estopped to object that his assessments were not made by the proper authority was justified.—*State Bank Building Co. v. Peirce* (Iowa) 61 N. W. 426.

92 Iowa, 668.

[c] (Iowa; 1895.)

The fact that a county has already expended the money retained by it from taxes collected for one of its cities, with the latter's consent, does not estop the city to claim it.—*Iowa City v. Johnson County* (Iowa) 61 N. W. 995.

[d] (Iowa; 1896.)

A noncapitalized religious association authorized its officer, to contract with an auxiliary stock company, authorizing it, as an auxiliary, to take title to and improve certain land for an association park, and that its stock should be se-

cured by a lien on the land. These officers exceeded their power by authorizing the stock company, in a certain event, to sell the park, and reimburse the stockholders out of the proceeds. Plaintiff, who drew up the contract, while it was in force, purchased stock. Subsequently, at a meeting of the association and company at which plaintiff presided, the contract was modified by striking out the unauthorized provisions; and later, by agreement of both, the company gave the association a trust deed of the park, subject to all liabilities of the company and claims of stockholders,—the association giving its notes for stock liability, payable in five years, with interest, secured by lien on the park. Plaintiff had been an officer of both the company and association at various times, and a supporter of the association, and was present at a meeting when the trust deed was approved, and donated 10 shares of the stock to the association, in furtherance of the plan. *Held*, that plaintiff was estopped from denying the validity of the trust deed.—*Hart v. Mt. Pleasant Park Stock Co. (Iowa)* 66 N. W. 190.

[c] (Mich.; 1896.)

A corporation and its president, both being insolvent, transferred their property, by several instruments, in trust for preferred creditors, to the president of complainant bank, a beneficiary in each and sole beneficiary in one; the latter being an assignment of its own stock. The trustee took possession of all the trust property, opened a single account as trustee with complainant, which was fully acquainted with the terms of the separate trusts, and continued the business of the corporation. The bank paid checks drawn on it by the trustee, and in some cases applied the proceeds on claims of other creditors, and, though it knew the assigned bank stock was reissued, and that the trustee had sold it, and was using the proceeds of it and of part of the realty in the business, raised no objection, and was equally negligent in asserting its rights when mortgages of part of the property were foreclosed. *Held* that the trust fund proving insufficient to pay the preferred claims in full, the bank was estopped from asserting a claim to moneys paid to other creditors in administration of the trust, on the ground it had not received its pro rata share.—*Fifth Nat. Bank v. Dunham (Mich.)* 66 N. W. 870.

[f] (Minn.; 1894.)

Testator gave several lots, used in connection with the homestead, but not a part thereof, to his widow for life, with remainder to his children in fee. The executors sold these lots, under a supposed general testamentary power, to pay debts. *Held*, that by allowing such lots to be sold, without objection, to bona fide purchasers, the widow and children were estopped to claim such lots, though the executors may not have been authorized by the will to make the sale.—*Lovejoy v. McDonald (Minn.)* 61 N. W. 320.

59 Minn. 393.

[g] (Minn.; 1896.)

Where, at a meeting of creditors at which the cashier of the defendant bank was present, an agent was appointed for the debtor firm, who, it was agreed, should be given entire control of the firm business until the return of a member of the firm, and who should deposit all money received, in two banks, one of which belonged to defendant, in his own name, as agent, but should not pay out any money upon the then existing indebtedness of the firm, and on the member's return the firm assigned for its creditors, the bank could not, in an action by the assignee against it to recover the amount of the deposit made with it, set off notes of the firm held by it.—*Fitzgerald v. State Bank of Duluth (Minn.)* 67 N. W. 361.

64 Minn. 469.

[h] (Neb.; 1894.)

Knowledge of the existence of a right, and the intention to relinquish it, must concur to create an estoppel by waiver.—*Ham-*

ton v. Home Fire Ins. Co. of Omaha (Neb.) 61 N. W. 93, 42 Neb. 883.

[i] (S. D.; 1896.)

Where one makes a water-right location on unoccupied public lands of the United States, but before he has constructed a ditch across the lands to conduct the water to his premises another acquires rights in the lands as a pre-emptor, such pre-emptor, and one to whom he conveys the lands 15 years thereafter, will be estopped to deny the right to maintain the ditch, the pre-emptor having been present when the ditch was surveyed and constructed, and having made no objection thereto during the 15 years he owned the land, and having, by permission of the owner of the water rights, used surplus water from the ditch, and opportunity to make other water-right locations having been lost by the lapse of time and change in the condition of the country.—*Scott v. Toomey (S. D.)* 67 N. W. 838.

§ 20. In expenditures and improvements.

[a] (Mich.; 1896.)

A party who passively allows the work of extending a drain to go on, with full knowledge that he is to be assessed therefor, and that compensation for the work can be provided in no other way than by an assessment for benefits, is estopped from restraining the collection of the tax.—*Atwell v. Barnes (Mich.)* 66 N. W. 583.

[b] (Minn.; 1896.)

The mere failure of a property owner to object to the erection on adjoining premises of a gas and electric light plant which subsequently became a nuisance because of its discharge of offensive gases, smoke, cinders, and soot, did not estop him from objecting to its continuance.—*Matthews v. Stillwater Gas & Electric Light Co. (Minn.)* 65 N. W. 947.

63 Minn. 493.

[c] (Wis.; 1896.)

The owner of land (Lawe) made and recorded a plat thereof, all being divided into lots and blocks, except a tract designated "Public Square." Twenty-seven years later he replatted this and other land, the land previously designated as "Public Square" being designated as "Lawe's Park," and, together with certain lots, being also designated as "Block 21." An act passed seven years later, which incorporated a city embracing such territory, expressly adopted the plats, and provided for replating the premises covered thereby. Proceedings were taken by or under the direction of the city council resulting in the recording, five years later, of an official plat, by which the land previously designated as "Lawe Park" was subdivided into lots of block 21. Shortly after this, Lawe incurred some expense in taking out stumps and otherwise improving the premises. Soon after incorporation of the city, Lawe, by order of the city council, built a sidewalk along one side of such park. The land designated as "Public Square" was not taxed till the making of the second plat, but was taxed thereafter. During all the time Lawe continued in the actual possession of the premises, the same being actually inclosed and used by him throughout substantially the whole period. *Held* that, notwithstanding any dedication by the first plat, the public was estopped to claim the land.—*Reuter v. Lawe (Wis.)* 68 N. W. 955.

§ 21. In judicial sales, mortgage foreclosures, etc.

[a] (Minn.; 1895.)

The fact that plaintiff was one of the sureties on a bond given for the purchase price at a receiver's sale does not prevent him from maintaining an action to set aside such sale as in fraud of creditors and in violation of the order of sale, when plaintiff did not know of the unlawful purpose for which the bond was in-

tened. — *Tozer v. O'Gorman* (Minn.) 61 N. W. 895.

60 Minn. 42.

[b] (Minn.: 1895.)

A mortgagor who allows foreclosure proceedings to be completed, abandons the land and allows the foreclosure to stand for 20 years, is estopped from denying its validity. — *Dimond v. Mannheim* (Minn.) 63 N. W. 495.

61 Minn. 178.

[c] (Minn.: 1895.)

The fact that defects in the sale of land on foreclosure of a mortgage under which defendant's claim title might have been ascertained by reference to the record will not prevent defendant from interposing against the mortgagor, in an action to set aside the foreclosure, the defense of estoppel by laches, and abandonment of the premises. — *Dimond v. Mannheim* (Minn.) 63 N. W. 495.

61 Minn. 178.

§ 22. In judgment for divorce.

(Minn.: 1895.)

Where a husband deserted his wife, and left the state, and had actual notice of an action for divorce against him, but made no defense, and, after learning of the judgment in the divorce proceedings, married again, he is estopped from denying the validity of the service of summons in the divorce proceeding in order to claim a share in his former wife's estate after her death. — *Marvin v. Foster* (Minn.) 63 N. W. 481.

61 Minn. 154.

§ 23. Acceptance of benefits.

[a] (Iowa; 1895.)

Where a bank agrees to pay a real-estate broker a commission on the sale of land, it cannot set up as a defense that under the laws of the state in which the land was situated a bank was prohibited from dealing in real estate, where it has availed itself of the benefits of the sale. — *Church v. Johnson* (Iowa) 61 N. W. 916.

93 Iowa, 544.

[b] (Iowa; 1895.)

One who received all the benefits of a decree of divorce against her, which was void for want of jurisdiction of the court, by accepting the alimony granted therein and remarrying before the death of her former husband, is estopped to deny its validity, or to claim a distributive share in her former husband's estate, after his death. — *Mohler v. Shank's Estate*, 61 N. W. 981, 93 Iowa, 273; *Shank v. Mohler*, Id.

[c] (Wis.; 1895.)

A defendant who accepts an amount taxed as the costs of the action on contract and trespass, as a condition of allowing plaintiff to proceed upon one of his causes of action after reversal of a judgment in his favor, is precluded from thereafter moving to dismiss the action for an improper joinder of causes. — *Wirth v. Bartell*, 62 N. W. 408, 89 Wis. 594.

§ 24. — By heirs and devisees.

(Mich.: 1896.)

A beneficiary under a will, who received from the executor the property given her by its provisions, and receipted for the same, without objection, is estopped to contest the will after the executor has made subsequent settlements with other beneficiaries. — *Lilly v. Townsend* (Mich.) 68 N. W. 136.

§ 25. Silence.

(Mich.: 1894.)

In an action to recover a balance due for slabs, edgings, etc., trimmed from lumber cut at plaintiff's mill, it appeared that defendant was to pay monthly for the material received; that both parties measured it; and that defendant sent statements monthly of its measurements, and a check for the amount thereby shown to be due. *Held*, that the court properly charged that if plaintiff received such state-

ments and checks without objection, and remained silent for any considerable time, he would be estopped from afterwards questioning the measurements, in the absence of fraud or mutual mistake. — *Taylor v. Butters & Peters Salt & Lumber Co.* (Mich.) 61 N. W. 5, 103 Mich. 1.

7. TO ASSERT OR DENY TITLE AND LIENS.

See, also, "Mechanics' Liens," § 17; "Vendor and Purchaser," § 40.

To assert tax title, see "Taxation," § 105.

To deny landlord's title, see "Landlord and Tenant," § 8.

To object to vendor's title, see "Vendor and Purchaser," § 28.

§ 26. To assert or deny title.

[a] (Iowa; 1895.)

Plaintiff and his grantor had for nearly 30 years asserted title and paid taxes on certain land, under a patent from the United States, with the knowledge of defendant's grantors. Defendant claimed that the land was swamp land, ceded to the state by act of congress of September 28, 1850, whence his title originally came, and each grantor in defendant's line of title had conveyed by quitclaim deed to defendant's immediate grantor, with nominal consideration, and specially reserving the right to any indemnity which might thereafter be granted by the United States in case of failure of title in the state. *Held*, that defendant was estopped from denying plaintiff's title. — *Knapp v. Paine* (Iowa) 63 N. W. 575.

[b] (Iowa; 1895.)

A mortgagor of chattels is estopped to deny his ownership thereof. — *Myers v. Snyder* (Iowa) 64 N. W. 771.

[c] (Iowa; 1896.)

Where a railroad company for many years fails to object to the purchase of land from a county as swamp land, and permits the purchaser to make improvements thereon, it is estopped, though the land is subsequently confirmed to it by the secretary of the interior, to deny the title of the purchaser. — *Bourne v. Ragan* (Iowa) 65 N. W. 826.

[d] (Mich.; 1897.)

The fact that a landowner builds a fence without knowing where his boundary is will not estop him from thereafter putting his fence on the true line, unless the adjoining owner has meantime acquired title to the strip so included by adverse possession. — *Beecher v. Ferris* (Mich.) 70 N. W. 1106.

[e] (Minn.: 1897.)

In 1877 plaintiff's husband, living at D., conveyed a lot to P. by a deed reciting that the grantor was unmarried. The lot was subsequently condemned by defendant for a schoolhouse site, its full value being paid to P. Upon the husband's death, in 1882, plaintiff, who had during all the time lived apart from him, came to D., remained six months, learned of the deed to P., the grantor's representations therein, and defendant's possession, but, without setting up any claim to the lot, she abandoned it as not being of sufficient value to warrant proceedings for its recovery, and left the state. After the lot had increased in value tenfold, and defendant, in good faith, relying on its title, had torn down the first schoolhouse and built partly on the lot another costing \$350,000, plaintiff, in 1895, brought suit for partition. *Held*, that she was estopped to claim any title to the lot. — *Holcomb v. Independent School Dist.* (Minn.) 69 N. W. 1067.

[f] (Neb.: 1897.)

That a mother who, in good faith, loaned to her son money with which to buy a store, and, upon his subsequent insolvency, induced him to confess judgment in her favor for the debt, knew that he was conducting the business

solely on the money borrowed from her, but neglected to give the public notice of that fact, did not estop her from claiming the proceeds of the sale under the judgment confessed, as against the son's other creditors.—*H. T. Clarke Drug Co. v. Boardman* (Neb.) 70 N. W. 248.

§ 27. Failure to disclose or assert claim.

[a] (Mich.; 1896.)

Where an attorney forecloses a mortgage running to his client on land to which the attorney claims title superior to that of the mortgagor, and permits title to pass to the client under a sheriff's deed, he is estopped from setting up his title against an innocent purchaser from his client.—*Walker v. Bottomley* (Mich.) 67 N. W. 1083.

[b] (S. D.; 1896.)

M. purchased land with money furnished by plaintiffs, but took the title to himself. While he held the title of record he was permitted by the city to change the location of a street across the property, the city relinquishing the ground formerly occupied, and large sums were spent by the city in improving the street, and by others in improvements with reference thereto. *Held*, that plaintiffs, having delayed 18 months, after knowledge of the facts, before notifying the city of their ownership of the property, and that the change in the street was unauthorized by them, could not recover the ground covered by the new street.—*Sweatman v. City of Deadwood* (S. D.) 69 N. W. 582.

§ 28. By representations or disclaimer.

[a] (Iowa; 1895.)

In 1870 defendant induced plaintiff's grantor, a railway company, to abandon a certain depot and build another on defendant's land. On a plat of a town filed by defendant in 1871, the disputed ground was marked as belonging to plaintiff's grantor, the plat showing that the disposition of land made therein was made with defendant's consent and by his desire. Plaintiff acquired the railroad property in 1874, as defendant knew. Defendant repeatedly admitted plaintiff's ownership of the land, and knew that it paid taxes thereon, and constructed side tracks, stock yards, and sidewalks upon it, and treated the land as its own; and certain buildings erected by defendant thereon were always assessed as personality, and sometimes returned as such by him. *Held*, that defendant was estopped to assert title in the land.—*Des Moines & Ft. D. R. Co. v. Lynd* (Iowa) 62 N. W. 806.

[b] (Iowa; 1897.)

The grantee of the interest of a surviving husband in land of which the wife died seized is estopped to claim any interest in the land, as against one who bought it from the surviving children at the instance and request of the husband, relying on his express disclaimer of interest therein.—*Stivers v. Gardner* (Iowa) 69 N. W. 1140.

[c] (Mich.; 1895.)

Statements of a mortgagor, made for the purpose of obtaining credit for a corporation of which he was a member, that he had sold to it the mortgaged property, would not conclude the mortgagee, unless it had knowledge thereof at the time, and kept silent.—*First Nat. Bank v. Marshall & Hsley Bank* (Mich.) 65 N. W. 604.

[d] (Minn.; 1896.)

One who intentionally, or by his culpable negligence, induced another to purchase property at a receiver's sale, in good faith, and in the belief that a certain mortgage lien on a part of the property had been or would be extinguished by such sale, as against good-faith purchasers from said party, and subsequent incumbrancers, cannot deny that the mortgage lien was extinguished by the sale, in an action to foreclose said mortgage as the equitable owner of the same.—*Brown v. Union Depot St. Ry. Co.* (Minn.) 68 N. W. 107.

[e] (Neb.; 1895.)

An owner of land against which a judgment was an apparent lien, who represented that the judgment was a valid lien to one who purchased the judgment in reliance on such representation, was estopped from asserting, as against that person, that the judgment was not a lien.—*Viergutz v. Aultman, Miller & Co.* 64 N. W. 693, 46 Neb. 141.

[f] (Neb.; 1896.)

A chattel mortgagee who represented to a prospective purchaser of the mortgaged property, knowing him to be such, at the latter's request for information on the subject, that there were but \$10,000 due on the mortgage, whereby the purchaser, relying thereon, bought the property, and retained control over no part of the price except \$10,000, which it caused to be paid to the mortgagee, was estopped from asserting as against the purchaser that a further amount was due on the mortgage.—*Brown v. Eno* (Neb.) 67 N. W. 434.

48 Neb. 538.

§ 29. To assert or deny lien or priority thereof.

[a] (Iowa; 1895.)

Where one who owns two judgment liens on the same land sells it under the junior lien, without fraud or representations of any kind, the seller is not estopped by such sale, and the receiving of the money thereunder, from selling the land again to satisfy the first lien.—*Matless v. Sundin* (Iowa) 62 N. W. 662.

[b] (Mich.; 1895.)

Where the seller of property, sold to a dealer therein on condition that the title shall not pass unless notes given for the purchase price are paid, stands by and permits the buyer to sell the property to an innocent purchaser, without disclosing his lien for the purchase price, he is estopped to afterwards assert his lien.—*Miller v. Ross* (Mich.) 65 N. W. 562.

[c] (Mich.; 1895.)

A bank which received a letter from another bank asking in regard to the character and financial standing of a certain person, without any intimation as to the making of a loan, is not estopped, as against a loan subsequently made by the inquiring bank, to claim a chattel mortgage lien on the man's property, because, in its answer, it merely stated the man's character, and assets above his indebtedness, without stating that he was indebted to it.—*First Nat. Bank v. Marshall & Hsley Bank* (Mich.) 65 N. W. 604.

§ 30. Of bailee to deny bailor's title.

(Mich.; 1894.)

Where defendant promised to return on demand money deposited with him by plaintiff, which he knew she claimed only by virtue of her husband's consent, he cannot, in defense of an action for such deposit, show title thereto in the husband.—*Pierce v. Underwood* (Mich.) 61 N. W. 344.

103 Mich. 62.

IV. PLEADING AND EVIDENCE.

§ 31. Necessity of specially pleading.

[a] (Iowa; 1895.)

That the grantor in a deed, duly signed and executed, but blank as to the name of the grantee, is estopped by his own negligence to assert, as against a bona fide purchaser, that it is invalid for want of delivery, must be specially pleaded.—*Golden v. Hardesty* (Iowa) 61 N. W. 913.

93 Iowa, 622.

[b] (Iowa; 1897.)

Matter in estoppel is not available unless specially pleaded.—*H. E. Spencer Co. v. Papach* (Iowa) 70 N. W. 748.

1c1 (Neb., 1895.)

Facts constituting an estoppel in pais must be pleaded.—*Scriggin v. Johnston* (Neb.) 61 N. W. 236, 45 Neb. 714.

1d1 (Neb., 1896.)

If the facts constituting an estoppel are in any way sufficiently pleaded by a party, he is entitled to the benefit arising therefrom, though the estoppel be not formally pleaded.—*City Nat. Bank v. Thomas* (Neb.) 65 N. W. 895, 46 Neb. 861.

§ 32. Evidence.**(Minn., 1897.)**

On the issue whether a wife, who had lived apart from her husband, was estopped to assert dower as against a purchaser from the husband, it was not error to receive evidence that the husband, at the time of the purchase, was reputed to be unmarried.—*Holcomb v. Independent School Dist.* (Minn.) 69 N. W. 1067.

EVICITION.

Of tenant, see "Landlord and Tenant," §§ 6, 7.

EVIDENCE.**I. JUDICIAL NOTICE, §§ 1-4.****II. PRESUMPTION, §§ 5-7.****III. BURDEN OF PROOF, § 8.****IV. BEST AND SECONDARY EVIDENCE, §§ 9-15.****V. HEARSAY, §§ 16, 17.****VI. DECLARATIONS AND ADMISSIONS, §§ 18-42.****1. In General, §§ 18-30.****2. Res Gestæ—Personal Injury Cases, §§ 31-33.****3. Accompanying Possession or Bearing on Conveyances and Ownership, §§ 34-37.****4. Of Agent, §§ 38-42.****VII. OPINION EVIDENCE, §§ 43-69.****1. In General, §§ 43-51.****2. Expert Testimony in General, §§ 52-58.****3. Testimony as to Value and Amount of Damages, §§ 59-61.****4. Medical Testimony, §§ 62-65.****5. Examination of Experts, §§ 66-69.****VIII. DOCUMENTS, §§ 70-85.****IX. PAROL EVIDENCE, §§ 86-102.****X. EVIDENCE AT FORMER TRIAL AND IN ANOTHER SUIT, §§ 103-105.****XI. COMPETENCY, MATERIALITY, AND RELEVANCY, §§ 106-118.****XII. PROOF OF HANDWRITING, §§ 119, 120.****XIII. PROOF OF FOREIGN LAWS, § 121.****XIV. WEIGHT AND SUFFICIENCY, §§ 122-127.**

See, also, "Deposition"; "Witness."

Absence as ground for continuance, see "Continuance," §§ 3, 4.

— as ground for new trial, see "New Trial," § 31.

Admissibility of altered instrument, see "Alteration of Instruments," § 7.

— to impeach witness, see "Witness," § 55.

— under pleadings, see "Pleading," §§ 79, 80.

Assignments of error as to rulings on, see "Appeal," § 93.

Comment of counsel on failure to produce, see "Trial," § 40.

Exhibiting injury to jury, see "Assault and Battery," § 8.

Harmless error in admitting or excluding, see "Appeal," §§ 243-253; "Criminal Law," §§ 232, 233.

How evidence brought into record, see "Appeal," §§ 140-146.

In condemnation proceedings, see "Eminent Domain," § 18.

In contempt proceedings, see "Contempt," § 15. Incorporation in record on appeal, see "Appeal," §§ 140-146; "Criminal Law," § 29.

In prosecution for receiving deposits after insolvency, see "Banks and Banking," § 36.

In will contest, see "Wills," §§ 21-23.

Matters necessary to review rulings on, see "Appeal," §§ 235-237.

Motions to strike out, see "Trial," §§ 24, 25, 31, 32.

Newly-discovered, as ground for new trial, see "Criminal Law," §§ 198, 199; "New Trial," §§ 33-36.

Offer of, see "Trial," §§ 9, 10.

Order and time of admission, see "Criminal Law," §§ 65, 66; "Trial," § 16, 17.

Pleading and proof, see "Pleading," §§ 76-85.

Proof of loss under policy, see "Insurance," §§ 72-91.

— statute, see "Statutes," § 35.

Rebuttal, order of admission, see "Trial," § 17.

— of impeaching testimony, see "Witness," § 73.

Reception of, see "Trial," §§ 9-20.

Statement of rules, see "Criminal Law," §§ 158-168.

Stipulations as to, see "Practice in Civil Cases," § 24.

To support motion for new trial, see "New Trial," §§ 13, 14.

— instructions, see "Trial," § 68.

— judgment, see "Judgment," § 25.

Evidence of

Adultery, see "Divorce," § 8.

Advancements, see "Descent and Distribution," §§ 9, 10.

Adverse possession, see "Adverse Possession," § 4.

Agency, see "Principal and Agent," §§ 2, 3.

Alteration of instrument, see "Alteration of Instruments," § 6.

Authority of agent, see "Principal and Agent," § 12.

Boundary, see "Boundaries," §§ 9, 10.

Consideration of bills and notes, see "Negotiable Instruments," §§ 16, 17.

Contract within statute, see "Frauds, Statute of," § 32.

Damages, see "Damages," § 40.

— in condemnation proceedings, see "Eminent Domain," § 39.

Enactment of statute, see "Statutes," §§ 4, 5.

Estoppel, see "Estoppel," § 22.

Existence of relation of master and servant, see "Master and Servant," § 5.

Fraud, see "Fraud," §§ 5, 6.

— in procuring will, see "Wills," §§ 7-10.

Gift, see "Gifts," § 2.

Insanity, see "Criminal Law," §§ 7, 8; "Insanity," § 7.

Malice, see "Libel and Slander," §§ 12-14.

Marriage, see "Marriage," §§ 4, 5.

Membership in corporation, see "Corporations," § 64.

Negligence, see "Negligence," §§ 37-43.

Novation, see "Novation," § 3.

Partnership, see "Partnership," §§ 8-10.

Payment, see "Payment," §§ 6-8.

— of taxes, see "Taxation," § 62.

Pledge, see "Pledge," § 2.

Rescission of contract, see "Contracts," § 59.

Release, see "Release and Discharge," § 7.

Right to fixtures, see "Fixtures," § 4.

Service of process, see "Writs and Notice of Suits," § 14.

Testamentary capacity, see "Wills," §§ 2-5.

Transactions with decedents, see "Witness," §§ 15-26.

Undue influence, see "Wills," §§ 7-10.

Usury, see "Usury," § 9.

Value and market price, see "Damages," § 45.

Venue, see "Criminal Law," § 38.

In actions against

- Infants, see "Infancy," § 7.
- Principal or agent, see "Principal and Agent," § 29.
- Sheriffs for wrongful seizures, see "Sheriffs and Constables," §§ 11, 12.
- Telegraph companies, see "Telegraph Companies," § 8.

In actions by or against

- City, see "Municipal Corporations," § 201.

In actions for

- Alienating affections, see "Husband and Wife," § 39.
- Civil damages, see "Intoxicating Liquors," § 59.
- Commissions, see "Factors and Brokers," § 20.
- Damages from fire set by engine, see "Railroad Companies," §§ 74-80.
- Injuries at crossings, see "Railroad Companies," § 42.
- from defects in streets or sidewalks, see "Municipal Corporations," §§ 95-97.
- to animals on track, see "Railroad Companies," § 65.
- to passengers, see "Carriers," § 51.
- to servant, see "Master and Servant," §§ 48-50.
- Price of goods, see "Sale," §§ 66, 67.
- Rent, see "Landlord and Tenant," § 49.
- Seduction, see "Seduction," § 2.
- Wrongful attachment, see "Attachment," §§ 61, 66.

In actions on

- Accounts stated, see "Account Stated."
- Bonds, see "Bonds," § 8.
- Certificates in mutual company, see "Insurance," § 183.
- Contracts, see "Contracts," §§ 70-72.
- Guaranty, see "Guaranty," § 16.
- Injunction bonds, see "Injunction," § 34.
- Notes, see "Negotiable Instruments," §§ 82-86.
- Policies, see "Insurance," §§ 119-126.
- Subscriptions, see "Subscriptions," § 5.

In actions to

- Enjoin maintenance of liquor nuisance, see "Intoxicating Liquors," § 49.
- Foreclose mortgage, see "Mortgages," § 61.

In criminal prosecutions.

- See "Adultery," § 3; "Arson," §§ 4, 5; "Bastardy," §§ 6-9; "Criminal Law," §§ 90-126; "Disorderly Conduct"; "Disorderly House," § 4; "Embezzlement," §§ 10, 11; "False Pretenses," § 6; "Forgery," §§ 7, 8; "Homicide," §§ 23-34; "Incest," § 3; "Larceny," §§ 5-7; "Perjury," §§ 6, 7; "Rape," §§ 4-11; "Receiving Stolen Goods," § 2; "Threats and Threatening Letters," § 4.

In equitable actions.

- See "Creditors' Bill," § 7; "Fraudulent Conveyances," §§ 42-52; "Injunction," § 34; "Specific Performance," § 11.

In particular actions.

- See "Assault and Battery," § 3; "Assumpsit," § 7; "Attachment," § 40; "Breach of Marriage Promise," § 2; "Death by Wrongful Act," §§ 3-5; "Deceit," § 6; "Ejectment," §§ 6, 7; "False Imprisonment," § 5; "Forceful Entry and Detainer," § 6; "Garnishment," § 24; "Libel and Slander," § 26; "Malicious Prosecution," §§ 14, 15; "Replevin," §§ 15-17; "Trove and Conversion," §§ 16, 17.

I. JUDICIAL NOTICE.**§ 1. Facts noticed in general.**

[a] (Iowa; 1895.)

The court may take judicial notice that the distance between the town in which absent witnesses reside and the place of holding court

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is such that they could have been produced at the trial.—State v. Seery (Iowa) 64 N. W. 631.

[b] (Minn.; 1896.)

Since courts of Minnesota take judicial notice that the city of Duluth is situate in St. Louis county, Minn., a notice of mortgage sale under a power describing the premises as certain lots in certain blocks "in Duluth Proper, First division," and in a certain division "of Duluth," according to the recorded plats thereof, was sufficient as to description, the plats being recorded.—Bauman v. Granite Sav. Bank & Trust Co. (Minn.) 68 N. W. 1074.

[c] (Neb.; 1895.)

The courts of Nebraska take judicial notice that the Republican river is unnavigable.—Clark v. Cambridge & A. Irr. & Imp. Co., 64 N. W. 239, 45 Neb. 798.

[d] (Neb.; 1896.)

The supreme court takes judicial notice of the fact that South Omaha contained a requisite population on September 4, 1888, to be governed by Comp. St. c. 14, art. 2, relating to cities of the second class.—Union Pac. Ry. Co. v. Montgomery (Neb.) 68 N. W. 619.

[e] (N. D.; 1896.)

Courts will take judicial notice that certain lands were within the "Indian country," and of the date when the Indian right of occupancy was terminated by treaty.—Kreuger v. Schultz (N. D.) 70 N. W. 269.

§ 2. Of official acts.

(Mich.; 1896.)

The failure of the city marshal to append, to his signature to the return on a writ of replevin, issued by a justice of the peace, his official title, does not invalidate the return, as the justice may take judicial notice that he is city marshal.—Fleugel v. Lards (Mich.) 66 N. W. 585.

§ 3. Of boundary of judicial district.

(Neb.; 1896.)

This court will take judicial notice of the boundaries of a judicial district, and of the counties included therein.—Chicago, B. & Q. R. Co. v. Hyatt (Neb.) 67 N. W. 8.
48 Neb. 161.

§ 4. Of statutes.

[a] (Minn.; 1897.)

The courts will take judicial notice of legislative acts providing for the erection of a courthouse and city hall.—Burlington Manuf'g Co. v. Board of Courthouse & City Hall Com'rs (Minn.) 69 N. W. 1091.

[b] (Neb.; 1896.)

Where a city or village is incorporated by a special act of the territorial legislature, the courts will take judicial notice of such incorporation, in case the legislature has in said act declared it to be a public law.—Hornberger v. State (Neb.) 66 N. W. 23.
47 Neb. 40.

[c] (Neb.; 1897.)

The courts will take judicial notice of a general statute conferring power on cities for the erection and maintenance of waterworks.—North Platte Water Works Co. v. City of North Platte (Neb.) 70 N. W. 393.

II. PRESUMPTION.

As to foreign laws, see post, § 121.

— advancements, see "Descent and Distribution," § 10.

— alteration of instruments, see "Alteration of Instruments," § 6.

— appealability of orders, see "Appeal," § 16.

— authority of agents, see "Principal and Agent," §§ 12-14.

— authority of corporate agents to make contracts, see "Corporations," § 31.

— delivery of deeds, see "Deed," § 15.

As to dissolution of corporations, see "Corporations," § 100.
 — enactment of statutes, see "Statutes," §§ 4, 5.
 — good faith of transfers of notes, see "Negotiable Instruments," § 53.
 In action for damages caused by fire from engines, see "Railroad Companies," § 75.
 — for injuries to passengers, see "Carriers," § 51.
 — on bills and notes, see "Negotiable Instruments," § 83.
 — on policies, see "Insurance," § 120.
 Of consideration, see "Negotiable Instruments," §§ 16, 17.
 Of death from absence, see "Death."
 Of fraud, see "Fraudulent Conveyances," §§ 42-44.
 Of malice, see "Libel and Slander," § 13.
 Of marriage, see "Marriage," §§ 4, 5.
 Of negligence, see "Negligence," § 39.
 Of payment, see "Payment," §§ 9, 10.
 Of survivorship, see "Death."
 Of testamentary capacity, see "Wills," § 3.
 Of undue influence, see "Wills," § 8.
 Of validity of statute, see "Statutes," § 19.
 On appeal, see "Appeal," §§ 209-220.

§ 5. Of receipt of matters sent by mail.

[a] (Iowa; 1896.)

There is no presumption that a person to whom a letter was mailed received the same, unless it appears that he then resided in the town to which the letter was addressed.—*Goodwin v. Provident Sav. Life Assur. Soc. (Iowa)* 66 N. W. 157.

[b] (Mich.; 1896.)

Postmarked letters in defendant's handwriting were produced, which were addressed to plaintiff's wife at her street and number, and showed on their face that they belong to a connected correspondence. *Held*, that the receipt of the letters by plaintiff's wife was sufficiently shown.—*Mead v. Randall (Mich.)* 69 N. W. 506.

§ 6. From failure to produce evidence.

(Iowa; 1895.)

In an action for the death of a railroad freight brakeman alleged to have been struck by a low bridge, where it is shown that the bridge was higher than the top of deceased's head while standing on a furniture car composing part of the train and which was higher than the ordinary cars, no presumption arises from the failure of defendant to show the height of all the cars in the train that there were other cars higher than the furniture cars.—*Donald v. Chicago, B. & Q. Ry. Co. (Iowa)* 61 N. W. 971.

93 Iowa, 284.

§ 7. Of compliance with law.

(Neb.; 1896.)

Where a petition alleges that plaintiff was employed by the county board of the defendant county to render medical services to a pauper, the presumption is that the board kept within the law (Comp. St. c. 67) in employing a physician, and that a poorhouse had, prior to that time, been established and opened under said chapter.—*Red Willow County v. Davis (Neb.)* 69 N. W. 138.

III. BURDEN OF PROOF.

As to authority of agent, see "Principal and Agent," § 13.
 — contributory negligence, see "Master and Servant," § 91.
 — damages, see "Damages," § 46.
 — delivery of deeds, see "Deeds," § 15.
 — fraud in conveyances, see "Fraudulent Conveyances," §§ 42-44.
 — good faith of transfers of notes, see "Negotiable Instruments," § 53.

As to good faith of chattel mortgagor, see "Chattel Mortgages," § 15.
 — limitations, see "Limitation of Actions," § 41.
 — negligence, see "Negligence," § 38.
 — payment, see "Payment," § 7.
 — testamentary capacity, see "Wills," § 3.
 — undue influence, see "Wills," § 8.
 In action for conversion, see "Trove and Conversion," § 15.
 — for damages caused by fire from engines, see "Railroad Companies," § 75.
 — for injuries to passengers, see "Carriers," § 51.
 — for wrongful attachment, see "Attachment," § 66.
 — on bills and notes, see "Negotiable Instruments," § 83.
 — on policies, see "Insurance," § 120.
 In replevin, see "Replevin," § 16.
 Of alteration of instrument, see "Alteration of Instruments," § 6.
 Of corporate existence, see "Corporations," § 43.
 On motion to vacate attachment, see "Attachment," § 55.

§ 8. On whom burden rests.

[a] (Iowa; 1894.)

In an action on an accident insurance policy conditioned that the policy shall not cover injuries received while the insured is under the influence of liquor, the fact that plaintiff unnecessarily negatives such conditions does not place on him the burden of proof to sustain the allegation, on issue being taken there.—*Jones v. United States Mut. Acc. Ass'n of City of New York (Iowa)* 61 N. W. 485.
 92 Iowa, 652.

[b] (Mich.; 1896.)

In an action to recover for a failure to properly feed and care for horses, evidence of their being in bad condition when taken from defendant, through lack of food, cast on defendant the burden of proving other cause for their condition.—*Hynes v. Hickey (Mich.)* 66 N. W. 1090.

[c] (Neb.; 1896.)

In an action to restrain county commissioners from removing fences from land alleged by them to be a highway, where plaintiff alleged that no highway existed, the burden was on defendants to establish the existence of the highway.—*Henry v. Ward (Neb.)* 68 N. W. 518.

[d] (Neb.; 1897.)

Where plaintiff has replied, denying a settlement pleaded by defendant, and alleging that he had agreed to accept the settlement if the money were paid within a fixed time, he assumes the burden of proving such allegation.—*Omaha Fire Ins. Co. v. Thompson (Neb.)* 70 N. W. 30.

IV. BEST AND SECONDARY EVIDENCE.

See, also, "Criminal Law," § 96.

§ 9. What is best and secondary evidence.

[a] (Iowa; 1896.)

One having no knowledge, outside a memorandum on a stock book, that stock was left as security, cannot testify to that fact, the memorandum being the best evidence.—*Iowa City State Bank v. Novak (Iowa)* 66 N. W. 186.

[b] (Iowa; 1896.)

Where a policeman, charged in part with the duty of reporting to the city defects in the sidewalks of his beat, makes his reports in writing, such reports are the best evidence, and a record of them is not admissible, where it is not shown to be one authorized by the law, on the issue of what information had been received.—*Lorig v. City of Davenport (Iowa)* 68 N. W. 717.

[c] (Iowa; 1897.)

Books of account are not the best evidence, so as to render inadmissible oral testimony as to payments credited therein.—*Christman v. Pearson* (Iowa) 69 N. W. 1055.

[d] (Mich.; 1896.)

In an action to recover certain land on the shore of a lake, conveyed in a deed as land "lying between the Lake road and the lake," where all traces of the road had gone, the field notes, plats, and deeds were the best evidence of the location of the road.—*Hoffman v. City of Port Huron* (Mich.) 68 N. W. 546.

[e] (Neb.; 1896.)

It appearing in an action on a stock subscription that the subscription book was lost, it was proper to permit plaintiff to prove the contents thereof by parol evidence, though there were in existence similar books, used for subscriptions, substantially like the one in question.—*Rawlings v. Young Men's Christian Ass'n* (Neb.) 66 N. W. 1124.
48 Neb. 216.

[f] (Wis.; 1895.)

An objection to the admission of the testimony of one who was present, and saw plaintiff's notice of her claim against defendant town for injuries written by her attorney, and copied in his letter-press book, to show that the notice there copied was the same that the witness afterwards served, is untenable.—*Alt-house v. Town of Jamestown* (Wis.) 64 N. W. 423, 91 Wis. 46.

§ 10. Admissibility of secondary evidence.

[a] (Iowa; 1896.)

Parol testimony as to the contents of an illustrated catalogue of the makers of defendant's engine, giving instructions as to its management, was properly excluded.—*Richardson v. Douglas* (Iowa) 69 N. W. 530.

[b] (Iowa; 1897.)

Acts of a board of directors may be shown by parol, when no record of them has been made.—*Zalesky v. Iowa State Ins. Co.* (Iowa) 70 N. W. 187.

[c] (Wis.; 1896.)

After it has been established that a letter has been lost, one who had read it to the recipient at the time it was received, because the latter was unable to read, may testify to the contents of the letter.—*Sawyer v. Choate* (Wis.) 66 N. W. 689.
92 Wis. 533.

§ 11. Questions eliciting secondary evidence.

[a] (Iowa; 1895.)

A question asked the deputy as to his having received a notice to release the property was proper, being merely asked to prove receipt of it, the notice itself being introduced to prove its contents.—*Peterman v. Jones* (Iowa) 63 N. W. 333.

[b] (Iowa; 1895.)

Witness was asked whether, in a letter received by him, the writer made a statement of what he claimed was a confession made by defendant. *Held*, that the question was proper to identify the letter, and did not call for secondary evidence as to the contents.—*State v. Seymore* (Iowa) 63 N. W. 661.

§ 12. Proof preliminary to admission of secondary evidence—Accounting for absence of primary evidence.

[a] (Iowa; 1895.)

In an action against a partner individually on a partnership transaction, after the partnership has ceased to do business, the fact that the books of account were taken by another partner, and are in another state, will not render secondary evidence of their contents admissible, where the only evidence of diligence to procure the books shown is that inquiries made two years, and again a few days, prior to the

trial failed to show the whereabouts of such partner.—*Waite v. High* (Iowa) 65 N. W. 397.

[b] (Iowa; 1896.)

A written agreement may be proven by copy, unless objection is made on the ground that the copy is not the best evidence, or that proof of the loss of the original has not been shown.—*Graff v. Adams* (Iowa) 69 N. W. 539.

[c] (Mich.; 1895.)

Secondary evidence of changes made in a tabulated sheet of election returns was properly admitted upon proof that the original sheet had been taken from the bound volume containing it, at an hotel, by some unknown person, and had not since been seen by the one charged by law with its custody.—*People v. Clarke* (Mich.) 62 N. W. 1117.
105 Mich. 169.

[d] (Mich.; 1895.)

It was not error to exclude secondary evidence of the contents of a writing, where its absence was not fully accounted for.—*Tanner v. Page* (Mich.) 63 N. W. 993.

[e] (Mich.; 1895.)

In an action on a contract, evidence that the contract was filed in a prior action before a justice, since deceased, and that his successor, the custodian of his docket, and counsel were unable, after search, to find it, rendered a copy of the contract admissible.—*Stanley v. Anderson* (Mich.) 65 N. W. 247.

[f] (Mich.; 1896.)

Where the addressee of a letter identifies it, and proves its loss, another, who saw it, may testify to its contents without showing that he knew the writer's handwriting.—*Painter v. Ledyard* (Mich.) 67 N. W. 901.

[g] (Minn.; 1896.)

Secondary evidence of the contents of a receipt claimed to have been given defendant by plaintiff for a balance due, on the ground that the same was lost, is inadmissible where the only evidence of its existence and loss was defendant's testimony that plaintiff gave it to him, and he handed it to his clerk in the store, who put in the safe; that afterwards he sold the store and safe; that he had written the clerk as to the whereabouts of the receipt, but received no reply, but that he had not looked in the safe for it.—*Slocum v. Bracy* (Minn.) 67 N. W. 813.

[h] (Minn.; 1896.)

It appearing that one of the parties to an alleged lost contract was dead, and that no copy of the contract could be found among his papers; that the other party to the contract was probably without the jurisdiction of the court, his whereabouts being unknown; and that the contract was searched for, without avail, in every place where it was known to have been, or where it would probably be,—parol evidence of its contents was admissible.—*Windom v. Brown* (Minn.) 67 N. W. 1028.

[i] (Neb.; 1896.)

Where the files of a case have been lost, papers in an attachment alleged to have issued in the case may be shown by parol to have existed, and their contents may be so proven.—*Regier v. Shreck* (Neb.) 66 N. W. 618.
47 Neb. 667.

[j] (Wis.; 1897.)

It was not error, on an issue whether defendant employed plaintiff, an attorney, to defend a third person, to permit the contents of a lost telegram, claimed to have been sent by defendant to plaintiff, to be proved orally against an objection that there was no proof that defendant sent it, or that it was in his handwriting, where there was evidence that defendant had sent letters to plaintiff containing directions relating to the defense similar to those contained in the telegram as proved.—*James v. Carson* (Wis.) 69 N. W. 1004.

§ 13. — Proof of execution and contents of deeds.

(Neb.; 1895.)

In an action to foreclose a mortgage, by the widow of the deceased mortgagee against subsequent purchasers of the mortgaged premises, where the mortgagor and another witness testified to the execution and delivery of the mortgage, and the legal adviser of the deceased mortgagee testified that soon after the latter's decease the mortgage was placed in his hands for safe-keeping, and so remained for two years; that "he had never surrendered possession thereof to any person, although he is now unable to find it, after the most diligent and careful search among his papers,"—a copy of such mortgage is admissible in evidence.—*Baldwin v. Burt*, 61 N. W. 601, 43 Neb. 245.

§ 14. — Letters.

[a] (Mich.; 1895.)

Where a party testifies that he is not in the habit of keeping his letters; that he had looked for a particular letter in the waste basket, but that it had been destroyed, with other letters,—he may testify as to its contents.—*Shrimpton v. Netzgorg* (Mich.) 62 N. W. 343. 104 Mich. 225.

[b] (Mich.; 1895.)

Where a person who received a letter testifies that, after he had read it, he laid it down, and had not seen it since, and that most of his papers had been burned, and that the letter was not in the only place where he kept papers, the loss of the letter is sufficiently shown to admit secondary evidence of its contents, though he further testifies that he had not searched for the letter.—*Burt v. Long* (Mich.) 64 N. W. 60.

[c] (Minn.; 1896.)

Where the addressee of a letter testified that he had received the letter, and lost it, and could not find it, and that a certain copy was substantially correct, it was proper to receive the copy.—*Hargreaves v. Reese* (Minn.) 69 N. W. 223.

§ 15. Documents beyond jurisdiction of court.

[a] (Iowa; 1895.)

Where a person without the state refuses to permit letters written to her by defendant to be attached to her deposition, secondary evidence of the contents of such letters is admissible.—*Bullis v. Easton* (Iowa) 65 N. W. 395.

[b] (Mich.; 1895.)

Parol evidence is admissible to show the nature of a cablegram which is without the court's jurisdiction.—*People v. Seaman* (Mich.) 65 N. W. 203.

[c] (S. D.; 1896.)

Where a paper is shown to have been lost in the possession of a person who is out of the state, notice to the adverse party to produce the paper is not necessary, to render secondary evidence of its contents admissible in evidence.—*Hagaman v. Gillis* (S. D.) 68 N. W. 192.

V. HEARSAY.

See, also, "Criminal Law." § 97.

§ 16. What constitutes hearsay.

[a] (Iowa; 1897.)

On an issue as to the substance of a conversation by telephone, one of the speakers cannot testify what he repeated to a third person as heard from the other.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[b] (Mich.; 1895.)

On an issue as to whether defendant's possession of certain wild lands was actual and bona fide, testimony that witness heard defendant say that he intended to make a home

thereon is inadmissible as hearsay.—*McKinnon v. Meston* (Mich.) 62 N. W. 1014. 104 Mich. 642.

[c] (Mich.; 1895.)

In an action for injuries from a dog bite, a witness for plaintiff, who testified that the dog had once chased him about defendant's store till defendant quieted it, could not be cross-examined as to whether he did not know that boys used to play with the dog, and get it to chase them, he testifying that he had not been present while boys were playing with the dog.—*Kennett v. Engle* (Mich.) 63 N. W. 1009. 105 Mich. 693.

[d] (Mich.; 1896.)

Statements by the son of an alleged fraudulent vendor as to where he got property subsequently sold by him are inadmissible against the vendee.—*Vyn v. Keppel* (Mich.) 65 N. W. 966.

[e] (Mich.; 1896.)

In an action by a mother under How. Ann. St. § 2283, against a saloon keeper, for injuries to her son, on whom she was dependent for support, sustained while under the influence of liquor sold by defendant, evidence of declarations of the son as to who furnished him the whisky on which he became drunk is hearsay, and inadmissible to bind plaintiff.—*Van Alstine v. Kaniecki* (Mich.) 67 N. W. 502.

[f] (Minn.; 1896.)

On an issue whether a lease was made before the appointment of a receiver for the lessor, the receiver's agent cannot testify that, on taking possession of the property, he was told by the lessor's agent that the lease had been made.—*Paget v. Electrical Engineering Co.* (Minn.) 69 N. W. 475.

§ 17. Hearsay evidence of opinion.

[a] (Mich.; 1894.)

On a will contest, statements made by a person for whom testator had sent to draft his will, declining to go on account of testator's mental incapacity, are inadmissible.—*Renaud v. Pageot* (Mich.) 61 N. W. 3. 102 Mich. 568.

[b] (Minn.; 1897.)

A statement by a party to his physician that he has lost his sexual powers owing to his injuries is not admissible as original evidence in his own favor, being mere hearsay.—*Williams v. Great Northern Ry. Co.* (Minn.) 70 N. W. 860.

VI. DECLARATIONS AND ADMIS- SIONS.

Declarations as to testamentary capacity, see "Wills," § 4.

— as to undue influence, see "Wills," § 9.

— in action on policy, see "Insurance," § 125.

— of parties to fraudulent conveyance, see "Fraudulent Conveyances," § 48.

— of partner to show partnership, see "Partnership," § 9.

— of testator, evidence in will contest, see "Wills," § 25.

In criminal cases, see "Criminal Law," §§ 109-113.

1. IN GENERAL.

§ 18. When admissible.

[a] (Iowa; 1896.)

Where a purchaser of land visited and examined it after his purchase, and afterwards brought an action against the vendor for a breach of warranty as to its quality, it is competent for the defendant to prove statements made by the plaintiff, after seeing the land, which tended to contradict the claim made in the action.—*Sway v. Etnire* (Iowa) 68 N. W. 597.

[b] (Mich.; 1896.)

In an action to recover money paid by plaintiff to discharge certain mortgages, in which plaintiff claimed that defendant was to pay the interest to a certain date, statements of defendant about paying the interest were admissible.—*Ford v. Savage* (Mich.) 69 N. W. 240.

[c] (Mich.; 1897.)

In an action for printing, where defendant claimed it was done for another, and that the credit was extended to such other, testimony that defendant looked over plaintiffs' books containing the items embraced in their bill of particulars, and agreed on how much was due, and agreed to pay it, is competent to show receipt by defendant of the items charged, and his recognition of his liability therefor.—*Baxter v. Reynolds* (Mich.) 70 N. W. 1039.

[d] (Minn.; 1895.)

In a suit by an assignee in insolvency against a third person, the schedule of liability of the insolvent debtor is not competent evidence against defendant to show the indebtedness of the debtor.—*Hahn v. Penney* (Minn.) 62 N. W. 1129, 60 Minn. 487.

[e] (Minn.; 1896.)

On an issue whether deceased executed a contract of marriage with petitioner, a letter written by petitioner to her sister subsequent to the contract, in which she refers to deceased as "my husband" and "your brother," was admissible as an admission of deceased, where he read the same, inclosed it in an envelope addressed to the sister, and put it in his pocket with other letters, apparently for the purpose of mailing it.—*In re Hulett's Estate* (Minn.) 69 N. W. 31; *Carey v. Hulett*, Id.

[f] (Minn.; 1897.)

In a suit to rescind the purchase of a mortgage because defendants falsely represented that there was a house on the mortgaged land, evidence that the mortgagor, after obtaining from defendants, for the purpose of building, the loan for which the mortgage was given, stated to them that he had decided not to build, was competent to show that defendants knew that there was no house on the land.—*Riggs v. Thorpe* (Minn.) 69 N. W. 891.

§ 19. Against interest.**[a] (Mich.; 1894.)**

Testimony by one of the proponents before the probate court that she thought that, if the other sisters had been present when the will was executed, they might "perhaps" have shared in the property, shows merely a conjecture, and is not admissible as an admission against interest.—*McHugh v. Fitzgerald* (Mich.) 61 N. W. 354.

103 Mich. 21.

[b] (Mich.; 1895.)

The statements of a party adverse to his own claim are always admissible.—*Reiser v. Portere* (Mich.) 63 N. W. 1041.

§ 20. Self-serving declarations.**[a] (Mich.; 1896.)**

On an issue as to whether defendant corporation had engaged the services of a physician for one of its employes, the testimony of the physician that he had charged such services to defendant on his books was incompetent.—*Hodges v. Detroit Electric Light & Power Co.* (Mich.) 67 N. W. 564.

[b] (Mich.; 1896.)

Where a physician had been employed to examine plaintiff a few days before the trial, his testimony as to voluntary exclamations and expressions of plaintiff tending to indicate pain or injury was incompetent.—*McKormick v. City of West Bay City* (Mich.) 68 N. W. 148.

§ 21. Absence of persons affected.**[a] (Iowa; 1896.)**

In an action to recover on a check alleged to have been issued by defendant's agent for

stock purchased for defendant, under an agreement between defendant and the agent that defendant should pay the checks, evidence that the agent requested third persons, from whom he had also purchased stock, not to disclose to his principal the price paid therefor, is inadmissible against plaintiff, such requests not having been made in his presence.—*Leach v. Hill* (Iowa) 66 N. W. 69.

[b] (Iowa; 1897.)

Statements made to a creditor by one who has mortgaged his stock of goods to his wife, that he does not owe her anything, are inadmissible against the wife, who did not authorize or know of the statements.—*Fowler Co. v. McDonnell* (Iowa) 69 N. W. 873.

[c] (Mich.; 1895.)

Plaintiff's witness cannot testify to a conversation with third persons not in the presence of defendant, though he repeated part of it, but not the most damaging part, to defendant.—*Munzer v. Stern* (Mich.) 63 N. W. 513.

105 Mich. 523.

[d] (Mich.; 1897.)

Admissions by husband, not brought home to his wife, are inadmissible against her.—*Whelpley v. Stoughton* (Mich.) 70 N. W. 1098.

[e] (Wis.; 1894.)

Evidence of conversations between two parties to a tripartite agreement in the absence of the third is not admissible to show the terms of the agreement.—*Green v. Hadfield* 61 N. W. 310, 89 Wis. 138.

[f] (Wis.; 1895.)

In conversion for a buggy taken by defendant more than six years before suit, where plaintiff claimed that the conversion was unknown to him until a short time before the action was brought, plaintiff could prove when and from whom he obtained such information, although defendant was not present when he obtained it.—*Hall v. Stevens* (Wis.) 62 N. W. 81, 89 Wis. 447.

§ 22. Statements in presence of person affected.**[a] (Mich.; 1896.)**

It was not error for the plaintiff to show that on the former trial of the action the defendant was present, and heard all of plaintiff's testimony, but made no denial thereof.—*Connell v. McNett* (Mich.) 67 N. W. 344.

[b] (Mich.; 1897.)

A statement by one who managed his wife's business, that his assignment of her book accounts, though absolute in form, was in trust to pay his wife's debts, was competent as an admission by the assignee, who was present, and did not contradict it.—*Matthews v. Forslund* (Mich.) 70 N. W. 1105.

§ 23. By parties in general.**[a] (Mich.; 1896.)**

In an action by attorneys for services, defendants claimed that they had paid plaintiffs in full, and had taken a receipt therefor, which they produced, and which purported to be signed by plaintiffs. One of defendants testified that he wrote it, and that B. one of plaintiffs, signed it. B. testified that "I never executed that paper on the date it purports to bear date, or upon any other date. * * * I would not be able to state positively whether it is my signature or not. The paper bears evidence of having had writing upon it before this, and that writing having been erased by a rubber." He also testified that "it is my impression that I wrote that date and the signature. It being in pencil it would be difficult for me to say. If it had been done in pen and ink, I could tell a great deal better." *Held*, that such witness did not admit the signature, and that whether it was executed by defendants or not was a question for the jury.—*Howell v. Smith* (Mich.) 66 N. W. 218.

[D] (Neb.; 1896.)

Where there was a dispute about the precise amount of a check, and the payee testified that he left the check with his attorney, and that it was lost, the opposite party was entitled to show a statement made by the payee on a previous trial of the case, that he had left the check at his home, as admissions of the payee tending to disclose a concealment of evidence, though on cross examination the payee admitted the former statement.—*Lowe v. Vaughn* (Neb.) 67 N. W. 464.

48 Neb. 651.

[E] (Wis.; 1890.)

In action for personal injury, a statement made by plaintiff a few days after the accident, in presence of witnesses, which was reduced to writing, read to plaintiff, and by him pronounced correct, and signed, is, when properly identified, admissible in evidence as an admission made by plaintiff before controversy had arisen.—*Klatt v. N. C. Foster Lumber Co.* (Wis.) 66 N. W. 791.

92 Wis. 622.

§ 24. By third person.**(Neb.; 1895.)**

In an action for breach of promise to marry, evidence of communications made by defendant's mother, who procured plaintiff to receive defendant as a suitor, concerning defendant's property, as an inducement to the marriage contract, were admissible to show the value of defendant's property.—*Stratton v. Dole* (Neb.) 63 N. W. 875.

45 Neb. 472.

§ 25. By husband or wife of party.**(Iowa; 1895.)**

Where goods were attached after an alleged sale thereof by an insolvent, evidence of a statement by the latter's wife, when the sheriff procured from her the key to the building where the goods were stored, that "she expected that," was not prejudicial in an action by the vendee against the sheriff, as an admission of fraud.—*Evaus v. Boyle* (Iowa) 64 N. W. 619.

§ 26. By insured against beneficiary.**(Iowa; 1896.)**

Declarations of the assured as to the amount due on a life policy are not admissible against the beneficiary.—*Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 66 N. W. 157.

§ 27. Of legatee—Will contest.**(Iowa; 1895.)**

Declarations of and conversations between the legatees prior to the execution of the will, relative to the property of the testatrix, are not admissible against the legatees.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, Id.

§ 28. Of conspirators.**[a] (Minn.; 1895.)**

Unless made in furtherance of the common design, so as to be a part of the *res gestæ*, the declarations and admissions of one conspirator are not admissible against the others.—*Nicolay v. Mallory* (Minn.) 64 N. W. 108.

62 Minn. 119.

[b] (Neb.; 1897.)

To render evidence of overt acts of the individuals tending to show a conspiracy admissible, it is not necessary first to show, by other evidence, the existence of the conspiracy.—*Farley v. Peebles* (Neb.) 70 N. W. 231.

[c] (Neb.; 1897.)

Declarations by the alleged conspirators in pursuance of the common object, not merely narrative of past occurrences, or statements of future purposes, but tending so directly towards the accomplishment of the object as to constitute a part of the *res gestæ*, are admissible

generally as against all to show the conspiracy.—*Farley v. Peebles* (Neb.) 70 N. W. 231.

[d] (Neb.; 1897.)

Evidence of overt acts or declarations of the alleged conspirators in pursuance of the common object cannot be considered as against those not participating therein to charge them with the resulting liability, unless, from all the evidence, the existence of the conspiracy has been proved.—*Farley v. Peebles* (Neb.) 70 N. W. 231.

§ 29. Offer of compromise or attempt to make settlement.

[a] An offer of compromise, not accepted, is not admissible in evidence.

—(Iowa; 1896) *Kassing v. Walter*, 65 N. W. 832;

(Neb.; 1896) *Callen v. Rose*, 66 N. W. 639, 47 Neb. 638.

[b] (Mich.; 1895.)

Where, in an action for personal injuries, evidence is admitted of a compromise by defendant, it is reversible error to refuse to instruct that such offer cannot be considered as evidence of any liability on his part.—*Pelton v. Schmidt* (Mich.) 62 N. W. 552.

104 Mich. 345.

[c] (Mich.; 1895.)

Where a mortgagee asserts a mortgage as an existing lien, the fact that the mortgagor, to purchase his peace, enters into negotiations for a compromise, will not be held a recognition by him of the mortgage as an existing lien, if, during the negotiations, he did not so recognize it, and the negotiations are not completed.—*Ward v. Munson* (Mich.) 63 N. W. 498.

105 Mich. 647.

[d] (Mich.; 1897.)

The fact that an attachment is sued out on the ground that defendant fraudulently contracted the debt does not render offers of settlement by defendant admissible.—*Finlay Brewing Co. v. Prost* (Mich.) 70 N. W. 137.

[e] (Neb.; 1896.)

The rule excluding evidence of offers to compromise existing disputes does not exclude evidence of offers to compromise a dispute which form the basis or constitute a part of a contract actually compromising such dispute, when such last contract is sued upon.—*Stuht v. Sweezy* (Neb.) 67 N. W. 748.

48 Neb. 767.

[f] (Neb.; 1896.)

In assumpsit for services in making a sale, and for the recovery of money expended in the transaction, a letter written by plaintiff to defendant, stating plaintiff's claim for money expended at a less amount than that claimed in suit, and making no demand whatever for compensation for services, was erroneously excluded as a mere proposition of compromise.—*C. Aultman & Co. v. Martin* (Neb.) 68 N. W. 340.

§ 30. In pleadings and judicial proceedings.**[a] (Iowa; 1894.)**

In an action on an accident policy, where the answer admits "due proof of death," but "denies that by such proof is established that the death" was caused by accident, it is not error to permit plaintiff to read the admission to the jury without reading also the denial.—*Jones v. United States Mut. Acc. Ass'n of City of New York* (Iowa) 61 N. W. 485.

92 Iowa, 652.

[b] (Iowa; 1896.)

A plea of guilty to a criminal charge is not conclusive proof of the commission of the act charged, against the defendant in a civil action, but is for the consideration of the jury with the other evidence.—*Jones v. Cooper* (Iowa) 65 N. W. 1000.

[c] (Mich.: 1896.)

In an action for alienating a wife's affections, it is error to admit, at plaintiff's instance, the complaint in a divorce proceeding instituted by plaintiff, and to permit the jury to consider it as substantive proof of the facts therein stated.—*Mead v. Randall* (Mich.) 69 N. W. 506.

[d] (Neb.: 1896.)

In an action to recover for money expended, a bill of particulars in a certain justice court, entitled the same as the case on trial, was not admissible to show that plaintiff there claimed judgment for a less sum than that demanded in suit, where the paper was not shown to have been prepared, signed, or filed by plaintiff, or by his authority, or that the case in which it was filed was ever tried.—*C. Autlman & Co. v. Martin* (Neb.) 68 N. W. 540.

[e] (N. D.: 1895.)

In an action on an insurance policy, an exemplified copy of the record of garnishee proceedings instituted in another state against the company in an action against insured, in which appeared what purported to be defendant's disclosure therein, was competent evidence that such disclosure was made, and hence admissible on the amount of the loss, as an admission made by the company in regard thereto in a judicial proceeding.—*Purcell v. St. Paul Fire & Marine Ins. Co.* (N. D.) 64 N. W. 943. 5 N. D. 100.

[f] (S. D.: 1896.)

An original superseded complaint, signed and verified by an attorney, is inadmissible against the plaintiff in support of an issue tendered by the answer to the amended complaint, in the absence of a clear showing that the recitals thereof were inserted under plaintiff's direction, or were knowingly ratified by him.—*Corbett v. Clough* (S. D.) 65 N. W. 1074.

[g] (Wis.: 1896.)

An allegation in the answer of an insurance company to an action on a policy, charging the plaintiff with having burned his property, though withdrawn before trial by leave of court, may be read in evidence by plaintiff as an admission, where it becomes material.—*Lindner v. St. Paul Fire & Marine Ins. Co.* (Wis.) 67 N. W. 1125. 93 Wis. 526.

2. RES GESTÆ—PERSONAL INJURY CASES.

Res gestæ in criminal cases, see "Criminal Law," § 104.

§ 31. Res gestæ.

[a] (Mich.: 1894.)

In an action against a railroad company for damage to timber land by fire, testimony by plaintiff that he told defendant's foreman, as he was setting the fires, that he did not wish it done, as it was dry, and he had wood and logs there, is admissible, as res gestæ, to show that the foreman was negligent.—*Gordon v. Grand Rapids & I. R. Co.* (Mich.) 61 N. W. 549. 103 Mich. 379.

[b] (Mich.: 1897.)

Where, pursuant to a conspiracy between plaintiff and her husband to defraud a wholesale dealer from whom the husband was accustomed to buy meat, the husband left the state, and plaintiff sent her son in his place to get meat on credit, sell it, and bring her the proceeds, what the son said while getting the meat, in explanation of his father's absence, is admissible against plaintiff, as part of the res gestæ.—*Jansen v. McQueen* (Mich.) 70 N. W. 552.

§ 32. Declarations after accident or injury.

[a] (Iowa: 1896.)

In an action for death of plaintiff's decedent, a brakeman, while attempting to uncouple cars in motion, his statement, made two minutes after the accident, as to the cause thereof, is admissible against the railroad company as res gestæ.—*Fish v. Illinois Cent. R. Co.* (Iowa) 65 N. W. 995.

[b] (Minn.: 1895.)

In an action for personal injuries, evidence that plaintiff, several hours after the accident, in answer to a question as to how badly he was hurt, replied, "I cannot tell, but I am pretty badly off," held inadmissible.—*Firkins v. Chicago Great Western Ry. Co.* (Minn.) 63 N. W. 172. 61 Minn. 31.

[c] (Minn.: 1897.)

Plaintiff's physician cannot state that, four or five days after the collision, plaintiff told him that the shock "wrenched him around, and threw him partly on the floor and partly on the opposite side of the car."—*Webber v. St. Paul Ry. Co.* (Minn.) 69 N. W. 716.

[d] (Wis.: 1896.)

The statement of a person fatally injured in a railroad collision, made from 30 to 60 minutes after the accident, as to the manner in which it occurred, is simply the narration of a past occurrence, and not admissible as part of the res gestæ.—*Steinhofel v. Chicago, M. & St. P. Ry. Co.* (Wis.) 65 N. W. 852. 92 Wis. 123.

[e] (Wis.: 1896.)

The declarations of deceased to a co-employee as to the cause of the injury, made a few minutes after it occurred, in a room adjoining the scene of the accident, was competent as a part of the res gestæ.—*Christianson v. Pioneer Furniture Co.* (Wis.) 66 N. W. 699. 92 Wis. 649.

[f] (Wis.: 1896.)

In an action for expulsion from defendant's street car, it appeared that plaintiff was expelled by the conductor after an altercation as to whether or not he had paid his fare, and was allowed to get on the car again, because the conductor became convinced that the fare had been paid. On the trial, plaintiff testified to the conversation between himself and the conductor, in respect to paying his fare, just after he stepped back into the car. Held, that it was admissible as a part of the res gestæ.—*Robinson v. Superior Rapid-Transit Ry. Co.* (Wis.) 68 N. W. 961.

§ 33. Declaration of injured person as to pain and suffering.

[a] (Mich.: 1896.)

In an action for personal injuries, statements and exclamations by plaintiff as to the extent, nature, and location of pain, made at the time she was feeling the pain, are admissible in evidence as original evidence.—*Will v. Village of Mendon* (Mich.) 66 N. W. 58.

[b] (Mich.: 1896.)

In a personal injury case, complaints made by the injured person, immediately after the injury, as to the pain suffered by her, are admissible in evidence in her favor.—*Mulliken v. City of Corunna* (Mich.) 68 N. W. 141.

[c] (Mich.: 1897.)

In an action for injuries, a physician who was called to treat plaintiff may testify as to exclamations of pain by plaintiff during an examination made with a view to such treatment.—*Hedde v. City Electric Ry. Co.* (Mich.) 70 N. W. 1096.

[d] (Minn.: 1897.)

Whenever bodily suffering is material to be proved, expressions or complaints, made at the time, which are the natural and instinctive manifestations of pain, are competent evidence as part of the res gestæ, and may be testified

to and described by any person in whose presence they were uttered. —*Williams v. Great Northern Ry. Co.* (Minn.) 70 N. W. 869.

[c] (Wis., 1896.)

Testimony that the injured woman said that when she lay down she was dizzy, and that she complained of her lungs and her back hurting her, is within the rule that a narration of pains is inadmissible to show the extent of an injury. —*Keller v. Town of Gilman* (Wis.) 66 N. W. 800.

93 Wis. 9.

See, also, "Damages," § 43.

3. ACCOMPANYING POSSESSION OR BEARING ON CONVEYANCES AND OWNERSHIP.

§ 34. When admissible.

[a] (Iowa; 1897.)

Declarations of a person in possession of personally, explanatory of such possession, are inadmissible where neither of the parties claims under him. —*Oberholtzer v. Hazen* (Iowa) 70 N. W. 207.

[b] (Minn.; 1895.)

On an issue as to whether a defendant in attachment had concealed property with the intent to defraud creditors, the statements of one, in whose possession property was found concealed, that it belonged to such defendant, are admissible as *res gestae*. —*Rosenberg v. Burnstein* (Minn.) 61 N. W. 684.
60 Minn. 18.

[c] (S. D.; 1897.)

Defendant's indebtedness to plaintiff bank was secured by trust deeds of land to its cashier. The land was sold, and the purchase-money mortgage and notes turned over to the bank, whereupon the cashier sent defendant a statement of account, reciting the terms on which the notes were held by plaintiff. *Held*, in an action to foreclose the mortgage, that such recitals were an admission by plaintiff. —*Commercial Bank v. Jackson* (S. D.) 70 N. W. 846.

§ 35. Of vendor tending to impeach vendee's title.

[a] (Minn.; 1895.)

The disclaimer and admissions of a grantor, made after he has parted with his title to and possession of the land, are not admissible to impeach the title of his grantee. —*Kurtz v. St. Paul & D. R. Co.* (Minn.) 63 N. W. 1.
61 Minn. 18.

[b] (Neb.; 1895.)

Evidence of declarations by a former owner of land is not admissible as against those claiming under him, when made after he has conveyed the land. —*Consolidated Tank-Line Co. v. Pien* (Neb.) 62 N. W. 1112.
44 Neb. 887.

[c] (Wis.; 1895.)

Declarations of a grantor, made after he has parted with his interest in land, are inadmissible to affect the title of the grantee. —*Matteson v. Hartman*, 65 N. W. 58, 91 Wis. 485.

§ 36. Of deceased—Self-serving declaration.

(Minn.; 1895.)

In ejectment, where the defense is adverse possession, evidence of declarations by a deceased person through whom defendants claim title, made while in possession of the premises, to the effect that he was the owner, is admissible. —*Brown v. Kohout* (Minn.) 63 N. W. 248.
61 Minn. 113.

§ 37. By assignor.

(Mich.; 1896.)

In garnishment of a fund held by an insurance company for payment of a policy in

favor of the principal defendant, where such defendant had assigned the policy, declarations by him, made subsequent to the assignment, that he intended to apply the funds in payment of his debts, were inadmissible as against the assignee. —*Muncey v. Sun Ins. Office* (Mich.) 67 N. W. 562.

4. OF AGENT.

To show agency, see "Principal and Agent," §§ 2, 3.

§ 38. Admissibility.

(Minn.; 1896.)

The correctness of certain tally cards, which were the basis of the scale bills received in evidence, being in issue, defendant, for the purpose of impeaching the integrity of the tallyman who made the cards, and the correctness of the cards, could not prove subsequent particular acts of misconduct of the tallyman, occurring two years after the cards were made, from which it was claimed that an admission that the cards were fraudulent might be implied, without first proving to the satisfaction of the trial court that the tallyman was acting for or in collusion with plaintiff as to said acts. —*Matthews v. Hershey Lumber Co.* (Minn.) 67 N. W. 1008.

§ 39. Preliminary proof of agency and scope thereof.

[a] (Mich.; 1896.)

In an action for malicious prosecution of plaintiff for receiving goods stolen from a railroad company with knowledge of the theft, declarations of the local attorney for the road, who had not been employed on the case, and who had no general authority, that there had been considerable stealing from the company, and that plaintiff was suspected, were inadmissible. —*Fletcher v. Chicago & N. W. Ry. Co.* (Mich.) 67 N. W. 330.

[b] (Mich.; 1896.)

In garnishment proceedings against a chattel mortgagee, declarations by the mortgagee, and others in possession, as to when the garnishee took possession, made in the garnishee's absence, are not admissible, in the absence of a showing that their possession was his possession, or that they were authorized to speak for him. —*Krementz v. Howard* (Mich.) 67 N. W. 526.

[c] (S. D.; 1896.)

Statements concerning commissions in controversy, written to an agent by the principal's secretary, in the nature of admissions, are incompetent, without proof that they were within the scope of the secretary's authority. —*Roberts v. Minneapolis Threshing-Mach. Co.* (S. D.) 67 N. W. 607.

§ 40. After event.

[a] (Mich.; 1895.)

In an action for injuries caused by the kick of a bay mare, which, with others, was being exhibited for sale in defendant's barn, it was error to permit plaintiff to testify that in justice's court, where the case had been once tried, he heard an employé of defendant say that the horse was a kicker. —*Abland v. Ft. Wayne & B. I. Ry. Co.* (Mich.) 62 N. W. 172.
104 Mich. 147.

[b] (S. D.; 1896.)

In an action to recover an organ, under a chattel mortgage to secure the price, defendant testified that plaintiffs' agent, who held the notes for collection, had testified on a former trial that an order previously given him by defendant's father had been accepted by him in full payment of the notes. *Held* inadmissible, it being the admission of an agent after the act. —*Estey v. Birnbaum* (S. D.) 68 N. W. 290.

§ 41. After termination of agency.

(Minn.: 1896.)

After the dissolution of a partnership, the acts or admissions of one partner are not admissible in evidence against his former co-partners, unless assented to or authorized by them.—*In re Strait's Estate* (Minn.) 67 N. W. 987; *First Nat. Bank v. Strait*, Id.

§ 42. By officers of corporations.

(Neb.: 1896.)

The testimony on another trial of an officer of a corporation with relation to previous corporate acts cannot be proved as an admission binding upon the corporation.—*Columbia Nat. Bank v. Rice* (Neb.) 67 N. W. 163. 48 Neb. 428.

VII. OPINION EVIDENCE.

Hearsay evidence of opinion, see ante, § 17.

Harmless error in admitting, see "Appeal," § 251.

In criminal cases, see "Criminal Law," §§ 99, 100; "Homicide," § 30.

Of capacity of testator, see "Wills," § 5.

1. IN GENERAL.**§ 43. On what subjects admissible in general.**

(Iowa: 1895.)

On an issue as to whether an accident happened on an approach to a bridge or on the highway before the approach was reached, a witness may not state whether or not the place where plaintiff's team backed off into a ravine was part of the approach or of the highway, as this is a question for the jury to say from descriptions of the location.—*Miller v. Boone County* (Iowa) 63 N. W. 352.

(Iowa: 1896.)

When the ability of a decedent to speak and understand the English language is in question, it is proper for a witness who speaks the language to testify that decedent spoke it so as to be understood, and that she appeared to understand it when spoken to her.—*Kuen v. Upmier* (Iowa) 67 N. W. 374.

(Iowa: 1896.)

In an action on a note which plaintiff alleged was indorsed to it as collateral by a bank for which a receiver was afterwards appointed, in which defendant claimed that plaintiff was not the owner of the note, it was not error to exclude evidence of the receiver as to whose property he had considered the note.—*Corn Exch. Bank v. Schuttletworth* (Iowa) 68 N. W. 827.

(Mich.: 1894.)

On a will contest, the scrivener who drew the will, after testifying that proponents were present at its execution, and that testatrix was very weak, and could not speak intelligibly, cannot give his opinion as to whether the will was practically the will of proponents.—*McHugh v. Fitzgerald* (Mich.) 61 N. W. 354. 103 Mich. 21.

(Mich.: 1895.)

Where a railroad employé was killed in the act of cutting a trolley wire crossing defendant's tracks, and it was an issue whether such wire was an obstruction which rendered its removal within the line of deceased's duty as a section boss, it was error not to allow defendant's road master to state how far above the top of a car a brakeman's lantern would go in giving certain signals.—*Walker v. Lake Shore & M. S. Ry. Co.* (Mich.) 62 N. W. 1032. 104 Mich. 606.

(Mich.: 1895.)

On an issue whether a horse was sound, as warranted by its seller, it was not error to

permit a witness to testify that about two weeks after the purchase he noticed a puff on the leg of the horse; that it looked like a spavin; that he did not think that such a spavin would appear within a week after it had been contracted, though he testified that he had never watched one until it was fully developed, and had no practical knowledge about them.—*Rogers v. Ferris* (Mich.) 64 N. W. 1048.

(I Mich.: 1895.)

A locomotive engineer may testify to the ability of a pushbar on his engine, which broke in making a coupling, to withstand the shock if free from defects.—*McDonald v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 597.

(I Mich.: 1895.)

A witness cannot be asked whether, in his opinion, certain evidence is evidence on which a verdict could be based.—*Strudgeon v. Village of Sand Beach* (Mich.) 65 N. W. 616.

(I Mich.: 1896.)

In ejectment, where the question was the location of a certain highway, it was error to permit witnesses to testify as to their recollection of where the road was actually traveled in early days, and that there was no road cut, or having any definite or uniform width, and to give an opinion as to where the road was.—*Hoffman v. City of Port Huron* (Mich.) 68 N. W. 546.

(I Mich.: 1896.)

In an action for loss of a mill by fire started by fire from defendant's land, a witness cannot testify that in his opinion the fire was started by the fire from defendant's land.—*Smaltz v. Boyce* (Mich.) 69 N. W. 21.

(I Minn.: 1895.)

A witness may be permitted to answer a question calling for a mere conclusion where the purpose of the question is to prove a negative.—*Peerless Mann'g Co. v. Gates* (Minn.) 63 N. W. 260.

61 Minn. 124.

(I Neb.: 1897.)

Where self-defense is pleaded as a defense to a civil action for assault and battery, proof that plaintiff was of a quarrelsome disposition and ungovernable temper must be shown by general reputation, and not by the opinion of witnesses.—*Golder v. Lund* (Neb.) 70 N. W. 379.

(I S. D.: 1895.)

A witness without special knowledge may testify as to the approximate height of a stream of water thrown on a building from an open street.—*Vermillion Artesian Well, Electric Light, Mining, Industrial & Improvement Co. v. City of Vermillion* (S. D.) 61 N. W. 802. 6 S. D. 466.

§ 44. — Negligence.

(Iowa: 1895.)

In an action for injuries caused by the alleged negligence of the motoneer on a street car, statements that the witness "supposed" the gong rang more than once, and that, so far as he knew, it was not cracked, were properly excluded.—*Orr v. Cedar Rapids & M. C. Ry. Co.* (Iowa) 62 N. W. 851.

(Iowa: 1895.)

On an issue as to a tenant's negligence in causing the destruction of the property by fire, it was proper to exclude defendants' proffered testimony that "all the care of the building was taken that could be with reference to its taking fire."—*Duer v. Allen* (Iowa) 64 N. W. 682.

§ 45. Qualification of witness.

(I Mich.: 1896.)

In assumpsit for the construction of a dock, where it was pleaded that, owing to faulty construction, it had been carried out into the lake, the opinion of a witness as to the cause of the loss of the dock, in the absence of anything to show

his qualifications, was properly rejected.—*Munroe v. Godkin* (Mich.) 69 N. W. 244.

[b] (Mich.; 1896.)

An opinion as to the qualifications of a witness as an expert, to be admissible, must be based on personal knowledge, and not on reputation.—*People v. Holmes* (Mich.) 69 N. W. 501.

§ 46. What are statements of facts or conclusions.

[a] (Iowa; 1894.)

In an action against a county for injuries caused by a defective bridge, a question asked of a member of the board of supervisors as to whether any notice was brought to the board of a defect in the material or construction of the bridge prior to the accident was properly excluded, as calling for a conclusion.—*Morgan v. Fremont County* (Iowa) 61 N. W. 231.

92 Iowa, 644.

[b] (Iowa; 1894.)

Testimony of a witness as to who "seemed" to be the financial manager of a certain business "while he was around" is inadmissible, since it states merely a conclusion.—*Oberholtzer v. Hazen* (Iowa) 61 N. W. 365.

92 Iowa, 602.

[c] (Iowa; 1895.)

In an action against a railroad company for the negligent killing of stock, on a question whether it was dark and foggy at the time of the accident, it was error to refuse to permit the conductor of the train which killed the stock to testify whether the trainmen could see the whistling posts at the crossings, and whether he could see them, this not involving the statement of a conclusion.—*Brown v. Sioux City & P. R. Co.* (Iowa) 62 N. W. 737.

[d] (Iowa; 1896.)

The asking of witness to state "whether you did sell him these notes or not," the sale being the point in issue, calls for a conclusion.—*Ward v. Dickson* (Iowa) 65 N. W. 997.

[e] (Iowa; 1896.)

Questions asked in an action for injury from slipping on steps leading from a sidewalk to a street crossing, of witnesses shown to have passed over them several times a day for some time, "State if at any times * * * you observed anything on the steps that would tend to render them in a bad condition," and "What, if anything, did you observe on these steps that would make it dangerous to fall or otherwise?" being directed to the condition of the steps, in the way of snow and ice, are objectionable, as asking for a conclusion.—*Langhammer v. City of Manchester* (Iowa) 68 N. W. 688.

[f] (Iowa; 1896.)

Statement of partners that they did not authorize the making of a note in suit, executed in the partnership name by the managing partner, is in the nature of a conclusion, and does not show that they did not write a letter to him claimed to give him such authority.—*Baxter v. Rollins* (Iowa) 68 N. W. 721.

[g] (Mich.; 1895.)

Testimony of a partner as to whether a claim assigned by him as an individual was his individual claim or a partnership claim is a conclusion of law, and inadmissible.—*Montgomery v. Martin* (Mich.) 62 N. W. 578.

104 Mich. 390.

[h] (Mich.; 1895.)

In an action for the death of a railroad employé while performing work outside his employment, under the alleged orders of defendant's road master, the latter may be asked on cross-examination whether he directed deceased to do the work.—*Walker v. Lake Shore & M. S. Ry. Co.* (Mich.) 62 N. W. 1032.

104 Mich. 606.

[i] (Mich.; 1895.)

On the issue as to whether signals were given by a train as it approached a crossing,

it is not error to permit a witness to be asked as to whether he could have heard the signal, if it was given, on the ground that it calls for a conclusion, such question being merely equivalent to an inquiry as to whether he was within hearing distance.—*Hooker and Grant, J.L., dissenting*.—*Crane v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 527.

[j] (Mich.; 1896.)

In an action for injuries by the breaking of a dam by reason of its negligent construction, evidence of a witness that the dam would not have broken but for the high stage of the water is properly excluded as being a conclusion of fact.—*Darling v. Thompson* (Mich.) 65 N. W. 754.

[k] (Mich.; 1897.)

In an action for commissions for the sale of logs on which plaintiffs had an option, testimony of the seller that defendant "made the purchase by virtue of the option of" plaintiffs was not inadmissible, as calling for a conclusion, where defendant testified that he did not make the purchase under the option, and that he had no agreement with plaintiffs.—*Barrell v. Gates* (Mich.) 70 N. W. 574.

[l] (Minn.; 1897.)

A statement by a witness that a check given by him was applied by the payee upon a certain debt, that fact not being presumptively within the witness' knowledge, nor shown by any other evidence, must be regarded as only a conclusion of the witness, and will not support a verdict.—*Traders' Ins. Co. v. Herber* (Minn.) 69 N. W. 701.

[m] (Wis.; 1895.)

On an issue as to the authority of defendant's agent to make a certain contract with plaintiff, a witness cannot be asked what the agent's authority was as to making contracts.—*Roche v. Pennington* (Wis.) 62 N. W. 946.

90 Wis. 107.

§ 47. Mental capacity or condition.

[a] (Iowa; 1895.)

It was error to allow a nonexpert witness, whose opinion as to testatrix's mental weakness was based on the fact that her "conversation was disconnected," to explain in what manner it was disconnected.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, Id.

[b] (Iowa; 1895.)

Evidence as to whether, in the opinion of the witness, the testatrix acted under the control of one of the legatees, was properly excluded.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, Id.

[c] (Iowa; 1896.)

A nonexpert may state the mental condition of a person, after giving facts showing an acquaintance and knowledge of the person.—*Kostecky v. Scherhart* (Iowa) 68 N. W. 591.

[d] (Mich.; 1896.)

A nonexpert testifying to the mental capacity of a testator cannot, on redirect examination, be asked his opinion of the mental capacity of a testator in a hypothetical case.—*Sagar v. Hogmire* (Mich.) 66 N. W. 327.

[e] (Mich.; 1897.)

Opinions of lay witnesses as to the mental capacity of the testatrix are admissible when based on facts and circumstances coming under their personal observation, and testified to as the grounds for such opinions.—*Sullivan v. Foley* (Mich.) 70 N. W. 322.

[f] (Minn.; 1896.)

Evidence that the deceased, at a certain time, appeared to be afraid of one of the parties in a conference relative to the disposition of his property, or that he appeared to be under such person's influence, is not competent.—*Manahan v. Halloran* (Minn.) 69 N. W. 619.

[g] (Neb.; 1896.)

A nonprofessional witness may give his opinion as to sanity as the result of his personal observation of the person whose sanity or mental condition is questioned, after first stating the facts which he observed.—*Hay v. Miller* (Neb.) 66 N. W. 1115.
48 Neb. 156.

§ 48. As to sanity.

(Wis.; 1895.)

It was not error to exclude the opinion of a nonexpert as to another's sanity, based upon the fact that the latter had become angry with the witness about a trivial occurrence while they were working together.—*Boorman v. Northwestern Mut. Relief Ass'n* (Wis.) 62 N. W. 924.
90 Wis. 144.

§ 49. As to physical condition.

[a] (Mich.; 1896.)

A witness who nursed a person who had received personal injuries may testify that the injuries caused a numbness in the injured person's limbs, as a fact within his observation.—*Will v. Village of Mendon* (Mich.) 66 N. W. 58.

[b] (Wis.; 1896.)

In an action for damages for personal injuries, the husband and mother of the injured woman may testify to her apparent physical condition after the accident, and to her apparent ability to move about, and to do lifting and ordinary housework, for a stated time thereafter.—*Keller v. Town of Gilman* (Wis.) 66 N. W. 800.
93 Wis. 9.

§ 50. As to intent.

[a] (Iowa; 1897.)

A married woman sued on a note may testify as to whether she intended to thereby bind her separate estate.—*Union Stock Yards Nat. Bank v. Coffman* (Iowa) 70 N. W. 693.

[b] (Mich.; 1894.)

In an action for a commission, testimony of the defendant that he had no idea that plaintiffs intended to charge a commission is incompetent to show the intent of the parties.—*McKinnon v. Gates* (Mich.) 61 N. W. 74.
102 Mich. 618.

§ 51. Effect of opinion evidence.

[a] (Iowa; 1896.)

Where witnesses have testified as to the genuineness of a signature, both from comparison and from familiarity with the signature of the alleged subscriber, it is proper to charge that evidence of this character is regarded by the law as unsatisfactory, and such as ought not to overthrow the positive and direct testimony of a credible witness, who testifies from personal knowledge.—*Jackson v. Adams* (Iowa) 69 N. W. 427.

[b] (Wis.; 1897.)

On a will contest, the weight of expert testimony as to testamentary capacity is to be determined by the court or jury.—*In re Jones' Will* (Wis.) 70 N. W. 685; *Jones v. Roberts*, Id.

2. EXPERT TESTIMONY IN GENERAL.

Opinion evidence as to qualification of expert, see ante, § 45.

Weight of expert testimony, see post, § 123.

— instructions thereon, see "Trial," § 77.
In criminal cases, see "Criminal Law," § 100.

§ 52. In general.

[a] (Neb.; 1895.)

Where no one was with deceased at the time of his death, opinion evidence of the coroner, a physician, and a surgeon, who took charge of the body, was admissible to show the

manner of death.—*Gran v. Houston* (Neb.) 64 N. W. 245, 45 Neb. 813.

[b] (Wis.; 1896.)

Expert evidence that plaintiff's injuries might have been aggravated by a want of proper physical exercise is inadmissible where there is no evidence that such exercise was not taken.—*Nichols v. Brabazon* (Wis.) 69 N. W. 342.

§ 53. Subjects of expert testimony.

[a] (Iowa; 1897.)

In an action to recover attorneys' fees, the question as to whether time shown to have been spent by plaintiff in preparing a case for trial was unnecessary, is not one for expert testimony.—*Kelly v. Incorporated Town of West Bend* (Iowa) 70 N. W. 726.

[b] (Mich.; 1895.)

In an action by an employé for injuries caused by the breaking of a saw, it was not error to permit expert witnesses, who were familiar with such saws, and had large experience in their use, to testify that in their judgment such saw was suitable and safe for use.—*Lau v. Fletcher* (Mich.) 62 N. W. 357.
104 Mich. 295.

[c] (Minn.; 1895.)

Large ice tongs are not in such common use that the proper manner of constructing them is a matter of such common knowledge as to preclude expert testimony as to the same.—*Neubauer v. Northern Pac. R. Co.* (Minn.) 61 N. W. 912.
60 Minn. 130.

[d] (Minn.; 1896.)

Whether it is in the usual course of banking business to discount paper of makers whose financial responsibility is unknown, indorsed without recourse, is a question of law for the court, or of fact for the jury, and not for expert evidence.—*Merchants' & Mechanics' Sav. Bank v. Cross* (Minn.) 67 N. W. 1147.

[e] (Minn.; 1896.)

In an action growing out of the collapse of a cistern wall while being constructed, the opinions of qualified experts might be received in evidence as to the sufficiency of the wall in respect to thickness alone, and whether a wall of the thickness of the one in question was strong enough to resist the pressure naturally resting upon it.—*Sveda v. Libera* (Minn.) 68 N. W. 36; *Kulas v. Same*, Id.

[f] (Minn.; 1896.)

The effect of operating a bolting or cut-off saw in a sawmill without a carriage attachment, as to the safety of the operator, is not a matter of such common knowledge as to preclude the giving of expert testimony thereon.—*Olmscheid v. Nelson-Tenney Lumber Co.* (Minn.) 68 N. W. 605.

[g] (Neb.; 1895.)

In an action by a clergyman for libel in the publication of charges against him, the opinion of another clergyman as to the effect of such publication on plaintiff's reputation, and usefulness in his office, is inadmissible.—*Piper v. Woolman*, 61 N. W. 588, 43 Neb. 289.

[h] (Neb.; 1895.)

Expert testimony is not necessary to establish injury to farm land due to an embankment causing the land to be flooded with surface water.—*Lincoln & B. H. R. Co. v. Sutherland* (Neb.) 62 N. W. 859.
44 Neb. 526.

§ 54. Operation of railroads and running of cars.

[a] (Iowa; 1895.)

Where a witness testified that he stood 25 feet from the track, and signaled and called out to the engineer to stop, but there was no evidence that the engineer saw or heard him, testimony of an expert as to the distance within which he could stop an engine running at a certain speed in case he saw a man, 25 feet

away, signaling and calling out to him to stop, is inadmissible.—*Adams v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 1059.

93 Iowa, 565.

[b] (Minn.; 1896.)

It was not an abuse of discretion to refuse to permit a conductor who had been running on an electric railway line for 19 months, and who testified that he knew what would happen in case a car running at the rate of 15 miles an hour should attempt to pass over a sharp curve, to testify what, in his opinion, the result would be.—*Blondel v. St. Paul City Ry. Co.* (Minn.) 68 N. W. 1979.

§ 55. Who are experts.

[a] (Iowa; 1894.)

In an action against a county for injuries caused by a defective bridge, shown to be not less than seven years old, a bridge builder may testify as to the effect on the bridge of the decay of the timber, and as to the ordinary life of such timbers as were used in the bridge.—*Morgan v. Fremont County* (Iowa) 61 N. W. 231.

92 Iowa, 644.

[b] (Iowa; 1896.)

Plaintiff's grain was destroyed by fire set by sparks from defendant's engine, operating a threshing machine. A witness testified that he had run an engine for about 40 years; had operated the engine in question a little; that he had run similar engines, but never for threshing grain. *Held*, that the witness was competent to testify as to the appliances necessary to keep sparks from escaping from such engine.—*Richardson v. Douglas* (Iowa) 69 N. W. 530.

[c] (Minn.; 1895.)

A brick and stone mason, without having a general knowledge as to the construction of buildings, is not competent to give opinion evidence as to what caused the floors and walls of a building to collapse.—*Peteler Portable Railway Manuf'g Co. v. Northwestern Adamant Manuf'g Co.* (Minn.) 61 N. W. 1024.

60 Minn. 127.

[d] (Minn.; 1896.)

The determination of whether a witness is competent to testify as an expert is largely within the discretion of the trial court.—*Sneda v. Libera*, 68 N. W. 36; *Kulas v. Same*, *Id.*

[e] (Minn.; 1897.)

Whether a witness is competent to testify as an expert is for the trial court.—*Beckett v. Northwestern Masonic Aid Ass'n* (Minn.) 69 N. W. 923.

§ 56. — Matters connected with operating railroads.

[a] (Iowa; 1895.)

A witness who has been engaged in railroad work for 20 years, and been in the construction department, and frequently seen others make pilot-bar couplings, is qualified to testify as to the usual manner of coupling a box car to an engine with a pilot-bar coupling.—*Kerns v. Chicago, M. & St. P. Ry. Co.* (Iowa) 62 N. W. 692.

[b] (Mich.; 1896.)

A person who has been a locomotive engineer for 14 years; who has known boiler stay bolts to break, and seen them taken off; and who has been in machine shops a good deal,—may testify as to whether broken stay bolts which he had examined were recently broken or not.—*Woods v. Chicago & G. T. Ry. Co.* (Mich.) 66 N. W. 328.

§ 57. Questions of due care and negligence.

[a] (Iowa; 1895.)

On an issue as to defendants' negligence in causing the destruction by fire of a creamery leased to them, it was proper to exclude the testimony of an expert that the creamery was

"conducted in the same manner that an ordinarily prudent man in that business would conduct a creamery."—*Duer v. Allen* (Iowa) 64 N. W. 682.

[b] (Iowa; 1897.)

On an issue as to negligence in driving over a bridge, with no railings or guards, a horse which was blind in one eye, text-books relating to the effect of blindness in horses are inadmissible, since the subject is not one of expert testimony, but depends on the knowledge of the disposition of the particular animal.—*Gould v. Schermer* (Iowa) 70 N. W. 697.

[c] (Mich.; 1896.)

In an action against a master for injuries alleged to have been caused by his negligence in employing an incompetent person as head sawyer in a sawmill, witnesses who had seen such person engaged in his employment, and who were familiar with the requirements of the place, may testify as to whether he was competent.—*Lewis v. Emery* (Mich.) 66 N. W. 569.

[d] (Minn.; 1896.)

That the use of steam power in threshing grain is hazardous, and that, with a wind prevailing in the direction of the stacks, the hazard is increased, are not subjects of expert testimony.—*Morris v. Farmers' Mut. Fire Ins. Co. of Harmony* (Minn.) 65 N. W. 655.

63 Minn. 420.

[e] (N. D.; 1895.)

Whether an obstruction in a street is calculated to frighten horses of ordinary gentleness is not a subject of expert testimony.—*Ouverson v. City of Grafton* (N. D.) 65 N. W. 676.

5 N. D. 281.

[f] (Wis.; 1896.)

In an action by a servant for injury caused by the breaking of a stringer in a staging on which he was working, it was not reversible error for the court to allow an expert bridge builder to give his opinion as to the sufficiency of a stringer like the one in question to bear the weight put thereon.—*Stanwick v. Butler-Ryan Co.* (Wis.) 67 N. W. 723.

93 Wis. 430.

§ 58. As to handwriting.

[a] (Iowa; 1897.)

A person whose business for 15 years required him frequently to make comparisons of handwritings is competent to testify as an expert in regard thereto, though he testifies that he is not an expert in the sense of making it his business.—*Christman v. Pearson* (Iowa) 69 N. W. 1055.

[b] (Mich.; 1896.)

One cannot testify, as an expert, that a signature to a note was not his; the only attempt to lay a foundation therefor being that he was asked if he was able to read and write, and if he would know his own signature when he saw it.—*Pillard v. Duan* (Mich.) 66 N. W. 45.

3. TESTIMONY AS TO VALUE AND AMOUNT OF DAMAGES.

Sufficiency of proof of value, see post, § 126.

§ 59. Admissibility.

[a] (Mich.; 1895.)

In an action for a wrongful levy on hay cut from a given acreage, which had not been weighed, and a sale thereof, a witness who had shown himself competent to testify could be asked to estimate the quantity of hay in the acreage for that season before harvest.—*Isaac v. McLean* (Mich.) 64 N. W. 2.

[b] (Mich.; 1897.)

In an action for personal services in defendant's farmhouse, where one testified, on the question of the amount of plaintiff's labors, that several men had worked on the farm while

he was there,—sometimes 10, and never less than 2,—he could state the average number so employed.—*Fowler v. Fowler* (Mich.) 70 N. W. 336.

[c] (Mich.; 1897.)

The value of services of a woman in "keeping house" for men on a farm is a subject for expert evidence.—*Fowler v. Fowler* (Mich.) 70 N. W. 336.

§ 60. Competency of witness.

[a] (Iowa; 1894.)

On the trial of one accused of setting fire to his store, one acquainted with the market value, at the place of the fire, of articles similar to those composing the stock destroyed, is a competent witness as to the value of the stock, though he may never have examined it.—*State v. Tennehom* (Iowa) 61 N. W. 193.

92 Iowa, 551.

[b] (Iowa; 1894.)

In an action on a fire insurance policy on furniture, the assured and her husband may testify that the furniture "was worth \$300," without showing their knowledge of the value.—*Thomason v. Capital Ins. Co.* (Iowa) 61 N. W. 843.

92 Iowa, 72.

[c] (Iowa; 1896.)

A farmer, who had been engaged in raising, handling, and selling horses, and was acquainted with the value of horses in that part of the state in which the cause of action arose, could testify as to the value of a race horse.—*Leek v. Chesley* (Iowa) 67 N. W. 580.

[d] (Iowa; 1896.)

Where the condition of a piano at a certain time has been shown, a witness conversant with the value of pianos may testify as to its value at such time, though he did not himself see it.—*Colby v. W. W. Kimball Co.* (Iowa) 68 N. W. 786.

[e] (Mich.; 1895.)

A witness who testifies that he knows very nearly what soda water fountains are worth is competent to testify as to the value of a fountain.—*Johnston v. Farmers' Fire Ins. Co.* of York (Mich.) 64 N. W. 5.

[f] (Mich.; 1896.)

In an action for breach of warranty on the sale of a horse, witnesses possessed of sufficient knowledge of the market to entitle them to give an opinion can testify as to the value of the horse.—*Connell v. McNett* (Mich.) 67 N. W. 344.

[g] (Mich.; 1896.)

Upon an issue as to the value of services rendered by a claimant against an estate, to the testatrix, as a companion and attendant, where the claimant is debarred from testifying, the opinions of other persons, who resided in the same house, and had a general knowledge of the condition of decedent, and the services rendered, are competent.—*Lathrop v. Sinclair* (Mich.) 65 N. W. 248.

[h] (Mich.; 1897.)

One who did all the work in a farmhouse was competent to testify in an action therefor, to what, in her judgment, the services were worth.—*Fowler v. Fowler* (Mich.) 70 N. W. 336.

[i] (Minn.; 1896.)

The testimony of an expert as to the value of services is not necessarily incompetent because he did not hear all the testimony relative to the services.—*Swanson v. Mellen* (Minn.) 69 N. W. 620.

[j] (Minn.; 1897.)

On an issue as to the reasonable value of repairs by a tenant he may testify what he paid for them, and that the prices paid were reasonable.—*Hausman v. Mulheran* (Minn.) 70 N. W. 866.

[k] (Neb.; 1895.)

One who had not seen, and did not know anything in regard to, the stock of goods in question, was not competent to testify as to what proportion of the original cost represented its value after it had been in store three months.—*Smith v. First Nat. Bank* (Neb.) 63 N. W. 796. 45 Neb. 444.

[l] (Neb.; 1896.)

One who has resided upon and owned real estate for 20 years, and is acquainted, from hearsay, with the recent sales of land in the vicinity, and the prices paid therefor, is a competent witness to the value of his own property.—*Chicago, B. & Q. R. Co. v. Shafer* (Neb.) 68 N. W. 342.

[m] (Neb.; 1897.)

One who testifies that he has bought and sold lands in the same county, and was acquainted with the market value of the land in the vicinity when a sale of land was made, is competent to testify as to the value of the land and its improvements.—*Mullen v. Kinsey* (Neb.) 70 N. W. 18.

[n] (S. D.; 1896.)

A witness who had never seen the engine in dispute, but had heard the other witnesses testify, was not competent to state what the engine was worth in its condition as described by such witnesses.—*Aultman Co. v. Ferguson* (S. D.) 66 N. W. 1081.

§ 61. — Value of legal services.

[a] (Iowa; 1895.)

An attorney can, for services rendered a client in a divorce suit, recover of her husband only what the services were reasonably worth where rendered, and attorneys living in different parts of the state, in order to qualify as experts as to the value of the services, should show that they knew the rates charged in the vicinity where the services were rendered.—*Stevens v. Ellsworth* (Iowa) 63 N. W. 683.

[b] (Mich.; 1896.)

In an action by attorneys for professional services, defendant, if not an attorney, is not a competent witness to testify as to the value of plaintiff's services, though he has employed and settled with other attorneys, and knew what their charges were in other cases.—*Howell v. Smith* (Mich.) 66 N. W. 218.

[c] (S. D.; 1894.)

An attorney of 20 years' practice can testify as to the value of legal services with which he is familiar, though he practiced in a different state than that in which such services were rendered.—*Frye v. Ferguson* (S. D.) 61 N. W. 161.

6 S. D. 392.

4. MEDICAL TESTIMONY.

§ 62. In general.

[a] (Iowa; 1895.)

The opinion of a doctor who attended deceased after the shooting, and assisted in the post mortem examination of his body, is competent as to the cause of his death.—*State v. Tippet* (Iowa) 63 N. W. 445.

[b] (Minn.; 1895.)

A medical expert could not give an opinion as to the cause of a person's physical condition, based in part on information derived from private conversations with other experts.—*Miller v. St. Paul City R. Co.* (Minn.) 64 N. W. 554. 62 Minn. 216.

[c] (Wis.; 1895.)

In an action for injuries from a fall caused by a defective sidewalk, an expert physician, who has examined the plaintiff and testified to the results of such examination, may be asked what he would say was the matter with a strong, healthy woman who had had a fall similar to plaintiff's, attended with results similar to those which he has ascertained attended plaintiff's

fall, without invading the province of the jury, as asking the cause of plaintiff's injury.—*Tebo v. City of Augusta* (Wis.) 63 N. W. 1015.
90 Wis. 405.

[d] (Wis.; 1896.)

It was not error to permit a medical expert to give an opinion, based on the testimony of another witness, which he heard, assuming such testimony to be true.—*McKoon v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 175.

§ 63. As to diseases of animals.

(Mich.; 1896.)

The testimony of a witness that he had been employed in a stable, containing 40 horses, for two years and a half, and had "watched the symptoms of horses," did not qualify him to give an opinion as an expert as to the cause of the death of a horse.—*Lewis v. Bell* (Mich.) 66 N. W. 1091.

§ 64. As to permanence of injuries.

[a] (Neb.; 1896.)

A medical expert, testifying in an action for personal injuries, may be examined as to the probable future duration of the injury.—*Chicago, R. I. & P. R. Co. v. Archer*, 65 N. W. 1043, 46 Neb. 907.

[b] (Wis.; 1895.)

In an action for personal injuries a physician may give his opinion as to the "reasonable probability" of plaintiff's ultimate recovery.—*Bloek v. Milwaukee St. Ry. Co.* (Wis.) 61 N. W. 1101, 89 Wis. 371.

§ 65. Necessity of giving basis of opinion.

(Iowa; 1895.)

On an issue as to whether decedent's death was caused by certain alleged injuries or from other causes, the opinion of the physician who attended decedent, based on statements made by decedent to him, is inadmissible, without also laying before the jury what those statements were.—*Van Winkle v. Chicago, M. & St. P. R. Co.* (Iowa) 61 N. W. 929.
93 Iowa, 509.

5. EXAMINATION OF EXPERTS.

§ 66. In general.

[a] (Mich.; 1896.)

An expert witness, called on the subject of insanity, cannot testify as to a particular case claimed to be analogous to the defendant's.—*People v. Holmes* (Mich.) 69 N. W. 501.

[b] (N. D.; 1896.)

Where a surgeon, shown to be duly qualified in his profession, testifies fully before the jury as to the condition in which he found a limb that had previously been amputated, he may properly be asked what, in his opinion, was the cause of the condition in which he found the limb.—*Tullis v. Rankin* (N. D.) 68 N. W. 187.

[c] (S. D.; 1895.)

A question to an expert as to how much water would be thrown from a certain opening "under a pressure such as was on the pumps," is properly excluded where there is no evidence as to the amount of pressure.—*Vermillion Artesian Well, Electric Light, Mining, Industrial & Improvement Co. v. City of Vermillion* (S. D.) 61 N. W. 802.
6 S. D. 466.

[d] (S. D.; 1896.)

In an action for trespass to land, a witness should not be allowed to give his opinion as to the amount of damages, the basis upon which it was made not being shown.—*Webster v. White* (S. D.) 66 N. W. 1145.

§ 67. Hypothetical questions.

[a] (Iowa; 1896.)

A statement, forming part of the basis of a hypothetical question, that testatrix "would not engage in any conversation, but appeared to be in a study," was not objectionable, as authorizing an inference that she would not talk at all.—*In re Denton's Will* (Iowa) 66 N. W. 99.

[b] (Mich.; 1896.)

Statements embodied in a hypothetical question to a medical expert, calling for his opinion as to mental condition, asked by the contestants of a will on the ground of the unsoundness of mind of a testator, should be limited to those facts testified to which, if true, are indicative of mental unsoundness.—*Rivard v. Rivard* (Mich.) 66 N. W. 681.

[c] (Mich.; 1896.)

A hypothetical question to a medical expert, calling for his opinion, upon the facts assumed, as to the mental capacity of a testator, is not objectionable because it includes the question of his power to comprehend "his moral obligations to others, and the objects of his bounty," where, from the context, it would be readily understood that it referred to the moral obligation of the testator to his children.—*Rivard v. Rivard* (Mich.) 66 N. W. 681.

[d] (Mich.; 1896.)

Where a witness was asked, "From what you know of the horse, and what you have heard testified to in reference to its present condition by witnesses here, particularly [certain witnesses], what would you say was the present fair market value?"—the question was properly excluded, being hypothetical, based on only a portion of the testimony.—*Connell v. McNett* (Mich.) 67 N. W. 344.

[e] (Wis.; 1896.)

In an action by one employed to take care of defendant's daughter while sick, to recover damages on the ground that the daughter was ill of typhoid fever, that defendant concealed such fact, and that plaintiff contracted such disease, it was not error to permit medical experts called by plaintiff to answer hypothetical questions purporting to state the facts testified to by plaintiff, and inquiring on such facts and on all of plaintiff's testimony when and where, in their opinion, plaintiff contracted the disease, where all of such experts, except two or three, testified that they had heard all of plaintiff's testimony, and the others stated that they had heard all but a portion of the recross-examination, which appeared to develop nothing of importance.—*Kliegel v. Aitken* (Wis.) 69 N. W. 67.

§ 68. — Facts assumed.

[a] (Iowa; 1895.)

In propounding a hypothetical question to an expert witness, counsel is not restricted to the conceded facts in evidence, he having a right to assume any facts which the evidence tends to establish.—*Bever v. Spangler* (Iowa) 61 N. W. 1072.
93 Iowa, 576.

[b] (Iowa; 1895.)

Where a testator made declarations as to how he should dispose of his property, and as to his failing memory, those declarations were properly stated in a hypothetical question asked an expert with a view to showing testator's mental incapacity.—*Bever v. Spangler* (Iowa) 61 N. W. 1072.
93 Iowa, 576.

[c] (Mich.; 1895.)

A question asked a physician, "In cases where there is simply a physical shock,—as a fall upon the side,—and there is no warning, no apprehension preceding the shock, would you expect a case of railroad spine or concussion of the spine to follow?" is objectionable because assuming that railroad spine and concussion of the spine meant the same thing, and because, as the question was put, it was impossible for an expert to

give an intelligent answer as to whether a fall on the side would occasion concussion of the spine, as it would depend upon the nature of the fall, which should be described in the question.—*Turner v. Township of Ridgeway (Mich.)* 63 N. W. 406.

105 Mich. 409.

[d] (Wis.: 1895.)

Where, in an action for injuries from a fall caused by a defective sidewalk, it appears that plaintiff, a short time before, had another fall, and there is evidence both that the plaintiff has fully recovered from her first fall, and also evidence that she has not, and she testifies directly that she has, it may be assumed that she was a strong, healthy woman at the time of the last fall, for the purpose of asking an expert physician what he would say was the matter with a strong, healthy woman who had fallen and suffered similarly to the plaintiff.—*Tebo v. City of Augusta (Wis.)* 63 N. W. 1045.

90 Wis. 405.

§ 69. Cross-examination.

[a] (Iowa: 1895.)

The allowance of the cross-examination of an expert witness on purely imaginary and abstract questions, not based on any theory of the evidence, being in the discretion of the trial court, the supreme court will not interfere when that discretion is fairly exercised.—*Bever v. Spangler (Iowa)* 61 N. W. 1072.

93 Iowa, 576.

[b] (Minn.: 1897.)

On the cross-examination of a witness, testifying as an expert, counsel may be permitted, for the purpose of testing his skill and accuracy, to ask him hypothetical questions, pertinent to the inquiry, assuming facts having no foundation in the evidence.—*Williams v. Great Northern Ry. Co. (Minn.)* 70 N. W. 860.

VIII. DOCUMENTS.

Beyond jurisdiction of court, secondary evidence, see ante, § 15.

Secondary evidence of contents of letters, see ante, § 14.

—of execution of deeds, see ante, § 13.

Evidence of boundary, see "Boundaries," § 10.

In criminal cases, see "Criminal Law," § 101.

In ejectment, see "Ejectment," § 7.

Letters as evidence in action for breach of marriage promise, see "Breach of Marriage Promise," § 2.

Withdrawal of documents put in evidence, see "Trial," § 4.

§ 70. Documentary evidence in general.

[a] (Iowa: 1896.)

The daily record of the sale of tickets, kept in the office of a railroad station agent, as required by a rule of the company, and containing a record of all tickets sold, and the names of the stations to which sold, when properly authenticated, is admissible as evidence of the facts therein shown.—*State v. Brady (Iowa)* 69 N. W. 290.

[b] (Iowa: 1896.)

It is not error to admit in evidence tabulated statements prepared by competent persons from records and documents in evidence, nor to permit a witness to testify to results arrived at by a compilation or comparison of such records and documents, for the purpose of facilitating the trial and assisting the jury.—*State v. Brady (Iowa)* 69 N. W. 290.

[c] (Iowa: 1896.)

In an action on a nonnegotiable note made in consideration of certain corporate stock, where defendant pleaded as a counterclaim a note made by the payee in consideration of stock in a kindred corporation subsequently organized, and both parties used as evidence the books of the original corporation, all of the contents of the books which tended to enlighten the jury on the motive of the

parties and their relations to each other in carrying on the corporations was properly admitted.—*Jackson v. Adams (Iowa)* 69 N. W. 427.

[d] (Iowa: 1897.)

The "American Table of Mortality," shown to be a standard table, used by leading life insurance companies, is competent evidence in a proper case.—*Kreuger v. Sylvester (Iowa)* 69 N. W. 1059.

[e] (Minn.: 1895.)

An entry by the clerk of court in his register of actions that the case was tried did not show conclusively that to be the fact.—*Taxes in Hennepin County v. Baldwin (Minn.)* 65 N. W. 80.

62 Minn. 518.

[f] (Minn.: 1896.)

Where defendant refused to produce a letter on the trial which he had been notified by plaintiff to produce, and the court held the refusal justified because the notice was not given a sufficient length of time before trial, it was error to receive in evidence the written notice containing the alleged contents of the letter.—*McNamara v. Pengilly (Minn.)* 67 N. W. 661.

64 Minn. 543.

[g] (Neb.: 1895.)

A certified copy of the record of the proceedings in the appellate court is admissible to prove that a trial was had in such court, and a judgment pronounced.—*Morrison v. Boggs (Neb.)* 62 N. W. 473.

44 Neb. 248.

[h] (Wis.: 1895.)

Under Rev. St. U. S. § 905, providing for exemplification of foreign judgments by the "authentication of the clerk and the seal of the court annexed, * * * together with a certificate of the judge * * * that the said attestation is in due form," a judgment of a court of which the judge is also ex officio clerk may be exemplified by the judge.—*Keith Bros. & Co. v. Stiles (Wis.)* 64 N. W. 860.

92 Wis. 15.

§ 71. Proof of execution of instruments.

[a] (Iowa: 1896.)

On the issue of a settlement between the parties, an exhibit bearing figures which plaintiff testified were made by defendant at the time of settlement, and which indicated the amount of defendant's indebtedness, was admissible, though denied by defendant, the weight of the evidence being for the jury.—*Nagle v. Fulmer (Iowa)* 67 N. W. 369.

[b] (Neb.: 1896.)

Where an instrument is received in evidence without sufficient proof of its execution, the error is cured, if such proof be subsequently, during the trial, made.—*Houck v. Linn (Neb.)* 66 N. W. 1103.

48 Neb. 227.

[c] (Wis.: 1896.)

Under Rev. St. § 4192 (making a signed written instrument proof of its due execution until the person signing it specifically denies the signature, but providing that the section shall not apply to instruments purporting to have been signed by one who had died prior to the requirement of proof), it was error, in an action against an executor on a debt bill alleged to have been given by his testatrix, to admit the debt bill in evidence before its execution had been duly proved.—*Campion v. Schinnick (Wis.)* 67 N. W. 11.

93 Wis. 111.

§ 72. Identification of documents.

[a] (Iowa: 1895.)

Documents purporting to be the articles and by-laws of a corporation are inadmissible unless identified.—*Wright v. Farmers' Mt. Live-Stock Ins. Ass'n (Iowa)* 65 N. W. 308.

[b] (Minn.; 1896.)

In an action for the conversion of logs, where the evidence was conflicting as to the quality and value of the logs, it was error to admit an unidentified paper, purporting to be a plat of the land on which the logs were cut, and a statement of the amount, quality, and value of the logs growing thereon.—*State v. Shevlin-Carpenter Co.* (Minn.) 68 N. W. 973.

[c] (Neb.; 1896.)

The identification, as part of the record, of the minutes of meetings of the Grandview Company, is not an identification of proceedings had by the board of trustees of the city of Grandview.—*Green v. Barker* (Neb.) 66 N. W. 1032.

47 Neb. 934.

§ 73. Records.

[a] (Iowa; 1897.)

In an action against a city for injuries received in falling on an icy sidewalk, the official record of the United States weather bureau, taken at a town four miles from the place of injury, was admissible to show the temperature and snowfall during the month when the accident occurred.—*Huston v. City of Council Bluffs* (Iowa) 69 N. W. 1130.

[b] (Iowa; 1897.)

Under Code, § 2713, requiring a copy of a judicial record of another state, to be admissible in evidence, to be authenticated by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law, a copy of a record, simply certified by the judge, with a statement that by the laws of the state he is also clerk of the court, is not sufficiently authenticated.—*Rowe v. Barnes* (Iowa) 70 N. W. 197.

[c] (Minn.; 1895.)

A judgment of probate court relating to the sale of land is as much a link in the chain of title as a conveyance, and is admissible in evidence in an action of ejectment.—*Kurtz v. St. Paul & D. R. Co.* (Minn.) 63 N. W. 1.

61 Minn. 18.

[d] (S. D.; 1895.)

The files and records of the board of county commissioners, showing the division of the county into school districts by the county superintendent, which were produced by the legal custodian thereof, held to be admissible in evidence, though there was no indorsement thereon as having been filed.—*Coler v. Rhoda School Tp. of Charles Mix County* (S. D.) 63 N. W. 158.

6 S. D. 640.

§ 74. — Of former action.

(Mich.; 1895.)

In an action by one surety on a replevin bond against another for indemnity, as promised by defendant, where plaintiff claims that the replevin suit was for the benefit of defendant, it is proper, for the purpose of showing defendant's interest in the goods, to put in evidence the files and record in the case leading up to the giving of the bond in question, in which the goods replevied were attached as having been conveyed to plaintiff in replevin as in fraud of creditors.—*Boyer v. Soules* (Mich.) 62 N. W. 1000.

105 Mich. 31.

§ 75. Deeds and mortgages.

[a] (Iowa; 1895.)

The certificate of the recorder as to the record of a mortgage being required to be indorsed thereon by statute, it is prima facie evidence that the mortgage was properly recorded and indorsed.—*Thompson v. Anderson* (Iowa) 63 N. W. 355.

[b] (Neb.; 1896.)

A deed signed by one as chairman was not admissible to show a conveyance of title from town-site trustees of a certain town, in

the absence of a showing that the signer was the chairman of the board of trustees of that town.—*Green v. Barker* (Neb.) 66 N. W. 1032.

47 Neb. 934.

[c] (N. D.; 1894.)

The fact that a sheriff's deed under foreclosure proceedings named the grantee as "Globe Investment Company, formerly Dakota Mortgage Loan Corporation," does not show that the investment company succeeded to the rights of the loan corporation under its sheriff's certificate of purchase.—*Hannah v. Chase* (N. D.) 61 N. W. 18.

4 N. D. 351.

§ 76. — Proof of recording.

(Minn.; 1894.)

An indorsement on the back of a deed purporting to be a certificate of registration, signed by the register of deeds of that county, certifying that the deed was recorded in his office on a certain date, is sufficient evidence that the deed was so recorded, without proof that such register had been appointed or elected.—*Thomas v. Hanson* (Minn.) 61 N. W. 135.

59 Minn. 274.

§ 77. Certificate of officer.

[a] (Minn.; 1896.)

A certificate of the town clerk of the payment of a road tax was no evidence that the tax had been assessed.—*Fleckton v. Spicer* (Minn.) 65 N. W. 926.

63 Minn. 454.

[b] (Minn.; 1897.)

Certificates of the register of the local land office, or letters from the commissioner of the general land office, stating that certain facts are shown by the records of their respective offices, are mere conclusions of the officers, and not competent evidence on a question of title.—*Preiner v. Meyer* (Minn.) 69 N. W. 887.

[c] (S. D.; 1895.)

A certificate of a public officer is only evidence when made so by law.—*Billingsley v. Hiles* (S. D.) 61 N. W. 687.

6 S. D. 445.

§ 78. Books of account and entries therein.

[a] (Iowa; 1895.)

Books of account are not admissible in evidence where the party offering them fails to show that the charges were made in the ordinary course of business, nor that the books show a continuous course of dealing with persons generally, or several items of charge at different times against the other party, and none of the charges are verified to the effect that they are just and true, and no reason is given for the failure to make such verification. Code, § 3658.—*Arney v. Meyer* (Iowa) 65 N. W. 337.

[b] (Iowa; 1896.)

A book in which intervenor kept a record of certain notes is not admissible, as a book of accounts, to prove plaintiff's indebtedness on said notes.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

[c] (Mich.; 1897.)

Book entries of charges for goods against a customer, made by a bookkeeper who had no personal knowledge of the sale or delivery of the goods, but who made the entries from slips furnished by the salesmen in the store, are not rendered admissible in evidence to prove the account by the testimony of the bookkeeper alone.—*Swan v. Thurman* (Mich.) 70 N. W. 1023.

[d] (Mich.; 1897.)

Plaintiffs, claiming that defendant agreed to settle the account as contained in entries on several pages of their books of account, may introduce them, on testimony of the witness that he made the entries, that they were the original entries as taken from the job or order book, and that he knew they were correct.—*Baxter v. Reynolds* (Mich.) 70 N. W. 1039.

[e] (Minn.; 1896.)

In an action for the conversion of a coat testified by defendants to have been taken in satisfaction of accounts against plaintiff of equal value, defendants' account books, which showed that plaintiff was indebted to them in about the same amount as the value of the coat, were competent evidence of themselves, and were also admissible in corroboration of defendants' testimony.—*Johnson v. Morsted* (Minn.) 65 N. W. 727.

63 Minn. 397.

[f] (Minn.; 1896.)

The fact that some entries in account books were made by the bookkeeper from temporary slips furnished by salesmen does not affect their character as original entries.—*Levine v. Lancashire Ins. Co.* (Minn.) 68 N. W. 855.

[g] (Minn.; 1896.)

The fact that books of account contain some errors does not, in the absence of evidence that the books were fraudulently falsified, necessarily render them incompetent.—*Levine v. Lancashire Ins. Co.* (Minn.) 68 N. W. 855.

[h] (Neb.; 1897.)

The admission of evidence as to a certain fact is not prejudicial because the witness testifies from an entry made at the time rather than from his recollection, the entry being correct, and it having been introduced in evidence by the party complaining.—*Davis v. State* (Neb.) 70 N. W. 984.

[i] (S. D.; 1896.)

Plaintiff shipped certain wheat to P., to be sold, and the proceeds placed to his account. The proceeds were afterwards attached as the property of a third party. *Held* that, on evidence of such shipment, entries in the books of P. in relation to the transaction, made in the ordinary course of business, and in the handwriting of a bookkeeper since deceased, were admissible as part of the *res gestæ*.—*Smith v. Hawley* (S. D.) 66 N. W. 942.

§ 79. Entries in ledger.**(Iowa; 1895.)**

In an action against a wife to recover an account alleged to have been incurred by her absent husband as a family expense, for which the property of either is made liable by Code, § 2214, it appeared that plaintiff kept no books of original entry, but entered sales on slips, and at the close of the day entered them on a ledger, which did not show the kinds of goods sold. *Held*, that the ledger was not admissible as a book of original entries.—*Way v. Cross* (Iowa) 63 N. W. 691.

§ 80. Letters.**[a] (Iowa; 1895.)**

Letters written from the home insurance office to the insured are not inadmissible on the ground that no proof is offered of authority to write them in the persons by whom they were written, where they were in answer to letters to the company, and were written on paper containing its letter heads, and part of them purport to be signed by the secretary and superintendent of the loss department.—*Bloom v. State Ins. Co.* (Iowa) 62 N. W. 810.

[b] (Iowa; 1897.)

Letters are inadmissible in evidence until they have been, in some way, identified.—*State v. Waite* (Iowa) 70 N. W. 596.

[c] (Mich.; 1897.)

Letters showing plaintiff's willingness to perform his part of the contract are not inadmissible because defendant admitted that plaintiff tendered performance.—*Milligan v. Sligh Furniture Co.* (Mich.) 70 N. W. 133.

§ 81. — Copies.**(Wis.; 1895.)**

In an action to enforce an agreement claimed to have been made by defendant, it was not error to refuse to admit in evidence a copy

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of a letter purporting to have been written by plaintiffs to defendant, where it was not shown that the original had been mailed to or received by defendant.—*Joannes v. Millerd* (Wis.) 62 N. W. 916.

90 Wis. 68.

§ 82. Memoranda.**[a] (Iowa; 1896.)**

An original entry of credit to a person, made in his presence and with his knowledge, and without any objection, is admissible to show what credit was given him.—*Iowa City State Bank v. Novak* (Iowa) 66 N. W. 186.

[b] (Neb.; 1896.)

A memorandum, made contemporaneously with the facts of which it purports to be a record, only when supplemented by the oath of the party who made it, or otherwise properly identified, is admissible as independent evidence.—*Imhoff v. Richards* (Neb.) 67 N. W. 483. 48 Neb. 590.

[c] (Wis.; 1896.)

A memorandum of a contract of sale made by the vendee's bookkeeper by his direction, and as dictated by him, in the presence of the vendor, and then read over to them by the bookkeeper, becomes, on identification, competent evidence of the contract.—*Hazer v. Streich* (Wis.) 66 N. W. 720.

92 Wis. 505.

[d] (Wis.; 1896.)

Evidence that a memorandum of a contract of sale was entered in the books of account of the vendee, by the vendee's bookkeeper, in the presence of the parties, is insufficient to render the memorandum admissible to prove the contract.—*Hazer v. Streich* (Wis.) 66 N. W. 720.

92 Wis. 505.

§ 83. Maps and plans.**[a] (Mich.; 1896.)**

In personal injury cases, maps of the scene of the accident, approximately correct, are admissible in evidence.—*Le Beau v. Telephone & Telegraph Const. Co.* (Mich.) 67 N. W. 339.

[b] (Neb.; 1897.)

In an action for injuries caused by an excavation in a street, a correct plan of the street and the excavation is competent evidence.—*Village of Culbertson v. Holliday* (Neb.) 69 N. W. 853.

§ 84. Proof of age.**(Mich.; 1894.)**

Certificates of baptism and marriage, by a priest, which merely assert that certain facts stated are shown by the parish register, but do not purport to be authenticated copies of such register, are not admissible on the question of the age of the person named in the certificates. *Hutchins v. Kimmell* (1875) 31 Mich. 126, distinguished.—*Tessmann v. Supreme Commandery of the United Friends of Michigan*, 61 N. W. 261, 103 Mich. 185.

§ 85. Interpretation of foreign writings.**(Iowa; 1896.)**

On an issue tried by the court as to whether certain indorsements in the Bohemian language on a note were there before the payee's death, it was competent for a witness who was familiar with that language to read and interpret the indorsements.—*Erusha v. Tomash* (Iowa) 67 N. W. 390.

IX. PAROL EVIDENCE.

As to matters adjudicated, see "Judgment," § 58.

— statements in application for policy, see "Insurance," § 43.

In actions on bills and notes, see "Negotiable Instruments," §§ 85, 86.

In criminal cases, see "Criminal Law," § 102.
To show bill of sale to be a mortgage, see "Chattel Mortgages," § 2.

— deed to be a mortgage, see "Mortgages," § 5.

To vary indorsement, see "Negotiable Instruments," § 34.

§ 86. Admissibility in general.

[a] (Mich.; 1894.)
Parol evidence is not admissible to vary the terms of a note.—*Hutchinson v. Hutchinson* (Mich.) 61 N. W. 60.
102 Mich. 635.

[b] (Mich.; 1895.)
The fact that the directors of a bank (mortgagee) authorized the publication of notice of foreclosure can be shown by parol.—*Gage v. Sanborn* (Mich.) 64 N. W. 32.

[c] (Mich.; 1896.)
Where the written lease authorizes subleasing for "business purposes," parol evidence is inadmissible to show a contemporaneous oral prohibition against subleasing for saloon purposes.—*Harrison v. Howe* (Mich.) 67 N. W. 527.

[d] (Mich.; 1896.)
Defendant executed her note to plaintiff dated May 1st, for money due for services rendered prior to January 1st. Subsequently there was indorsed on the note a credit, the indorsement reciting that it was to be applied in payment of interest "from January 1, 1894, till June 1, as far as interest calls." *Held*, that parol evidence was admissible to show the understanding of the parties in regard to the indorsement.—*Rawlings v. Fisher* (Mich.) 67 N. W. 977.

[e] (Neb.; 1895.)
Where a lease did not bind the lessee to make any particular repairs, parol evidence is admissible, in an action by the landlord in which liability for repairs is in issue, to show that certain repairs were agreed on, and that the landlord promised to pay part of the expense.—*Woodworth v. Thompson* (Neb.) 62 N. W. 450.
44 Neb. 311.

[f] (Neb.; 1896.)
Parol evidence is not admissible, in an action on a subscription to corporate stock, to add conditions to those expressed in the writing.—*Nebraska Exposition Ass'n v. Townley* (Neb.) 65 N. W. 1062, 46 Neb. 893.

[g] (Neb.; 1896.)
Parol evidence is not admissible to show that the additional county treasurer's bond given under Comp. Laws 1889, c. 10, § 21, which was unambiguous in its terms, was given for the sole purpose of securing the treasurer's faithful performance of his duties in regard to but one special fund.—*Stoner v. Keith County* (Neb.) 67 N. W. 311.
48 Neb. 279.

[h] (Neb.; 1896.)
Evidence contradictory of the terms of a note cannot furnish a defense to the note when it is admitted by defendants that the note was duly executed by them.—*Miller v. Gunderson* (Neb.) 67 N. W. 769.
48 Neb. 715.

[i] (S. D.; 1896.)
A written contract of agency for the sale of machinery on commission "in the immediate vicinity of S. F., also M. county, excepting the trade tributary to J.," also expressly reserved the right to sell to any party applying to the principal at its home office. *Held*, that parol evidence that the agent was to receive commissions on all sales, whether made by the principal, or by agents at J., in territory tributary thereto, is inadmissible.—*Roberts v. Minneapolis Threshing-Mach. Co.* (S. D.) 67 N. W. 607.

[1] (Wis.; 1895.)

Parol evidence is admissible to show that a deed purporting to be based on a sheriff's deed, but dated prior thereto, was improperly dated.—*Moore v. Smead*, 62 N. W. 426, 80 Wis. 558.

§ 87, 88. Matters merged in writing—Previous negotiations.

[a] (Iowa; 1895.)
Oral representations by the agents of an insurance company are merged in a subsequent contract of insurance, and are inadmissible to vary the terms of the contract.—*Gongower v. Equitable Mut. Life & Endowment Ass'n* (Iowa) 63 N. W. 192.

[b] (Mich.; 1895.)
In an action on a contract to board a child, statements by plaintiff as to his wish to adopt the child, made some months before the contract for its board was alleged to have been made, were properly excluded.—*Burt v. Long* (Mich.) 64 N. W. 60.

[c] (Mich.; 1896.)
Where a contract for the construction of a building is not unambiguous, letters between the parties, written prior to its execution, are inadmissible to show that it was the intention of the parties that the building should be cheaply constructed.—*Eaton v. Gladwell* (Mich.) 66 N. W. 598.

[d] (Neb.; 1895.)
In an action for a failure of a written warranty given on the sale of a horse, which guarantees that the horse is registered in the Stud Book of England, it is incompetent for the seller to prove by parol testimony that prior to the sale he informed the purchaser that the horse was not registered. 46 N. W. 491, 30 Neb. 264 (1890) affirmed.—*Watson v. Roode*, 61 N. W. 625, 43 Neb. 348.

[e] (Neb.; 1896.)
Parol evidence of prior or contemporaneous conditions modifying a written proposition afterwards submitted and acted upon cannot be received in evidence to vary the terms of the writing.—*Commercial State Bank v. Antelope County* (Neb.) 67 N. W. 465.
48 Neb. 496.

[f] (S. D.; 1895.)
Statements made by a soliciting agent of a mutual benevolent association prior to or at the time of an application for insurance are inadmissible to vary the terms of the policy.—*Knudson v. Grand Council of Northwestern Legion of Honor* (S. D.) 63 N. W. 911.

[g] (Wis.; 1895.)
A parol agreement to pay a commission for the sale of property at a certain price, giving the agent the right to become one of the purchasers, is not merged in a subsequent written agreement giving the agent an option on the property at such price.—*Starke v. Wolf* (Wis.) 63 N. W. 755.
90 Wis. 434.

[h] (Wis.; 1895.)
Parol evidence to show what was said at the time of and before executing a lease for the purpose of varying its terms is not admissible.—*Ninman v. Suhr*, 64 N. W. 1035, 91 Wis. 392.

[i] (Wis.; 1896.)
Statements and representations as to the amount of work to be done, made during the negotiations, and previous to the execution of a written contract, must be considered merged therein.—*Beers v. North Milwaukee Town-Site Co. No. 2* (Wis.) 67 N. W. 936.
93 Wis. 569.

§ 89. Contemporaneous agreements.

[a] (Iowa; 1895.)
Where a deed is unconditional on its face, the contrary cannot be proved by parol.—*Magee v. Allison* (Iowa) 63 N. W. 322.

[b] (Iowa; 1895.)
In an action for wrongful conversion of notes executed by plaintiff to defendant on a sale

of machinery with a warranty, though the contract provided for payment, by the notes, on delivery of the machine, plaintiff may show that, though the machine was delivered, the notes were given to defendant's agent under his agreement to hold them until plaintiff was satisfied with the working of the machine, such action not being founded on the contract of sale, for breach thereof.—*Dean v. Nichols & Shepard Co. (Iowa)* 63 N. W. 582.

[c] (*Iowa; 1896.*)

Parol evidence is admissible of an oral agreement, at the time the check was given, that it need not be promptly presented.—*Gray v. Anderson (Iowa)* 68 N. W. 790.

[d] (*Iowa; 1897.*)

In an action on a claim for medical services, where defendant had made his note for plaintiff's benefit, it may be shown that there was an oral agreement that the claim should be paid out of the proceeds of an insurance policy covering the personal injuries which made plaintiff's services necessary.—*Murdy v. Skyles (Iowa)* 70 N. W. 714.

[e] (*Mich.; 1897.*)

Parol evidence is admissible to show that a written assignment of book accounts, absolute in form, was made with the understanding that the assignee should collect the accounts, and hold the proceeds as a trust fund for the assignor's creditors.—*Matthews v. Forslund (Mich.)* 70 N. W. 1105.

[f] (*Minn.; 1894.*)

In an action on a note, parol evidence is inadmissible to show a contemporaneous agreement, by which plaintiff was to allow defendant to make certain collections for him for a fixed per cent., and apply such per cent. on the note.—*Singer Manuf'g Co. v. Potts (Minn.)* 61 N. W. 23.

59 Minn. 240.

[g] (*Minn.; 1896.*)

A vendee could show by oral evidence that, at the time of the purchase of a new machine, it was also, and as a part of the same transaction, agreed that a previous sale of an old machine should be rescinded, and that a note given therefor should be retained by the vendor as a partial payment on the price of the new machine, where the contract of sale of the latter did not refer to the sale of the former.—*Lynch v. Curfman (Minn.)* 68 N. W. 5.

[h] (*Minn.; 1896.*)

An oral warranty cannot be ingrafted on a written contract of sale on the ground that it is merely collateral to the contract. *Thompson v. Libbey (1895)* 26 N. W. 1. 34 Minn. 374, followed.—*Wheaton Roller-Mill Co. v. John T. Noye Manuf'g Co.*, 68 N. W. 854.

[i] (*Neb.; 1895.*)

Parol evidence is inadmissible to show that an oral agreement made contemporaneously with a negotiable instrument provided that it should not be negotiated.—*Waddle v. Owen* 61 N. W. 731, 43 Neb. 489.

[j] (*Neb.; 1895.*)

Where an order for goods, and the contract guarantying the payment thereof, were in writing, parol evidence was inadmissible to show that, at the time the contracts were made, goods of a kind other than that furnished were agreed to be delivered.—*Quinn v. Moss (Neb.)* 63 N. W. 931.

45 Neb. 614.

[k] (*Neb.; 1897.*)

In an action on a note or other written agreement, a contemporaneous written contract, connected therewith by direct reference or necessary implication, is admissible as part of the transactions involved.—*Seieroe v. First Nat. Bank (Neb.)* 70 N. W. 220.

[l] (*Wis.; 1896.*)

A contract leasing property at a certain amount per month, with privilege to purchase

during the term at a price "not exceeding \$900," which merely gives the right to purchase at \$900, with a suggestion that the lessor might consent to take less, does not admit of parol evidence to show a contemporaneous agreement that in case of purchase the rent should be applied on the purchase price.—*Brann v. Wisconsin Rendering Co. (Wis.)* 66 N. W. 196.

92 Wis. 245.

[m] (*Wis.; 1896.*)

On an issue as to whether a debt evidenced by promissory notes was the individual obligation of one partner, created before the existence of the firm, while he was a sole trader, or had been assumed by the other member when the firm was created, evidence of a parol agreement by the latter to assume, along with the other member, debts contracted in the business prior to the creation of the partnership, is not objectionable as varying individual indorsements by the new member on such notes.—*J. & H. Clagens Co. v. Silber (Wis.)* 67 N. W. 1122.

93 Wis. 579.

§ 90. Subsequent agreements.

(*Mich.; 1895.*)

In an action on a contract for the purchase of carriage axles which failed to describe the axles, and provided that specifications should be furnished in the future, letters written by the parties after its execution, and providing that the axles should be set at the collar, and shaped to a certain form, are admissible to modify the contract.—*Liggett Spring & Axle Co. v. Michigan Buggy Co. (Mich.)* 64 N. W. 466.

§ 91. Explaining ambiguities.

[a] (*Iowa; 1895.*)

Parol evidence is admissible to show whether a guaranty to be responsible for any goods "you may let B. have, and I will see the same paid, the same as if it was my own debt," was intended as a continuing guaranty or not, as the use of the word "debt" renders it as applicable to a single transaction as to more than one.—*S. Hamill & Co. v. Woods (Iowa)* 62 N. W. 735.

[b] (*Mich.; 1894.*)

Where a contract of sale provides that title shall remain in the seller until the price, including notes given therefor, is paid, the fact that two of the notes were signed by only two of the buyers, and one by only the other one, does not render the contract ambiguous, so as to permit the admission of parol evidence to show that the contract was in fact several.—*Pettyplace v. Grotton Bridge & Manuf'g Co. (Mich.)* 61 N. W. 266.

103 Mich. 155.

§ 92. — Subsequent conduct of parties.

(*Minn.; 1895.*)

When the language of a written contract is so ambiguous as to be open to either of two interpretations, parol evidence of the subsequent conduct of the parties, showing the construction put on it by them, is admissible.—*Engel v. Scott & Hollister Lumber Co. (Minn.)* 61 N. W. 825.

60 Minn. 39.

§ 93. Showing meaning of words.

(*Minn.; 1896.*)

The plaintiffs sold a stallion for the purpose of begetting colts, and warranted him to be a "breeder." Held, that it was competent to permit witnesses familiar with the business of breeding and raising stock to testify as to how the term "breeder" was used and understood by farmers, horsemen, and stockmen engaged in such business.—*St. Paul & M. Trust Co. v. Harrison (Minn.)* 66 N. W. 980.

64 Minn. 300.

§ 94. Identifying property described in writing.

[a] (Iowa; 1895.)

A chattel mortgage on "all the fixtures" contained in a certain store covers show cases, counters, and a wall case, and parol testimony is admissible to identify them.—*Myers v. Snyder* (Iowa) 64 N. W. 771.

[b] (Mich.; 1895.)

In an action on a contract for the purchase of carriage axles which failed to describe the axles, and provided that specifications should be furnished in the future, evidence of conversations by the parties at the time the contract was made is admissible to show the description of the axles contracted for.—*Liggett Spring & Axle Co. v. Michigan Buggy Co.* (Mich.) 61 N. W. 466.

[c] (Mich.; 1895.)

Where defendant, a dealer in farm implements, ordered "two square footings shafts. 4 ton hoe drills" (sic), it was proper to permit him to show that he intended to order two shafts for ten hoe drills.—*Stoddard Manuf'g Co. v. Miller* (Mich.) 64 N. W. 945.

[d] (Minn.; 1895.)

Where an insurance policy covering two horses was indorsed, "This policy is hereby reduced to the sum of \$125, covering one horse only," parol evidence was admissible to show as to which horse it was canceled.—*Pfeifer v. National Live-Stock Ins. Co.* (Minn.) 64 N. W. 1018.

62 Minn. 536.

[e] (S. D.; 1896.)

If a contract constituting one another's agent for the sale of land be indefinite as to description of the land intended, parol evidence is admissible to make it certain.—*Farrell v. Edwards* (S. D.) 66 N. W. 812.

[f] (Wis.; 1895.)

Where the description in a deed is free from ambiguity, parol evidence is not admissible to show that the premises in controversy were intended to be included therein.—*Elofrson v. Lindsay* (Wis.) 63 N. W. 89.

90 Wis. 203.

[g] (Wis.; 1895.)

Extrinsic evidence is not admissible to show acquiescence in a different location than that described in a deed, where the description is definite and unambiguous.—*Elofrson v. Lindsay* (Wis.) 63 N. W. 89.

90 Wis. 203.

[h] (Wis.; 1896.)

A written contract, purporting to state the whole contract, providing only for sale of a store and the stock of general merchandise therein, followed by a deed conveying the same and nothing more, cannot, in the absence of fraud or mistake, be varied by parol to show that furniture, tools, and implements used in and about the store, but not constituting part of the fixtures, were to pass with it.—*Caldwell v. Perkins* (Wis.) 67 N. W. 29.

93 Wis. 89.

§ 95. Supplying omissions where writing does not show complete contract.

[a] (Minn.; 1895.)

An unsigned writing delivered by defendant to plaintiff, as follows: "I hereby give to V., for fifteen days from the date hereof, entire control of selling, if possible, the following described real estate, or any part thereof, for the full price of one dollar per acre net to me, for which I agree to give a warranty deed within a reasonable time after sale is made, or after the payment of ten per cent. earnest money,"—not being a complete contract, could be explained by parol evidence that the contract of the parties was that plaintiff should have what he might sell the land for in excess of one dollar per acre, net, for his services in making

the sale.—*Vaughan v. McCarthy* (Minn.) 65 N. W. 219.

63 Minn. 221.

[b] (Minn.; 1896.)

Where an order for the purchase of property was so insufficient as not to contain a complete agreement, evidence of a contemporaneous oral agreement with regard to the property was admissible.—*Tufts v. Ilmutter* (Minn.) 65 N. W. 922.

63 Minn. 464.

[c] (Minn.; 1896.)

In consideration of the insertion of an advertisement, a glass company promised "to pay to the order of H. \$255, payable as over. * * * It is agreed that the whole agreement between the parties is contained in this contract. * * * (Payable as over.)" On the back of the instrument was written: "The within named amount is available as a credit, and is to be deducted from our contract price for glass other than we have estimated on or contracted for prior to the date hereof, which is to be purchased of us by or in consequence of H.'s connection with the work in which the glass purchased is used. In the event of the said contract not being awarded us, we are to be absolutely acquitted of any charge for the advertisement herein provided." Held, that the agreement was uncertain and incomplete with reference to the contract under which glass was to be furnished, and hence parol evidence was admissible to show a separate oral agreement with regard thereto not inconsistent therewith.—*Hend v. Ryan Drug Co.* (Minn.) 65 N. W. 1081.

63 Minn. 539.

[d] (Neb.; 1897.)

Parol evidence is admissible to supply an omission or remove an ambiguity in an insurance policy, creating a doubt as to when it becomes operative.—*Modern Woodmen Ass'n v. Kline* (Neb.) 69 N. W. 943.

§ 96. Showing nonliability or conditional liability of parties to contract.

[a] (Iowa; 1895.)

Where a note provides that the indorsers waive presentment, notice of nonpayment, and due diligence, the payee cannot show by parol that his indorsement thereof was simply to transfer title.—*Iowa Valley State Bank v. Sigstad* (Iowa) 65 N. W. 407.

[b] (Mich.; 1896.)

In an action on a note indorsed by defendant before it was uttered, or indorsed by the payee, parol evidence of an agreement, made prior to the execution of the note, that defendant's indorsement was not to create any liability against him, was inadmissible.—*Gumz v. Giegling* (Mich.) 66 N. W. 48.

[c] (Mich.; 1896.)

Parol evidence is admissible to show that a mortgage was executed without consideration, as a mere form, to satisfy the relatives of the mortgagee, and to protect the interests of the mortgagor, and that it was not intended to be enforced.—*Church v. Case* (Mich.) 68 N. W. 424.

[d] (Minn.; 1895.)

Parol evidence was not admissible to show an oral agreement, made at the time the note sued on was executed, that the note should be held as security only, and that payment thereof should not be enforced except in a certain event.—*Northern Trust Co. v. Hiltgen* (Minn.) 64 N. W. 909.

62 Minn. 361.

[e] (Neb.; 1897.)

A general indorsement of commercial paper may, except as against a bona fide holder, be explained, and the precise terms of the agreement shown, by parol evidence.—*Whitney v. Spearman* (Neb.) 70 N. W. 240.

[f] (S. D.; 1895.)

In an action on a note, evidence that the note was executed on condition that it was not to be considered a note until a third party had also executed it is admissible.—*McCormick Harvesting Mach. Co. v. Faulkner* (S. D.) 64 N. W. 163.

[g] (S. D.; 1895.)

Parol evidence was admissible, in an action on a written order for school supplies, apparently complete in form, and signed by several of the members of the school board, to show that the same was signed by each member on the express condition that every other member should sign the same, and that the order was to be of no effect, and was not to be considered delivered, unless signed by all.—*Manufacturers' Furnishing Co. v. Kremer* (S. D.) 64 N. W. 528.

[h] (Wis.; 1896.)

As between indorsers of a note, one of whom has paid it, and sued the other for contribution, it may be shown by parol that their indorsements were for the benefit of other persons, and that at the time of indorsement it was agreed that each should be liable for half.—*Kiel v. Choate* (Wis.) 67 N. W. 431.

92 Wis. 517.

§ 97. Explaining consideration of contracts.**[a] (Iowa; 1895.)**

In the absence of fraud, parol evidence is inadmissible to show that there was no consideration for a deed which recites a consideration on its face.—*Magee v. Allison* (Iowa) 63 N. W. 322.

[b] (Iowa; 1896.)

In an action on a note, where defendant claimed to be surety only, and it appeared that the principal had given a mortgage to plaintiff covering the property for which the note sued on was given, the consideration stated in the mortgage not including the note in suit, it was proper to allow defendant, he not being a party to the mortgage, to show by parol that, as part of the consideration of the mortgage, it was agreed by plaintiff that he would release defendant from all liability on the note.—*De Goey v. Van Wyk* (Iowa) 66 N. W. 787.

[c] (Mich.; 1895.)

One who conveys land by an absolute deed, and delivers possession to the grantee, cannot show a parol agreement made when the deed was delivered, and by which, as a further consideration for the deed, the grantee promised to pay to the grantor part of the proceeds of the growing crop. *Long and Montgomery, JJ., dissenting.*—*Adams v. Watkins* (Mich.) 61 N. W. 774.

103 Mich. 431.

[d] (Mich.; 1895.)

Plaintiff purchased timber land from defendant by warranty deed, cut the timber, and sold it to a lumber company. A person claiming title to the land sued the lumber company for the conversion of the timber, and recovered. Plaintiff paid the lumber company the amount paid by it on the judgments, and sued defendant for the value of the timber. *Held*, that parol evidence was admissible to show what part of the consideration of the deed was paid for the timber.—*Fitzpatrick v. Hoffman* (Mich.) 62 N. W. 349.

104 Mich. 228.

[e] (Mich.; 1895.)

Where a written instrument recited that certain accounts were assigned to defendant for collection for a reasonable compensation, evidence that the assignor suggested 10 per cent. in lieu thereof is not admissible to fix the amount of such compensation.—*Tanner v. Page* (Mich.) 63 N. W. 993.

[f] (Mich.; 1896.)

The mortgagee of land took a deed from the grantee, and, in replevin for a third of the crop grown afterwards on the land, claimed

that he had allowed the grantee to raise a crop of wheat for one-third thereof. *Held*, that defendant, in possession under the grantee, could show that it was part of the consideration for the deed that the mortgagor should be allowed to raise a crop of grain the following year.—*Breitenwischer v. Clough* (Mich.) 69 N. W. 88.

[g] (Mich.; 1897.)

That the consideration for a deed to property to be used for church purposes was a trust declared in the deed may be shown by parol.—*White v. Rice* (Mich.) 70 N. W. 1024.

[h] (Minn.; 1894.)

In replevin based on a chattel mortgage, the elements of the consideration of the mortgage may be shown by parol, if not expressed in the mortgage or collateral notes.—*Zelch v. Hirt*, 61 N. W. 20, 59 Minn. 360.

[i] (Minn.; 1896.)

A deed recited that it was "made subject to two mortgages, one of \$1,500, due in five years from October 22, 1887, and one of \$500, due in one year from November 12, 1887, which said party of the second part agrees to assume and pay." *Held*, in an action on the contract of assumption, that, where the grantee alleged that he assumed the \$500 mortgage only, it was proper to receive parol evidence of the actual consideration of the deed, for the purpose of assisting the court in construing said contract.—*Board of Trustees of Ripon College v. Brown* (Minn.) 68 N. W. 837.

§ 98. Showing parties to contracts and their relations.**[a] (Iowa; 1896.)**

In an action to quiet title, it appeared that plaintiff claimed as successor to the title of the widow of B.; that B., by his will, gave her certain personal property; that she in writing accepted the provisions of the will on condition that the executors pay her \$10,000 in addition to all the provisions made for her by the will; and that the money was paid to her on that condition. *Held*, that parol evidence was admissible to show who were the parties to such agreement, they not being named therein, and the consideration which induced them to join in it.—*Baldwin v. Hill* (Iowa) 66 N. W. 889.

[b] (Mich.; 1896.)

An offer by letter was directed to a paving company of which defendant was agent, and acceptance signed by defendant in his own name. On the margin of the instrument was printed a guaranty on the part of the paving company as to the quality of the work. *Held*, that parol evidence was admissible to show that the contract was that of the paving company, and not of defendant.—*Armstrong v. Andrews* (Mich.) 67 N. W. 567.

[c] (Mich.; 1897.)

Where a mortgage on its face is for the payment of a specific sum of money to an individual mortgagee, parol evidence is admissible to show that it was executed for the benefit of a firm of which the mortgagee was a member, to secure, not only an existing indebtedness, but also future advances in the way of goods, and that payments by the mortgagor from time to time were to be credited on his general indebtedness, and not on the note and mortgage.—*Johnson v. Bratton* (Mich.) 70 N. W. 1021.

[d] (Neb.; 1896.)

If a note, in the ordinary form, is executed in the name of a corporation, "by" its president and its secretary, parol evidence is inadmissible to show that the obligation is of the stockholders of the corporation alone.—*Nebraska Nat. Bank v. Ferguson* (Neb.) 68 N. W. 370.

§ 99. Showing time or mode of payment or of performance of contracts.**[a] (Iowa; 1896.)**

Where the correspondence constituting a contract for the purchase of restaurant fixtures,

including a back case and a counter, with show cases and drip board, specified the style of the back case, but did not specify the style or material of the other fixtures, or show that they were to be considered as a part of the back case, evidence of declarations made by the purchaser to plaintiff's manufacturing foreman as to the style and material of the show case, counter, and drip board were admissible, though such foreman had no authority to make a contract for the sale of such fixtures, where plaintiff made his offer on memoranda made by the foreman.—*Dietrich v. Stebbins* (Iowa) 69 N. W. 561.

[b] (Mich.; 1895.)

In an action for the price of logs, parol evidence that logs delivered by plaintiff at a place different from that designated in the written contract of sale were so delivered at the request of defendants is admissible.—*Duplanty v. Stokes* (Mich.) 61 N. W. 1015.

103 Mich. 630.

[c] (Mich.; 1895.)

Parol evidence that delay in performance of a written contract was assented to by the other party is admissible.—*Duplanty v. Stokes* (Mich.) 61 N. W. 1015.

103 Mich. 630.

[d] (Mich.; 1895.)

Where the written order for the purchase of mill machinery recites that the buyer will settle for the machinery "when the mill is fixed and gives good results," parol evidence is inadmissible to show a prior parol agreement that no more power would be required to run the new machinery than was required for the old.—*John Hutchinson Manuf'g Co. v. Pinch* (Mich.) 64 N. W. 729.

[e] (Mich.; 1895.)

Where the written order for the purchase of mill machinery is silent as to an agreement that the seller shall furnish mill rights and put up the machinery within a specified time, parol evidence is admissible to show such agreement.—*John Hutchinson Manuf'g Co. v. Pinch* (Mich.) 64 N. W. 729.

[f] (Mich.; 1896.)

A deed contained a covenant that the premises were free of incumbrances, except two mortgages, particularly described, and warranted against all claims except such mortgages. *Held*, in an action by the grantee to recover the interest paid on such mortgages, that parol evidence was admissible to show that the contract was that defendant was to pay, not only the interest accrued, but also the interest on the mortgages to a certain future time.—*Ford v. Savage* (Mich.) 69 N. W. 240.

[g] (S. D.; 1896.)

Since Comp. Laws, § 3573, declares that time is never of the essence of the contract unless, by its terms, expressly so provided, parol evidence was not admissible to show a contemporaneous agreement making time of the essence of the contract.—*Strunk v. Smith* (S. D.) 66 N. W. 926.

[h] (S. D.; 1896.)

A general indorser of a note, in effect, contracted in writing, as provided for in Comp. Laws, § 4479, subd. 4, that he would pay it on due notice of the dishonor of the instrument; and where no such notice was given, evidence of a purported oral promise on the part of the indorser that he would guaranty the amount thereof, in any event, in case of default by the maker, was incompetent, under section 3545, excluding evidence of oral agreements when the contract has once been put in writing.—*Schmitz v. Hawkeye Gold-Mining Co.* (S. D.) 67 N. W. 618.

[i] (Wis.; 1896.)

Where a written agreement provided that plaintiff was to receive a commission for procuring a purchaser for defendant, payable at the date when the price was to be paid by the purchaser, parol evidence was inadmissible to show that

plaintiff was to wait for his commissions until the price was actually paid.—*Erbacher v. Seefeld* (Wis.) 66 N. W. 252.

92 Wis. 350.

[j] (Wis.; 1896.)

In an action for the specific performance of a contract for the conveyance of land conditioned on the payment by plaintiff of a specified sum, evidence that plaintiff had lived in the vendor's family from childhood, working without pay, and that vendor had stated frequently that he had bought the land for plaintiff, and intended to give it to him for his work, was not objectionable as tending to vary the conditions of a written contract, but was properly admitted to show that the condition of the contract had been performed and satisfied by the work and labor of the plaintiff.—*Bolea v. Welch* (Wis.) 68 N. W. 655.

[k] (Wis.; 1897.)

Where a contract for services is silent as to the time of payment, but there is nothing to show that it did not embody the entire agreement between the parties, a contemporaneous parol agreement as to the time of payment cannot be shown.—*Cliver v. Heil* (Wis.) 70 N. W. 346.

§ 100. Showing mistake or fraud.

[a] (Iowa; 1896.)

The rule excluding evidence contradictory of a written instrument does not apply when fraud is the gravamen of the action, or gist of the defense.—*Humbert v. Larson* (Iowa) 68 N. W. 703.

[b] (Iowa; 1896.)

As a matter of defense to an action for the price of a harvester bought by written contract, it may be shown by parol that the contract was entered into by reason of false and fraudulent representations that the machine had all brass bearings.—*McCormick Harvesting Mach. Co. v. Williams* (Iowa) 68 N. W. 907.

[c] (Neb.; 1895.)

A representation by which one was induced to sign a written order for the purchase of personal property may be shown by parol.—*Bryant v. Thesing*, 64 N. W. 967, 46 Neb. 244.

[d] (N. D.; 1895.)

Before parol evidence can be admitted to contradict the terms of a written contract on the ground of mistake, it must clearly appear that the mistake was mutual.—*William Deeriog & Co. v. Russell* (N. D.) 65 N. W. 691.

5 N. D. 319.

[e] (Wis.; 1894.)

In an action on a policy of accident insurance, where the company set up a contract to accept a weekly payment for a certain number of weeks in discharge of the claim, parol evidence is admissible to show that plaintiff could not read or write, and placed his mark on the proofs of loss without knowledge that they contained such contract, and that he afterwards refused to sign a receipt in full when the sum of such weekly payments was paid to him.—*Lord v. American Mut. Acc. Ass'n* (Wis.) 61 N. W. 293, 89 Wis. 19.

§ 101. To supply omissions in records.

(Neb.; 1895.)

In an action to avoid a decree entered on service by publication based on an affidavit of nonresidence, to which no jurat was attached, parol evidence is admissible to show that the affidavit was in fact sworn to by affiant.—*Bantley v. Finney*, 62 N. W. 213, 43 Neb. 794.

§ 102. Contradicting judgment.

(Wis.; 1895.)

Where a judgment for alimony does not recite the length of time for which it is to be paid, it cannot be shown by parol that, before the entry of the judgment, the parties had agreed that any alimony decreed should be paid

as long as the woman lived.—*Maxwell v. Sawyer* (Wis.) 63 N. W. 283.
90 Wis. 352.

X. EVIDENCE AT FORMER TRIAL AND IN ANOTHER SUIT.

§ 103. In general.

[a] (Iowa; 1896.)

Where it was shown that a subpoena had been issued for an absent witness, and the officer in whose hands it was placed testified that he had made diligent search and inquiry, but had been informed that the witness had left the county, such evidence was competent for the purpose of laying a foundation for reading, in rebuttal, a transcript of the testimony given by the witness on the former trial.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 67 N. W. 227.

[b] (Neb.; 1897.)

Testimony of a witness on the first trial is not rendered incompetent on a third trial of the same case, he being then out of the state, by the fact that he also testified at an intervening second trial.—*City of Ord v. Nash* (Neb.) 69 N. W. 964.

§ 104. Written stipulation of facts.

(Minn.; 1895.)

A written stipulation of facts, on which a trial was had, was admissible on a second trial.—*Merchants' Nat. Bank v. Stanton* (Minn.) 64 N. W. 390.

62 Minn. 204.

§ 105. Stenographer's notes.

[a] (Iowa; 1894.)

One who seeks to have the testimony of a witness on a former trial read by the stenographer from his notes because the witness is ill must show that the witness is unable to attend the trial.—*Edwards v. Edwards* (Iowa) 61 N. W. 413.

93 Iowa, 127.

[b] (Iowa; 1897.)

In a civil action for assault and battery, it was not error to admit the evidence of a witness taken in shorthand on the trial of defendant for assault with intent to commit great bodily injury on plaintiff, where the proper foundation was laid, and the reporter who took the notes testified at the civil trial as to what the witness said in the criminal trial, and in the criminal trial the witness was fully cross-examined.—*Kreuger v. Sylvester* (Iowa) 69 N. W. 1059.

[c] (Mich.; 1897.)

A court stenographer's minutes of testimony cannot be objected to as evidence because the stenographer does not remember every word of the witness.—*Lucker v. Liske* (Mich.) 70 N. W. 421.

XI. COMPETENCY, MATERIALITY, AND RELEVANCY.

§ 106. Competency.

[a] (Iowa; 1895.)

On an issue as to whether the maker of notes had acknowledged the debt so as to withdraw it from the bar of the statute, the recipient of letters written by such maker, which referred to notes, and contained remittances to be applied thereon, may testify that he was the agent for the person who made the loan, and that he had the notes in his possession, and that they were the only notes held by him, made by defendant; and that he applied the remittances on such notes.—*First Nat. Bank v. Woodman* (Iowa) 62 N. W. 28.

93 Iowa, 668.

[b] (Iowa; 1895.)

Where the evidence relative to speed of the street car at the time of the collision was conflicting, testimony that the company had contracted for cars that could run 20 miles per hour was inadmissible.—*Orr v. Cedar Rapids & M. C. Ry. Co.* (Iowa) 62 N. W. 851.

[c] (Iowa; 1897.)

On an issue as to the sufficiency of a heating apparatus to properly warm a building, where it was claimed that its failure was due to the faulty construction of the building, evidence of the comparative results obtained from such plant and another subsequently placed in the same building is admissible.—*Kramer v. Messner* (Iowa) 69 N. W. 1142.

[d] (Mich.; 1895.)

An answer by a witness, in response to a question as to how he remembered that the wind was blowing hard at the time of the fire, that he and another spoke about it, is admissible.—*Cole v. Lake Shore & M. S. Ry. Co.* (Mich.) 63 N. W. 647.

105 Mich. 549.

[e] (Mich.; 1896.)

Where it appeared that defendant, who was approaching plaintiff in a buggy on the opposite side of the road, drove across and ran into the latter's horse, evidence as to previous ill feeling on defendant's part towards plaintiff, and as to what defendant subsequently said about the collision, was competent to show his motive in crossing the road.—*Tyler v. Nelson* (Mich.) 66 N. W. 671.

[f] (Mich.; 1897.)

On an issue as to an agreement for the division of commissions received by defendant as agent on certain insurance policies, defendant having testified that he was required to pay such a large part of the commissions to another that, if he had paid plaintiff the amount claimed, he would have very little for himself, it was proper to show that he received a commission on subsequent annual premiums.—*Raymond v. Day* (Mich.) 69 N. W. 832.

[g] (Minn.; 1897.)

The insured was found dead with a bullet hole in the back of his head and a revolver in his hand. There was evidence that there were no powder marks around the wound. *Held* that, on the issue whether he committed suicide, it was competent to prove experiments made in discharging the same revolver, loaded with similar cartridges, and noting at what distances the object fired at was found to be singed or powder-burned.—*Beckett v. Northwestern Masonic Aid Ass'n* (Minn.) 69 N. W. 923.

[h] (Neb.; 1895.)

The fact that no land stood of record in a certain county in the name of a certain party could not be shown by calling the attention of the clerk of that county merely to the index of the record, and asking him affirmatively for the contents of the record.—*Smith v. First Nat. Bank* (Neb.) 63 N. W. 796.

45 Neb. 444.

§ 107. — Negative testimony.

(Mich.; 1895.)

On an issue as to whether plaintiff had supported the bastard child of defendant's daughter under a contract by defendant to pay for the support, a letter from plaintiff to defendant wherein plaintiff stated that he was short of money, but did not ask defendant for payment for the child's support, is inadmissible.—*Burt v. Long* (Mich.) 64 N. W. 60.

§ 108. Relevancy in general.

[a] (Iowa; 1891.)

It is proper to exclude testimony tending to show the agreement as to compensation between plaintiff and his attorney.—*Swanson v. Freuch* (Iowa) 61 N. W. 407.

92 Iowa, 695.

[b] (Iowa; 1895.)

Where, on suit for insurance on personal property, plaintiff claims the value of a large number of books destroyed, and there is evidence that after the fire there were no remnants of the books, evidence that remnants of books remained after the burning of another building is properly excluded, where data as to the size of the building or extent of the fire are not given.—*Names v. Dwelling-House Ins. Co. of Boston* (Iowa) 64 N. W. 628.

[c] (Iowa; 1896.)

Evidence of the distance cars on certain of a street-car, company's lines could be heard is not admissible to show how far they could be heard on another line, it not being shown that the cars on the different lines were of the same character, and operated under the same conditions.—*Wilkins v. Omaha & C. B. Railway & Bridge Co.* (Iowa) 65 N. W. 987.

[d] (Iowa; 1896.)

Upon an issue as to what property was included in a contract of sale, proof of statements made by the seller before negotiations for the sale were begun is irrelevant.—*Smay v. Etnire* (Iowa) 68 N. W. 597.

[e] (Iowa; 1896.)

In an action for injury from slipping on a sidewalk, evidence that others had slipped or fallen at the same place is inadmissible.—*Langhammer v. City of Manchester* (Iowa) 68 N. W. 688.

[f] (Mich.; 1895.)

Where it appears that, in measuring timber sold in Michigan, a Canadian scaling hook was used, evidence is admissible to prove the difference between the American and Canadian scaling hooks.—*Duplanty v. Stokes* (Mich.) 61 N. W. 1015.

103 Mich. 630.

[g] (Mich.; 1895.)

In an action to recover possession of premises held under a parol lease, evidence of the value of goods alleged to have been purchased by the tenant from the landlord at more than their value, as a consideration for a lease longer than one year, was properly excluded.—*Fratcher v. Smith* (Mich.) 62 N. W. 832.

104 Mich. 537.

[h] (Mich.; 1896.)

In an action by a married woman to recover for personal injuries, it was error to permit her to testify that her husband, who lived apart from her, "never let her have a cent."—*Burleson v. Village of Reading* (Mich.) 68 N. W. 204.

[i] (Mich.; 1896.)

In an action for personal injuries, where plaintiff had testified on cross-examination that after she was injured she went to her usual work at a factory, and did not find out for several days that her knee was fractured, it was competent to permit her to state, as a reason for going to work so soon, that she had to meet the expenses of her mother's funeral, and was in debt. Long, C. J., dissenting.—*Burleson v. Village of Reading* (Mich.) 68 N. W. 294.

[j] (Mich.; 1896.)

In an action for work and labor, proof of plaintiff's general reputation is not admissible merely because he was asked questions implying wrongdoing on his part, which he denied.—*Munroe v. Godkin* (Mich.) 69 N. W. 244.

[k] (Minn.; 1896.)

In an action for goods alleged to have been furnished a corporation at defendant's request, who was its president, and on his promise to pay for them, the evidence was conflicting as to the alleged promise of defendant. Held, that evidence that at the time the corporation was insolvent, and largely indebted to plaintiffs, was competent, as tending to show that the testimony of one party was more reasonable than that of the other.—*Cochrane v.*

West Duluth Industrial Const. & Imp. Co. (Minn.) 67 N. W. 206.
64 Minn. 369.

[l] (S. D.; 1895.)

Where creditors of a vendee attacked the surrender of his contract for the purchase of land, evidence of the character and condition of the land, the amount realized by the vendee therefrom, and the size of the vendee's family, was admissible to show why he wished to surrender the contract.—*Kvello v. Taylor* (S. D.) 63 N. W. 889.

5 N. D. 76.

[m] (S. D.; 1895.)

In an action for a commission on the sale of land, plaintiff testified that he sold defendant's land, and that defendant agreed to pay him a certain commission if the sale was consummated. Held, that it was error not to permit defendant to testify that plaintiff was never authorized to sell the land, and that the sale mentioned was never consummated.—*Baird v. Gleckler* (S. D.) 64 N. W. 118.

[n] (S. D.; 1896.)

On the issue as to the cost of rebuilding a defective wall, evidence as to what bidders were willing to do the work for is inadmissible.—*Hulst v. Benevolent Hall Ass'n* (S. D.) 68 N. W. 200.

§ 109. Materiality.**[a] (Iowa; 1896.)**

Error cannot be predicated on the admission of evidence to establish a fact which is put in issue by the pleadings, whether material or not.—*Smay v. Etnire* (Iowa) 68 N. W. 597.

[b] (Minn.; 1895.)

In an action for wages, where the only issue was as to whether there was an express contract between the parties for work by the month or by the year, evidence of the period for which the contracts of other employes extended is immaterial.—*Ham v. Wheaton* (Minn.) 63 N. W. 495.

61 Minn. 212.

§ 110. Res inter alios acta.**[a] (Mich.; 1895.)**

In an action on a contract to board a child, evidence that the child was apprenticed to plaintiff's wife was admissible only on the question of the probability of the agreement for the child's board.—*Burt v. Long* (Mich.) 64 N. W. 60.

[b] (Mich.; 1896.)

In an action for services as attorney, defendant testified to a receipt for services written by him, and signed for the attorney; and, on cross-examination testified that he had often drawn receipts for his attorneys. Held, that such receipts from other attorneys than plaintiff were inadmissible.—*Howell v. Smith* (Mich.) 66 N. W. 218.

[c] (Neb.; 1896.)

In an action to recover for services rendered under a special contract, the defense alleged was that such services were, by agreement, performed as an equivalent for the plaintiff's board and lodging during the period named. Held, that evidence that, on or about the date of the agreement alleged by the defendant, a third person, in his (defendant's) presence offered to employ plaintiff for wages, was rightly admitted on the reasonableness of plaintiff's claim, and corroborative of his testimony.—*Blomgren v. Anderson* (Neb.) 67 N. W. 186.

§ 111. Res gestæ.**[a] (Iowa; 1896.)**

In an action on a life insurance policy defendant claimed that insured committed suicide, and therefore the policy was avoided, whereas plaintiff claimed she was murdered by her husband. There was no dispute but that insured died from poison. Held, that evidence that a month after insured's death a small

quantity of poison of the same kind as that which caused insured's death was found on the husband's person is inadmissible as res gestæ.—*Laird v. Equitable Life Assur. Soc. of United States (Iowa)* 67 N. W. 385.

[b] (Mich.: 1896.)

In an action for slander brought against a priest for words alleged to have been spoken concerning the plaintiff from the pulpit, a previous occurrence on the same day, out of which trouble arose between the parties, was part of the res gestæ, and was proper to be shown as bearing on the question of malice.—*Provost v. Brueck (Mich.)* 67 N. W. 1114.

§ 112. As to financial circumstances—Showing reputation.

(Minn.: 1895.)

In an action by the assignee of an insolvent bank to recover notes transferred by the bank before its assignment, and alleged to constitute a fraudulent preference, it was not error, on an issue of the assignor's insolvency at the time of the transfer, to exclude evidence of the assignor's reputation for solvency in financial circles previous to the transfer which was not limited to the community in which he did business.—*Hahn v. Penney (Minn.)* 63 N. W. 843.

§ 113. Ownership of property.

[a] (Iowa: 1895.)

Assessors' books are not competent evidence to prove title to the property assessed.—*Hecht v. Eherke (Iowa)* 64 N. W. 650.

[b] (Minn.: 1896.)

On an issue whether defendants were the owners of money loaned by them, and the notes taken therefor, payable to certain banks, defendants offered in evidence conversations and correspondence between them and the banks, tending to show that the money and notes were the property of such banks, and that defendants, in making the loan, acted simply as loan brokers for the banks. *Held* competent and relevant.—*Fredin v. Richards (Minn.)* 68 N. W. 402.

[c] (Neb.: 1896.)

On an issue whether stock shipped in the name of one party was owned by the plaintiff, evidence that plaintiff furnished the money with which the stock was paid for was properly admitted.—*Paddock v. Sam Gosney Live-Stock Commission Co. (Neb.)* 66 N. W. 1121.
48 Neb. 176.

Sufficiency of proof of ownership, see post, § 125.

§ 114. Value of property.

[a] (Iowa: 1895.)

In trover by a landlord against a purchaser from his tenant of property subject to the landlord's lien, evidence as to what defendant paid or agreed to pay for the property is admissible to show its value.—*Thompson v. Anderson (Iowa)* 63 N. W. 355.

[b] (Iowa: 1896.)

In an action for the use of land and for trespass by such use it is proper to allow plaintiff to ask witnesses testifying on cross-examination to the rental value of the land what the value of the land is.—*Jenks v. Lansing Lumber Co. (Iowa)* 66 N. W. 231.

[c] (Iowa: 1896.)

On an issue as to the value of the insured building at the date of the fire, where it appeared that it had no market value aside from the land, evidence of the cost of building it 20 years before the fire was admissible.—*Scott v. Security Fire Ins. Co. (Iowa)* 66 N. W. 1054.

[d] (Mich.: 1895.)

In an action to recover the reasonable value of services rendered in giving information leading to the arrest of criminals, it is not competent for plaintiff to base his judgment as to the value of his services on the fact that specific re-

wards may have been offered in cases more or less similar.—*Foley v. Platt (Mich.)* 63 N. W. 520.
105 Mich. 635.

[e] (Mich.: 1895.)

In an action on a fire insurance policy, it was not error, in proving the value of the goods destroyed, consisting of drug-store fixtures, to allow the former owner and the mechanic who made them to testify to their condition some years before the fire.—*Johuston v. Farmers' Fire Ins. Co. of York (Mich.)* 64 N. W. 5.

[f] (Wis.: 1896.)

On an issue involving the question of the value of land, testimony as to offers received for the land is incompetent.—*Atkinson v. Chicago & N. W. Ry. Co. (Wis.)* 67 N. W. 703.

93 Wis. 362.

Expert testimony as to value, see ante, §§ 59-61.

Sufficiency of proof of value, see post, § 126.

§ 115. Evidence concerning agreement between counsel.

(Iowa: 1894.)

Negotiations carried on between plaintiff and defendant from the offices of their respective attorneys, through the conversation of the latter over a telephone, are not within Code, § 213, par. 2, which provides that no evidence of an agreement between the counsel in a cause, other than the statement of counsel themselves, is admissible.—*Kraner v. Chambers (Iowa)* 61 N. W. 373.

92 Iowa, 681.

§ 116. To show fraud and deceit.

[a] (Iowa: 1895.)

In an action against a railroad company for personal injuries, defendant, for the purpose of proving that plaintiff was endeavoring to exaggerate his injuries, cannot show that plaintiff made fraudulent claims upon insurance associations respecting the same injuries, the said claims not being so connected with the prosecution of the action as to evince a common purpose.—*Hood v. Chicago & N. W. Ry. Co. (Iowa)* 64 N. W. 261.

[b] (Mich.: 1895.)

Evidence of like fraudulent representations made by the promoter of a corporation to other subscribers, to induce them to subscribe to the stock, is admissible to prove that defendant was induced to subscribe by fraud.—*French v. Ryan (Mich.)* 62 N. W. 1016.
104 Mich. 625.

[c] (Neb.: 1896.)

In an action on a note given as part payment for corporate stock, the defense was that defendants were induced to make the purchase by false representations of plaintiff. *Held*, that evidence that prior to the sale plaintiff made to other persons similar misstatements in sales to them of a portion of the same series of stock was irrelevant.—*Johnson v. Gulick (Neb.)* 65 N. W. 883. 46 Neb. 817.

[d] (Wis.: 1895.)

In an action for false representations, by the owner of land, as to the amount of lumber thereon whereby plaintiff was induced to enter into a contract for cutting the same, evidence of similar statements by defendant to third persons as to the quantity of lumber on the land, made both before and after plaintiff entered into the contract, is inadmissible against him.—*Huganir v. Cotter (Wis.)* 65 N. W. 364.
92 Wis. 1.

§ 117. Evidence made competent by that of adverse party.

[a] (Iowa: 1895.)

Where, in an action for goods sold, but refused when shipped, the answer denied the giving of a written order for the goods, as averred in the petition, and alleged that plaintiff agreed to prepay the freight, and the re-

ply denied the averment as to prepayment, and averred that defendant agreed to pay the freight and deduct it from the price, and plaintiff introduced testimony to sustain the averment of the reply, it was proper to permit defendant to testify as to what the agreement was regarding freight, though, when the goods were ordered, plaintiff's salesman made a triplicate order, a copy of which was given to each party, but which was not signed, wherein were the words, "Freight paid through."—*Hallenbeck v. Garst* (Iowa) 65 N. W. 417.

[b] (Mich.; 1895.)

On an issue as to whether timber was properly sawed by plaintiffs for defendant, where a witness for the latter testified that it was not proper to saw different kinds of timber without readjusting the saw, a witness for plaintiffs could properly testify that it was proper to do so.—*Reynolds v. Sweet* (Mich.) 62 N. W. 356.

104 Mich. 252.

§ 118. Demonstrative evidence.

[a] (Iowa; 1896.)

Where the thermometer by which an inspection of oil was made is introduced in evidence, it is not error to admit also the certificate of the experts testing the thermometer before its use, which accompanied the thermometer and directed the variations to be made from the face reading to secure accuracy.—*Hatcher v. Dunn* (Iowa) 66 N. W. 905.

[b] (Mich.; 1894.)

In an action to recover for towing services, in which are counterclaimed damages suffered by reason of a defective towline, plaintiffs can show an identified portion of the line to the jury.—*Stevenson v. Michigan Log-Towing Co.* (Mich.) 61 N. W. 536.

103 Mich. 412.

XII. PROOF OF HANDWRITING.

Expert testimony, see ante, § 58.

§ 119. Comparison of handwriting by jury.

(Neb.; 1896.)

Under Code Civ. Proc. § 344, providing that evidence respecting handwriting may be given by comparison, made by experts or by the jury, with writings of the same person which are proved to be genuine, writings proven to be genuine should be admitted in evidence for the purpose of permitting the jury as well as experts to make comparison.—*First Nat. Bank v. Carson* (Neb.) 67 N. W. 779.

48 Neb. 763.

§ 120. Sufficiency of proof.

(Neb.; 1895.)

Where the handwriting of a letter has been identified as that of one of the parties to the action, it is, if otherwise competent and relevant, admissible in evidence, though the signature thereto is denied by the party charged with writing it.—*Burgess v. Burgess* (Neb.) 62 N. W. 242.

44 Neb. 16.

XIII. PROOF OF FOREIGN LAWS.

§ 121. Presumption.

[a] (Iowa; 1895.)

Acts 16th Gen. Assem. c. 53, § 3, provides that when there is a misstatement as to the age of insured, in an application for insurance, the insurer may collect the difference of premium, but no other defense shall be permitted. *Held*, that in a suit on an insurance contract made in another state, in the absence of evidence to the contrary it will be presumed

that the laws of said state are the same as said statute, and therefore such misrepresentation will not avoid the policy.—*Seiverts v. National Gen. Ass'n of Minneapolis* (Iowa) 64 N. W. 671.

[b] (Iowa; 1896.)

The laws of the state where a contract was made will, in the absence of proof to the contrary, be presumed to be the same as those of the state where suit is brought thereon.—*Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 66 N. W. 157.

[c] (Neb.; 1895.)

Where there is no proof of a foreign statute it will be presumed to be the same as that of the state of the forum.—*Chapman v. Brewer*, 62 N. W. 320, 43 Neb. 890.

[d] (Neb.; 1897.)

The laws of sister states are, in the absence of proof, presumed to be the same as our own.—*East Omaha St. R. Co. v. Godola* (Neb.) 70 N. W. 491.

[e] (S. D.; 1897.)

It will be presumed that the law of Illinois in respect to the order of payment to holders of notes secured by the same mortgage out of the proceeds of foreclosure is the same as that of South Dakota, where rights under a mortgage on lands in South Dakota are governed by a contract executed in Illinois.—*Commercial Bank v. Jackson* (S. D.) 70 N. W. 846.

XIV. WEIGHT AND SUFFICIENCY.

Proof of handwriting, see ante, § 120.

Essentials to review sufficiency of evidence, see "Appeal," §§ 122, 123.

In criminal cases, see "Criminal Law," § 126. Instructions on weight of evidence, see "Trial," §§ 76-78.

Mode of taking advantage of insufficiency of plaintiff's evidence, see "Trial," § 92.

Proof of adultery, see "Divorce," § 8.

—of agency, see "Principal and Agent," § 3.

—of partnership, see "Partnership," § 10.

—of payment, see "Payment," § 8.

Review on appeal, see "Appeal," §§ 221-231.

§ 122. In general.

[a] (Iowa; 1894.)

There is no error in leaving the jury to determine whether a coal car had a stirrup and hand hold, though two witnesses for defendant testified that it had, where one of them on cross-examination showed that he knew nothing about it, and plaintiff testified that he saw no such things on the car, and it did not appear that any of the section hands who got on the car at the time plaintiff was injured in getting on it saw such things, and it was shown that none of them got on the car by using such aid.—*Light v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 380.

93 Iowa, 83.

[b] (Iowa; 1894.)

Defendant, after withdrawing his account from a bank, wrote to its president for money. The vice president inclosed the bank's draft for \$1,500, saying that he would debit defendant therewith on account, and credit him with certain "sale notes," if he would send them. The vice president was then personally indebted to defendant, but had no money in the bank, and paid nothing for the draft, which the bank charged to defendant. On receipt of the draft, defendant sent the "sale notes" to the bank. He testified that the vice president verbally authorized him to apply the balance, after deducting the above credits, to the debt of the vice president. This testimony was contradicted, and it was shown that defendant afterwards received another letter from the vice president, clearly informing him that the bank had charged the draft to him, and that defendant expressed no disapproval. *Held*, in an action by a receiver of the bank to recover

such balance, that a finding that defendant borrowed the \$1,500 from the bank was justified.—*Findlay v. Richards* (Iowa) 61 N. W. 428. 93 Iowa, 789.

[c] (Mich.: 1894.)

The president of a corporation agreed to increase the salary of plaintiff, as its secretary, from \$4,000 to \$6,000 a year. Plaintiff testified that at the end of the year he stated to the president that he would postpone payment of \$1,000 of his salary. For several of the succeeding years the officer was paid a salary of \$5,000, and no credit was given him on the books for the \$1,000 not paid. The president testified that plaintiff at the time did not say anything in regard to the additional \$1,000 being paid him in the future. *Held*, that the evidence warranted a finding that payment of the \$1,000 was only postponed.—*Chamberlain v. Detroit Stove Works* (Mich.) 61 N. W. 532. 103 Mich. 124.

[d] (Mich.: 1895.)

In garnishment against a bank it appeared that defendant had been accustomed to deposit with the bank drafts drawn on customers, and receive credit therefor on account, and it was agreed that, if any drafts were dishonored, the bank should charge them back to defendant. The bank claimed that defendant agreed to keep at all times \$1,000 on deposit to cover such returned drafts. *Held*, that the fact that the amount to defendant's credit in the bank was often less than \$1,000 was insufficient to show that no such contract existed, since it was not inconsistent with such contract.—*Rice v. Third Nat. Bank* (Mich.) 62 N. W. 295. 104 Mich. 176.

[e] (Mich.: 1896.)

In trover for conversion of timber, to which defendant pleaded limitations, an instruction requiring plaintiff to prove by a "clear" preponderance of the evidence that he had commenced his action within the period of limitations, in which the jury are also told that plaintiff must prove his right to recover by evidence that preponderates, so that their minds are not left unbalanced, and so that they "know" his right to recover exists, is erroneous, as requiring too strict a degree of proof.—*Hoffman v. Loud* (Mich.) 69 N. W. 231.

[f] (Minn.: 1895.)

On an issue whether a brakeman knew the rate of speed at which the front section of a train was backing up to couple onto the rear section, the brakeman testified that the track curved to the south in the direction from which the engine came, and that witness stood by the rear section on the south side of the track; that there was nothing to obstruct his view of the engine; that he did not watch it; and that it could not have been coming at a rate of over two or three miles an hour. *Held*, that a finding that he knew the rate was warranted.—*Pettit v. Great Northern Ry. Co.* (Minn.) 64 N. W. 1019. 62 Minn. 530.

[g] (Minn.: 1895.)

Evidence that a few days before the foreclosure sale defendant and his son held conversations with the sheriff in regard to bidding on the property, that defendant stated that the son would probably bid thereon, and that after the sale the son stated that he bid on the property for the father, did not warrant a finding that the father authorized the son to bid.—*Blexrud v. Kuster* (Minn.) 64 N. W. 1140. 62 Minn. 455.

[h] (Minn.: 1897.)

Testimony of defendant that one talking to him through the telephone gave his name as M., and that he went immediately to the office of M., who admitted the conversation just had by telephone, sufficiently identified the person talking through the telephone.—*William Dering & Co. v. Shampik* (Minn.) 69 N. W. 1088.

[i] (Neb.: 1895.)

Where it appeared, in an action for damages resulting from the overflow of a canal, that plaintiff's lands were never overflowed prior to the construction of the canal, and that for four consecutive years thereafter the lands were overflowed; that a part of the embankment of the canal was washed away; that during one year farmers cultivated the canal embankments, and thereby lowered them,—the jury could infer that the company was negligent in maintaining the embankments.—*Kearney Canal & Water-Supply Co. v. Akeyson* (Neb.) 63 N. W. 921. 45 Neb. 635.

[j] (Wis.: 1895.)

It is for the jury to determine whether plaintiff's testimony, though improbable, should be believed against a number of witnesses for defendant.—*Adams v. Chicago & N. W. Ry. Co.* 62 N. W. 525, 89 Wis. 645.

§ 123. Relative weight of positive and negative testimony.

[a] (Mich.: 1895.)

On the issue as to whether signals were given by a train as it approached a crossing, testimony of persons who were watching the approaching train, and who were in a position to have heard the signals, if given, that they heard no signals, is sufficient to make it a question for the jury, though other witnesses testify directly that the signals were given.—*Crane v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 527.

[b] (Mich.: 1896.)

Where plaintiff supports her claim, that metritis and pelvic inflammation suffered by her were the result of a fall on the sidewalk, by positive testimony that she had no such troubles before, and by testimony of the physician who examined her after the fall that the injury which he then found could have been caused by such a fall, and defendant supports its claim, that the injuries were, at most, only an aggravation of a previous existing condition, by opinions of physicians, an instruction that expert testimony was competent, but that it was for the jury to say what weight should be given it; that they were not bound by it, but were to canvass it as the testimony of any other witness; that they were to adopt it as far as it appealed to their judgment, but that they were not bound to accept the opinion of an expert as to what the facts were, in the face of the testimony of witnesses claiming to have actual knowledge of the facts; that they were not to disregard the testimony of the experts without cause, but that they were judges of the credibility of all witnesses, including the experts,—is proper, and simply places the testimony of all witnesses on the same footing.—*Olson v. Village of Manistique* (Mich.) 68 N. W. 986.

[c] (Mich.: 1897.)

Testimony of a witness that, as defendant's engine approached a crossing, he did not hear any bell or whistle, is not negative testimony, so as to require an instruction as to the relative value of negative and positive evidence, where he testifies that he was looking right at the engine, and was within hearing distance, though on cross-examination he testifies that he was not at the time thinking of the train, but would have heard it, probably, if it had whistled, and hardly thought the bell could have rung without his noticing it.—*Lonis v. Lake Shore & M. S. Ry. Co.* (Mich.) 69 N. W. 642.

[d] (Wis.: 1895.)

Where one witness testified that defendant at a certain time promised to pay to plaintiffs the debt of a third person, and several witnesses who were present denied that such promise was made, the refusal to instruct the jury that the affirmative evidence was entitled to more weight was not error.—*Joannes v. Milder* (Wis.) 62 N. W. 916. 90 Wis. 68.

§ 124. Reasonable doubt.**[a] (Mich.; 1895.)**

An instruction requiring the facts relied on to prove the defense of fraud in an action on a fire policy to "admit of no other reasonable explanation" is erroneous, since it requires it to be established beyond a reasonable doubt.—*Knop v. National Fire Ins. Co.* (Mich.) 65 N. W. 228.

[b] (Neb.; 1895.)

A parol gift of land need not be established "beyond a doubt," a preponderance of evidence being sufficient.—*Wylie v. Charlton* (Neb.) 62 N. W. 220, 43 Neb. 810.

§ 125. Proof of ownership.**[a] (Minn.; 1895.)**

In replevin by a wife for grain raised on land of which she was the nominal lessee, where there was evidence that the husband was the real owner of the lease, the question as to which was the owner of the grain was for the jury.—*Honeywell v. Norby* (Minn.) 63 N. W. 488.

61 Minn. 188.

[b] (Neb.; 1895.)

In an action to foreclose a mortgage on live stock in which one claiming title was joined as co-defendant with the mortgagors, and the only evidence of title in the mortgagors was their own statements and possession at the time the mortgage was given, evidence that the cattle were originally branded with the initials of the other defendant, and that the brand had been changed without his knowledge, coupled with evidence of a purchase by him and a transfer of the cattle to the place where they were when mortgaged, will support a judgment in his favor.—*Citizens' State Bank v. Bellangee* (Neb.) 63 N. W. 363.

45 Neb. 203.

[c] (Neb.; 1895.)

In an action to obtain the title to land, plaintiff testified that his father gave him, and put him in possession of, the land, and that plaintiff had since been in possession and made improvements. There was evidence that plaintiff had not been in possession continually, and defendant (plaintiff's mother) testified that, while the father intended the land for plaintiff eventually, he did not give him title thereto, because of plaintiff's bad management, and because he thought plaintiff required a guardian. It appeared that the father paid the taxes, and raised part of the crops, and in his will he gave plaintiff the land, subject to the control of the mother. *Held*, that a decree for defendant was proper.—*Wiley v. Wiley* (Neb.) 63 N. W. 844.

45 Neb. 585.

§ 126. Proof of value.**(Minn.; 1895.)**

Mere opinion evidence as to the value of services sued for, though uncontradicted, would not justify the court to withhold the question of value from the jury.—*Aldrich v. Grand Rapids Cycle Co.* (Minn.) 63 N. W. 1115.

61 Minn. 531.

§ 127. As to chilling bidding.**(Iowa; 1895.)**

A tax deed was attacked on the ground of a fraudulent compact between the purchasers at the sale, to prevent competition. Plaintiff testified that he was offered and accepted from certain persons money not to bid at the sale, but he was directly contradicted by one of the persons. In the registry of the sales the different sales to each person were grouped together, this being done for convenience. The evidence also showed that, at the sale, purchasers for all the land to be sold could not be procured. *Held*, that the fraudulent compact was not shown.—*Krueger v. Walker* (Iowa) 63 N. W. 320.

EXAMINATION.

Of adverse party before trial, see "Discovery," § 3.

Of juror, see "Jury," § 18.

Of witness, see "Witness," §§ 27-42.

On criminal charge, see "Criminal Law," §§ 17-21.

Physical examination of person injured, see "Damages," § 44.

EXCAVATION.

See "Adjoining Landowners," § 1.

Right to lien for, see "Mechanics' Liens," § 11.

EXCEPTIONS.

In deeds, see "Deed," § 20.

In grants in aid of railroads, see "Public Lands," § 8.

To instructions, see "Criminal Law," § 150; "Trial," §§ 81-87.

EXCEPTIONS, BILL OF.

See, also, "Appeal"; "Certiorari"; "Error, Writ of"; "New Trial."

Assignments of error in bill, see "Appeal," § 88. Authentication and certificate to bill, see "Appeal," § 131.

Bringing in original bill, see "Appeal," § 106.

Embodying evidence on motion to discharge attachment, see "Attachment," § 56.

Extension of time for filing, appealable order, see "Appeal," § 15.

Necessity of bill to bring matters into record, see "Appeal," § 135.

— of exceptions, see "Appeal," §§ 74, 75.

— of incorporating exceptions in bill of exceptions, see "Appeal," § 136.

Objections relating to bill, see "Appeal," §§ 131, 132.

Sufficiency and scope of exceptions, see "Appeal," §§ 77, 78.

§ 1. Power of inferior courts.**[a] (Neb.; 1895.)**

A county judge has no jurisdiction to settle a bill of exceptions preserving the evidence adduced on the hearing of a motion to dissolve an attachment.—*Michigan Stove Co. v. Miller* 61 N. W. 610, 43 Neb. 332.

[b] (Neb.; 1895.)

Under Code Civ. Proc. §§ 988, 1086, exceptions taken in the county or justice's court must be entered on the docket, and presented to the district court by a transcript, and not by a bill of exceptions, as section 587a, authorizing the certification of the original bill of exceptions, applies only to proceedings in the supreme court reviewing judgments of district courts.—*Sedgwick v. Durham* (Neb.) 63 N. W. 142.

45 Neb. 86.

[c] (Neb.; 1896.)

Prior to the taking effect of Laws 1895, c. 72, a county judge had no authority to allow a bill of exceptions preserving testimony taken on a motion to dissolve an attachment.—*Weitz v. Walter A. Woods Reaping & Mowing Mach. Co.* (Neb.) 68 N. W. 613.

Power of justices to settle, see "Justices of the Peace," § 10.

§ 2. Submission of bill to adversary.**(Neb.; 1896.)**

A proposed bill of exceptions is not submitted to the adverse party, or his attorney of record, within Code Civ. Proc. § 311, by leav-

ing it at the office of the attorney, in his absence.—*Laurester County Bank v. Gillilan* (Neb.) 68 N. W. 352.

§ 3. Settlement by clerk of court.

[a] (Neb.; 1895.)

Where the clerk of court can allow and sign a bill of exceptions only when the judge is, for some reason, prevented from doing so (Civ. Code, § 311), a bill allowed by the clerk will not be considered unless it is shown that it could not have been allowed by the judge.—*Glass v. Zutaveru*, 61 N. W. 579, 43 Neb. 334.

[b] (Neb.; 1895.)

The clerk of the court below can settle and allow a bill of exceptions only during the absence or sickness of the judge, as provided by Code Civ. Proc. § 311.—*Nelson v. Johnson* (Neb.) 62 N. W. 244.

44 Neb. 7.

[c] (Neb.; 1895.)

A review cannot be had on a bill of exceptions settled by the clerk of the district court, where the bill fails to show sickness of the judge or his absence from the district, or that the parties agreed on the bill.—*Griggs v. Harmon* (Neb.) 63 N. W. 125.

45 Neb. 21.

[d] (Neb.; 1895.)

A bill of exceptions settled by the clerk, without an agreement thereon, cannot be considered.—*Mattis v. Connolly* (Neb.) 63 N. W. 918.

45 Neb. 628.

[e] (Neb.; 1896.)

A certificate of the clerk of the district court that the proposed bill of exceptions is a true and complete transcript of all the papers and proofs in the case does not constitute a settlement or allowance of the bill.—*White v. Smith* (Neb.) 66 N. W. 638.

47 Neb. 625.

[f] (Neb.; 1896.)

The clerk of the district court is clothed with the power to sign and allow a bill of exceptions, when it is made to appear by affidavit that the trial judge is absent from his district.—*Chicago, B. & Q. R. Co. v. Hyatt* (Neb.) 67 N. W. 8.

48 Neb. 161.

§ 4. — Stipulations.

[a] (Neb.; 1895.)

A mere stipulation of counsel, not attached in writing to the bill of exception, is not sufficient to authorize the clerk to sign and allow the bill, in the absence of a showing that the judge is dead, or prevented, by sickness or absence, from signing and allowing it.—*Martin v. Fillmore County* (Neb.) 62 N. W. 863.

44 Neb. 719.

[b] (Neb.; 1895.)

Mere stipulation of counsel that the clerk may sign and allow a bill of exceptions is insufficient to authorize him to do so.—*Yenney v. Central City Bank* (Neb.) 62 N. W. 872.

44 Neb. 402.

[c] (Neb.; 1895.)

To authorize the clerk for the trial court to sign and allow a bill of exceptions, it must appear that the judge was, because of his absence or sickness, unable to do so himself, or that the parties agreed upon the bill, the mere stipulation of counsel that the clerk of court may allow and sign the same not being sufficient.—*School Dist. No. 49 of Adams County v. Cooper*, 62 N. W. 1084, 44 Neb. 714; *Rice v. Winthers*, 63 N. W. 830, 45 Neb. 517.

[d] (Neb.; 1896.)

The clerk of court was authorized to settle a bill of exceptions by the following stipulation: "Returned this bill of exceptions * * * without amendments; and it is hereby stipulated * * * that the clerk of the district court shall allow, sign, and certify this bill of exceptions,

and make the same a part of the record in this case, and be the bill of exceptions."—*Fire Ass'n of Philadelphia v. Ruby* (Neb.) 68 N. W. 939.

[e] (Neb.; 1897.)

The clerk may sign the bill of exceptions instead of the trial judge, if authorized to do so by stipulation of the parties.—*Behrends v. Beyerschlag* (Neb.) 69 N. W. 835.

[f] (Neb.; 1897.)

A stipulation, signed by the parties, that the clerk shall "sign this bill of exceptions," instead of the trial judge, is equivalent to an agreement that the paper to which the stipulation is attached is in fact a bill of exceptions.—*Behrends v. Beyerschlag* (Neb.) 69 N. W. 835.

§ 5. Time of presentation, settlement, and filing.

[a] (Iowa; 1895.)

Under Code, § 2831, providing that bills of exception must be filed during the term, or within such time thereafter as the court may fix, but that in no event shall the time be extended more than 30 days beyond the term except by consent of the parties or by order of the judge, where a party, for any reason, fails to file a bill of exceptions within the time fixed by an order, his right to file it cannot be revived by the court.—*White v. Guarantee Abstract Co.* (Iowa) 65 N. W. 305.

[b] (Iowa; 1897.)

In a suit against a city for damages and an injunction, a judgment for damages was entered on September 18, 1894, but the case was retained as to the injunction until December 11, 1894, when a decree was entered denying the writ, and reciting that by consent 60 days were allowed plaintiff "to settle his bill of exceptions." No order had been entered allowing the city to file exceptions to the judgment after the term at which it was rendered, but its bill was filed after such term, on December 17, 1894. *Held*, that the bill was not filed in time.—*Bennett v. City of Marion* (Iowa) 70 N. W. 105.

[c] (Iowa; 1897.)

The letters "O. K.," followed by the names of appellee's attorneys, on a bill of exceptions filed after term, will not be considered as an approval of the filing at such time, if it does not appear when the notation was made, and there is nothing to show whether it meant an approval of the filing at such time, or merely of the contents of the bill.—*Bennett v. City of Marion* (Iowa) 70 N. W. 105.

[d] (Neb.; 1895.)

Code Civ. Proc. § 311, requires the bill of exceptions to be presented to the trial judge for settlement within 60 days after adjournment sine die of the term of court at which the motion for new trial was overruled and the judgment was rendered. *Held*, that where the bill of exceptions was not presented to be signed for 10 months after its return by the opposite party without suggestion of amendment, and it did not appear when the term of court at which the judgment was rendered and the motion for new trial was overruled adjourned sine die, the supreme court could not presume that such term of court was adjourned within 60 days of the time the bill was presented for signing, and the bill would hence be quashed.—*Conway v. Grimes*, 64 N. W. 971, 46 Neb. 288.

[e] (Neb.; 1896.)

Where a trial has been had and a motion for a new trial sustained, the time for preparing a bill of exceptions embodying the evidence on that trial is fixed at the latest by the term at which the motion for a new trial was sustained, and not by the term at which final judgment was rendered, or at which a new trial was had, or a new trial after such second trial denied.—*State v. Ambrose* (Neb.) 66 N. W. 306.

47 Neb. 235.

[1] (Neb.: 1896.)

The fact that the party excepting has been diligent, and that the delay has been caused by the court reporter in preparing the transcript, does not authorize the submission of a bill of exceptions after the expiration of the 80 days from the adjournment of the term which may be allowed for its submission under Code Civ. Proc. § 311. *Richards v. State* (1887) 24 N. W. 346, 22 Neb. 115, overruled.—*Horbach v. City of Omaha*, 69 N. W. 121.

[1] (Neb.: 1897.)

Where the bill is served on the adverse party after the time therefor had expired, a written stipulation by the parties that the trial judge shall allow the bill is a waiver of objection that it was not presented within the statutory time.—*Thompson v. Missouri Pac. Ry. Co.* (Neb.) 69 N. W. 1119; *Alexander v. Overton*, Id.; *Hake v. Woolner*, Id.; *Mapes v. Village of Syracuse*, Id.; *Brown v. Hartman*, Id.

[1] (N. D.: 1896.)

The district judge has power to settle a bill of exceptions after an appeal has been perfected, when the original record in the case is still in the district court.—*Conlter v. Great Northern Ry. Co.* (N. D.) 67 N. W. 1046.

5 N. D. 508.

[1] (S. D.: 1895.)

The trial court cannot, except for good cause shown, as required by Comp. Laws. § 5093, settle a bill of exceptions after the expiration of the statutory and extended time.—*McGillycuddy v. Morris* (S. D.) 65 N. W. 14.

[1] (Wis.: 1895.)

Though exceptions to findings must be filed within 10 days after notice of entry of judgment (Rev. St. § 2870), unless the court permits them to be filed later (section 2831), it will be presumed, on their appearance in the bill of exceptions bearing date subsequent to the 10 days, without explanation, that the court gave leave for the filing.—*Henrizi v. Kehr* (Wis.) 63 N. W. 285.

90 Wis. 344.

§ 6. Extension of time.**[1] (Minn.: 1894.)**

After an appeal from an order denying a motion for a new trial, made on the judge's minutes, is taken, a supersedeas appeal bond is filed, and the time to settle a case or bill of exceptions has expired, the trial court may grant leave to serve a proposed case or bill of exceptions, extend the time to settle, and settle and allow the same.—*Loveland v. Cooley* (Minn.) 61 N. W. 138.

59 Minn. 259.

[1] (Neb.: 1895.)

It is not error to deny a motion for the extension of time for preparing and serving a bill of exceptions, where the party seeking such extension has not used due diligence.—*Stein v. Vannice*, 62 N. W. 464, 44 Neb. 132.

[1] (Neb.: 1896.)

An application under Code Civ. Proc. § 311, as amended in 1881, for an extension of time within which to prepare a bill of exceptions, must be addressed to the judge to whose rulings the exceptions were taken, though his term of office has expired since the trial. *Payne v. Jones* (1891) 50 N. W. 8, 33 Neb. 260, distinguished.—*Hanscom v. Lantry*, 67 N. W. 762, 48 Neb. 665.

[1] (S. D.: 1896.)

A bill of exceptions will not be stricken out on the ground that the time to settle the same had expired, where the bill was served in time, and the judge extended time for settlement by an order reciting that such extension was for "good cause shown."—*Davis v. Cook* (S. D.) 69 N. W. 18.

§ 7. Notice before settlement.

(Iowa: 1895.)

The official stenographer's report of the evidence certified by the judge constitutes a

bill of exceptions, and no notice is required to the parties before certifying the same.—*Hood v. Chicago & N. W. Ry. Co.* (Iowa) 64 N. W. 261.

§ 8. Amendment.**[1] (Mich.: 1895.)**

Under 3 How. Ann. St. § 6534e2, providing for a court stenographer, and that, if the stenographer's notes are certified by the court as necessary for appeal, the appellant may tax as costs stenographer's fees, and that such notes may be used by the opposite party in proposing amendments to the record, the court may require appellant to furnish the opposite party with a copy of the stenographer's notes necessary to prepare amendments to a bill of exceptions.—*Gillies v. Adsit* (Mich.) 61 N. W. 733.

[1] (S. D.: 1896.)

The trial judge may allow a bill of exceptions to be amended after it is submitted to him for settlement by inserting a specification of the particular errors relied on.—*Davis v. Cook* (S. D.) 69 N. W. 18.

[1] (Wis.: 1895.)

Where amendments to a bill of exceptions are not incorporated therein, but follow the judge's certificate, the court will strike out the bill of its own motion.—*King v. Town of Farmington* (Wis.) 62 N. W. 928.

90 Wis. 62.

See, also, "Appeal," § 155.

EXCESSIVE DAMAGES.

See "Damages," §§ 34-37.

EXCHANGE OF PROPERTY.

Election of remedies by party defrauded, see "Election of Remedies," § 1.

§ 1. Rights of parties.**[1] (Mich.: 1895.)**

Where an exchange of goods for land was to be made on the basis of an appraisal at cost, and one of the parties misrepresented the cost of the goods, and removed the cost marks, and raised the cost price, and destroyed his books, the other party to the contract is not concluded by the inventory of the appraisers.—*Sutcliff v. Dayton* (Mich.) 65 N. W. 522.

[1] (Mich.: 1896.)

Plaintiff contracted to exchange a stock of goods for certain lots owned by defendant, described by block and number. Defendant represented that one of the lots was located in a certain portion of the city, and showed plaintiff a lot, which he alleged was the one described in the contract, and executed a deed. Subsequently plaintiff discovered that the lot was in another and different locality, and of less value, than the one pointed out by defendant. *Held*, that plaintiff could not, upon waiver of the tort, maintain assumpsit for the value of the lot.—*Reed v. Ismond* (Mich.) 67 N. W. 912.

§ 2. Action for breach of contract.**[1] (Iowa: 1896.)**

In an action for refusal to accept land which plaintiff agreed to convey to defendant in exchange for other property, plaintiff, to prove his title, offered an abstract, which the abstractor testified was correct. Attached to the abstract was the certificate of another abstractor, reciting that the title remained unchanged from the date of the abstract. *Held*, that as the certificate was part of the abstract which plaintiff furnished defendant at the time the contract was to be consummated, and as plaintiff's evidence of title was sufficient independent of the certificate, it was not error to refuse to strike it out.—*Warren v. Chandler* (Iowa) 67 N. W. 242.

[b] (Mich.: 1895.)

Plaintiff and defendant having contracted in writing to exchange certain realty for personalty, plaintiff cannot show by parol that defendant represented the land to be worth much more than it really was, and that such representation was omitted from the contract by fraud, in an action on an implied promise to pay the difference in value.—*Warnes v. Brubaker* (Mich.) 65 N. W. 276.

§ 3. Damages for breach of contract to exchange.**[a] (Iowa: 1896.)**

Defendant having put it out of his power to perform, by conveying to another part of the property he was under contract to convey to plaintiff, plaintiff was entitled to substantial damages for the breach.—*Warren v. Chandler* (Iowa) 67 N. W. 242.

[b] (Iowa: 1896.)

In an action for breach of a contract to exchange, plaintiff is entitled to recover the expenses incurred by him after execution of the contract, in an endeavor to perform, but before he learned that prior thereto defendant had put it out of his power to perform, by conveying to another.—*Warren v. Chandler* (Iowa) 67 N. W. 242.

[c] (Iowa: 1896.)

In an action for breach of a contract to transfer certain land and a stock of goods, in exchange for land to be conveyed by plaintiff to defendant, together with plaintiff's note for the money difference between the properties, the court directed the jury to find the value of the land, and the rent thereof, which plaintiff was to convey to defendant, and the amount for which plaintiff was to give his note on completing the invoice of said goods, on or about the date when the exchange was to be made, to find the value of the real estate and of the goods that defendant was to transfer to plaintiff, to add thereto the incumbrances which defendant was to assume, and the difference would be the measure of damages. *Held*, that the instruction was not incorrect, in that it permitted plaintiff to recover, if at all, the difference between the value of the property he was to give and the value of that which he was to receive, as plaintiff was not confined merely to any change in the values between the time the contract was made and the time of the alleged breach.—*Warren v. Chandler* (Iowa) 67 N. W. 242.

EXCUSABLE HOMICIDE.

See "Homicide," §§ 14-18.

EXECUTED CONTRACTS.

Operation of statute of frauds, see "Frauds, Statute of," § 1.

EXECUTION.**I. ISSUANCE AND VALIDITY, §§ 1-8.****II. PROPERTY SUBJECT TO, §§ 9, 10.****III. LEVY AND LIEN, §§ 11-14.****IV. CLAIMS BY THIRD PERSONS, §§ 15-18.****V. SALE, §§ 19-29.****VI. RETURN, §§ 30, 31.****VII. DISTRIBUTION OF PROCEEDS, §§ 32, 33.****VIII. REDEMPTION, § 34.****IX. RELIEF AGAINST EXECUTION, §§ 35-37.****X. SUPPLEMENTARY PROCEEDINGS, §§ 38-44.****XI. EXECUTION AGAINST THE PERSON, §§ 45, 46.**

See, also, "Attachment"; "Garnishment"; "Judicial Sales."

Liability for wrongful levy, see "Sheriffs and Constables," §§ 8-10.

On judgment against corporation, condition precedent to action to enforce stockholders' liabilities, see "Corporations," § 81.

— of foreclosure, see "Mortgages," § 63.

— of justice, see "Justices of the Peace," § 27.

Replevin for property seized, see "Replevin," § 4.

Stay or release pending appeal, see "Appeal," § 270.

To enforce charge for alimony, see "Divorce," § 38.

I. ISSUANCE AND VALIDITY.

Issuance and return as condition precedent to creditors' suit, see "Creditors' Bill," § 2.

§ 1. Time of issuance.**[a] (Mich.: 1895.)**

Under How. Ann. St. § 7029, declaring that no execution on judgment against appellant and surety shall be levied on the surety's property unless such execution, if issued in the circuit court, is issued within 30 days, or, if issued in the supreme court, within 90 days, from the time when it shall be legally issuable, the 30 days begin to run, not from time judgment is rendered in the supreme court, but from the time remittitur is filed in the circuit court.—*Wright v. King* (Mich.) 65 N. W. 556.

[b] (Mich.: 1896.)

Under 2 How. Ann. St. § 8721, providing that the time of the absence of the debtor from the state shall not be included in computing limitations, and section 8736, making limitation on a judgment 10 years, execution may issue on a deficiency judgment at any time within 10 years, excluding any time defendant may have been absent.—*Shelden v. Barlow* (Mich.) 66 N. W. 338.

[c] (S. D.: 1896.)

Under Comp. Laws, § 5110, providing for the issuance of execution within five years after entry of judgment, no execution can issue until after such entry.—*Locke v. Hubbard* (S. D.) 69 N. W. 588.

§ 2. — After entry of stay.**(Mich.: 1896.)**

Where stay of execution for 20 days was granted on a judgment for plaintiff from the date of its rendition, June 18, 1895, a writ of execution issued and delivered July 8, 1895, to plaintiff's attorney, but not delivered to the sheriff till July 9, 1895, was valid.—*Peterson v. Carpenter* (Mich.) 66 N. W. 487.

§ 3. Issuance before entry of judgment.**(Iowa: 1895.)**

Where, at the time of issuing an execution, the only evidence of the existence of a judgment is the entry by the judge in his calendar for judgment, and an unapproved copy of the judgment filed with the clerk, the execution is void.—*Winter v. Coulthard* (Iowa) 62 N. W. 732. 94 Iowa, 312.

§ 4. Issuance in vacation.**(Mich.: 1894.)**

Execution on a judgment for the possession of land may be issued in vacation as a matter of course if the time limited for the stay of execution has expired.—*Christler v. Locke* (Mich.) 61 N. W. 263.

103 Mich. 86.

§ 5. Against property of deceased debtor.

(Minn.; 1895.)

The right given by Gen. St. 1891, § 5417, to a judgment creditor, to have execution issued after the death of the judgment debtor, is limited to cases wherein a lien was acquired prior to the debtor's death, and hence is not given to a creditor who procured a judgment in the debtor's lifetime in a county other than that in which the property sought to be subjected to execution was situated, and who did not file a transcript of the judgment in the latter county until after the debtor's death.—*Byrnes v. Sexton* (Minn.) 61 N. W. 155.

62 Minn. 135.

§ 6. Recitals.

(Mich.; 1895.)

Where the summons and declaration in assumpsit contained a statement that the suit was instituted to enforce a mechanic's lien, and the judgment, which was in assumpsit, contained a like statement, an execution against defendant's property in general is valid, though it contains a recital of the lien. *Koepke v. Dyer* (1890) 45 N. W. 143, 80 Mich. 311, distinguished.—*Allured v. Voller*, 65 N. W. 285.

§ 7. Alias writs.

(Mich.; 1896.)

A second execution cannot be issued where there is an existing levy undischarged.—*Friyer v. McNaughton* (Mich.) 67 N. W. 978.

§ 8. Abandonment of execution.

[a] (Mich.; 1896.)

Mere delivery of a writ of execution, with levy indorsed thereon, to the justice who issued the same, does not constitute an abandonment of the execution.—*Friyer v. McNaughton* (Mich.) 67 N. W. 978.

[b] (Mich.; 1896.)

The taking out of a second execution, though evidence of an abandonment of a prior execution, is not conclusive.—*Friyer v. McNaughton* (Mich.) 67 N. W. 978.

II. PROPERTY SUBJECT TO.

Property subject to supplementary proceedings, see post, § 39.

Exemption of property in custodia legis, see "Exemptions," § 10.

§ 9. Equitable interest in land.

(Neb.; 1896.)

The equitable interest of a judgment debtor in land, if not coupled with possession, cannot be subjected to payment of the debt on execution.—*First Nat. Bank v. Tighe* (Neb.) 68 N. W. 490.

§ 10. Rights under building contract.

(Minn.; 1895.)

Neither the rights of a contractor to money in payment for work under the contract, nor a claim of the contractor for unliquidated damages suffered because of delays on the part of the employer in furnishing materials, are subject to levy, in the hands of the employer, under a judgment against the contractor, and the fact that the amount due is subsequently adjusted by agreement is immaterial.—*In re Kelly* (Minn.) 62 N. W. 280; *Iron River Brown Stone Co. v. Gunniss*, Id.

III. LEVY AND LIEN.**§ 11. Levy.**

[a] (Iowa; 1897.)

A levy on a safe, which is locked, and its contents, described in the return as "notes and money and books," is a good levy on notes pay-

able to the execution defendant, contained in the safe. *Smith v. Clark* (Iowa) 69 N. W. 1011.

[b] (Mich.; 1891.)

A judgment is not satisfied by the levy of an execution on the debtor's property, when the property is left in the debtor's possession, and by him placed beyond the officer's control.—*Lastfield v. Ball* (Mich.) 61 N. W. 339.

103 Mich. 17.

[c] (Neb.; 1895.)

The validity of a levy on personalty is determined by the fact that the officer's acts would make him liable as a trespasser but for the protection of his writ.—*Grand Island Banking Co. v. Costello* (Neb.) 63 N. W. 376.

45 Neb. 119.

[d] (Neb.; 1896.)

An agreement that, if execution issued for the balance of a judgment, it should first be levied on property of a certain one of the judgment debtors before resorting to property of the others, was broad enough to include an execution for costs.—*Gibson v. McClay* (Neb.) 65 N. W. 851.

47 Neb. 900.

§ 12. — Release.

(Wis.; 1897.)

Where the judgment debtor and one of his creditors by fraud induced the judgment creditor to release a levy of execution, so as to enable the creditor to levy and obtain a paramount lien, the fact that the agreement for release provided that the judgment creditor might take property of the debtor, to a certain amount, at prices to be fixed by himself, does not show fraud upon the other creditors, of whose existence the judgment creditor was not aware, and so prevent the judgment creditor from claiming priority of the levy so released.—*Marks v. Auerbach* (Wis.) 69 N. W. 1001.

§ 13. Lien.

(Neb.; 1895.)

An officer cannot hold property under an execution issued on a void judgment as against the owner of the property. *Overruling Wilson v. Macklin* (1878) 7 Neb. 50.—*Miller v. Plue*, 64 N. W. 232, 45 Neb. 701.

§ 14. — Priorities.

[a] (Mich.; 1895.)

The possession, through a tenant, of a building under an unrecorded contract of purchase is constructive notice to persons levying on the land under an execution against the grantor, so as to prevent the lien under the levy having priority, under Pub. Acts 1889 (Act No. 227), providing that the filing of a proper notice of levy with the register of deeds shall be a lien on the land, which shall be valid against all prior grantees of whose claims the party interested shall not have actual or constructive notice.—*Corey v. Smalley* (Mich.) 64 N. W. 13.

[b] (Mich.; 1895.)

Land in possession of a vendee holding under an unrecorded contract of purchase was levied on under execution against the vendor, who had, prior thereto, assigned his interest in the contract of sale in fraud of his creditors. *Held*, that the recording of the levy was not constructive notice to the vendee of the claims of the execution plaintiff so as to render payments by the vendee to the assignee of the contract invalid as against the execution plaintiff.—*Corey v. Smalley* (Mich.) 64 N. W. 13.

IV. CLAIMS BY THIRD PERSONS.**§ 15. Right to intervene.**

(Iowa; 1896.)

Neither Code, § 3016, providing for the intervention of persons claiming an interest in "attached property," nor section 3051, providing for intervention in proceedings by "garnish-

ment on execution," authorizes intervention by a person claiming an interest in property seized under execution issued on a judgment.—*Ball v. Cedar Val. Creamery Co. (Iowa)* 67 N. W. 232.

§ 16. Notice to officer of claim.

[a] (Iowa; 1895.)

The admission of the deputy, when testifying, that he received the notice, is sufficient proof of its delivery.—*Peterman v. Jones (Iowa)* 63 N. W. 338.

[b] (Iowa; 1895.)

Under Code, § 3055, providing that after levy the officer shall be protected from liability by reason of the levy till he receives written notice from a third person that he claims the property, it is sufficient to serve it on the deputy who made the levy, and claimant having delivered the notice and a copy to the deputy, and he having read the original and indorsed acceptance of service thereon, and returned it, keeping the copy, the service is sufficient.—*Peterman v. Jones (Iowa)* 63 N. W. 338.

[c] (Iowa; 1896.)

A judgment creditor, to induce the sheriff to sell property levied on, although no notice had been received that the property was claimed by a third person, voluntarily executed a bond to indemnify the sheriff. *Held*, that under Code, § 3055, providing that if, on levy, the officer receives notice that the property is claimed by a third person, he may release the levy unless bond is given, but he shall not be liable until he receives such notice, the judgment creditor is not liable on the bond to one claiming the property, in default of notice to the sheriff, their liability being contingent on the liability of the sheriff.—*Whitney v. Gammon (Iowa)* 67 N. W. 405.

§ 17. Injunction by claimant.

(Minn.; 1897.)

The enforcement of an execution will not be enjoined at suit of a third person claiming the property because, by reason of the threatened sale, insurance of the property has been canceled.—*Pelican River Milling Co. v. Maurin (Minn.)* 69 N. W. 1149.

§ 18. Replevin.

(Neb.; 1897.)

Where property levied on is replevied by a third person, it cannot be again levied on under another writ against the same person pending the replevin suit.—*Beagle v. Smith (Neb.)* 69 N. W. 956.

V. SALE.

Injunction by claimant, see ante, § 17.
Effect on widow's right to dower, see "Dower," § 2.
Of note, see "Negotiable Instruments," § 38.

§ 19. Presumption.

(Minn.; 1896.)

Where a sheriff levies on property under an execution, and notes the fact of levy on the writ, the presumption is that he does his duty by proceeding to sell the property before making a return of, or filing, the execution.—*Bradley v. Sandilands (Minn.)* 68 N. W. 321.

§ 20. Time of sale.

(Neb.; 1895.)

Comp. St. 1895, § 6085, limiting the power of an officer to advertise real estate and offer the same for sale under execution more than twice under one appraisalment, does not authorize the officer to reappraise property twice advertised and offered for sale, and not sold for want of bids, and offer it for sale, after the expiration of the life of the execution as limited by section 6101.—*Burket v. Clark (Neb.)* 64 N. W. 1113, 46 Neb. 466.

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§ 21. Notice.

[a] (Iowa; 1894.)

Where the name of defendant, the date and amount of the judgment, the court which rendered it, and the fact that attachment had been issued on the land in question, were properly set out in the execution, the sale thereunder is not made void by a mistake in the name of plaintiff in the execution and notice of sale, or by defects in the notice.—*Griffith v. Milwaukee Harvester Co. (Iowa)* 61 N. W. 243.

92 Iowa, 634.

[b] (S. D.; 1896.)

Under Comp. Laws, §§ 5141, 6111, requiring public notice to be given at least 10 days before an officer can sell property levied upon by virtue of an execution, a sale and delivery thereof upon 8 days' notice is unauthorized, and renders the seizure and all subsequent proceedings the acts of a trespasser from the beginning.—*Bowman v. Knott (S. D.)* 66 N. W. 457.

§ 22. Appraisement.

[a] (Iowa; 1895.)

Under Code, § 3100, providing that "personal property levied upon and advertised for sale on execution must be appraised before sale," etc., such appraisement cannot be waived.—*Minneapolis Threshing Machine Co. v. Beck (Iowa)* 64 N. W. 637.

[b] (Neb.; 1895.)

Under Comp. St. 1895, § 6082, providing that after levy and appraisalment the sheriff shall deposit with the clerk of court a copy of the appraisalment, together with his written application for liens and the certificates of liens mentioned in the section, and "shall immediately advertise the real estate" for sale, the copy of the appraisalment, together with such application and certificates, must be deposited with the clerk before the sale is advertised. *La Plume v. Jones (1876)* 5 Neb. 256, overruled.—*Burket v. Clarke, 64 N. W. 1113, 46 Neb. 466.*

[c] (Neb.; 1897.)

An officer levying an execution upon real estate must cause an appraisalment to be made, and a copy thereof deposited in the office of the clerk of the district court from which the execution issued, before the sale is advertised.—*First Nat. Bank v. Hamer (Neb.)* 70 N. W. 497.

§ 23. Confirmation.

[a] (N. D.; 1896.)

Comp. Laws, § 5149, providing for confirmation of execution sales of real estate, contemplates a mere ex parte proceeding by the court, without looking beyond the report of sale, and hence the order of confirmation settles no question of fact or proposition of law as against the owner of the property sold.—*Warren v. Stinson (N. D.)* 70 N. W. 279.

[b] (N. D.; 1896.)

Failure to secure confirmation of an execution sale will not of itself warrant setting the sale aside.—*Warren v. Stinson (N. D.)* 70 N. W. 279.

§ 24. Inadequacy of price.

[a] (Iowa; 1894.)

The validity of a sale of land on execution is not affected by mere inadequacy of the price for which it was sold.—*Griffith v. Milwaukee Harvester Co. (Iowa)* 61 N. W. 243.

92 Iowa, 634.

[b] (N. D.; 1896.)

Plaintiff purchased land subject to the lien of a judgment held by A. On being requested by defendant, A.'s agent, to settle the judgment, he stated that C., the former owner, was to pay it, and C., in the presence of both plaintiff and defendant, promised that he would do so. Subsequently, without notice to plaintiff that the judgment had not been paid, A. advertised and sold the land under execution issued on the judgment, bidding it in at a grossly inadequate

price, and assigning the certificate to defendant. Plaintiff did not know of the sale until the time to redeem had expired, and none of the papers were put on record within that time. *Held*, that it was not error to set the sale aside. —Warren v. Stinson (N. D.) 70 N. W. 279.

§ 25. Mistake.

(Iowa; 1897.)

In an action by C. against W., M., and others for foreclosure, C. had personal judgment against W., and decree that the mortgage be foreclosed, and that execution issue for sale of the property to satisfy the judgment, taxes, penalties, etc.; the decree, however, declaring the lien of M. for taxes superior to the mortgage, and directing C. to pay the amount thereof, and, in default thereof, allowing M. execution against the premises, but providing that, if C. pay such amount, he be subrogated to the rights of M. L., attorney for C., learning that an execution had been issued for sale of the land, and mistakenly understanding that it was for sale of the property to pay C.'s judgment as well as M.'s claim for taxes, wrote the sheriff referring to the execution as in the case of C. v. W., M., et al., and directing him to bid for the property the total amount of all claims against it. By mistake, due to the direction of M.'s attorney to the clerk, the judgment docket showed the judgment and decree in favor of M. as entered in a case entitled "M. v. C. et al.," and the execution was issued in the same form. Owing to this, and the insistence of M.'s attorney, who knew of L.'s letter and his understanding of the matter, the sheriff ignored L.'s bid, though he stated that otherwise he would have accepted it, and sold the property to M. for a third its value. *Held*, that W. being insolvent, and the sale being without redemption, it should be set aside, without regard to whether the form of the judgment docket entry and of the execution vitiated it. —Corney v. Wetmore (Iowa) 70 N. W. 178.

§ 26. Title and rights acquired by purchaser.

[a] (Neb.; 1895.)

The purchaser at execution sale against a husband alone takes his title with notice of the wife's inchoate right of dower. —Butler v. Fitzgerald, 61 N. W. 640, 43 Neb. 192.

[b] (Neb.; 1895.)

A purchaser at execution sale of land takes the land subject to a deed or mortgage recorded at the time of the sale, though unrecorded at the time the judgment under which the sale was had became a lien on the land. —Hargreaves v. Menken (Neb.) 63 N. W. 951.

45 Neb. 668.

§ 27. — Right to deed.

(Iowa; 1896.)

Code, § 3089, provides that, where the purchaser at sheriff's sale "fails to pay the money when demanded, plaintiff may elect to proceed against him for the amount; otherwise, the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after a postponement" as authorized elsewhere. *Held* that where an execution for \$500 was given to the sheriff without notice that it was issued on an appeal judgment, from a sale to satisfy which no redemption could be had (Code, § 3102), and levy was made in the belief that redemption could be had, on land worth from \$6,000 to \$11,000, and sale was made to one who failed to pay the price for 30 days, when the sheriff accepted the amount of the execution, with costs, and returned it as satisfied, the purchaser was not entitled to a deed on a subsequent tender of the amount of the bid (no election having been made by the plaintiff to sue the purchaser), since the sale was virtually nullified, and the money was not received by the sheriff for a redemption, but to satisfy an outstanding execu-

tion in his hands. —Long v. Valleau (Iowa) 66 N. W. 195.

§ 28. Collateral attack on sale.

[a] (Neb.; 1895.)

A sale on execution issued on a dormant judgment being merely voidable, neither it nor the title acquired thereunder can be assailed in a collateral proceeding. —Gillespie v. Switzer 62 N. W. 228, 43 Neb. 772.

[b] (Neb.; 1896.)

A sale of real estate to satisfy a judgment which has become dormant under Code Civ. Proc. § 482, is voidable only, and cannot be assailed in a strictly collateral proceeding. —Link v. Connell (Neb.) 67 N. W. 475.

48 Neb. 574.

§ 29. Sale after redemption for balance due on judgment.

(S. D.; 1896.)

Where property of a judgment debtor has been sold for less than the amount of the judgment, and redeemed from such sale by the judgment debtor, the property may again be sold on a second execution issued on the same judgment for the balance due thereon. —Scaman v. Galligan (S. D.) 66 N. W. 458.

VI. RETURN.

§ 30. Showing as to sale.

(Iowa; 1896.)

A sheriff's return on an execution recited only that on a certain day he levied on land specifically described, and, on a subsequent day named, he sold said land to the judgment plaintiff, naming him, for a certain sum, which exceeded the amount of the judgment. There was nothing to show whether the costs were paid, or what further, if anything, was done under the sale. *Held* to show a complete sale, which satisfied the judgment; and that Code, § 3089, providing that, where the purchaser fails to pay the money, plaintiff may proceed against him, otherwise the sheriff shall treat the sale as a nullity, and may resell, does not apply. —Harpham v. Worthington (Iowa) 69 N. W. 535.

§ 31. Conclusiveness.

[a] (Mich.; 1895.)

Though a sheriff's return is dated Sunday, it may be shown by the clerk's entry and the indorsement on the writ that the return was made the Saturday preceding. —Macomber v. Wright (Mich.) 65 N. W. 610.

[b] (Mich.; 1895.)

A judgment debtor may, in the suit in which the judgment was rendered, move to set aside the return on execution, and show its falsity. —William Wright Co. v. Frazer (Mich.) 66 N. W. 954.

[c] (Mich.; 1896.)

A return or nulla bona is not open to attack on a judgment creditor's bill based on such return. —William Wright Co. v. Frazer (Mich.) 66 N. W. 954.

VII. DISTRIBUTION OF PROCEEDS.

§ 32. Apportionment.

[a] (Neb.; 1895.)

Where two or more judgments in favor of different plaintiffs against the same defendant are entered at the same term of court, and executions are issued thereon during the term, or within 10 days thereafter, and delivered to the officer, though on different days, which are levied on the debtor's property, the proceeds of sale under any or all of such writs must be apportioned pro rata among the several execu-

tion creditors.—*Moore v. Peycke* (Neb.) 62 N. W. 1072.

44 Neb. 405.

[b] (Neb.: 1895.)

Two executions were issued against the same debtor on judgments of the district court during the term at which they were entered, and placed in the hands of the sheriff, who levied on the property. Subsequently, but at the same term of the court, several transcripts of judgments against the same debtor, rendered by a justice of the peace, were filed in the district court, and executions were issued thereon, and delivered to the same officer, which were levied on the same property, subject to the other levies. *Held*, that the money arising from sale under the levies must first be applied pro rata to the satisfaction of the writs first delivered, and next to the payment of other writs, in the order of their priority.—*Moore v. Peycke* (Neb.) 62 N. W. 1072.

44 Neb. 405.

§ 33. Mortgaged property.

(Iowa: 1895.)

Where execution is levied on mortgaged chattels, the deposit by the execution creditor of the amount of the mortgage debt for the benefit of the mortgagee, as required by Acts 21st Gen. Assem. c. 117, is properly deducted from the amount realized at the sale; and the fact that the amount of the deposit was advanced to such execution creditor by his attorney, who borrowed it for that purpose, is immaterial.—*Tyler v. Budd* (Iowa) 64 N. W. 679.

VIII. REDEMPTION.

§ 34. Second redemption—Time of making.

(N. D.: 1896.)

A redemption, from a prior redemptioner of real estate sold under execution or on foreclosure of a mortgage by advertisement, must, under Code, § 5542, be made within 60 days from the prior redemption.—*State v. O'Conner* (N. D.) 69 N. W. 692.

IX. RELIEF AGAINST EXECUTION.

Injunction at instance of claimant, see ante, § 17.

§ 35. By bill in equity.

(N. D.: 1896.)

A bill in equity, instead of a motion, may be filed to set aside an execution sale where the title is held by one who may claim the rights of an innocent purchaser, or plaintiff may be required to explain his long delay in attacking the sale, or the circumstances of the case present other questions which cannot be fully investigated on the hearing of a motion.—*Warren v. Stinson* (N. D.) 70 N. W. 279.

§ 36. Injunction.

(Iowa: 1895.)

Where land is conveyed as security for an agreement to support the grantee during life, the levy of an execution against the grantee on such land will be enjoined.—*Eherke v. Hecht* (Iowa) 64 N. W. 652.

§ 37. Remedy after sale.

(Neb.: 1895.)

The correctness of the appraisement of land seized under execution cannot be assailed after the sale, except for fraud.—*Kearney Land & Investment Co. v. Aspinwall* (Neb.) 63 N. W. 827.

45 Neb. 601.

X. SUPPLEMENTARY PROCEEDINGS.

§ 38. Affidavit for examination of debtor.

(Mich.: 1895.)

Under How. St. § 8107, providing that on return of an execution unsatisfied the judgment creditor "may obtain an order" requiring the judgment debtor to appear and make discovery as to his property, the affidavit filed for such order need only show that the execution has been returned unsatisfied.—*Berles v. Comstock* (Mich.) 62 N. W. 148.

104 Mich. 129.

§ 39. Property subject.

(Minn.: 1896.)

Wages due a fireman from a municipal corporation are not subject to seizure on supplementary proceedings, it being against public policy to permit them to be so taken.—*Sandwich Manuf'g Co. v. Krake* (Minn.) 68 N. W. 606.

§ 40. Pleading.

(Minn.: 1896.)

One suing as a receiver in supplementary proceedings to set aside fraudulent conveyances of a debtor must show in his complaint that he was appointed receiver of the debtor; a general allegation of his appointment to a receivership being insufficient.—*Tvedt v. Mackel* (Minn.) 69 N. W. 475.

§ 41. Parties.

[a] (Minn.: 1896.)

The commencement of a suit by a receiver appointed in supplemental proceedings in which the judgment defendant was not served, against a third party as a debtor of such defendant, or the institution of proceedings against the third party requiring him to appear and disclose, did not give the judgment plaintiff a lien on his defendant's assets in the hands of another third party who was not made a party to the suit, or otherwise proceeded against.—*Ware v. Linderbergh* (Minn.) 68 N. W. 771.

[b] (Minn.: 1896.)

Where a judgment defendant remained out of the state for several months before and after the commencement of supplemental proceedings in which third parties were proceeded against as his debtors, the failure to obtain service on him was not a defect of parties fatal to those proceedings.—*Ware v. Linderbergh* (Minn.) 68 N. W. 771.

§ 42. Lien.

[a] (Minn.: 1896.)

Where a judgment defendant who was absent from the state at the time supplemental proceedings were instituted, returned to the state about three months after a receiver was appointed in those proceedings on disclosure of an alleged debtor of defendant, service on him of the order appointing the receiver without further order of court, was extra-judicial and gave the judgment plaintiff no lien generally on the equitable or concealed assets of defendant.—*Ware v. Linderbergh* (Minn.) 68 N. W. 771.

[b] (Minn.: 1896.)

The fact that a receiver appointed in supplemental proceedings contributed towards the expense of litigating a suit commenced before his appointment by the judgment defendant to recover a money judgment against a third party against whom the receiver had not proceeded, gave the judgment plaintiff no lien on the fruits of that litigation.—*Ware v. Linderbergh* (Minn.) 68 N. W. 771.

§ 43. Appointment of receiver.

[a] (Minn.: 1896.)

Where a judgment creditor's demand is secured by mortgage, a receiver of the judgment debtor's property may be appointed in supplementary proceedings, under Gen. St.

1894, § 5492, although the creditor has not exhausted his mortgage security. *Bean v. Heron* (Minn.) 67 N. W. 805.

[1b] (Minn.; 1896.)

In supplementary proceedings for the appointment of a receiver, it appeared that at the time plaintiff's debt was contracted defendant owned property valued at \$90,000, but that he had conveyed it to friends, under circumstances tending to show that it was to defraud creditors; that at the time plaintiff obtained her judgment there was no property on which to levy except unproductive land which had been mortgaged to her to secure the debt; that the mortgage security was not worth to exceed \$1,000; and that plaintiff's debt was \$3,800. *Held*, that the receiver was properly appointed.—*Bean v. Heron* (Minn.) 67 N. W. 805.

§ 44. Punishment for contempt.

[1a] (Mich.; 1896.)

Under How. Ann. St. c. 27S, § 8115, providing that, if any party or witness shall disobey any order of the judge or commissioner made in proceedings for disclosure, such party or witness may be punished as for contempt, the circuit court can punish for contempt a debtor who refuses to appear before the circuit court commissioner, and make disclosure.—*Shepard v. Grove* (Mich.) 68 N. W. 221.

[1b] (Neb.; 1895.)

Code Civ. Proc. §§ 532-549, relating to supplementary proceedings, and providing that property of the judgment debtor in the hands of third persons may be ordered applied to the satisfaction of the judgment, do not authorize the committal for contempt of one who disobeyed an order to turn over property to be applied in discharge of a judgment against a debtor.—*In re Havelik*, 64 N. W. 234, 45 Neb. 747.

[1c] (Wis.; 1895.)

The circuit court has power to punish as for contempt the refusal of a debtor to make discovery of his property when brought before it, under Rev. St. § 3029, providing that when an execution against a judgment debtor is returned unsatisfied, the judgment creditor may compel the discovery of any property belonging to the judgment debtor.—*In re Rosenberg* (Wis.) 63 N. W. 1065.

90 Wis. 581.

[1d] (Wis.; 1896.)

In an action for discovery in aid of execution, under Rev. St. § 3029, where the court is satisfied that a proper discovery is being thwarted by defendant's contumacy, an order committing him as for a contempt committed in presence of the court, until he shall make a full discovery, is not so clear an abuse of the power of the court as to require its reversal.—*Warren v. Rosenberg* (Wis.) 69 N. W. 339.

[1e] (Wis.; 1896.)

In an action for discovery in aid of execution under Rev. St. § 3029, a commitment as for contempt, for failure to pay over money ordered to be paid, can be sustained only where there is satisfactory evidence that defendant has power to comply at once with the order.—*Warren v. Rosenberg* (Wis.) 69 N. W. 339.

XI. EXECUTION AGAINST THE PERSON.

§ 45. Issuance.

(S. D.; 1895.)

Execution against the person may issue without order of court or judge.—*Hormann v. Sherin* (S. D.) 65 N. W. 434.

§ 46. When authorized.

[1a] (S. D.; 1895.)

Comp. Laws, § 6136, provides that judgment in the district court on an appeal has the same force as judgment in actions commenced therein. Laws 1890, c. 78, provides that the

county court, on appeal from the court, has the same power as the district court. *Held* that, on appeal by defendant to the county court from a judgment for costs entered in a justice court in an action for the wrongful conversion of personal property, though execution against the person could not have been issued in the justice court, it was properly issued on the judgment entered on the appeal.—*Winton v. Knott* (S. D.) 63 N. W. 783.

[1b] (S. D.; 1895.)

Since defendant in an action for wrongful conversion of personal property may be arrested (Comp. Laws, § 4915), execution "against the person" of defendant (Comp. Laws, § 5115) may issue on a judgment for costs in such action.—*Winton v. Knott* (S. D.) 63 N. W. 783.

[1c] (S. D.; 1895.)

Execution against the person of a judgment debtor could issue on a judgment rendered by the county court, in an action for conversion, on appeal from justice's court, and hence an action for false imprisonment does not lie against an officer seizing and detaining the debtor under such execution.—*Winton v. Kirby* (S. D.) 64 N. W. 528.

[1d] (S. D.; 1895.)

Execution against the person may issue on a judgment for wrongful conversion of personal property.—*Hormann v. Sherin* (S. D.) 65 N. W. 434.

[1e] (S. D.; 1895.)

Execution against the person may issue on a judgment in an action combining several causes of action on a judgment, on some of which execution against the person could not issue, where the verdict shows that it was based solely on a cause which could support a judgment permitting the issue of such execution.—*Hormann v. Sherin* (S. D.) 65 N. W. 434.

[1f] (S. D.; 1896.)

Comp. Laws, § 5115, provides that an execution shall not issue against the person of a judgment debtor unless an order of arrest has been served, or unless the complaint contains a statement of facts showing one or more causes of arrest. *Held* that, in an action on a purchase-money note, allegations of the complaint that the note was given for goods obtained by false pretenses are immaterial, and therefore the arrest of defendant was not authorized unless an order for his arrest issued before judgment.—*Griffith v. Hubbard* (S. D.) 67 N. W. 850.

EXECUTORS AND ADMINISTRATORS.

I. APPOINTMENT AND TENURE, §§ 1-5.

II. ASSETS, § 6.

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IV. ALLOWANCE AND PAYMENT OF CLAIMS, §§ 12-26.

1. In General, §§ 12-14.

2. Presentation and Statement of Claims, §§ 15-18.

3. Limitation of Time for Presenting, §§ 19-21.

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5. Priority of Claims—Payment, §§ 25, 26.

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VI. LIABILITIES AND MISCONDUCT, §§ 33, 34.

VII. DISTRIBUTION OF ESTATE, §§ 35-37.

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1. In General, § 38.

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IX. ALLOWANCE TO WIDOW, §§ 45, 46.

X. ACTIONS, §§ 47-50.

XI. FOREIGN AND ANCILLARY ADMINISTRATION, § 51.

XII. EXECUTOR DE SON TORT, § 52.

See, also, "Descent and Distribution"; "Wills." Collection of taxes on estate of decedent, see "Taxation," § 79. Execution of testamentary powers, see "Powers," § 2. Release of sureties on administrator's bond, see "Principal and Surety," § 11. Right of executor to appeal, see "Appeal," § 10. Survival of cause of action on promise of decedent, see "Abatement and Revival," § 9.

I. APPOINTMENT AND TENURE.

Appointment of foreign or ancillary administrator, see post, § 51.

§ 1. When administration necessary or proper.

(Mich.: 1895.)

The right of action given by How. Ann. St. §§ 8313, 8314, to an administrator for the death by wrongful act of his decedent, constitutes assets of the estate of a nonresident killed within the state, sufficient to grant administration thereon, under section 5848, providing that administration may be granted if a nonresident decedent leaves "estate" within the state to be administered.—*Findlay v. Chicago & G. T. Ry. Co.* (Mich.) 64 N. W. 732.

§ 2. Jurisdiction of courts.

(Neb.: 1896.)

Comp. St. c. 23, § 177, provides that when one shall die intestate, being an inhabitant of Nebraska, administration shall be granted in the county of which he was a resident at the time of his death, and that if at that time the intestate resided in any other state or country, leaving an estate in Nebraska to be administered, letters may issue in any county in which any of such estate is situated. *Held*, that the jurisdiction of the county court to grant administration does not depend upon the residence of the intestate in Nebraska at the time of his death.—*Spencer v. Wolf* (Neb.) 67 N. W. 858.

§ 3. Right to appointment as administrator.

(Neb.: 1896.)

Comp. St. 1895, c. 23, § 178, provides that administration shall be granted (1) to the widow or next of kin; (2) to a creditor of the intestate in case the widow or next of kin shall neglect for 30 days after the death of intestate to apply for administration; (3) to some person selected by the judge of probate in case there is no creditor. *Held*, that the exclusive right of the widow and next of kin to the appointment does not continue longer than 30 days from the death of the intestate, and an heir applying for letters of administration after that time, and before they have issued to a creditor, is not entitled, as a matter of right, to the appointment.—*Spencer v. Wolf* (Neb.) 67 N. W. 858.

§ 4. Proceedings for appointment.

[a] (Mich.: 1896.)

A petition for the appointment of an administrator, which alleges that intestate died possessed of real and personal property, cannot be traversed, and the court is bound to grant the letters.—*In re Brooks' Estate* (Mich.) 67 N. W. 975.

[b] (Mich.: 1896.)

Where a petition for the appointment of an administrator alleges that intestate died possessed of real and personal estate, an answer

traversing such allegation is demurrable, and the appointment cannot be denied on the ground that the demurrer admits the truth of the answer.—*In re Brooks' Estate* (Mich.) 67 N. W. 975.

[c] (Neb.: 1896.)

A petition by a creditor of an intestate to be appointed his administrator alleged that the intestate died seized of real and personal estate situate in the county, that the real estate was worth about \$5,600, and that the personal estate was estimated to be worth several hundred dollars. *Held*, the allegations were sufficient as to description of the property.—*Spencer v. Wolf* (Neb.) 67 N. W. 858.

§ 5. Discharge.

(Iowa: 1895.)

Where the final report of an administratrix is approved, and the administratrix discharged, the court cannot reappoint such administratrix for the purpose of allowing her to sue on an uncollected claim due the estate; such claim having, on approval of the final report, vested in the heirs, leaving no assets upon which to order further administration.—*Jordan v. Hunnell* (Iowa) 65 N. W. 302.

II. ASSETS.

Collection of assets, see post, §§ 7, 8.

§ 6. What are.

[a] (Iowa: 1896.)

Where a legatee under a will sells his interest in the estate, in advance of its settlement, the proceeds received by him do not become assets of the estate, nor subject to the payment of its debts or expenses. The thing sold being merely a right to participate in the effects of the estate, its transfer in no manner prejudices the rights of creditors, and the money received therefor is impressed with no trust in their favor.—*Ristine v. Kurtz* (Iowa) 66 N. W. 185.

[b] (Mich.: 1895.)

Growing crops on the lands of a decedent are assets of his estate.—*McGee v. Walker* (Mich.) 64 N. W. 482.

III. POWERS AND DUTIES IN COLLECTION AND MANAGEMENT OF ESTATE.

§ 7. Collection and recovery of assets.

[a] (S. D.: 1896.)

Under Comp. Laws, § 5795, which provides that claims against an estate "allowed by the executor or administrator, and approved by the judge," etc., shall be filed in the county court, the appropriate phrase, in an action to recover assets, to show that there are acknowledged debts against an estate, is that the claims have been "approved" by the county judge.—*Bright v. Ecker* (S. D.) 68 N. W. 326.

[b] (S. D.: 1896.)

Where parties have been cited to appear before the county court for examination touching an administrator's complaint that they have converted the assets of his intestate's estate, the court's citation and order directing them to deliver the assets to the administrator are made prima facie evidence, by Comp. Laws, § 5776, of the administrator's right to recover the property, and hence are competent evidence to charge defendants in a subsequent action by the administrator for the value of the assets.—*Bright v. Ecker* (S. D.) 68 N. W. 326.

[c] (S. D.: 1897.)

Comp. Laws, § 5776, making an order of a county court, entered after a citation, requiring a person to deliver assets of the estate of an intestate to his administrator, prima facie evidence of the right of the administrator to recov-

er such assets is valid. *Bright v. Ecker* (S. D.) 69 N. W. 821.

[d] (Wis.; 1896.)

The circuit court which assumes jurisdiction of matters arising in the administration of estates, over which it has concurrent original jurisdiction with the county court only when special facts show that adequate relief cannot be given by the county court, will take jurisdiction of an action by a personal representative to recover a fund belonging to his intestate's estate, a discovery of which is rendered necessary by plaintiff's ignorance of its form and amount.—*Meyer v. Garthwaite* (Wis.) 66 N. W. 701.

92 Wis. 571.

[e] (Wis.; 1896.)

An administrator cannot sue to compel specific performance of a contract to convey land to his decedent, the price for which has been paid, where it does not appear that the administrator is in possession, or that the personal assets of the estate are insufficient to pay the debts.—*Carpenter v. Popper* (Wis.) 68 N. W. 874.

§ 8. — Property fraudulently conveyed by decedent.

[a] (Mich.; 1895.)

In an action by an administrator to set aside a conveyance by his decedent as in fraud of creditors, testimony of decedent's son and of the administrator that they are unaware of any other property belonging to the estate, except another tract also conveyed in fraud of creditors, is prima facie evidence of a deficiency of assets.—*Walker v. Cady* (Mich.) 63 N. W. 1005.

[b] (Mich.; 1895.)

The granting of an order allowing the administrator a certain time within which to move for a new trial in a case in which a claim against a decedent's estate is allowed, does not suspend the right of the administrator during such time to sue to annul a conveyance by his decedent as in fraud of the creditor in whose favor the claim is allowed.—*Walker v. Cady* (Mich.) 63 N. W. 1005.

[c] (Mich.; 1896.)

In a suit by an executor under How. Ann. St. § 5884, to set aside a voluntary deed by his testator as in fraud of creditors, a decree setting aside the deed absolutely should not be rendered, but it should be conditioned on the non-payment within a specified time of the claims against decedent's estate, including the costs of the proceedings in the probate and circuit courts.—*Reed v. Jordan* (Mich.) 66 N. W. 947.

§ 9. Contracts—Negotiable instruments.

[a] (Minn.; 1895.)

A note given by an executor in his official capacity, for a debt due by testator, which was not allowed by the probate court, without any new consideration, and after the expiration of the time for filing claims against the estate, was without consideration.—*Germania Bank v. Michaud* (Minn.) 65 N. W. 70.

62 Minn. 459.

[b] (Minn.; 1895.)

Under the law merchant, a negotiable note made by an administrator in his official capacity imports sufficient consideration to bind him personally.—*Germania Bank v. Michaud* (Minn.) 65 N. W. 70.

62 Minn. 459.

§ 10. Lease of land.

(Mich.; 1895.)

Under 2 How. St. § 5875, allowing an executor to take possession of the real and personal property of his testator, and to lease the same "from year to year," and providing that the probate court shall deliver the real estate to the heirs or devisees on their showing that the personality is sufficient to pay debts, a lease for two years, by an executor, of the real estate of his decedent, which he has taken possession of and retained without objection from the heirs or devisees,

though void as a lease for two years, is valid as a lease from year to year.—*Grady v. Warrell* (Mich.) 63 N. W. 201.
105 Mich. 310.

§ 11. Inventory.

(Iowa; 1896.)

Where an executor fails to file his inventory within 15 days after his appointment, as required by Code, § 2370, the court will order it to be filed, though the facts on which the order is based are brought to the court's knowledge by one having no interest in the estate.—*Poole v. Burnham* (Iowa) 68 N. W. 816.

IV. ALLOWANCE AND PAYMENT OF CLAIMS.

Jurisdiction of probate court, see "Courts," § 19. Proof of claims, testimony as to transactions with decedent, see "Witness," § 25.

1. IN GENERAL.

§ 12. Debts and contracts of decedent in general.

[a] (Iowa; 1896.)

Under Acts 20th Gen. Assem. c. 191, § 1, making taxes, after they become due, a debt of the person taxed, one who acquired title to land from a devisee may enforce payment of taxes, due thereon at the death of the testatrix, against the executor; and the fact that the executor is himself the devisee, and conveyed by deed of special warranty, under which he was not individually liable for claims for taxes, is immaterial.—*Findley v. Taylor* (Iowa) 66 N. W. 744.

[b] (Mich.; 1895.)

The estate of one to whom money was intrusted for investment is liable on presentment of a claim therefor to the commissioners.—*Frank v. Morley's Estate* (Mich.) 64 N. W. 577.

[c] (Minn.; 1896.)

Where, after the death of a subscriber for stock in a corporation organized for pecuniary profit, the corporation became insolvent, and passed into the hands of a receiver, the claim for the ascertained balance due on deceased's subscription was not a contingent claim, and accordingly was provable against his estate, the time for presenting claims not having expired at the time the receiver was appointed.—*State v. Probate Court of Rock County* (Minn.) 68 N. W. 1063.

§ 13. Disallowance.

(Minn.; 1896.)

That a claim has been presented and allowed in the state in which decedent resided, or that the claimant holds security therefor, is not ground for refusing to allow it in the state in which the claimant lives, where the condition of the estate in the former state is not shown.—*State v. Probate Court of Rock Co.* (Minn.) 69 N. W. 609.

§ 14. Conclusiveness of decision.

(Mich.; 1897.)

Commissioners on the estate of a decedent act judicially, and, where a claim has been presented and disallowed, their decision, if not appealed from, is final.—*Finley v. Dubay* (Mich.) 70 N. W. 885.

2. PRESENTATION AND STATEMENT OF CLAIMS.

§ 15. Presenting and filing.

[a] (Iowa; 1895.)

The fact that an executrix told a creditor she would pay his claim, and asked him not

to file it, will not excuse a failure to file a claim on a note of which the executrix had no notice.—*Manning v. Stout* (Iowa) 61 N. W. 963.

93 Iowa, 233.

[b] (Iowa; 1895.)

Code, §§ 2408-2411, regulating the filing and allowance of claims against the estates of decedents, contemplates the filing of such claims with the clerk, and the filing only with the administrator is insufficient.—*Corey v. Gillespie* (Iowa) 62 N. W. 837.

[c] (Iowa; 1895.)

Plaintiffs mailed the statement of their claim against decedent to the administrator, but did not file it with the clerk. They received no reply from the administrator, but did nothing further until the claim was barred. *Held*, that they were not entitled to equitable relief.—*Corey v. Gillespie* (Iowa) 62 N. W. 837.

[d] (Mich.; 1895.)

A note payable absolutely, and secured by mortgage on land, is not, as between the holder and the estate of the maker, a contingent claim, within 3 How. Ann. St. § 5932, providing that "if any person shall be liable as security for the deceased, or have any other contingent claim against his estate which cannot be proved as a debt before the commissioners, or allowed by them, the same may be presented, with the proper proof, to the probate court or to the commissioners, who shall state the same in their report."—*Osmun v. Oakland Circuit Judge* (Mich.) 64 N. W. 949.

[e] (Mich.; 1895.)

How. Ann. St. § 5894, providing that a decedent's estate may be opened to allow a claim to be filed, provided that all costs and charges in the probate court shall be paid by claimant, does not require that such claimant shall pay the costs incurred in case of an appeal to the circuit court.—*Shepherd v. Shepherd's Estate* (Mich.) 65 N. W. 580.

§ 16. Necessity of presentation.

[a] (Iowa; 1896.)

Claims for taxes due by deceased, which Code, § 2420, requires the executor to pay, need not be filed.—*Findley v. Taylor* (Iowa) 66 N. W. 744.

[b] (S. D.; 1896.)

With the exception of a deficiency found to exist after a foreclosure sale, it is not necessary to present to an administrator a claim secured by mortgage upon the real property of a decedent.—*Kelsey v. Welch* (S. D.) 66 N. W. 390.

[c] (S. D.; 1896.)

A debt secured by a mechanic's lien made of record is not a claim that must, under Comp. Laws, § 5790, be presented to an administrator for allowance.—*Fish v. De Laray* (S. D.) 66 N. W. 465.

§ 17. Time of presentation.

(Mich.; 1895.)

A claim against the estate of a deceased surety in favor of the obligee of a bond accrues at the time of a settlement between the principal and such obligee, and not at the time of rendering judgment against the principal and a surviving surety, within 2 How. Ann. St. § 5936, providing that, if the claim of any person shall accrue after the time limited for creditors to present their claims, the claimant may present it to the probate court, and prove it at any time within one year after it shall have accrued.—*In re Hill's Estate* (Mich.) 65 N. W. 758; *John Hancock Life Ins. Co. v. Hanna*, *Id.*

§ 18. Amendment on appeal.

(Mich.; 1894.)

In a proceeding in the probate court to establish a claim against a decedent's estate, claimant alleged that his claim was for 900 bushels of corn, being one-half of that grown

on 47 acres of land. On appeal to the circuit court he was allowed to amend so as to claim 1,000 bushels grown on the same land. One-half the crop was all that was claimed upon the trial. *Held*, that the amendment did not enlarge the amount of the claim.—*Dayton v. Dakin's Estate* (Mich.) 61 N. W. 349.

103 Mich. 65.

3. LIMITATION OF TIME FOR PRESENTING.

§ 19. In general.

[a] (Iowa; 1895.)

Where a petition for the allowance of a claim against the estate of a decedent alleges that it was not filed within one year after notice of the appointment of an executrix, and sets out matters which are claimed to excuse the delay, under Code, § 2421, and the answer states that the claim is barred by reason of such failure, the executrix need not show the date of her appointment, for the purpose of proving that the claim was not filed in time.—*Manning v. Stout* (Iowa) 61 N. W. 963.

93 Iowa, 233.

[b] (Iowa; 1895.)

Under Code, § 2421, providing that all claims of the fourth class against a decedent's estate must be filed within 12 months of the giving of notice of administration, a claim presented two years after such notice should not be allowed, the only excuse being that it had been presented in time, but had been lost by the administrator, where the creditor knew the claim would be disputed.—*Pearson v. Christman* (Iowa) 61 N. W. 1085.

93 Iowa, 703.

[c] (Iowa; 1897.)

Under Code, § 2421, requiring claims against a decedent's estate to be filed within 12 months after notice by the administrator, unless the claim is pending in the district court, the pendency of a suit, which on the death of decedent is not revived against his representatives, but is dismissed as to him, before the expiration of the 12 months, does not toll the statute.—*Schlutter v. Dahling* (Iowa) 69 N. W. 884.

§ 20. Relief where claims are barred.

[a] (Iowa; 1897.)

"Peculiar circumstances," entitling a claimant against a decedent's estate to equitable relief against the bar for failure to file his claim within 12 months (Code, § 2421), are not shown by the fact that a stranger to the settlement of the estate, who was also liable on the claim, represented to claimant that decedent's widow, who was also liable, was decedent's sole devisee, and that she would give him additional security, and that prior liens against land mortgaged by deceased to secure the claim would be paid off, by reason of which representations claimant forbore filing the claim.—*Schlutter v. Dahling* (Iowa) 69 N. W. 884.

[b] (Minn.; 1895.)

Prob. Code, § 104 (Gen. St. 1894, § 4511), providing that all claims arising on contract, whether due, not due, or contingent, shall be barred unless presented for allowance as directed by the court, does not preclude the holder of a claim, not so presented, against the estates of deceased sureties on the bond of a guardian whose account was not settled when the time expired for presenting claims against their respective estates, from enforcing the claim against the next of kin, legatees, or devisees to the extent of the estate received by them, under Prob. Code, § 107 (Gen. St. 1894, § 4514), which provides that no claims shall be a charge on the estate unless presented within five years after decedent's death, but that such provision shall not affect the creditor's right to recover on his claim from the next of kin, legatees, or devisees

to the extent of assets received by them.—*Hantzsch v. Massolt* (Minn.) 63 N. W. 1069.
61 Minn. 361.

[c] (Minn.; 1895.)

Prob. Code, § 101 (Gen. St. 1891, § 4511), providing that all claims arising on contract, whether due, not due, or contingent, shall be barred unless presented for allowance as directed by the court, does not preclude a lessee from suing the administrator of the estate of a co-lessee for decedent's proportion of moneys paid for rent, taxes, and insurance of the leased premises, which by the lease became due after the expiration of the time provided for filing claims against the co-lessee's estate.—*Oswald v. Pillsbury* (Minn.) 63 N. W. 1072.
61 Minn. 520.

§ 21. — Extension of time.

(Minn.; 1896.)

The probate court should extend the time for presentation of claims, so as to allow a claimant, who has used due diligence, to file his claim, where such extension will not delay the settlement of the estate, even though the claim has already been presented and allowed in the state of decedent's residence.—*State v. Probate Court of Rock County* (Minn.) 69 N. W. 609.

4. ENFORCEMENT.

§ 22. Parties and evidence.

[a] (Iowa; 1897.)

In a proceeding to establish a claim against an estate it was not error to strike an amendment by claimant making the administrator of another estate a party, where the amendment would cause a continuance, and the two claims were based on separate facts, though the claim set up by amendment had to be established first, and both claims might have been adjudicated in one proceeding.—*Guion v. Giller* (Iowa) 70 N. W. 201.

[b] (Minn.; 1895.)

Evidence that the administratrix admitted that she would pay a claim filed in the probate court against the estate, and that she paid part thereof, was not admissible, on a trial on appeal from disallowance of the claim to show the existence or validity thereof.—*In re Hoff's Estate* (Minn.) 65 N. W. 464, 63 Minn. 296; *Johanson v. Hoff*, Id.

§ 23. Reference.

(Mich.; 1895.)

On the trial of a claim against the estate of a decedent, the executor may consent to the appointment of two referees, instead of one or three, as provided for by statute.—*Shepherd v. Shepherd's Estate* (Mich.) 65 N. W. 580.

§ 24. Review.

[a] (Mich.; 1896.)

A claim filed against an estate on its face showed that it was equally consistent with the theory that it was based upon a sale of the property described in the claim, and upon a trust relation. The evidence established the fact that the claim was presented to the commissioners on the basis of a trust. *Held* that, on appeal by claimant to the circuit court, he could not establish his right of recovery on the theory of an absolute sale, instead of on a trust relationship.—*Raub v. Nisbett* (Mich.) 69 N. W. 77.

[b] (Minn.; 1895.)

A dispute having arisen between persons interested in an estate and their attorney, it was agreed between the attorney and all parties interested in the estate that the executors should pay a reasonable fee to the attorney, subject to allowance by the probate court. *Held*, that an order of that court disallowing the attorney's claim was not an order disallowing a creditor's claim, within Gen. St. 1894, § 4665, and hence

was not appealable. *Smith v. Pence* (Minn.) 64 N. W. 822.
62 Minn. 321.

5. PRIORITY OF CLAIMS—PAYMENT.

§ 25. Classification and order of payment.

(Iowa; 1895.)

Where an agent collects rents for his principal, deposits the money in bank to his own account, and keeps a running account between him and his principal, which is settled once a year, on the death of the agent the amount due the principal is not a trust fund, which constitutes a preferred claim against his estate.—*Chappell v. Craig* (Iowa) 65 N. W. 146.

§ 26. Interest.

(Mich.; 1895.)

Interest is properly allowed on a claim against a decedent's estate from the time demand is made on the administrator for payment.—*Shepherd v. Shepherd's Estate* (Mich.) 65 N. W. 580.

V. SETTLEMENT AND ACCOUNTING.

Right of executor or administrator to appeal, see "Appeal," § 10.

§ 27. Duty to account—Acting in different capacities.

[a] (Mich.; 1896.)

A will provided, inter alia, that on the coming of age of testator's youngest child the residue of the estate should be equally divided into shares, the income of each one of which should be paid to his wife and to each of his children, respectively, during their lives, and that on the death of any of them the principal share of the deceased should vest absolutely in his or her children. Certain persons were constituted executors and trustees to carry out the will, who annually accounted to the probate court, without attempting to distinguish the trust funds from the general funds of the estate. *Held* that, before such persons can discharge themselves of their official responsibility as executors, they must do some act to change the character of their holding, and show that the remaining funds are safely placed where they should be placed.—*In re Sanborn's Estate* (Mich.) 67 N. W. 128.

[b] (Mich.; 1896.)

Where an executor who is also a trustee has in his hands a large fund as executor, as shown by the last report filed by him in the probate court, and has failed to make further reports as provided for by 2 How. Ann. St. § 5957, the court may require him to render an accurate account of all moneys and other property in his hands, as authorized by section 6809.—*In re Sweetser's Estate* (Mich.) 67 N. W. 130; *Sanborn v. Sanborn*, Id.

§ 28. Credits—Impediment for fraud.

(Neb.; 1896.)

An administrator presenting, in support of his final accounting, receipts of a distributee of the estate, such distributee may oppose the allowance of credits thereon, on the ground that the receipts were obtained by fraud, and payments not made as shown thereby.—*Westover v. Carman's Estate* (Neb.) 68 N. W. 501.

§ 29. Compensation.

[a] (Mich.; 1894.)

A charge of five dollars per diem by an administrator for his time and the use of his horse and buggy in the management of an estate, composed principally of real property situated at some distance from his residence, is not unreasonable where the affairs of the estate were matters of every-day consideration,

for which no specific charges other than for expenses were made.—*Nuckols v. Underhill's Estate* (Mich.) 61 N. W. 506.

103 Mich. 297.

[b] (Mich.; 1894.)

The court may allow the administrator a gross sum for services without particularly specifying the items.—*Nuckols v. Underhill's Estate* (Mich.) 61 N. W. 506.

103 Mich. 297.

[c] (Minn.; 1895.)

An executor who was not guilty of willful default, misconduct, or gross negligence in the management of his trust, whereby the estate suffered loss, was entitled to compensation.—*St. Paul Trust Co. v. Kittson* (Minn.) 65 N. W. 74; *Kittson v. St. Paul Trust Co.*, Id.

62 Minn. 408.

[d] (Wis.; 1895.)

Under Rev. St. § 3929, extra compensation, not unreasonable in amount, may be allowed by the court to an executor who manages an estate with great skill and prudence.—*In re Zentner's Estate* (Wis.) 63 N. W. 162, 90 Wis. 236; *Schintz v. Schintz*, Id.

[e] (Wis.; 1895.)

Where a will creates trusts of which the executor is trustee, and which, had he qualified as trustee, would require the entire estate to remain in his hands until the expiration of the trusts, it is not error to allow compensation to the executor for services rendered during that time, although he held title to the estate as such, and not as trustee.—*In re Zentner's Estate* (Wis.) 63 N. W. 162, 90 Wis. 236; *Schintz v. Schintz*, Id.

§ 30. — Extra allowances.

[a] (Iowa; 1895.)

Where an executor or trustee under a will claims an allowance for extraordinary services, as provided for by Code, § 2495, he must show that such services were necessary in a proper performance of his duties, and that the statutory compensation allowed by section 2494 would be insufficient.—*In re Gloyd's Estate* (Iowa) 61 N. W. 975.

93 Iowa, 303.

[b] (Iowa; 1896.)

Though an administrator, as such, rendered his services for over 20 years, it was proper not to allow extra compensation under Code, § 2495, for extraordinary services, inasmuch as interest was not charged to him with annual rests, as might have been done under the circumstances of the case.—*In re Young's Estate* (Iowa) 66 N. W. 163.

§ 31. Conclusiveness of settlement and discharge.

[a] (Iowa; 1895.)

Under Dist. Ct. Rule No. 7, providing that no executor will be discharged on final settlement till notice of the application is given to all persons interested, as required in case of an original notice for the commencement of a civil action, which Code, § 2599, requires to state in general terms the cause or causes of action, an order approving the report of an executrix, and discharging her, is not a binding adjudication against the heirs of testator that under the will they were not entitled to the estate after the death of testatrix, though the report showed that executrix claimed to be the sole owner of the estate, where the notice of application for discharge served on the heirs did not inform them that the executrix claimed to own the estate unconditionally, and the heirs did not claim the right to receive from the executrix, before her discharge, any part of the estate.—*Jordan v. Woodin* (Iowa) 61 N. W. 948.

[b] (Neb.; 1896.)

An ex parte order allowing an annual account of an executor or administrator is not conclusive, and accordingly is subject to re-examination so long as the final account remains

unsettled.—*Bachelor v. Schmela* (Neb.) 68 N. W. 378.

[c] (Wis.; 1895.)

The allowance of an executor's account made, upon due notice to the persons interested, who were represented at the hearing, and withdrew opposition thereto, although made contrary to section 6, rule 17, of the county court rules, is conclusive upon the matters embraced in it.—*In re Zentner's Estate* (Wis.) 63 N. W. 162, 90 Wis. 236; *Schintz v. Schintz*, Id.

§ 32. Review.

[a] (Mich.; 1896.)

The question whether the agreement by which legatees consented to the allowance of the account of the executor of their testator by the probate court was obtained by fraud, could not properly be tried on the accounting of the executor in the circuit court on appeal from the allowance of his account by the probate court.—*In re Sanborn's Estate* (Mich.) 67 N. W. 128.

[b] (Neb.; 1895.)

An appeal from an order of the county court directing distribution of a decedent's estate is governed by Comp. St. c. 23, § 304, found in the subdivision of that chapter entitled "Partition and Distribution of Estates," and providing that "any person aggrieved by an order, decree, or denial of a court in pursuance of the provisions of this subdivision may appeal therefrom," and not by chapter 20, § 42, providing that, "in all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court," by any one affected thereby.—*Merrick v. Kennedy* (Neb.) 64 N. W. 989, 46 Neb. 264.

[c] (Wis.; 1895.)

The fact that extra compensation, not set up as a claim in the statement of his final account, as required by section 2, rule 17, county court rules, was allowed to an executor without objection, is not reviewable on appeal.—*In re Zentner's Estate* (Wis.) 63 N. W. 162, 90 Wis. 236; *Schintz v. Schintz*, Id.

[d] (Wis.; 1895.)

Rev. St. § 4052, exempting "an executor, administrator, guardian or trustee" from the necessity of filing an appeal bond, does not dispense with such bond on an appeal by an administratrix from a judgment in a cause or proceeding other than that in which she was appointed.—*In re Meseberg's Estate*, 64 N. W. 1002, 91 Wis. 399; *In re Steiner's Estate*, Id.

VI. LIABILITIES AND MISCONDUCT.

§ 33. Personal liability in general.

[a] (Iowa; 1896.)

Defendant employed plaintiff to advise with certain heirs, and assist defendant in procuring an appointment as co-administrator, agreeing to pay him "as such co-administrator." The agreement was signed by defendant individually, as "party of the first part." *Held*, that he was personally liable thereon.—*Argo v. Blondel* (Iowa) 69 N. W. 534.

[b] (Iowa; 1897.)

A judgment against defendants as administrators only, which establishes plaintiff's claim as one of the third class, and directs defendants, as administrators, to pay it, does not create a personal liability against them.—*Martin v. Shannon* (Iowa) 70 N. W. 720.

§ 34. Liability for interest.

[a] (Iowa; 1895.)

The question whether an executor shall be charged with interest on funds belonging to the estate, which he has allowed to remain uninvested, is a matter within the sound discretion of the lower court.—*In re Gloyd's Estate* (Iowa) 61 N. W. 975.

93 Iowa, 303.

[b] (Iowa; 1896.)

An administrator having funds of the estate, which he used in his private business without attempting to invest them for the benefit of the estate, though he could have realized a profit thereon greater than 6 per cent., was properly charged with interest at 6 per cent. on the average amount while it was in his hands, though the will, in providing that no distribution should be made, until the youngest legatee attained majority, did not direct that the funds should be invested, and, though the administrator's report showed that the moneys were not invested, it did not show that he was using them for his own profit.—*In re Young's Estate* (Iowa) 66 N. W. 163.

[c] (Minn.; 1895.)

An executor which used part of a fund belonging to the estate in its private business as loan and trust company, but kept no separate accounts of investments made from the fund, or of interest or profits derived from the use thereof, was properly charged, on a settlement, with interest on so much of the fund as was used by it at 7 per cent. per annum.—*St. Paul Trust Co. v. Kittson* (Minn.) 65 N. W. 74, 62 Minn. 408; *Kittson v. St. Paul Trust Co.*, Id.

[d] (Minn.; 1895.)

A trust company, with which executors were permitted by statute to make deposits of trust funds, which deposited funds in its possession as executor with itself as trust company, and, as such, issued certificates of deposit therefor to itself as executor, in effect used such funds in its private business.—*St. Paul Trust Co. v. Kittson* (Minn.) 65 N. W. 74; *Kittson v. St. Paul Trust Co.*, Id. 62 Minn. 408.

[e] (Neb.; 1896.)

An administrator who mingles the funds of the estate with those of strangers in his possession and under his control may be charged with interest thereon, though he receives no individual benefit therefrom.—*Westover v. Carman's Estate* (Neb.) 68 N. W. 501.

VII. DISTRIBUTION OF ESTATE.**§ 35. Right to distribution.****(Mich.; 1897.)**

Where an estate has been settled, excepting a claim by the executors, which cannot be adjusted until they file their final account, which they refuse to do in obedience to an order of the probate court, and the persons entitled to the estate have adjusted matters between themselves, they are entitled to an order assigning the property to them and discharging the executors.—*Thomas v. Lambie's Estate* (Mich.) 70 N. W. 442.

§ 36. Enforcement.**(Neb.; 1895.)**

An order for distribution of personality would not be vacated because of the pendency of a suit against the executor, as such, for a construction of a bequest of land which in no way affected the personality.—*Merrick v. Kennedy*, 64 N. W. 989, 46 Neb. 261.

§ 37. Revocation of decree.**(Wis.; 1894.)**

On a showing that legatees and devisees under a will, who lived at a great distance from the property, and were ignorant of its value, were induced, by the fraudulent representations of the administrator, to convey to him the whole estate for one-third its value, the county court has jurisdiction to revoke its previous order of final distribution, approving the sale to defendant, and require him to account.—*Creamer v. Ingalls* (Wis.) 61 N. W. 82, 89 Wis. 112.

VIII. SALES UNDER ORDER OF COURT.

Laches in attacking sale, see "Equity," § 59.

1. IN GENERAL.**§ 38. Purchase by executors or administrators.****[a] (Mich.; 1895.)**

Though Illow. Ann. St. § 6042, provides that the executor making a sale shall not be interested in the purchase of any part of the estate sold, and that all sales made contrary thereto shall be void, a reconveyance by the purchaser at an executor's sale to the executor is not void against one claiming thereunder in good faith and without notice.—*Otis v. Kennedy* (Mich.) 65 N. W. 219.

[b] (Mich.; 1896.)

The facts that land was sold by the widow, as administratrix, for a small price to her second husband, and that a year later he conveyed it to his wife, did not conclusively show that the transaction was a sale to her; it appearing that the land was worth but little, and that the sale was open, and had been properly advertised.—*Louden v. Martindale* (Mich.) 67 N. W. 133.

[c] (Wis.; 1896.)

Under Rev. St. § 3914, providing that sales of real estate by an executor or administrator, where such representative is interested directly or indirectly in the purchase of the property, shall be void, such a sale is only voidable; the title conveyed, if fair on its face, being subject to attack only by one whose interests were affected by the sale.—*Melms v. Pabst Brewing Co.* (Wis.) 66 N. W. 518.

93 Wis. 153.

2. SALE OF LAND TO PAY DEBTS.**§ 39. In general.****[a] (Minn.; 1896.)**

The sale is not vitiated by the fact that there was no scroll or seal opposite the signatures of the obligors in the sale bond.—*Buntin v. Root* (Minn.) 69 N. W. 330.

[b] (Minn.; 1896.)

The fact that, in the orders for sale of land by an administrator and for confirmation of the sale, the land was described merely as 20 acres in a certain section, does not vitiate the sale, where deceased owned no other land in that section, in view of Gen. St. 1894, § 4612, providing that no sale of land by an administrator shall be avoided on account of any defect in the proceedings, where the administrator had license to sell, and gave bond, and took the prescribed oath, and gave notice of the sale, and the sale was made as ordered by court.—*Buntin v. Root* (Minn.) 69 N. W. 330.

[c] (Neb.; 1895.)

It is no ground for resisting an application by an administrator to sell lands for the payment of debts that the administrator was not regularly appointed.—*Waldow v. Beemer* (Neb.) 63 N. W. 918.

45 Neb. 626.

§ 40. License to sell.**(Minn.; 1897.)**

Pursuant to Gen. St. 1894, § 4598, a license to sell the real estate of a decedent to pay debts was granted by the court, and subsequently extended for two years after the year therein named as the time in which the real estate should be sold, but the real estate was not sold under said license. *Held* that, the license having expired at the end of said three years, the court had power to grant a second license.—*Harrison v. Harrison* (Minn.) 70 N. W. 802.

§§ 41, 42. Time of application—Limitation and laches.

[a] (Iowa; 1895.)

A claim was allowed against decedent's estate, which the assets on hand were insufficient to pay without selling land. Leave was granted the administratrix to ask the court of another state for an order to sell land therein, but this was never done, because a suitable purchaser could not be found. The application of the administratrix for an order to sell land in Iowa was delayed partly in the hope that the land in the foreign state might be sold for enough to pay the claim, and partly because of delay on the part of her former attorney; but it appeared that she had been endeavoring in good faith for some months to institute the proceeding. *Held* that, under the circumstances, the lapse of 3 years, 1 month, and 11 days after the completed publication of notice of the appointment of the administratrix, should not bar an application to sell land. —Reed v. Reed (Iowa) 63 N. W. 329.

[b] (Mich.; 1896.)

In 1888, the senior member of a firm, consisting of father and son, died intestate, the son continuing the business, and paying interest on a note previously executed by the firm to defendant, a nonresident, until 1893, when he failed and absconded. Thereafter defendant caused letters of administration to be taken out on decedent's estate, and, after having his claim allowed, procured an order of court for the sale of certain real estate for the payment of such claim, there being no personality. *Held*, that defendant was not guilty of such laches as to render the sale inequitable as against one who had purchased the land from the son prior to administration. —Flood v. Strong (Mich.) 66 N. W. 473.

§ 43. Parties.

(Wis.; 1895.)

Rev. St. § 3835, provides that any one or more of the judgment creditors whose claims against a decedent's estate shall have been allowed may begin an action to subject to sale any land of decedent, or interest therein. *Held*, that where one purchased and paid for land, but had title conveyed to a third person, a creditor of such purchaser could bring suit to subject the land to the payment of the purchaser's debts on showing the latter's decease, and the insolvency of his estate, without joining other creditors of such estate. —Allen v. McRae, 64 N. W. 889, 91 Wis. 226.

§ 44. Deed to purchaser.

(Mich.; 1896.)

How. Ann. St. § 5347, provides that, whenever any purchaser shall have died before the issuing of a patent for the lands described in his certificate, his administrator may sell such certificate, and all the interest which the deceased had in the lands therein described, for the payment of debts, upon obtaining license therefor. *Held*, that an administratrix had authority, under license from the probate court, to sell such lands for the payment of her intestate's debts; and, the sale thereof having been confirmed, an assignment of the certificate to the purchaser was properly made, the purpose thereof being to comply with the requirements of the land department. —Louden v. Martindale (Mich.) 67 N. W. 133.

IX. ALLOWANCE TO WIDOW.

§ 45. Right to allowance.

(Neb.; 1895.)

Comp. St. 1893, c. 23, § 176, subd. 1, providing for an allowance to the widow of certain property of her deceased husband pending the settlement of the estate, "as well when she receives the provision made for her in the will of her husband as when he dies intestate," refers to the personal property mentioned in that

subdivision only. 57 N. W. 394, 38 Neb. 657 (1891) overruled. —Godman v. Converse, 61 N. W. 756, 43 Neb. 463.

§ 46. Maintenance and support.

[a] (Minn.; 1896.)

After a widow elects to take under the will, she cannot, as against other devisees, have the allowance, pending administration, provided by Gen. St. 1894, § 4477, subd. 3, except as an advancement out of her own share. —In re Blakeman's Estate (Minn.) 67 N. W. 69, 61 Minn. 315; Blakeman v. Blakeman, Id.

[b] (Minn.; 1896.)

Under Gen. St. 1894, § 4527, providing that, when there is not sufficient personality in the hands of the executor or administrator to pay the statutory allowance to the widow and minor children, the probate court may, on petition, order the sale of real estate sufficient to pay the same, the allowance may be made by the probate court out of the rents and profits of the real estate when there is not sufficient personality to pay it. —In re Blakeman's Estate (Minn.) 67 N. W. 69, 64 Minn. 315; Blakeman v. Blakeman, Id.

X. ACTIONS.

Against executor de son tort, see post, § 52.
To recover assets of estate, see ante, §§ 7, 8.

§ 47. Action by—In personal and representative capacity.

[a] (Mich.; 1895.)

A bill by an administrator to set aside a conveyance by his decedent as in fraud of creditors, which sets out the probate proceedings, complainant's appointment as administrator, allowance of a claim against the estate and a deficiency of assets, sufficiently shows that the bill is filed by plaintiff in his capacity of administrator, though there is no specific allegation to such effect. —Walker v. Cady (Mich.) 63 N. W. 1005.

[b] (Wis.; 1895.)

Though Rev. St. § 3845, provides that an administrator may be sued to foreclose a lien, it is error to enter a personal judgment against an administrator in an action to foreclose a lien on logs. —Viles v. Green (Wis.) 64 N. W. 856, 91 Wis. 217.

§ 48. — Stay pending determination in probate court.

(Minn.; 1895.)

In an action by an administrator to collect a debt due the estate, where the answer alleged payment to the sole heir and distributee prior to plaintiff's appointment, and that the estate was sufficient to pay all claims against it, including expenses of administration, without resort to the debt in suit, the proper practice was to stay all proceedings in the suit until the ability of the estate to pay without collecting the debt in suit was determined in the probate court. —Vail v. Anderson (Minn.) 64 N. W. 47, 61 Minn. 552.

§ 49. Action against.

(Minn.; 1895.)

Until final decree of distribution in the probate court, the district court has no jurisdiction of an action against an administrator by an heir to recover his share of the estate. —Schmidt v. Stark (Minn.) 63 N. W. 255, 61 Minn. 91.

§ 50. Pleading.

[a] (Mich.; 1896.)

In a suit by an executor under How. Ann. St. § 5884, to set aside a voluntary deed by his testator as in fraud of creditors, the defense that in the allowance of the claims to the payment of which the land is to be subjected, and in making the report, only one of the two commis-

sioners acted, unless pleaded, is not available as a defense, though evidence in support thereof is introduced.—*Reed v. Jourdan* (Mich.) 66 N. W. 917.

[b] (S. D.; 1896.)

Where an administrator sues in behalf of creditors to recover a gift made by his intestate in view of death, it sufficiently appears that there are creditors interested in having the property recovered where it is alleged that there are outstanding and unpaid claims, which have been duly presented, allowed by the administrator, and approved by the county judge, and that there is no property other than that in possession of defendants out of which they can be satisfied.—*Bright v. Ecker* (S. D.) 68 N. W. 326.

XI. FOREIGN AND ANCILLARY ADMINISTRATION.

§ 51. Appointment, rights, and duties of foreign or ancillary executor or administrator.

[a] (Iowa; 1894.)

It is not a proper exercise of the discretion of a probate court to appoint as administrator in Iowa of the estate of a deceased non-resident, who dies testate, one who managed deceased's business in such state for many years, in place of the foreign executor, where the latter was named in the will as executor 12 years before testator's death, and testator afterwards made several codicils to his will, and did not revoke such nomination, but by his last codicil, made about a year before his death, imposed on him an important trust.—*In re Miller's Estate* (Iowa) 61 N. W. 229, 92 Iowa, 741; Appeal of Dorris, Id.

[b] (Iowa; 1894.)

Code 1873, c. 2, tit. 16, § 2347, under the head, "Executors—Trustees," provides that if a person appointed executor refuses to appear within 10 days after appointment, and give bond, or if an executor removes from the state, a vacancy occurs. Section 2352, under the head, "Foreign Wills," provides that the law relating to domestic wills after probate shall, "so far as applicable," apply to foreign wills admitted to probate. *Held* that, where a foreign will has been admitted to probate in Iowa, a failure of the executor of such will to qualify as ancillary administrator within 10 days after his appointment as such does not create a vacancy.—*In re Miller's Estate* (Iowa) 61 N. W. 229, 92 Iowa, 741; Appeal of Dorris, Id.

[c] (Iowa; 1896.)

The right of a foreign administratrix to sue in Iowa without having qualified there is not in issue when a general allegation of plaintiff's capacity is met by a general denial merely, instead of by an averment of the facts relied on to show her want of capacity, as provided by Code, § 2717.—*Sparks v. National Masonic Acc. Ass'n* (Iowa) 69 N. W. 678.

[d] (Minn.; 1895.)

Under Gen. Laws 1870, p. 66, providing that "letters testamentary or letters of administration with the will annexed may issue to a foreign executor or administrator with the will annexed, though not a resident of this state, on filing a duly authenticated copy of his appointment and the bond given by him in the state or country in which it was originally proved," etc., the foreign probate conclusively establishes the validity of the will; and, in the absence of any demand for ancillary administration, the foreign executor may exercise the power of sale in the will, subject to the rights of local creditors.—*Babcock v. Collins* (Minn.) 61 N. W. 1020.

60 Minn. 73.

[e] (Minn.; 1896.)

Where nonresidents, on their petition, are appointed executors or administrators by a probate court of Minnesota, that court has power to

order them to submit to service of summons in a civil action brought in such state to determine the liability of the estate on a claim not provable in course of administration.—*State v. Probate Court of Rock County* (Minn.) 68 N. W. 1063.

XII. EXECUTOR DE SON TORT.

§ 52. Action against—Evidence.

(Iowa; 1896.)

In an action against a surviving husband, on his wife's note, evidence of the amount of property which the wife had when she married defendant is proper, where it appears that she died 18 months after marriage, and that he is in possession of her estate, without administration.—*Leipold v. Stotler* (Iowa) 66 N. W. 150.

EXEMPLARY DAMAGES.

See "Damages," §§ 3-5.

EXEMPTIONS.

I. WHAT IS EXEMPT, §§ 1-10.

II. WHO MAY CLAIM, §§ 11-14.

III. LIABILITIES AGAINST WHICH NO EXEMPTION CAN BE CLAIMED, §§ 15, 16.

IV. ENFORCEMENT OF RIGHT, §§ 17-21.

See, also, "Homestead."

Constitutionality of laws, see "Constitutional Law," § 65.

Conveyance of exempt property, see "Fraudulent Conveyances," § 5.

From grand jury duty, see "Grand Jury," § 1.

—taxation, see "Taxation," §§ 20-24.

Garnishment of exempt earnings, see "Abuse of Process."

Of agricultural society from liability for negligence, see "Agricultural Societies."

Of income from professional services from claims for alimony, see "Divorce," § 23.

Of proceeds of life policy, retrospective legislation, see "Constitutional Law," § 27.

Reservation in assignment, see "Assignment for Benefit of Creditors," § 17.

I. WHAT IS EXEMPT.

Evading exemption law by going to another state to levy on wages, see post, § 21.

§ 1. Limit as to amount.

(Minn.; 1894.)

Gen. Laws 1885, c. 184, § 17, exempting from seizure for the debts of the insured and beneficiary "all" the insurance money payable by mutual insurance companies doing business in the state, is void, under Const. art. 1, § 12, which requires a "reasonable" limit to be placed on the amount of exemptions.—*Hov v. Hov* (Minn.) 61 N. W. 456.

59 Minn. 415.

§ 2. Household goods.

[a] (Mich.; 1894.)

A piano is not within *How. St.* § 7686, subd. 7, exempting to each householder "household goods, furniture, and utensils."—*Kehl v. Dunn* (Mich.) 61 N. W. 71.

102 Mich. 581.

[b] (Minn.; 1895.)

Where it did not appear that the furniture seized was kept and used by the debtor and his family, or kept for their use, as required by Gen. St. 1894, § 5459, subd. 5, it was subject to execution.—*Fletcher v. Staples* (Minn.) 64 N. W. 1150.

§ 3. Tools and implements of trade:**[a] (Iowa; 1895.)**

An abstractor of titles is not a "mechanic," within Code 1873, § 3072, exempting from execution the proper tools, instruments, or books of a mechanic.—*Tyler v. Coulthard* (Iowa) 64 N. W. 681.

[b] (Iowa; 1897.)

A lawyer who is the head of a family is entitled to hold his books and office furniture exempt from execution, under Code, § 3072, exempting the "proper tools, instruments or books of a debtor if a * * * lawyer," where he earns a part of his living by legal work for others in his office, though he combines it with other business, and does not advertise as a lawyer, nor appear in court in the trial of cases.—*Equitable Life Assur. Soc. of United States v. Goode* (Iowa) 70 N. W. 113.

[c] (Mich.; 1896.)

In order to be entitled to exemptions under *How. Ann. St.* § 7686, subd. 8, providing that certain property shall be exempt to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, it must appear in what business the execution defendant is engaged.—*Murphy v. Mulvena* (Mich.) 66 N. W. 224.

§ 4. Wearing apparel.**(S. D.; 1896.)**

Under *Comp. Laws*, § 5127, which makes absolutely exempt "all wearing apparel and clothing of the debtor and his family," a watch and chain owned and habitually worn by the debtor is absolutely exempt, as wearing apparel.—*Brown v. Edmonds* (S. D.) 66 N. W. 310.

§ 5. Animals.**(Iowa; 1895.)**

A stallion kept by a farmer for breeding purposes is not exempt from forced sale, under Code, § 3072, as one of the team by which the farmer habitually earns his living.—*Smith v. Dayton* (Iowa) 62 N. W. 650.

§ 6. Proceeds of sale of exempt property.**(Mich.; 1896.)**

The proceeds of a sale of exempt personal property, designed for reinvestment in other exempt personalty, to take the place of that sold, are not subject to garnishment in the hands of the purchaser.—*Cullen v. Harris* (Mich.) 60 N. W. 78.

§ 7. Patent rights.**(Mich.; 1895.)**

Even though a person engaged in the business of an inventor and in selling patent rights may claim as exempt a horse and buggy to enable him to carry on his business, yet, where such person purchases the same purely for speculative purposes, they are not exempt.—*Boyle v. Walsh* (Mich.) 63 N. W. 435.

105 Mich. 237.

§ 8. Funds of beneficial society.**(Minn.; 1895.)**

Gen. St. 1894, § 3295, exempting from execution the "beneficiary fund" of a benevolent association, and *Id.* § 3312, exempting from execution the "money or other benefit, charity, relief, or aid to be paid," by such associations, apply only to the beneficiary or mortuary funds, and not to the contingent funds.—*Lake v. Minnesota Masonic Relief Ass'n* (Minn.) 63 N. W. 293.

61 Minn. 107.

§ 9. Life insurance.**[a] (Iowa; 1897.)**

Where an insurance policy carried by a husband provides that in the event of his total disability \$1,500 shall be paid to him, and in

event of death to his wife, and the husband becomes totally disabled, and the money is paid to him, and by him is given to his wife, the fund is not exempt to the wife, under Code, § 1182 (amended by 24th *Gen. Assm.*), providing that "the avails of all policies of insurance on the life of any individual, payable to his surviving widow, shall be exempt from liabilities for all debts of such beneficiary contracted prior to the death of the assured."—*Murdy v. Skyles* (Iowa) 70 N. W. 714.

[b] (Minn.; 1896.)

Gen. St. 1894, § 3312, providing that the money to be paid by co-operative or assessment life insurance associations shall be exempt from execution, exempts such money from execution after it has been paid to, and while it remains in the hands of, the beneficiary named in the certificate or policy.—*First Nat. Bank v. How* (Minn.) 67 N. W. 994.

[c] (Neb.; 1897.)

An endowment policy was taken out by a husband, which was made payable to his wife. The premiums thereon were paid by him, and the money due on the policy was received by the wife from the insurance company during the solvency of the husband, and was invested in real estate in her name. Subsequently the husband became insolvent. *Held*, that such property was not subject to the claims of his creditors.—*Studebaker Bros. Manuf'g Co. v. Welch* (Neb.) 70 N. W. 920.

[d] (S. D.; 1896.)

Laws 1890, c. 51, § 21, providing that a policy of life insurance, in the absence of an agreement to the contrary, shall inure to the separate use of the husband or wife independently of creditors, and that an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liabilities for his debts, violates the constitutional provision declaring that the right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, and exempting from forced sale a reasonable amount of personal property, the kind and value of which is to be fixed by general laws.—*Skinner v. Holt* (S. D.) 69 N. W. 595.

§ 10. Property in custodia legis.**(Neb.; 1895.)**

Goods in possession of a chattel mortgagee after garnishment are in the custody of the law, and not subject to execution.—*Grand Island Banking Co. v. Costello* (Neb.) 63 N. W. 376.

45 Neb. 119.

II. WHO MAY CLAIM.**§ 11. Who may claim.****[a] (Iowa; 1897.)**

Under Code, §§ 1182, 2372, providing that the avails of life insurance are not subject to the debts of deceased, but shall inure to the separate use of deceased's husband or wife and children, and be disposed of like other exempt property of deceased, the fund is exempt in favor of collateral heirs.—*Larrabee v. Palmer* (Iowa) 70 N. W. 100.

[b] (Iowa; 1897.)

There was no "special contract or arrangement," between one whose life was insured and his creditors, whereby the avails of the insurance were to be paid to the creditors (Code, §§ 1182, 2372), where, though deceased clearly desired that the fund should be so distributed, and offered to provide for such a distribution, the offer was not definitely accepted by the creditors.—*Larrabee v. Palmer* (Iowa) 70 N. W. 100.

[c] (Iowa; 1897.)

In an action against a husband and wife, aided by garnishment, where they jointly plead that the money in the hands of the garnishee is

the property of the wife, the wife cannot claim the money as exempt to her husband. *Murdy v. Skyles* (Iowa) 70 N. W. 714.

§ 12. Head of family.

[a] (Iowa; 1895.)

A widow living alone is not the head of a family, within Code, § 3072, permitting a debtor who is resident of this state, and the "head of a family," to hold certain property exempt from execution, though she once had others living with her who depended on her for support.—*Emerson v. Leonard* (Iowa) 65 N. W. 153.

[b] (S. D.; 1895.)

Since Comp. Laws, § 2588, commands a wife to support her husband in case he has no separate property and cannot support himself, a wife who has supported her husband and family from the proceeds of a mercantile business owned by her may claim exemption from attachment under Comp. Laws, § 5128, as the head of a family.—*Linander v. Longstaff* (S. D.) 63 N. W. 775.

§ 13. Wife of debtor.

[a] (Mich.; 1895.)

A wife of a merchant who has absconded and abandoned his business cannot recover the value of merchandise set apart to the husband as exempt, but subsequently again seized by his creditors under an attachment, as the husband may abandon such exemption.—*Betz v. Brenner* (Mich.) 63 N. W. 970.

[b] (S. D.; 1896.)

Absolute exemptions, defined in the sections preceding Comp. Laws, § 5133, are within the provision of said section that, if in any case the debtor fails to claim "the whole or any of the aforesaid exemptions," his wife is entitled to make such claim.—*Meyer v. Beaver* (S. D.) 68 N. W. 310.

§ 14. Farmers.

(Iowa; 1897.)

Where he intends to resume farming, the mere fact that a farmer is temporarily residing in town, has sought other employment while there, and has offered a part of his farming implements for sale, does not deprive him of his exemptions as a farmer allowed to him by Code, § 3072.—*Pease v. Price* (Iowa) 69 N. W. 1120.

III. LIABILITIES AGAINST WHICH NO EXEMPTION CAN BE CLAIMED.

§ 15. In general.

[a] (Minn.; 1896.)

Gen. St. 1824, § 6248, creating a lien in favor of livery or boarding stable keepers on account of feed and care of animals placed in their charge, is not unconstitutional in that the lien may exist upon exempt property.—*Flint v. Lulhrs* (Minn.) 68 N. W. 514.

[b] (S. D.; 1895.)

Comp. Laws, § 5139, denying the right to additional exemptions, as against a debt incurred for property obtained under false pretenses, is not repealed by Const. art. 21, § 4, declaring the right of a debtor to exemption, from forced sale, of a homestead and a reasonable amount of personal property.—*Sundback v. Griffith* (S. D.) 63 N. W. 544.

§ 16. Claim for wages.

[a] (Minn.; 1897.)

Const. art. 1, § 12, as amended in 1888, providing that property otherwise exempt shall be subject to seizure and sale for any debt to a laborer or a servant for labor performed, does not apply to a debt for materials furnished.—*Burlington Manuf'g Co. v. Board of Courthouse & City Hall Com'rs* (Minn.) 69 N. W. 1091.

[b] (Neb.; 1896.)

One who manufactured a pair of boots upon the written order of another was an independent contractor, and hence his claim was not within Code Civ. Proc. § 321, providing that nothing shall exempt any property from execution for clerks', laborers', or mechanics' wages.—*Fox v. McClay* (Neb.) 67 N. W. 888.

48 Neb. 820.

IV. ENFORCEMENT OF RIGHT.

§ 17. Claim of exemption.

(Neb.; 1895.)

An officer holding property under levy of attachment cannot question the validity of the signature and affidavit filed by the debtor, under Comp. St. 1893, § 522, for the purpose of claiming an exemption.—*Smith v. Johnson* (Neb.) 62 N. W. 217, 43 Neb. 754.

§ 18. Time of claiming exemption.

[a] (S. D.; 1896.)

Under Comp. Laws, § 5135, as amended by Laws 1893, c. 19, providing that upon a levy upon personal property the debtor must claim the benefit of his exemptions within five days after notice of the levy, the time for making such claim is not extended by the pendency of replevin by a third person to recover the property levied upon, and to which the debtor is not a party.—*Furrow v. Zollars* (S. D.) 67 N. W. 612.

[b] (S. D.; 1896.)

An alternative writ of mandamus to compel a sheriff to restore to plaintiff property claimed by her as exempt, out of the property of her husband in defendant's possession, under a writ of attachment against plaintiff's husband, cannot, on demurrer, be held to show that plaintiff's claim for exemptions, under Comp. Laws, § 5133, in default of claim by her husband, was unreasonably delayed,—it being alleged that she made her claim within a reasonable time; that the claim was made November 25th; that it was not sooner made because of proceedings theretofore pending, which led her to believe it would not be necessary; that immediately on said levy, on October 18th, proceedings were begun by her husband, which resulted in an order of dissolution of the attachment October 27th; that plaintiff in attachment attempted to appeal from such order, and had not secured sufficient securities when the mandamus proceeding was begun.—*Meyer v. Beaver* (S. D.) 68 N. W. 310.

§ 19. Selection.

(Mich.; 1896.)

In replevin of property taken on execution, and claimed by plaintiff to be exempt, it appeared that plaintiff was absent at the time of the levy, that the sheriff selected the exempt property, and that his return stated that the execution debtor refused to select. *Held*, any error in holding the return of the officer conclusive was harmless, under How. Ann. St. § 7690, which permits the officer to make the selection if the execution debtor is absent.—*Murphy v. Mulvena* (Mich.) 66 N. W. 224.

§ 20. Replevin by debtor.

[a] (S. D.; 1895.)

Exempt property wrongfully seized under attachment may be recovered in claim and delivery.—*Linander v. Longstaff* (S. D.) 63 N. W. 775.

[b] (S. D.; 1895.)

Failure of a sheriff to act on a valid claim for exempt property scheduled as required by Comp. Laws, § 5130, by the attachment debtor, who has named an appraiser in accordance with Id. § 5131, is no defense to replevin against the sheriff for recovery of the property.—*Linander v. Longstaff* (S. D.) 63 N. W. 775.

§ 21. Evading exemption law—Going to another state to levy on wages.

[a] (Neb.; 1894.)

Laws 1889, c. 25, providing that where wages due employes of a corporation engaged in interstate business, which are exempt from execution under the laws of Nebraska, are collected by action in another state, the amount so collected may be recovered, applies to a debt incurred before its passage, and assigned in good faith, where the assignee afterwards assigns it to be collected out of the state to evade the exemption laws.—*Bishop v. Middleton*, 61 N. W. 129, 43 Neb. 10.

[b] (Neb.; 1894.)

Laws 1889, c. 25, provides that where wages due employes of a corporation engaged in interstate business, which are exempt from execution under the laws of Nebraska, are collected by action in another state, the amount so collected may be recovered. *Held*, that the term "corporations engaged in interstate business," means one doing business and employing men in Nebraska and having in another state such a situs as to permit of its being reached by process of garnishment there.—*Bishop v. Middleton*, 61 N. W. 129, 43 Neb. 10.

EXPERIMENTS.

As evidence, see "Criminal Law," § 98; "Trial," § 19.

EXPERT TESTIMONY.

See "Evidence," §§ 52–58.

EX POST FACTO LAWS.

See "Constitutional Law," § 28.

EXPRESS TRUSTS.

See "Trusts," §§ 1–4.

EXPULSION.

Of members of association, see "Associations," § 5.

EXTINGUISHMENT.

Of easement, see "Easements," § 8.

Of franchise, see "Horse and Street Railroads," § 2.

Of lien, see "Mechanics' Liens," §§ 44–47.

— of pledge, see "Pledge," § 7.

EXTRA ALLOWANCE.

Of compensation to executor or administrator, see "Executors and Administrators," § 30.

For extra work under contract, see "Contracts," § 53.

EXTRADITION.

[a] (Minn.; 1896.)

In interstate extradition proceedings the affidavit accompanying the requisition is sufficient if it substantially charges the commission of a crime against the laws of the state from whose justice the accused is alleged to have fled.—*State v. Goss* (Minn.) 68 N. W. 1089.

[b] (Neb.; 1896.)

A fugitive from justice, surrendered by one state upon the demand of another, may, notwithstanding his objection, be prosecuted by the latter for any extraditable offense committed within its borders, without first having had an opportunity to return to the state by which he was surrendered. *Lascelles v. Georgia* (1893) 13 S. Ct. 687, 148 U. S. 537, followed. In *re Robinson* (1890) 45 N. W. 267, 29 Neb. 135, distinguished. —In *re Petry*, 66 N. W. 308, 47 Neb. 126.

F.

FACTORIZING PROCESS.

See "Garnishment."

FACTORS AND BROKERS.

- I. IN GENERAL, §§ 1-6.
II. COMPENSATION, 7-21.

See, also, "Principal and Agent."

I. IN GENERAL.

§ 1. Authority to sell land.

(Iowa; 1895.)

Defendant wrote to B. that he had referred a person to him for terms of lease or sale of certain land; that he wanted a certain rent if it was leased, or, if sold, he wanted \$15 per acre, "on almost any terms to suit purchaser," if \$1,200 is paid cash, and 8 per cent. interest on deferred payments. "If you succeed in selling, I am willing to allow and pay you 2½ per cent. commission (\$900)." *Held*, that it gave no authority to make a contract of sale, but that the terms of any offer were to be submitted to defendant.—*Furst v. Tweed* (Iowa) 61 N. W. 857.
93 Iowa, 300.

§ 2. Liability to principal.

(Neb.; 1895.)

Where a consignment is made to a commission merchant for sale without instruction, in the absence of an established usage to the contrary, of which the consignor has or must be presumed to have knowledge, the consignee's authority to sell cannot be delegated, and its exercise is limited to the place to which the consignment was originally made.—*Burke v. Frye* (Neb.) 62 N. W. 476.
44 Neb. 223.

§ 3. Liability of principal — Rights of factor.

(Minn.; 1895.)

A principal is not liable to his factor for the deficit caused by the excess of expenses incurred by the latter in handling the goods, over the receipts from their sale, on the ground of a custom among factors of receiving reimbursement for such expenses, unless it is shown that the custom was so general, long-established, and notorious that the principal will be presumed to have had knowledge of it.—*Earl Fruit Co. v. Thurston Cold-Storage & Warehouse Co.* (Minn.) 62 N. W. 439.
60 Minn. 351.

§ 4. Levy by creditor of factor.

(Neb.; 1895.)

Property in the possession of a factor, to be sold for the benefit of his principal, is not liable to execution or attachment in satisfaction of the debts of the former.—*National Cordage Co. v. Sims* (Neb.) 62 N. W. 514.
44 Neb. 148.

§ 5. Del credere commission.

(Neb.; 1895.)

Where a contract provides for the sale of goods on commission at prices fixed by the consignor, and requires returns at stated periods, the consignee guarantying payment, the relation created is that of agency on a del credere commission, and not that of vendor and vendee.—

National Cordage Co. v. Sims (Neb.) 62 N. W. 514.

44 Neb. 148.

§ 6. Advances—Lien and reimbursement.

[a] (Minn.; 1895.)

Though the contract between a commission merchant and his principal contains no agreement to that effect, the commission merchant is entitled to a lien for advances on goods.—*Haebler v. Luttgen* (Minn.) 63 N. W. 720.
61 Minn. 315.

[b] (Wis.; 1896.)

A real-estate broker made loans in his principal's name, and, to secure his commissions, took second mortgages in his own name, and at sales thereunder bid in the property, and thereafter, without the knowledge of his principal, quietclaimed to her the lands so acquired, the deeds being placed among her other papers in his possession. *Held* that, in the absence of a ratification and an acceptance of the deeds, the broker was not entitled to credit for the expenses of foreclosures under the second mortgages, and for taxes paid without the principal's knowledge, on the theory that such expenditures inured to her benefit.—*Carpenter v. Momsen* (Wis.) 65 N. W. 1027.
92 Wis. 419.

II. COMPENSATION.

§ 7. Contract for commissions.

[a] (Iowa; 1897.)

A contract to pay commissions for procuring customers from a certain county for real estate, and for all customers in a certain town in such county, is not invalid because there is no limit as to time.—*Boyd v. Watson* (Iowa) 70 N. W. 120.

[b] (Mich.; 1896.)

Evidence that defendant, knowing that plaintiff was trying to make a sale of defendant's land after the expiration of plaintiff's option, wrote to him that, unless he consummated a sale of the land within a certain time, all obligations on defendant's part with him for a sale of the land would cease, and that plaintiff secured a purchaser, with whom defendant consummated a sale, sufficiently shows an agreement on defendant's part to pay plaintiff for securing the purchaser.—*Nolan v. Swift* (Mich.) 69 N. W. 96.

§ 8. Amount of commission.

(Iowa; 1897.)

In estimating the commission for a sale of real estate, where a part of the price was paid in town lots, the actual, and not the trade, value of the lots should be considered.—*Boyd v. Watson* (Iowa) 70 N. W. 120.

§ 9. Right to commission.

[a] (Iowa; 1895.)

That an employer of a real-estate agent did not know that one to whom he sold the land was sent to him by the agent is not a valid defense to an action for the agent's commissions, where the employer, who had not terminated the agency, took no steps to inform himself on the subject.—*Kelly v. Stone* (Iowa) 62 N. W. 842.

[b] (Iowa; 1896.)

Defendant owned a farm, and informed plaintiff, who was a real-estate agent, that if he could sell it at a specified price he would receive a commission thereon. On the following day plaintiff met one N., who wished to purchase the farm, and told him the price for

which it could be bought. Plaintiff introduced N. to defendant, stating that N. wished to look at the farm, and accordingly the three went to look at it. A sale was effected at the price named, plaintiff assisting in the negotiations. *Held*, that plaintiff's right to compensation could not be defeated by the fact that prior to defendant's purchase the farm had been in the hands of another agent, with whom N. had negotiated.—*Staufer v. Bell* (Iowa) 68 N. W. 517.

[c] (Iowa: 1897.)

A real-estate broker cannot recover commissions for selling land, where he fails to prove either a completed sale or one negotiated on terms authorized by the owner.—*Hurd v. Neilson* (Iowa) 69 N. W. 867.

[d] (Iowa: 1897.)

Where defendants agree to pay commissions for customers procured for their land, plaintiffs must not only find the purchaser, but because thereof a sale must follow.—*Boyd v. Watson* (Iowa) 70 N. W. 120.

[e] (Iowa: 1897.)

Where defendants agreed to pay plaintiffs commissions for sales of land in a certain county, to customers "procured" by plaintiffs, defendants were liable for such commissions for sales made to customers procured by one employed by plaintiffs, without the knowledge of defendants, to make sales, if, before the consummation of the sales, defendants knew that the customers were furnished by plaintiffs.—*Boyd v. Watson* (Iowa) 70 N. W. 120.

[f] (Iowa: 1897.)

A real-estate agent, authorized to procure a sale at \$5,300 to one who would make a cash payment of \$500, is not entitled to a commission for procuring an offer of \$5,600 from one who would pay only \$25 down, and who required a well and a water supply, not mentioned in the terms fixed by the principal.—*Smith v. Allen* (Iowa) 70 N. W. 694.

[g] (Mich.: 1894.)

Where plaintiffs secured and sold an option on logs to defendant, who purchased only a part of them, it was proper, in an action for a commission for such sale, to refuse to charge that plaintiffs could recover a commission only on the logs purchased by defendant.—*McKinnon v. Gates* (Mich.) 61 N. W. 74.

102 Mich. 618.

[h] (Mich.: 1894.)

Where plaintiff secured and sold an option on logs to defendant, who purchased the logs, but not under the option, it was proper, in an action for a commission, to charge that defendant was liable, whether his purchase was under the option or not, unless he was prevented from purchasing thereunder through some fault of plaintiffs or the owners of the logs.—*McKinnon v. Gates* (Mich.) 61 N. W. 74.

102 Mich. 618.

[i] (Mich.: 1896.)

The fact that the broker, after the sale, was promised by the purchaser an interest in the profits of the lands, in consideration that he should look after them and try to effect a sale at an increased price, did not constitute him a purchaser, so as to entitle plaintiffs to a commission.—*Douville v. Comstock* (Mich.) 69 N. W. 79.

[j] (Minn.: 1895.)

Where a contract with a broker to sell a note and mortgage is silent as to the time within which the sale is to be made, the broker is entitled to a reasonable time.—*Peterson v. Hall* (Minn.) 63 N. W. 733.

61 Minn. 268.

[k] (Minn.: 1896.)

Under a contract by the terms of which a real-estate broker is to receive a commission for his services if he finds a purchaser, the broker must produce a purchaser to his prin-

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cipal, the owner.—*Baars v. Hyland* (Minn.) 67 N. W. 1148.

§ 10. — Sales by another broker.

[a] (Mich.: 1894.)

A real-estate broker, who procures a purchaser for realty, and brings the parties together, is entitled to his commission, although the sale is consummated by another broker upon different terms.—*Wood v. Wells* (Mich.) 61 N. W. 503.

103 Mich. 320.

[b] (Mich.: 1896.)

Plaintiffs, as real-estate agents, were authorized to sell certain lands at not less than five dollars per acre, but such authorization was not exclusive. Subsequently plaintiffs had some negotiations with a broker who offered to get a purchaser at less than the amount stipulated, upon a division of commissions. This offer plaintiffs refused. Some months later the broker obtained authority from defendants to sell the lands at five dollars, at a certain commission, and, under such authority, negotiated a sale. *Held*, that plaintiffs were not entitled to commissions.—*Douville v. Comstock* (Mich.) 69 N. W. 79.

§ 11. — Defect in principal's title.

(Mich.: 1896.)

Defendant gave to an agent an option for the sale of land on commission, and the agent found a purchaser, who entered into a land contract with defendant, whereby the premises were to be conveyed as soon as an abstract was furnished showing good title in the grantor. The abstract furnished did not show a good marketable title in defendant, and the purchaser refused to complete his contract. *Held*, that the agent was entitled to his commission.—*Stange v. Gosse* (Mich.) 67 N. W. 1108.

§ 12. — Ability of purchaser to perform.

[a] (Iowa: 1895.)

In an action to recover commissions for the sale of land, alleged to have fallen through on account of the principal's failure to procure a patent to the land within the time agreed on, the intended purchaser being unable to complete the purchase when the patent was secured, the agent cannot recover unless he affirmatively proves that the purchaser had during the time the actual cash to make the payment, it not being sufficient to show that he had property out of which the price could have been made by suit.—*Dent v. Powell* (Iowa) 61 N. W. 1043.

93 Iowa, 711.

[b] (Iowa: 1896.)

One who was employed to effect an exchange of property complies with the contract by procuring a person with whom a contract of exchange is made, and who is able and willing to make the exchange.—*Brown v. Wilson* (Iowa) 67 N. W. 251.

[c] (Iowa: 1896.)

Where the owner of personality agreed to pay an agent a commission in case he should succeed "in disposing of" the property on acceptable terms, and the agent procured a purchaser who made a written contract with the owner to buy the goods, and to pay for the same partly with a deed to certain land, and such purchaser was unable to perform his contract, for want of title to such land, the agent was not entitled to commissions.—*Greusel v. Dean* (Iowa) 67 N. W. 275.

[d] (Neb.: 1897.)

A real-estate broker, employed to dispose of property, cannot claim commissions until he has furnished a purchaser willing and able to buy on the terms, and at the price, prescribed by the vendor.—*Stewart v. Smith* (Neb.) 70 N. W. 235.

§ 13. — Refusal of principal to carry out contract.

[a] (Iowa; 1895.)

Defendant wrote plaintiff that he wanted \$15 per acre for his land, on almost any terms to suit purchaser, provided \$1,200 was paid cash, and deferred payments bore 8 per cent. interest; and that, if plaintiff succeeded in selling, defendant would pay him 2½ per cent. commission. *Held*, that plaintiff had authority only to receive and submit offers, and therefore could not recover commissions where he made a contract which defendant refused to ratify.—*Berry v. Tweed* (Iowa) 61 N. W. 858. 93 Iowa, 296.

[b] (Iowa; 1895.)

Where a real-estate agent makes a sale of the land within the prescribed terms of the contract, he is entitled to his commissions, though his principal refuses to complete the conveyance.—*Pelts v. Butcher* (Iowa) 61 N. W. 991.

93 Iowa, 414.

[c] (Neb.; 1896.)

A real-estate broker who produces one ready and willing to purchase, but able to do so only by perpetrating a fraud on a third party, is not entitled to commissions, though an executory contract of sale is entered into between his principal and the proposed purchaser, where the principal refuses to consummate the contract because of the purchaser's proposed fraud.—*Zittle v. Schlesinger*, 65 N. W. 892, 46 Neb. 814.

§ 14. — Sales effected by principal.

[a] (Mich.; 1896.)

A vendor cannot escape liability for commissions to the agent employed to negotiate a sale of the land, on completing himself a sale to a purchaser with whom the agent had been negotiating, by including in the sale other lands in addition to those the agent was employed to sell.—*Ranson v. Weston* (Mich.) 68 N. W. 152.

[b] (Minn.; 1896.)

The broker did not have the exclusive right to sell. After he had found a purchaser ready and willing to buy on the owner's terms, but before he had notified the owner thereof, the owner found another purchaser, and closed a sale with him. *Held*, the owner was not liable to the broker for a commission.—*Baars v. Hyland* (Minn.) 67 N. W. 1148.

§ 15. — Broker acting for both parties.

[a] (Minn.; 1896.)

A real agent who agreed to divide his commission with the prospective lessee to induce the latter to take the premises, and, at the request of the lessee, tried to induce his principal to reduce the rental, while concealing from him his relations to the lessee, was not entitled to a commission for procuring the lessee.—*Hobart v. Sherburne* (Minn.) 68 N. W. 841.

[b] (Neb.; 1895.)

An agent is not entitled to commission for bringing parties together for an exchange of property against one who did not, in advance, consent to the agent's dual employment.—*Strawbridge v. Swan*, 62 N. W. 190, 43 Neb. 781.

[c] (Wis.; 1895.)

Where a broker employed to sell defendant's farm on commission produces a purchaser who takes the property at a price fixed by defendant, the latter cannot withhold the commission on the ground that when the contract of employment was made the broker had, unknown to defendant, already found the customer, and was employed by him to buy a farm, but from whom he was to receive no commission.—*Donohue v. Padden* (Wis.) 66 N. W. 804.

93 Wis. 20.

§ 16. — Who Liable.

(Wis.; 1895.)

Where three joint owners of land agree that two of them may procure a sale thereof, but that neither of them shall charge any commission, and one of them employs attorneys who are his general legal advisers, and they bring about a sale, which the other owners ratify by joining in a conveyance, the other joint owner authorized to sell will not be liable for the attorneys' commissions for the sale, though he knew when he joined in the conveyance that they had procured it, where he did not know that in procuring it they were acting otherwise than as the attorneys of the other, or that they intended to make any charge.—*Brown v. Scott* 65 N. W. 499, 91 Wis. 674.

§ 17. Lien for compensation.

[a] (Minn.; 1895.)

A broker is entitled to a lien for commissions on a note and mortgage left in his possession for sale on commission.—*Peterson v. Hall* (Minn.) 63 N. W. 733.

61 Minn. 268.

[b] (N. D.; 1896.)

A delivery of property to a carrier by the owner, to be shipped to another point, for the place of business of the factor, and the taking by the owner from the carrier of a bill of lading in the name of such factor, and forwarding it to him, are not conclusive on the question of the intent of the owner to deliver possession to the factor, so as to entitle the latter to a lien on the property, where there are other facts in the case tending to show that it was not the purpose of the owner to surrender possession to the factor, but that the object of shipping in the name of the factor was to obtain the benefit of a through rate, which could not be attained if the shipment was made part of the way in the name of the owner, and thereafter the balance of the distance to the place of business of the factor in his name.—*Rosenbaum v. Hayes* (N. D.) 67 N. W. 951.

5 N. D. 476.

[c] (Wis.; 1896.)

A real-estate broker, who is not an attorney at law, cannot claim a general lien on all securities in his possession for expenses incurred in managing some of such securities, but the lien is confined to the specific securities for which the expenses were incurred.—*Carpenter v. Momen* (Wis.) 65 N. W. 1027.

92 Wis. 449.

§ 18. Necessity of license to sell land.

(Iowa; 1895.)

Where a city ordinance prohibits real-estate brokers from carrying on their business before procuring a license, one who sells land without a license cannot recover commissions for his services.—*Richardson v. Brix* (Iowa) 63 N. W. 325.

§ 19. Action for commissions.

(Iowa; 1895.)

In an action by a real-estate agent for his services in selling a farm, defendant cannot give evidence as to the amount and value of his crops and improvements, on the theory that, as no time was alleged within which plaintiff was authorized to sell, he was bound to do so before the crops had been planted and the farm improved, where the defense is not pleaded.—*Kelly v. Stone* (Iowa) 62 N. W. 842.

§ 20. — Evidence.

[a] (Mich.; 1894.)

Where plaintiffs secured an option on logs which they sold to defendant, in an action for a commission for such sale it was competent, in order to show the value of the commission, to ask, on cross-examination, the time occupied in the negotiations with defendant, although the question did not include plaintiffs'

negotiations with the former owners of the logs.—*McKinnon v. Gates* (Mich.) 61 N. W. 74. 102 Mich. 618.

[b] (Mich.; 1894.)

Evidence as to the reasonableness of a commission is inadmissible in an action on an express contract therefor.—*McKinnon v. Gates* (Mich.) 61 N. W. 74. 102 Mich. 618.

[c] (Mich.; 1894.)

In an action for a commission for the sale of logs, papers relating to the situation, amount, character, and quality of the logs, submitted to defendant during the negotiations, are admissible as part of the *res gestae*.—*McKinnon v. Gates* (Mich.) 61 N. W. 74. 102 Mich. 618.

[d] (Mich.; 1894.)

A telegram from the owners of logs on which plaintiff's had an option, stating that the option was extended, is competent to show that fact, in an action for a commission for the sale of the option to a third party.—*McKinnon v. Gates* (Mich.) 61 N. W. 74. 102 Mich. 618.

[e] (Mich.; 1896.)

Evidence that defendant agreed to pay plaintiff a commission for procuring a person who would make a satisfactory exchange of real estate, and that plaintiff brought a person who entered into a contract with defendant for an exchange, establishes a *prima facie* right to recover.—*Whitaker v. Engle* (Mich.) 69 N. W. 493.

[f] (Mich.; 1897.)

In an action for commissions for the sale of logs on which plaintiffs had an option, where defendant was permitted to show all the information he obtained from other persons in regard to such logs, and he stated that he did not make the purchase by virtue of plaintiff's option, the court properly refused to allow him to state on whose judgment and what information he relied.—*Burrell v. Gates* (Mich.) 70 N. W. 574.

[g] (Mich.; 1897.)

A finding that defendant agreed to pay plaintiff, a real-estate broker, a commission on any acceptable sale procured by him, is supported by evidence that plaintiff was authorized to sell to a certain corporation, and a commission was agreed on; that plaintiff then said that he should receive such commission if defendant sold on "any proposition" submitted by him and accepted by defendant, to which defendant assented.—*Brooks v. Leathers* (Mich.) 70 N. W. 1099.

[h] (Mich.; 1897.)

In an action by a real-estate broker for a commission on a sale concluded by the principal, plaintiff may show, on the issue whether he was the procuring cause of the sale, that the person to whom it was made was a stockholder of a corporation to which plaintiff had endeavored to sell the land through such stockholder and another, the principal having notice of his interviews with such stockholder.—*Brooks v. Leathers* (Mich.) 70 N. W. 1099.

[i] (Minn.; 1895.)

Where plaintiff is entitled to commission on sales of property delivered to purchasers by defendant, on orders sent him by plaintiff, the acceptance of orders may be inferred from the fact that defendant received and retained them without notifying plaintiff that they were rejected.—*O'Brien v. Colchester Rubber Co.* (Minn.) 63 N. W. 106. 60 Minn. 535.

[j] (Wis.; 1897.)

In an action by a real-estate broker to recover a certain sum which he alleged defendant agreed to pay him to procure a purchaser of land, it was error to admit evidence of the terms of a contract between defendant and another agent, and of the usual commission paid agents

for sale of land of like value.—*Oliver v. Moawetz* (Wis.) 69 N. W. 977.

§ 21. — Instructions.

[a] (Iowa; 1896.)

Where the complaint, in an action for commissions for procuring a purchaser for land, alleged an express oral promise by defendant to pay a reasonable commission, but defendant denied the promise, and testified that he merely told plaintiff, if he found a purchaser, to send him around, and "I will do as much for you," it was proper to charge that plaintiff must prove the promise.—*Harrison v. Pusteoska* (Iowa) 66 N. W. 93.

[b] (Iowa; 1897.)

Where defendants agreed to pay commissions for sales of land to customers "procured" by plaintiffs, an instruction that defendants were liable if plaintiffs "furnished" customers is not a departure from the issues made.—*Boyd v. Watson* (Iowa) 70 N. W. 120.

FAIRS.

See "Agricultural Societies."

FALSE IMPRISONMENT.

See, also, "Arrest"; "Malicious Prosecution."

Liability of judge for judicial acts, see "Judge," § 7.

§ 1. What constitutes.

(Neb.; 1895.)

Where plaintiff was arrested on Sunday, and the sheriff notified the prosecuting attorney on the following day to file the complaint, and a complaint was filed on Tuesday, and by consent of the parties the hearing was set for Thursday, when it was had, the court properly held, as a matter of law, that the detention was not unreasonable, though, by the Code, magistrates may examine prisoners charged with crime on the first day of the week.—*Diers v. Mallon*, 64 N. W. 722, 46 Neb. 121.

§ 2. Arrest under valid process.

[a] (Mich.; 1896.)

A complaint and warrant valid on their face are sufficient to protect the complaining witness from liability for false imprisonment, though he may be liable for malicious prosecution.—*Schnltz v. Huebner* (Mich.) 66 N. W. 57.

[b] (Mich.; 1897.)

Where one is arrested under a warrant which is good on its face, and prosecuted for the offense charged, an action for false imprisonment will not lie.—*Tryon v. Pingree* (Mich.) 70 N. W. 905.

[c] (Neb.; 1895.)

A city marshal, in executing a warrant lawful on its face, and issued by proper authority, is not liable in an action for false imprisonment, though the proceedings in which the warrant issued were void because of irregularities.—*Atwood v. Atwater*, 61 N. W. 574, 43 Neb. 147.

§ 3. Who liable.

[a] (Mich.; 1895.)

When defendant went before a magistrate with his counsel, to make a complaint, expecting to make the complaint in writing, and that the warrant would be issued in the usual manner, he is not liable for the act of the magistrate in directing the arrest of the defendant without a warrant.—*Loupard v. Dumas* (Mich.) 63 N. W. 301, 105 Mich. 326.

[b] (Neb.; 1895.)

Where the murderer, before plaintiff's arrest, stated that he was hired by plaintiff to commit the murder, and the sheriff was inform-

ed by two credible persons that plaintiff was a dangerous man, and that deceased had stated that he feared death at plaintiff's hands, the court properly held, as a matter of law, that the sheriff had reasonable grounds to arrest plaintiff.—*Diers v. Mallon* (Neb.) 61 N. W. 722, 46 Neb. 121.

§ 4. Complaint and affidavit.

(Mich.; 1895.)

An affidavit attached to a *capias* states a case of false imprisonment when it shows that defendant caused plaintiff's arrest and imprisonment under the fraudulent debtor's act, on an affidavit which gave no jurisdiction to the justice who issued the warrant.—*Paulus v. Grobben* (Mich.) 62 N. W. 160, 104 Mich. 42.

(b) (Minn.; 1896.)

A complaint which alleges that, at a time and place stated, the defendant imprisoned the plaintiff without probable cause, states a cause of action.—*Nixon v. Reeves* (Minn.) 67 N. W. 989.

§ 5. Evidence.

(a) (Neb.; 1895.)

Evidence of the previous good character of plaintiff in an action for false imprisonment is not admissible where plaintiff's character is not assailed.—*Diers v. Mallon* (Neb.) 64 N. W. 722, 46 Neb. 121.

(b) (Neb.; 1895.)

One arrested for murder could not show, in an action for false imprisonment, as bearing on a want of probable cause, that he was on friendly terms with deceased.—*Diers v. Mallon*, 64 N. W. 722, 46 Neb. 121.

(c) (Wis.; 1897.)

On an issue as to whether plaintiff was violating the game laws by shooting "in the nighttime," so as to justify his arrest by a game warden without a warrant, evidence that plaintiff was in a boat on water covering land of a third person, and that there were notices on the premises forbidding trespasses, was inadmissible.—*Lamb v. Stone* (Wis.) 70 N. W. 72.

FALSE PRETENSES.

See, also, "Deceit"; "Forgery"; "Fraud"; "Fraudulent Conveyances"; "Larceny."

Right to exemptions as against debt incurred for property obtained under false pretenses, see "Exemptions," § 15.

§ 1. What constitutes offense.

(Iowa; 1896.)

Under Code, § 45, subds. 9, 10, making the word "property" embrace real and personal property, and including under personal property "evidences of debt," a nonnegotiable draft drawn on an insurance company by its authorized adjuster, in settlement of a claim, subject to the company's approval, is "property," within Code, § 4073, punishing any person who obtains money, goods, or property by false pretenses, though such draft be never approved or accepted.—*State v. Patty* (Iowa) 66 N. W. 727.

§ 2. Defense.

(Mich.; 1895.)

On a prosecution for obtaining money under false pretenses, the fact that the defendant is able and willing to repay the money so obtained is no defense.—*People v. Oscar* (Mich.) 63 N. W. 971, 105 Mich. 704.

§ 3. Reliance on representations.

(Neb.; 1894.)

To authorize a conviction for obtaining money by false pretenses, defendant's false rep-

resentations need not have been the sole cause that induced the person defrauded to part with his money, but it is sufficient if it appear that they were some of the inducements, and that he would not have done so without them.—*Wax v. State*, 61 N. W. 117, 43 Neb. 18.

§ 4. Misrepresentation of value.

(Mich.; 1895.)

A complaint which alleges that defendant, for the purpose of obtaining a loan on certain property, represented that there was a house thereon of the value of \$1,200, but that in fact there was none, charges a criminal offense.—*People v. Oscar* (Mich.) 63 N. W. 971, 105 Mich. 704.

§ 5. Indictment and information.

(a) (Mich.; 1895.)

An information for obtaining money by false pretenses negatives defendant's ignorance of the falsity of the representations, by alleging that he "did designedly falsely represent and pretend" that he had received a subscription for a certain amount from a certain person with payment in full thereof from him.—*People v. Lennox* (Mich.) 64 N. W. 488.

(b) (Mich.; 1896.)

An indictment charging a violation of How. Ann. St. § 9353, which alleged that by reason of the false representations of the defendant the complainant, believing such representations, was induced to sign the note, was sufficient to connect the fraudulent representations with the signature of the note.—*People v. Kinney* (Mich.) 67 N. W. 1089.

(c) (Mich.; 1896.)

An information charging the violation of How. Ann. St. § 9353, providing for the punishment of any person who shall by false pretenses obtain the signature of any person to any note, etc., was not defective in that it did not allege that the note was delivered to the defendant, the allegation that he obtained the signature being sufficient to show that it came into his possession.—*People v. Kinney* (Mich.) 67 N. W. 1089.

§ 6. Evidence.

(Mich.; 1895.)

The use to which money obtained by false pretenses is put is immaterial on the question of criminal intent in obtaining it.—*People v. Lennox* (Mich.) 64 N. W. 488.

§ 7. Verdict.

(Neb.; 1894.)

In a prosecution for obtaining money under false pretenses, a verdict of guilty will not be set aside because it fixes the value of the money at a few dollars more than is established by the evidence, where the uncontradicted proofs show that the sum procured exceeded \$35, the amount such obtaining of which is made criminal by Cr. Code, § 125.—*Wax v. State*, 61 N. W. 117, 43 Neb. 18.

FALSE REPRESENTATIONS.

See "Deceit"; "Fraud."

As ground for rescinding contract, see "Equity," §§ 24-29; "Sale," §§ 54, 55.

FALSE SWEARING.

See "Perjury."

FALSUS IN UNO, ETC.

See "Witness," § 52.

FARMERS.

Right to claim exemptions, see "Exemptions," § 14.

FAST DRIVING.

Control of streets by city, see "Municipal Corporations," § 54.

FEDERAL COURTS.

Conflicting state and federal jurisdiction, see "Courts," § 27.
State court following federal decision, see "Courts," § 29.

FEES.

Of attorney, see "Attorney and Client," §§ 13-23; "District and Prosecuting Attorneys."
Of clerk, see "Clerk of Court."
Of coroner, see "Coroner."
Of county officer, see "Counties," §§ 23-25.
Of justice, see "Justices of the Peace," § 14.
Of public officer, see "Office and Officer," §§ 12-15.
Of sheriff or constable, see "Sheriffs and Constables," §§ 1-5.
Of witness, see "Witness," §§ 76, 77.

FELLOW SERVANT.

See "Master and Servant," §§ 56-66.

FELONY.

Agreement to compound, public policy, see "Contracts," § 21.

FEME COVERT.

See "Husband and Wife."

FENCES.

Duty of railroad company to erect and maintain, see "Railroad Companies," § 57.
Extending possession to, see "Adverse Possession," § 10.
Inclosing land with fence, effect on claim of adverse possession, see "Adverse Possession," § 9.
Liability of railroad company for injuries due to defects, see "Railroad Companies," §§ 58, 59.
Penalty for taking down railroad fences, see "Railroad Companies," § 18.

FERRY.

Constitutionality of act granting special privilege, see "Constitutional Law," § 26.
Special legislation relating to, see "Constitutional Law," §§ 17, 18.

§ 1. Franchises and privileges.

[a] (N. D.; 1896.)

The board of county commissioners of the county to which an unorganized county is attached for judicial purposes has no power to grant a ferry franchise between points one of which is within the unorganized county, but

neither of which is within the organized county, whose board granted the franchise.—*Patterson v. Wollmann* (N. D.) 67 N. W. 1040. 5 N. D. 608.

[b] (N. D.; 1896.)

The fact that another than one to whom the county commissioners granted a ferry franchise was the highest bidder for the franchise does not raise a presumption that the grant was invalid, in the absence of a showing that such other party complied with the requirements of the law as to giving security for the payment of the rent for the privilege.—*Patterson v. Wollmann* (N. D.) 67 N. W. 1040. 5 N. D. 608.

[c] (S. D.; 1896.)

A lease by a board of county commissioners granting plaintiff an exclusive ferry privilege at a designated point within the county, on the east bank of the river, is not void for the reason that the western terminus of the ferry is within the limit of an Indian reservation under the jurisdiction of the United States, the place where the ferry was established being within the jurisdiction of the county board.—*Nixon v. Reid* (S. D.) 67 N. W. 57.

[d] (S. D.; 1896.)

A ferry license granted by the board of county commissioners authorizing the maintenance of a ferry at a designated point is exclusive, under Comp. Laws 1887, §§ 1361-1369, providing that ferry licenses shall not be granted at points on the same stream within two miles of each other.—*Nixon v. Reid* (S. D.) 67 N. W. 57.

[e] (S. D.; 1896.)

An assignment of a ferry lease granted by the board of county commissioners, accepted and approved by the board, is valid to pass all rights thereunder.—*Nixon v. Reid* (S. D.) 67 N. W. 57.

[f] (S. D.; 1896.)

A ferry lease granted by a board of county commissioners for the term of five years, with the privilege of renewal for five years, and, at the end of that time, a second renewal for five years, is within the powers of the board under a law giving the board authority to grant such leases for a term not exceeding 15 years.—*Nixon v. Reid* (S. D.) 67 N. W. 57.

§ 2. — Infringement.

(N. D.; 1896.)

Injunction is the proper remedy to employ when one without authority of law is operating a ferry to the injury of another, who is the owner of a ferry franchise.—*Patterson v. Wollmann* (N. D.) 67 N. W. 1040. 5 N. D. 608.

FILING.

Affidavit for attachment, see "Attachment," § 16.
Charge against attorney, see "Attorney and Client," § 10.
Claim against assigned estate, see "Assignment for Benefit of Creditors," §§ 35, 36.
— county, see "Counties," § 48.
— decedent's estate, see "Executors and Administrators," § 15.
— insolvent estate, see "Insolvency," § 10.
Indictment or information, see "Indictment and Information," §§ 2-4.
Lien statement, see "Mechanics' Liens," § 31.
Papers and pleadings, see "Practice in Civil Cases," §§ 27-29.
Release of judgment, see "Judgment," § 83.
Security for costs, see "Costs," § 17.
Statement of intention to contest election, see "Elections and Voters," § 27.
Transcript, see "Appeal," § 105.

FINDING LOST GOODS.

Appropriating property found, see "Larceny," § 3.

FINDINGS.

Of referee, see "Reference," §§ 4-7.

On trial by the court, see "Trial," §§ 121-124.

FINES.

Excessive fine for obstructing justice, see "Obstructing Justice."

Imprisonment for nonpayment of fine imposed in civil action, see "Constitutional Law," § 60.

FIRES.

See, also, "Arson."

Liability of railroad company, see "Railroad Companies," §§ 68-80.

Negligence in setting, see "Negligence," § 4.

Set by steamer, see "Shipping."

(Iowa; 1896.)

A tract of land two to four miles wide and five to six miles long, covered with wild grass, which has never been cultivated, is prairie land, within Code, § 3890, making it a misdemeanor for any one to set fire to prairie land, and allow the fire to escape from his control.—*Lewis v. Schnltz* (Iowa) 67 N. W. 266.

FIRM.

See "Partnership."

FISCAL MANAGEMENT.

Of municipalities, see "Municipal Corporations," §§ 169-189.

FISHERIES.

Act authorizing seizure of fishing apparatus, taking property without due process of law, see "Constitutional Law," §§ 41, 42.

— for protection of fish, special legislation, see "Constitutional Law," § 18.

— regulating, police power, see "Constitutional Law," § 45.

Liability of county for expense of fish chutes, see "Counties," § 43.

§ 1. Statutory provisions.

(Iowa; 1895.)

In Acts 23d Gen. Assem. c. 34, prohibiting the taking of fish by certain methods from "any of the waters of the state," provided that "nothing herein contained shall be held to apply to fishing in the Mississippi, the Missouri, or the Big Sioux rivers, nor so much of the Des Moines river as forms the boundary between the states of Missouri and Iowa," the Mississippi river includes only the water popularly so known, constituting the boundary of the state, and does not include a lake wholly within the state, and constituting no part of the Mississippi, for purposes of navigation or boundary, but being merely connected with it, and in every other respect being as distinct a body of water as any in the interior of the state.—*State v. Haug* (Iowa) 64 N. W. 398.

§ 2. Fishways in stream.

(Neb.; 1896.)

Persons erecting and maintaining dams for milling purposes, in the streams of this state,

do so with the implied obligation to maintain adequate fishways for the passage of fish from the lower to the higher level of such streams and their tributaries.—*West Point Water Power & Land Imp. Co. v. State* (Neb.) 66 N. W. 6.

§ 3. Offenses.

[a] (Iowa; 1895.)

Acts 23d Gen. Assem. c. 34, § 5, prohibiting the placing across any body of water of a trot-line, so as to prevent "the free passage of fish up, down, or through" such water, to catch fish other than minnows, unless under the supervision of the fish commissioner, and section 2, making it lawful to catch fish with hook or line, the placing of a trot-line across a stream is not an unlawful act, unless so placed as to obstruct the free passage of fish up and down the stream.—*Collins v. Bankers' Acc. Ins. Co.* (Iowa) 64 N. W. 778.

[b] (Mich.; 1895.)

Laws 1889, Act No. 111, § 5, declaring it unlawful to take or catch or attempt to take or catch fish with nets, is not violated by one who sets nets for turtles, with openings for fish to escape, though fish are accidentally imprisoned therein; they being returned alive, so far as possible, to the water. *Hooker and Grant, JJs., dissenting.*—*People v. Deremo* (Mich.) 64 N. W. 489.

[c] (Mich.; 1895.)

Pub. Acts 1895, Act No. 200, § 2, forbidding any person to "use any pound, trap, stake, gill, or set nets or seines or any device of any kind for taking fish in any of the tributaries of Saginaw river," does not prohibit fishing with a hook and line; the word "device" meaning a device of like kind as those described.—*In re Yell* (Mich.) 65 N. W. 97.

FIXTURES.

Conversion of, see "Trove and Conversion," § 7.

§ 1. What constitutes.

[a] (Mich.; 1897.)

Plaintiff sold a boiler and engine to W., retaining title thereto till the price should be paid, and W. set them up on land held by one B., under a contract for its purchase; the engine being bolted to a stone foundation and the boiler arched with brick, and connected by rods with the outer walls of the building. B. forfeited his land contract, and the vendor took possession of the premises with the understanding that the machinery belonged to W., from whom he received a bill of sale, and thereafter defendant, to whom W. had mortgaged the machinery, purchased the realty with the understanding that he was getting the boiler and engine with it. *Held*, that the machinery never became a fixture, and hence did not pass by the deed to defendant.—*Lansing Iron & Engine Works v. Wilbur* (Mich.) 69 N. W. 667.

[b] (Minn.; 1894.)

On an issue as to whether a mill erected by D. on land standing in the name of S., which had been previously mortgaged to plaintiff, was personal property, so as to be subject to a chattel mortgage to defendant for the price thereof, a finding that there was never any understanding between D. and S. that the mill should become a part of the realty is insufficient to sustain a judgment in favor of defendant.—*Merchants' Nat. Bank v. Stanton* (Minn.) 61 N. W. 680.

59 Minn. 532.

[c] (Minn.; 1894.)

On an issue as to whether a mill erected by D. on land previously conveyed to S., and mortgaged by S. to plaintiff, was personal property, as between plaintiff and a holder of a chattel mortgage thereon, evidence that defendant's deed to S. was for the latter's accommodation, in order that he might mortgage the

property, and that D. was equitable owner, was admissible, as showing the understanding when the mill was built.—*Merchants' Nat. Bank v. Stanton* (Minn.) 61 N. W. 680.
59 Minn. 532.

[d] (Minn.; 1895.)

Where plaintiff sold personal property on condition that title should not pass until paid for to defendant, who leased it with realty, and the last of successive tenants left it on defendant's premises, *held*, that plaintiff could recover the property after the expiration of the tenant's term.—*St. Paul Furniture Co. v. Sauer* (Minn.) 63 N. W. 110.

61 Minn. 15.

[e] (Wis.; 1897.)

Where, pursuant to an agreement to separate the business of a manufacturing corporation from the real estate, the building was conveyed to one of the stockholders, who thereupon gave to the others a lease thereof, which provided that all personal property and the machinery in said building should belong absolutely to the lessees, with power of removal, said machinery became personalty, as between the lessor and the lessees' purchasers, and could be removed by the latter.—*Keefe v. Furlong* (Wis.) 70 N. W. 1110.

§ 2. Between mortgagor and mortgagee.

[a] (Mich.; 1897.)

Where a factory is erected, and machinery is put into it, attached permanently, and adapted for the purposes of manufacture, and the owner of the realty is also the owner of the fixtures, a real-estate mortgage on the property includes the machinery in the building, where such was the intention of the parties.—*Studley v. Ann Arbor Sav. Bank* (Mich.) 70 N. W. 426.

[b] (Minn.; 1895.)

As between mortgagor and mortgagee, gas fixtures, consisting of chandeliers and burners, screwed to the ends of the gas pipes projecting from the walls, are not a part of the realty.—*Capehart v. Foster* (Minn.) 63 N. W. 257.

61 Minn. 132.

[c] (Minn.; 1895.)

22. An electric annunciator attached to the wall, and to all the wires of the electric bell system of an hotel, is a part of the realty.—*Capehart v. Foster* (Minn.) 63 N. W. 257.

61 Minn. 132.

[d] (Minn.; 1895.)

Steam radiators, attached at the floors to steam pipes, are a part of the realty.—*Capehart v. Foster* (Minn.) 63 N. W. 257.

61 Minn. 132.

[e] (Minn.; 1896.)

A mortgagor constructed buildings, in which he placed machinery for the purpose of making all of the same a manufacturing plant, and used the same as such. *Held*, as between him and the mortgagee, that machines bolted to the floors or posts of the buildings, either with bolts or lag screws, or blocked to the floor, or held by a counter shaft, or braced in the building, and machines weighing respectively $3\frac{1}{2}$ and 4 tons, resting on the floor by their own weight, became a part of the realty, but that other machines which do not appear to be ponderous, and which were attached to the building only by belts connecting them with pulleys on the shafting when in operation, did not become fixtures.—*Shepard v. Blossom* (Minn.) 69 N. W. 221.

§ 3. Between landlord and tenant.

(Mich.; 1895.)

Where a tenant removes the pillars, partitions, sewers, and floors in the building occupied by him, replacing them by others more expensive, but considered by him better suited to his business, the latter do not thereby become trade fixtures, subject to removal by him on the

termination of the lease.—*Felcher v. McMillan* (Mich.) 61 N. W. 791.
103 Mich. 494.

§ 4. Evidence.

[a] (Mich.; 1897.)

Though a chattel mortgage on fixtures is evidence that they are not permanently annexed, it does not conclusively fix their character as personal property when given concurrently with a real-estate mortgage covering the same property, for the purpose of insuring against a possible mistake as to their character.—*Studley v. Ann Arbor Sav. Bank* (Mich.) 70 N. W. 426.

[b] (Minn.; 1895.)

On an issue, in an action to foreclose a mortgage, whether a mill located on the premises was personal property, evidence that the mortgagor's grantor, while constructing the mill, after conveying to the mortgagor, gave a chattel mortgage on the same to a third party, and that the mortgagor knew of that fact, was properly admitted.—*Merchants' Nat. Bank v. Stanton* (Minn.) 64 N. W. 390.

62 Minn. 204.

§ 5. Removal.

[a] (Neb.; 1896.)

In the absence of an agreement or consent of the landlord, a tenant cannot remove trade fixtures after the expiration of the tenancy, or after the tenant has surrendered possession.—*Fuller v. Brownell* (Neb.) 67 N. W. 6.

48 Neb. 145.

[b] (Neb.; 1896.)

A chattel mortgagee of a tenant has no greater rights than a tenant to remove mortgaged fixtures after the tenant has quit possession.—*Fuller v. Brownell* (Neb.) 67 N. W. 6.

48 Neb. 145.

FLOWAGE.

See "Surface Water"; "Waters and Water Courses."

Right to flowage by prescription, see "Waters and Water Courses," § 9.

FOLLOWING TRUST PROPERTY.

See "Trusts," § 28.

FORCIBLE ENTRY AND DETAINER.

Action by landlord, see "Landlord and Tenant," § 60.

Allegations in ejectment, see "Ejectment," § 4.

§ 1. When action lies.

(Neb.; 1895.)

The summary remedy provided by Code Civ. Proc. § 1023, for the possession of land, may be maintained against one who wrongfully enters and detains possession thereof, or one who, having lawfully entered, forcibly detains possession.—*Blachford v. Frenzer* (Neb.) 62 N. W. 1101.

44 Neb. 829.

§ 2. Time of filing complaint.

(S. D.; 1897.)

It is sufficient if the complaint in the justice's court is filed at or before the time the defendant is required by the summons to appear and answer. Comp. Laws, § 6077.—*Browne v. Haseltine* (S. D.) 70 N. W. 648.

§ 3. Notice to quit.

(Iowa; 1896.)

A petition in forcible entry and detainer, which alleges that, by virtue of a written agree-

ment, defendants were to give up possession of the farm the "last of October, 1894," and that notice was served January 3, 1895, to quit the premises within 30 days, is not demurrable because the notice did not fix March 1st as the time to quit, as required by McClain's Code, § 3190, in cases of tenants occupying farms, since such section also provides that, where there is an express agreement, the tenancy shall cease at the time agreed upon, without notice.—Waller v. Vermitt (Iowa) 66 N. W. 763.

§ 4. Recovery of premises sold under mortgage.

[a] (Mich.; 1895.)

A complaint which alleges that defendant is in possession of premises therein named, and holds the same unlawfully and against the rights of complainant, who is lawfully entitled to possession of the same, is sufficient, in summary proceedings under 3 How. Ann. St. §§ 8295, 8296, to recover the possession of land sold by virtue of a mortgage, and held after the time for redemption has expired.—Gage v. Sanborn (Mich.) 61 N. W. 32.

[b] (Mich.; 1895.)

In summary proceedings for the possession of premises, defendant cannot assail plaintiff's legal title acquired at a foreclosure sale on the ground that the purchase by plaintiff was made as agent for one whose duty it was to redeem, and therefore fraudulent.—Gage v. Sanborn (Mich.) 64 N. W. 32.

[c] (Mich.; 1895.)

Under 3 How. Ann. St. § 8295, subd. 3, providing for the recovery of possession of premises sold under mortgage by summary proceedings when any person shall continue in possession thereof after the expiration of the time limited by law for redemption, the commissioner can try the fact and validity of the mortgage sale.—Gage v. Sanborn (Mich.) 64 N. W. 32.

§ 5. Defenses.

[a] (Mich.; 1895.)

The defense of fraud in the procurement of a deed by plaintiff is not available in a summary proceeding to recover possession of land.—Gale v. Eckhart (Mich.) 65 N. W. 274.

[b] (Minn.; 1895.)

It was no defense for an action of forcible entry and unlawful detainer that defendant owned and occupied as a homestead a building on the leased land, and that plaintiff knew that fact when the lease was executed.—Lloyd v. Secord (Minn.) 63 N. W. 1099.

61 Minn. 448.

§ 6. Pleading and evidence.

[a] (Mich.; 1895.)

In a summary proceeding to recover possession of land, a deed purporting to convey the premises in question to plaintiff is admissible to show plaintiff's right of possession.—Gale v. Eckhart (Mich.) 65 N. W. 274.

[b] (Neb.; 1895.)

In a summary action under Code Civ. Proc. § 1023, for the possession of land, plaintiff need not set out facts constituting his cause of action, the complaint being sufficient where it follows the language of the statute.—Blachford v. Frenzer (Neb.) 62 N. W. 1101.

44 Neb. 829.

§ 7. Judgment.

(Minn.; 1895.)

Where an answer in an action for forcible entry and unlawful detainer admitted the material allegations of the complaint, and did not allege a defense, judgment on the pleadings for restitution was proper.—Lloyd v. Secord (Minn.) 63 N. W. 1099.

61 Minn. 448.

§ 8. Damages.

[a] (Mich.; 1894.)

The fact that the defendant in trespass brought under How. St. § 8506, by one who has recovered judgment of ouster against him, continued to occupy the premises after notice to quit, in the belief that he had a lawful right to do so, is no bar to the recovery against him of treble damages, as therein provided.—Lane v. Ruhl (Mich.) 61 N. W. 347.

103 Mich. 38.

[b] (Mich.; 1895.)

It is error to exclude evidence of the rental value for years preceding that stated in the lease.—Vincent v. Defield (Mich.) 63 N. W. 302.

105 Mich. 315.

FORECLOSURE.

Of mortgage, see "Chattel Mortgage," §§ 43-51; "Mortgages," §§ 46-51.

FOREIGN.

Acknowledgment, see "Acknowledgment," § 5.

Administration, see "Executors and Administrators," § 51.

Corporations, see "Corporations," §§ 105-108.

Insurance companies, see "Insurance," §§ 186-188.

Judgments, see "Judgment," §§ 76-80.

Receivers, see "Receivers," §§ 14, 27.

Statutes, see "Evidence," § 121; "Statutes," § 34.

Wills, see "Wills," §§ 22, 23.

FOREMEN.

See "Master and Servant," §§ 58-60.

FORFEITURE.

For exacting usury, see "Usury," §§ 13-16.

Of bail, see "Bail," § 5.

Of charter of plank road, see "Turnpikes and Toll Roads," § 1.

Of contract to convey, see "Vendor and Purchaser," § 14.

Of corporate franchise, see "Corporations," §§ 98-104.

Of lease, see "Landlord and Tenant," §§ 28-30.

Of membership in mutual company, see "Insurance," §§ 171-178.

Of mining claim, see "Mines and Mining," § 6.

Of stock, see "Corporations," § 57.

— in building association, see "Building and Loan Associations," § 9.

FORGERY.

See, also, "Alteration of Instruments."

Cashing forged checks, see "Banks and Banking," § 17.

Conviction of offense included in charge, see "Indictment and Information," § 28.

§ 1. What constitutes offense.

[a] (Iowa; 1896.)

It is sufficient to constitute forgery that the forged instrument be of apparent legal efficacy, or the evidence of a legal right.—State v. Van Aken (Iowa) 68 N. W. 454.

[b] (Mich.; 1895.)

Though the names of both the drawee and the payee of a forged check be fictitious, the false making of it with intent to defraud constitutes forgery.—People v. Warner (Mich.) 62 N. W. 405.

104 Mich. 337.

[c] (Minn.; 1895.)

Where a contract is signed "M. F. Higgins," changing the second initial, "F." to "J.," with intent to defraud, constitutes forgery.—*State v. Higgins* (Minn.) 61 N. W. 816. 60 Minn. 1.

§ 2. Uttering forged instrument.**(Iowa; 1897.)**

Uttering a forged check is an offense within Code, §§ 3917, 3918, providing for the punishment of any person who, with intent to defraud, fraudulently makes or forges any bill of exchange, or any instrument in writing, purporting to be the act of another, by which any pecuniary obligation purports to be created, and of any person who utters and publishes as true any instrument of writing above mentioned knowing the same to be falsely forged, with intent to defraud.—*State v. Bigelow* (Iowa) 70 N. W. 600.

§ 3. The subject of forgery.**[a] (Mich.; 1895.)**

How. Ann. St. §§ 9213, 9214, provide that every person who shall make or utter and publish any forged record, deed, etc., shall be punished. *Held*, that a chattel mortgage is a deed, within the meaning of said sections.—*People v. Watkins* (Mich.) 64 N. W. 324.

[b] (Mich.; 1897.)

Under 1 How. Ann. St. § 2, requiring statutory phrases to be construed according to common usage, a paper purporting to authorize the bearers to solicit subscriptions for a labor organization is not a "letter of attorney," or an "order for money," within the statute making such instruments the subjects of forgery.—*People v. Smith* (Mich.) 70 N. W. 466.

[c] (Neb.; 1896.)

An order to deliver to bearer a specific article of personal property is the subject of forgery under Crim. Code, § 145, as "any order or any warrant or request for * * * the delivery of goods and chattels of any kind," though it is not addressed to any person by name.—*Morearty v. State* (Neb.) 65 N. W. 784. 46 Neb. 652.

§ 4. Indictment and information.**[a] (Iowa; 1896.)**

Where an indictment charges a county auditor with forgery in altering a record of the board of supervisors, originally reciting that "the board allowed the auditor \$250 for hired help for 1893," by inserting the words "above fees" in place of "for 1893," the objection that, inasmuch as it is not alleged that when the record was altered there were any fees for which defendant had not accounted, no one was prejudiced by the alteration, is untenable, since, if defendant had already accounted for the fees of his office, the alteration might give him the apparent right to recover them from the county.—*State v. Van Anken* (Iowa) 68 N. W. 454.

[b] (Iowa; 1896.)

An indictment charging defendant with forgery in altering a record of the board of supervisors, originally reciting that "the board allowed the auditor \$250 for hired help for 1893," by inserting the words "above fees" in place of "for 1893," charges a material alteration of a public record, though it fails to show that defendant was the county auditor, and that he intended to profit by the alteration.—*State v. Van Anken* (Iowa) 68 N. W. 454.

[c] (Minn.; 1896.)

Gen. St. 1894, § 6702, provides that a person "who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, or disposes of, or puts off, as true, * * * an instrument, * * * the false making, forging, or altering of which is punishable as forgery,—is guilty of forgery in the same degree as if he had forged the same." *Held*, that an indictment omitting the words "as true," is

insufficient.—*State v. Cody* (Minn.) 67 N. W. 798.

[d] (Minn.; 1897.)

An indictment for uttering a false or forged instrument need not set out who made the false instrument, or how it was made, or the intent of the maker.—*State v. Goodrich* (Minn.) 69 N. W. 815.

[e] (Minn.; 1897.)

In an indictment for uttering and publishing a false entry in an account of a survey of logs, allegations showing that defendant was employed to assist a deputy surveyor of logs in making a survey, that he was to make entries on tally cards of the number of logs, their marks, and the number of feet therein as surveyed by such deputy, and that the tally cards were returned into the office of the surveyor, and were made the basis for making out correct scale bills, which are, by statute, made prima facie evidence of the facts stated therein, sufficiently show that any person might be defrauded by the utterance of said false entry.—*State v. Goodrich* (Minn.) 69 N. W. 815.

[f] (Neb.; 1896.)

When an order for the delivery of personal property is set forth by copy in an information charging its forgery, and it is apparent from its face that there was a possibility by its use to deprive some person of property rights, the information is sufficient without averment of any facts extrinsic to the instrument to extend or explain its terms.—*Morearty v. State* 65 N. W. 784, 46 Neb. 652.

§ 5. — Description of instrument.**[a] (Iowa; 1896.)**

McClain's Code, § 5696, provides that, when an instrument which is the subject of an indictment has been withheld by procurement of defendant, and the fact of such withholding is alleged in the indictment, the misdescription of the instrument is immaterial. *Held*, that an indictment charging the forging of a note substantially in the words and figures of a note therein set out, followed by allegation that said note has been by the procurement of defendant withheld from the grand jury, and that they are unable to more accurately describe the same, is sufficient.—*State v. White* (Iowa) 67 N. W. 267.

[b] (Iowa; 1896.)

Where an indictment for forgery, in altering the record of the board of county supervisors, sets out the matter alleged to have been changed, and the alterations charged, error in describing such matter as the record of a "resolution," whereas it was merely an entry showing that an allowance had been made to a county officer, is immaterial.—*State v. Van Auker* (Iowa) 68 N. W. 454.

§ 6. — Allegations as to intent.**[a] (Iowa; 1896.)**

An indictment charging that defendant did alter and forge a public record, "with intent to defraud,"—setting out the record as it existed before and after the alleged alteration,—is sufficient, without repeating that the alteration so set out was made with intent to defraud.—*State v. Van Auker* (Iowa) 68 N. W. 454.

[b] (Neb.; 1896.)

It is sufficient in an information for forgery to charge the intent to defraud in general terms, it being unnecessary to prove an intent to defraud any particular person.—*Morearty v. State*, 65 N. W. 784, 46 Neb. 652.

§ 7. Evidence.**[a] (Iowa; 1896.)**

On a trial for forgery in altering a record of the board of supervisors, originally reciting that "the board allowed the auditor \$250 for hired help for 1893," by inserting the words "above fees" in place of "for 1893," it was immaterial that the allowance of \$250 for 1893,

with the fees collected by the auditor during that year, amounted to more than the board could legally allow.—*State v. Van Auken* (Iowa) 68 N. W. 454.

1b) (Iowa; 1896.)

On a trial for forgery in altering the record of a board of supervisors, originally reciting that "the board allowed the auditor \$250 for hired help for 1893," by inserting the words "above fees" in place of "for 1893," a bill which defendant had presented to the board of commissioners, including an item of \$250 for making assessors' plats, etc., was properly admitted, as showing the claims defendant had made for compensation, and to explain the knowledge and motive with which he acted in making the alteration.—*State v. Van Auken* (Iowa) 68 N. W. 454.

1c) (Iowa; 1896.)

It was also proper to show that defendant had been county auditor, and to introduce his report of the fees he had collected.—*State v. Van Auken* (Iowa) 68 N. W. 454.

§ 8. — Sufficiency.

(Iowa; 1896.)

On trial for forgery, defendant testified that, while he was agent for a sewing machine company, he agreed to deliver to a certain person a new sewing machine in exchange for her old one and her note for \$25; that he did not then have a suitable blank upon which to make said note; and that said person then authorized him to make out said note when he procured such blank. Defendant's wife testified fully to such agreement, and her testimony was partially corroborated by two other apparently disinterested witnesses. Said person denied said agreement, and, though she never received said machine, it appeared that, soon after the alleged agreement, she went to a distant part of the county, and there was evidence that defendant procured a new machine from the company to deliver to said person after she had gone away. *Held*, that a conviction of forging said note was against the clear weight of the evidence.—*State v. White* (Iowa) 67 N. W. 267.

§ 9. Instructions.

(Iowa; 1895.)

On a trial for uttering a forged note the state showed that at the time defendant claimed the note was signed the prosecutor signed but one instrument,—a contract,—which was also signed by defendant, and that it was wider than the note, and signed with green ink. The note was signed with black ink, and the defense showed that the prosecutor signed both it and the contract. The contract was not in evidence. *Held*, that a charge as to defendant's liability for fraudulently altering the contract into the form of the note was inapplicable.—*State v. Bowman* (Iowa) 62 N. W. 759.

FORMER JEOPARDY.

See "Criminal Law," §§ 30-37.

FORM OF ACTION.

See "Action," § 4.

FORNICATION.

See, also, "Adultery"; "Seduction."

Election of counts, see "Indictment and Information," § 28.

Joinder of count for rape, see "Indictment and Information," § 27.

(Wis.; 1895.)

Sanb. & B. Ann. St. § 4580, provides in its first clause for the punishment of one who "commits fornication with a single woman," and in its second of one who shall "commit fornication with a female of previous chaste character under the age of fifteen years." Unlawful sexual intercourse with a married woman is by statute adultery. Rev. St. § 2329, renders a female 14 years of age incapable of contracting marriage. *Held*, that an information charging that defendant "did commit fornication and have sexual intercourse with * * *, a female of previous chaste character," 14 years old, could be amended by inserting the word "single" before the word "female."—*Jackson v. State* (Wis.) 64 N. W. 833. 91 Wis. 253.

FORTHCOMING BOND.

See "Replevin," § 33.

FORTUNE TELLING.

See "Disorderly Conduct."

FRANCHISE.

Of building association, see "Building and Loan Associations," § 1.

Of corporation, see "Corporations," § 1.

Of ferry, see "Ferry."

Of irrigation company, see "Irrigation."

Of railroad company, see "Railroad Companies," § 1.

Of street-car company, see "Horse and Street Railroads," § 1.

To use public wharf, see "Wharves."

FRAUD.

See, also, "Deceit"; "Duress"; "False Pretenses"; "Fraudulent Conveyances."

As ground for attachment, see "Attachment," §§ 3-7.

— for collateral attack on judgment, see "Judgment," § 73.

— for equitable relief from judgment, see "Judgment," § 109.

— for reformation of contract, see "Equity," § 10.

— for rescission of contract, see "Contracts," § 57; "Equity," §§ 24-29.

— for rescission of contract to convey, see "Vendor and Purchaser," § 31.

— for rescission of release, see "Release and Discharge," § 5.

— for rescission of sale, see "Sale," §§ 54, 55.

— for vacation of judgment, see "Divorce," §§ 17, 18; "Judgment," § 101.

Conspiracy to defraud, see "Conspiracy," § 2.

Determination on motion, see "Practice in Civil Cases," § 15.

Effect on running of limitations, see "Limitation of Actions," §§ 24, 25.

Evidence of fraud in action on policy, see "Insurance," § 121.

Fraudulent disposition of mortgaged chattels, see "Chattel Mortgages," § 60.

In assignment, see "Assignment for Benefit of Creditors," § 10.

In making proof of loss, see "Insurance," § 75.

In ordering public improvement, see "Municipal Corporations," § 118.

In procuring contract, see "Contracts," § 7.

— delivery of deed, see "Deed," § 13.

— guaranty, see "Guaranty," § 3.

— mortgage, see "Mortgages," § 13.

— note, see "Negotiable Instruments," § 3.

In procuring payment, see "Payment," § 13.
 — service of process, see "Writs and Notice of Suits," § 11.
 — subscription to stock, see "Corporations," § 55.
 — will, see "Wills," §§ 7-10.
 In sale, see "Sale," § 16.
 Liability of attorney, see "Attorney and Client," § 9.
 — of corporation for fraud of officer, see "Corporations," § 38.
 — of firm for fraud of partner, see "Partnership," § 19.
 Limitation of action for, see "Limitation of Actions," § 4.
 Measure of damages, see "Damages," § 23.
 Misrepresentations in application for policy, see "Insurance," §§ 30, 31.
 Of agent, see "Principal and Agent," §§ 25, 26.
 Parol evidence of, see "Evidence," § 100.
 Presumption of, see, also, "Fraudulent Conveyances," §§ 12, 42-44.
 Raising constructive trust, see "Trusts," § 13.
 Relief of settlers on public land, see "Public Lands," § 18.
 Survival of cause of action for, see "Abatement and Revival," § 10.

§ 1. In general.

[a] (Mich.; 1895.)

Where a lease reserves a lien in the nature of a chattel mortgage on all personal property placed on the premises, to secure the rent, and the lessee thereafter mortgaged such personal property to defendants, with intent to defraud plaintiff, and such intent was known to defendants, who took possession for default, and converted the property, the lessor may recover for the fraudulent deprivation of the right to exercise the power given in the lease, though it did not amount to a conveyance of a present interest in the property, and may also recover in the same action damages for the time during which he was excluded by defendants from possession of the premises.—Crockett v. Bearee (Mich.) 62 N. W. 344.

104 Mich. 257.

[b] (S. D.; 1895.)

Where a building contractor drew on the owner in favor of a material man, by agreement with the latter, for an amount in excess of that due for material furnished, and the material man, on collection of the draft, paid the contractor the excess, he was liable to the owner for the amount thereof.—Caldwell v. Maxfield (S. D.) 64 N. W. 166.

§ 2. False representations.

[a] (Mich.; 1895.)

Members of a firm, whose business was unprofitable, desired to form a corporation to carry on their business. Defendant was induced by the fraudulent representations of one member to take stock in the corporation, giving his note in payment. The firm property was sold to the corporation, at an inflated value, and defendant's note was transferred to plaintiff, a member of the firm. *Held*, that plaintiff was chargeable with the fraud of his partner, since he accepted the avails of the scheme.—French v. Ryan (Mich.) 62 N. W. 1016.

104 Mich. 625.

[b] (Mich.; 1895.)

False representations as to the future earnings of a proposed corporation are fraudulent, if made with intent to deceive, by a person having superior knowledge as to such matter.—French v. Ryan (Mich.) 62 N. W. 1016.

104 Mich. 625.

[c] (Minn.; 1896.)

A person told plaintiff that a contemplated exchange of notes between plaintiff and defendants had been fully agreed to by defendants, and plaintiff afterwards, but before the exchange, made fraudulent representations to defendants concerning the notes to be given them. *Held*, that the fact that such person

had apparent authority to close the trade in defendants' behalf did not render the representations immaterial where he had no authority in fact.—Wallace v. Hallowell (Minn.) 69 N. W. 466.

[d] (Neb.; 1897.)

One who purchases a warrant of another state, relying on a misrepresentation by the vendor as to the statute of limitations of that state, has a right of action against the seller.—Wood v. Roeder (Neb.) 70 N. W. 21.

[e] (Neb.; 1897.)

A fraudulent misrepresentation as to the law of another state is one on which a person can rely.—Wood v. Roeder (Neb.) 70 N. W. 21.

[f] (Wis.; 1895.)

A statement by a vendee of land, for the purpose of inducing another to indorse his note, and take the contract in his name as security therefor, that the vendee expected to resell the land at an advanced price, is a mere opinion, and cannot be made a basis of a charge of fraud in defense to an action by the vendee against the indorser for interest due.—Spence v. Geilfuss, 62 N. W. 529, 89 Wis. 499.

§ 3. Who liable.

[a] (Mich.; 1896.)

A vendor who gives a false receipt, purporting to be in payment of half the price of land, to enable the vendee, through it, to sell the land for double the actual price, is a joint wrongdoer with the vendee, and is responsible for the consequences of, though he receives no benefit from, the fraud.—Stoney Creek Woolen Co. v. Smalley (Mich.) 69 N. W. 722.

[b] (Wis.; 1896.)

Appellants entered into an agreement with their codefendants whereby the latter were to form a corporation to purchase a tract of land; the promoters to represent to the stockholders that they would be compelled to pay \$23,000 for the land, whereas in fact the land was to be purchased for about \$13,000; appellants to receive as a consideration a portion of the \$10,000 profits made by the promoters. *Held*, that appellants were, equally with the promoters, liable to the corporation for the money received from it by the fraud, in excess of the \$13,000.—Fountain Spring Park Co. v. Roberts (Wis.) 66 N. W. 399.

92 Wis. 345.

§ 4. Pleading.

[a] (Mich.; 1896.)

A complaint stating a representation as to the width of a street, made by defendant as an inducement to plaintiff to purchase; that he believed and relied on it, and purchased the land; that the representation was false; and that plaintiff suffered damages,—states a cause of action for deceit.—Merrill v. Newton (Mich.) 67 N. W. 120.

[b] (Neb.; 1896.)

In actions for false representations it is not necessary to aver or prove that the party making the representations knew at the time that they were untrue.—Johnson v. Gulick 65 N. W. 883, 46 Neb. 817.

[c] (Neb.; 1897.)

A petition to recover damages for fraud need not state the probative or evidential facts negating the truth of the representations.—Johnston v. Spencer (Neb.) 70 N. W. 982.

[d] (N. D.; 1896.)

General allegations of fraud in an answer, without probative facts being set forth, are insufficient to raise the defense of fraud.—Van Dyke v. Doherty (N. D.) 69 N. W. 200.

§ 5. Evidence.

[a] (Mich.; 1896.)

In an action based on defendant's false representations in procuring goods from plaintiff, where the latter's credit man testified to the representations made to him at the time of

the purchase, it was competent for plaintiff to state what those representations were, as reported to him by such employé, not in corroboration of the latter's testimony, but to show that plaintiff knew what the false representations were, and relied upon them in selling the goods.—*Banner v. Schlessinger* (Mich.) 67 N. W. 116.

[161 (Neb.; 1896.)

Fraud is never presumed, but must be clearly proved, in order to entitle a party to relief on the ground that it has been practiced on him.—*Davidson v. Crosby* (Neb.) 68 N. W. 338.

§ 6. — Sufficiency.

[161 (Iowa; 1894.)

A. held a claim for \$15,000 against a railroad company, arising under several contracts for constructing a portion of its road, for \$6,000 of which he had accepted subsidy notes of the company, but whether as collateral or in payment was disputed. Pending a suit by him to enforce a lien for the whole amount, pleaded as arising under one contract, he assigned to B., a prior lien holder, for \$9,000, all of his claim "to a mechanic's lien, as set forth and claimed by him in the suit"; the assignment providing that it did not pass the subsidy notes. A. claimed that he intended to transfer only so much of the claim as was enforceable by mechanic's lien; that B. represented such to be the legal effect of the assignment, and induced him not to consult an attorney; and that B., though representing that he did not want to purchase the \$6,000 claim, fraudulently drew the papers so as to transfer the whole claim. B.'s attorney in the transaction testified that he supposed the whole claim arose under one contract; that he told A. he would not take the claim if the subsidy notes had been taken as collateral; and that A. told him they were taken as payment. *Held*, that the facts did not show fraud in procuring the assignment.—*Bigelow v. Wilson* (Iowa) 68 N. W. 798.

[161 (Mich.; 1895.)

Where fraud is charged, it is error to instruct that there must be "clear proof" thereof, such as to create a "hearty conviction" of the truth of the charge. The proof is sufficient, if it creates a belief that fraud has been perpetrated.—*Gumberg v. Treusch* (Mich.) 61 N. W. 872.

103 Mich. 543.

§ 7. Criminal liability.

(Wis.; 1895.)

Under Laws 1887, c. 244 (Sanb. & B. Ann. St. § 4131a), providing that any person who shall "convey" land knowing that it is incumbered, with intent to defraud, shall be punished, etc., a person is guilty who conveys land through the medium of an innocent party, in whom the legal title has been placed, and who executes the deed under such person's directions. *Pinney, J., dissenting.*—*State v. Hunkins* (Wis.) 62 N. W. 1047, 90 Wis. 264; *Id.*, 63 N. W. 167, 90 Wis. 264.

FRAUDS, STATUTE OF.

I. IN GENERAL, §§ 1, 2.

II. SUFFICIENCY OF MEMORANDUM, §§ 3-6.

III. PROMISE TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER, §§ 7-11.

IV. AGREEMENTS RELATING TO LAND, §§ 12-18.

V. AGREEMENTS RELATING TO SALE OF GOODS, §§ 19-23.

VI. AGREEMENTS NOT TO BE PERFORMED IN A YEAR, §§ 24-26.

VII. REPRESENTATIONS AS TO CREDIT, § 27.

VIII. CONTRACT WITHIN STATUTE—ESTOPPEL AND RECOVERY ON IMPLIED CONTRACT, §§ 28, 29.

IX. PLEDGING AND PRACTICE, §§ 30-33.

Parol gift of land, see "Gifts," § 3.

— trusts, see, "Trusts," §§ 3, 4.

— trusts for benefit of creditors, see "Assignment for Benefit of Creditors," § 9.

Requirements as to express trusts, see "Trusts," § 1.

Specific performance of parol contract, see "Specific Performance," § 5.

I. IN GENERAL.

§ 1. Executed contracts.

[161 (Mich.; 1895.)

Plaintiff agreed that, if defendant should buy at auction land owned by her and her daughter, he could have plaintiff's share at a certain price, regardless of what was bid at the sale. The land was bid in by defendant at a price greater than the agreed price. *Held*, in an action for the greater price, after a deed to the land had been made, it could not be claimed that the agreement, being by parol, was not binding on plaintiff.—*Gardner v. Gardner* (Mich.) 63 N. W. 988.

[161 (Mich.; 1895.)

In the adjustment of adverse claims to land, complainant executed a deed to defendant, who was in possession of the land, and received in return a mortgage. The land was misdescribed in both the deed and the mortgage. *Held*, that the statute of frauds did not preclude a reformation of the instruments.—*Judson v. Miller* (Mich.) 63 N. W. 965.

[161 (Minn.; 1895.)

Where a vendor orally agreed, as part of the consideration for the price, to assign an insurance policy on the premises to the vendee, and procure the insurance company's consent thereto, and, through his failure to do so, the vendee was unable to recover of the company for a loss occurring during the continuance in force of the policy, the vendee could, after the conveyance of the premises to him, recover on the vendor's oral agreement.—*Hagelin v. Wacks* (Minn.) 63 N. W. 624.

[161 (Neb.; 1896.)

Where one of two adjoining proprietors was about to build upon his land, and, at the request of the other, constructed a party wall, situated half on the land of each, and the other, after the completion of the wall, promised to pay one-half the cost thereof, the case is not within the statute of frauds, and a recovery can be had upon the promise to pay.—*Stuht v. Sweesy*, 67 N. W. 748, 48 Neb. 767.

[161 (Wis.; 1896.)

An executed verbal agreement to surrender a written lease is not within the statute of frauds.—*Goldsmith v. Darling* (Wis.) 66 N. W. 397, 92 Wis. 363.

§ 2. Effect of statute.

(Wis.; 1897.)

A written contract whereby a firm hired an employé for five years being within the statute, the joint liability of the partners to pay the agreed wages cannot be changed by a subsequent oral agreement that each shall pay one-half only.—*Hanson v. Gunderson* (Wis.) 70 N. W. 827.

II. SUFFICIENCY OF MEMORANDUM.

Necessity of alleging writing, see post, §§ 30, 31.

§ 3. Requisites and sufficiency.

[161 (Mich.; 1896.)

Plaintiff's written petition to the city council for a right of way and privilege to lay a sewer in

certain streets, specifically describing the termini of the sewer, and its exact locality in the streets named, was, by resolution, referred to the committee on sewerage, with power to act, such resolution being spread on the records of the council. Plaintiff was authorized to proceed with the work on giving bond, and a bond, referring to the petition, was thereupon executed, approved by the chairman of the committee, received by the council, and filed in the proper office. *Held* sufficient to satisfy the statute. *Hooker, J., dissenting.*—*Stevens v. City of Muskegon (Mich.)* 69 N. W. 227.

[b] (Mich.: 1897.)

A contract for the sale of land provided that the vendee should pay \$1,000 cash, \$4,000 within 30 days, and the balance at any time within 5 years, in sums not less than \$1,000; and that the vendor would give a deed when one-half the price was paid, and accept a mortgage for the other half, but did not provide the length of time the mortgage should run. *Held*, that the contract was not void under the statute of frauds, in that it was incomplete, since the clause in relation to the mortgage would be read in connection with the one relating to payments, and the mortgage would be payable accordingly. —*Proctor v. Plumer (Mich.)* 70 N. W. 1028.

[c] (Minn.: 1895.)

Where one indorsed a note in the hands of the payee, with a verbal agreement to assume liability thereon as guarantor, and the payee wrote over the signature the contract of guaranty, the contract was taken out of the statute.—*Peterson v. Russell (Minn.)* 64 N. W. 555.

62 Minn. 220.

[d] (Wis.: 1895.)

A writing signed by defendant, and reciting: "Received of J. B. \$300, paid some days since, and \$1,900, this 27th day June, 1890, on lots 481, 483, 485, 487, on 5th St., Ely Add. to Superior. Deed made to be delivered and grantee named. A mort. for \$3,800, 1 and 2 at 8 per cent."—is insufficient as a memorandum of a contract to convey land.—*Harney v. Burhans* 64 N. W. 1031, 91 Wis. 348.

§ 4. Separate writings.

[a] (Iowa: 1895.)

Two or more papers, executed as parts of one transaction involving the sale of personal property, which was not delivered or paid for, may be construed together to ascertain whether the transaction is within the statute of frauds.—*American Oak Leather Co. v. Porter (Iowa)* 62 N. W. 658.

[b] (Iowa: 1895.)

A dated list of personal property, showing merely the price of each item thereof, and signed by the agent of the seller only, in connection with a letter from the seller to the buyer, giving the terms upon which the goods will be shipped, is not sufficient to take the contract out of the statute of frauds.—*American Oak Leather Co. v. Porter (Iowa)* 62 N. W. 658.

[c] (Wis.: 1895.)

A letter from an agent to his principal conveying A's offer to purchase land of the principal, and a letter from the principal to the agent accepting such offer, constitute a sufficient memorandum of the contract of sale to satisfy the statute of frauds.—*Singleton v. Hill* 64 N. W. 588, 91 Wis. 51.

§ 5. Showing as to consideration.

[a] (Minn.: 1895.)

A letter by which defendant requested plaintiff to sell goods to a third person, and agreed that he would "see them paid for," sufficiently expresses the consideration for the guaranty to satisfy the statute of frauds.—*Straight v. Wight (Minn.)* 63 N. W. 105.
60 Minn. 515.

[b] (Minn.: 1896.)

A writing as follows: "I, the undersigned, herewith promise to pay to the Widow M. G., on the wedding day, when she shall become my wife, the sum of \$1,000," did not express the consideration for its execution with reasonable clearness, within Gen. St. 1894, § 4209. *Start, C. J., and Buck, J., dissenting.*—*Siemens v. Siemens (Minn.)* 67 N. W. 802.

[c] (Wis.: 1896.)

Under Rev. St. § 2307, providing that every agreement to answer for the debt of another shall be void unless in writing, expressing the consideration, and subscribed by the party to be charged, a promise by one creditor to protect the claim of another, though in writing, cannot be enforced unless the consideration is therein expressed, or a new consideration, beneficial to the promisor, is proved.—*Twoly Mercantile Co. v. Ryan Drug Co. (Wis.)* 68 N. W. 963.

§ 6. Signature.

(Mich.: 1896.)

A paper purporting to express the terms of sale of real property is within the statute of frauds when signed by the vendor's agent, whose sole authority to make the sale rests in parol.—*Baldwin v. Schiappacasse (Mich.)* 66 N. W. 1091.

III. PROMISE TO ANSWER FOR DEBT OR DEFAULT OF ANOTHER.

Sufficiency of memorandum, see ante, § 4.

§ 7. What constitutes.

[a] (Iowa: 1895.)

Where a de jure corporation takes all the property belonging to a de facto one of the same name, assuming its liabilities, the transaction is not within the statute of frauds.—*Calumet Paper Co. v. Stotts Inv. Co. (Iowa)* 64 N. W. 782.

[b] (Mich.: 1897.)

In an action for work done, plaintiff testified that defendant told him that he would have some work for him, and that L. would call to see about it; that he and L. went to the place where the work was to be done, and he made an estimate of the cost; that, suspecting L's responsibility, he told defendant he had looked up L's record, and found that he was without credit, and defendant said: "That is all right. I am putting \$520 into this matter, and I am helping L. along, and all the debts and money go through my hands, and I will pay you the money." *Held*, there was some evidence of a direct promise by defendant.—*Wenzel v. Johnston (Mich.)* 70 N. W. 549.

[c] (Wis.: 1897.)

A contract whereby the promisors retain an attorney to defend a third person charged with crime, made before any substantial services are rendered, is not one to answer for the debt of another.—*James v. Carson (Wis.)* 69 N. W. 1004.

§ 8. Original or collateral undertaking.

[a] (Iowa: 1895.)

An attorney, acting for his client, requested plaintiff to render services for the client, and subsequently promised to pay for the same whenever the client furnished him money for that purpose. *Held* that, though the money was furnished, his promise was within the statute of frauds.—*Walker v. Irwin (Iowa)* 62 N. W. 785.

[b] (Iowa: 1897.)

An oral promise by one to pay a debt of his deceased son-in-law, if the creditor would not make trouble, is within the statute of frauds, where it does not appear that the promisor gained any personal advantage by the creditor's forbearance, and it is shown that, by reason of the insolvency of the estate, the cred-

itor would have received nothing had he pressed his claim.—*Schaafs v. Wentz* (Iowa) 69 N. W. 1022.

[c] (Mich.; 1895.)

A promise by a debtor, who has assigned a note and mortgage made by a third person to the creditor in payment of the debt, to pay such note and mortgage if the creditor cannot collect them by action, is not an undertaking to answer for the debt of another, within the statute of frauds.—*Bryant v. Rich's Estate* (Mich.) 62 N. W. 116.

101 Mich. 124.

[d] (Mich.; 1895.)

An oral agreement by the owner of a building to pay a subcontractor, on the abandonment of the contract by the original contractor, an amount already due him from the latter, and an additional sum for extras if he would complete the work, is not void as being a promise to answer for the debt of the contractor.—*McLaughlin v. Austin* (Mich.) 62 N. W. 719.

104 Mich. 489.

§ 9. Contracts of indemnity.

[a] (Mich.; 1895.)

A promise to indemnify plaintiff for becoming a surety on the replevin bond of C., made by one interested as C.'s mortgagee in the goods replevied, is not a promise to answer for the debt, default, or miscarriage of another, within the statute.—*Boyer v. Soules* (Mich.) 62 N. W. 1000.

105 Mich. 31.

[b] (Mich.; 1896.)

A fidelity insurance company having given a bond to indemnify an employer against dishonesty of an employé, defendants agreed to indemnify it against loss thereon. *Held*, that defendants' contract of indemnity was not within the statute.—*Fidelity & Casualty Co. v. Lawlor* (Minn.) 66 N. W. 143.

64 Minn. 141.

§ 10. Release of original debtor—Novation.

[a] (Mich.; 1895.)

An order was drawn by M. on defendant, in favor of plaintiff, and defendant at the time was indebted to M., and the amount of the order, when collected, was to be applied on the indebtedness of M. to plaintiff; but there was no novation, nor was there a previous agreement to accept the order. *Held*, that an oral acceptance thereof was within How. Ann. St. § 6185, which makes invalid the oral promise to pay the debt of another.—*Upham v. Clute* (Mich.) 63 N. W. 317.

105 Mich. 350.

[b] (Mich.; 1895.)

Where contractors sublet a contract to one who assigns to them moneys due the laborers, the agreement to pay such laborers is not within the statute.—*Gleason v. Fitzgerald* (Mich.) 63 N. W. 512.

105 Mich. 516.

[c] (Wis.; 1895.)

Where a written lease of a farm provides that the lessor shall furnish the lessee with money to carry it on, an oral promise by the lessor to pay the wages of a farm hand employed by the lessee will not render him liable therefor.—*Rietzloff v. Glover* (Wis.) 64 N. W. 298, 91 Wis. 65.

§ 11. Benefit accruing to promisor.

(Wis.; 1894.)

Where plaintiffs held an unrecorded bill of sale of a part of their debtor's property as security for his notes, and in consideration of their surrendering it to defendant, and of the transfer to defendant by the debtor of all his property, defendant promised to pay said notes, the promise was not to pay the debt of a third person, within the statute of frauds.—*Green v. Hadfield*, 61 N. W. 310, 89 Wis. 138.

IV. AGREEMENTS RELATING TO LAND.

Sufficiency of memorandum, see ante, § 3.

Waiver of defense of statute, see post, § 33.

§ 12. What agreements are within statute.

[a] (Iowa; 1897.)

Code 1873, §§ 3662, 3664, declaring that no evidence of a contract for the transfer of an interest in lands shall be competent unless in writing, etc., do not render inadmissible parol evidence as to the identity of lands described in such contract.—*Wilson v. Riddick* (Iowa) 69 N. W. 1039.

[b] (Mich.; 1896.)

An agreement between a grantor and grantee that the grantee shall build a certain portion of the fence between the land conveyed and certain other lands of the grantor, in part consideration for the deed, need not be in writing. *Moore, J., dissenting.*—*Dodder v. Snyder* (Mich.) 67 N. W. 1101.

[c] (Minn.; 1896.)

An agreement by a guarantor of mortgage notes, that, on foreclosure, if the mortgagee will bid in the property for the full amount due, he will pay the amount of the notes and costs, if the foreclosure does not result in the collection of the money, is within the statute of frauds.—*Veazie v. Morse* (Minn.) 69 N. W. 637.

[d] (Neb.; 1897.)

The statute does not preclude a vendor from recovering the price merely because he did not formally accept in writing the written offer of the purchaser who has taken possession.—*Griffith v. Thompson* (Neb.) 69 N. W. 946.

§ 13. Parol warranty.

(Mich.; 1895.)

A sublease of a portion of a building, given by one holding a lease on the entire building for a term of five years, is a conveyance of an "interest in lands," within How. Ann. St. § 6179, providing that no interest in lands, other than leases for one year, shall be conveyed by parol.—*Fratcher v. Smith* (Mich.) 62 N. W. 832.

104 Mich. 534.

§ 14. Leases.

[a] (Mich.; 1895.)

Where the consideration of a parol lease for two years was that the lessee should clear part of the land, and the tenant was then in possession, and remained therein, and made a portion of the clearing, he cannot, in summary proceedings to remove him from the land because of his failure to clear the land agreed on, claim that the lease is void under the statute of frauds. *McGrath, C. J., and Hooker, J., dissenting.*—*Smelling v. Valley* (Mich.) 61 N. W. 878.

103 Mich. 580.

[b] (Mich.; 1896.)

Under How. Ann. St. § 6179, which provides that an interest in lands other than one-year leases can be created only by a conveyance in writing, a verbal statement to one that he may remain in possession till certain sums are paid him gives him no interest in the premises.—*Smalley v. Mitchell* (Mich.) 68 N. W. 978.

§ 15. Partnership to deal in land.

[a] (S. D.; 1894.)

A parol contract by which persons agree to jointly purchase certain land, and to contribute an equal amount therefor, and to share equally in the profit or loss arising from a resale, is not an agreement for the sale of real property, within the statute of frauds (Comp. Laws, § 3544).—*Davenport v. Buchanan* (S. D.) 61 N. W. 47.

6 S. D. 376.

[b] (S. D.: 1894.)

A contract by which persons agree to purchase land jointly, paying equal amounts therefor, and to share equally in the profits or loss arising from a resale thereof, constitutes a special partnership, and is valid, though not in writing.—*Davenport v. Buchanan* (S. D.) 61 N. W. 47.

6 S. D. 376.

[c] (Wis.: 1895.)

A verbal contract for the formation of a partnership to purchase standing timber is void.—*McMillen v. Pratt*, 62 N. W. 588, 89 Wis. 612.

§ 16. Creation of easement.**[a] (Mich.: 1896.)**

A grantor cannot reserve, by parol contract with the grantee, certain trees on the land conveyed, and the right of pasturage.—*Dodder v. Snyder* (Mich.) 67 N. W. 1101.

[b] (Wis.: 1895.)

An easement in another's land for drainage purposes cannot be created by parol.—*Thoenke v. Fiedler*, 64 N. W. 1030, 91 Wis. 386.

§ 17. Performance or part performance.**[a] (Iowa: 1895.)**

A contract for the transfer of an interest in land, in consideration of legal services rendered in settlement of an estate, and the signing of a bond, is not within the statute of frauds, when such consideration has been fully executed, except the taking of a formal order of court approving of the settlement.—*Mitchell v. Colby* (Iowa) 63 N. W. 769.

[b] (Mich.: 1894.)

Under 2 How. St. § 6181, which provides that any contract for the sale of land shall be in writing, and section 6183, which reads, "Nothing in this chapter contained shall be construed to abridge the powers of a court of chancery to compel the specific performance of agreement in case of part performance of such agreements," the possession of land under an oral agreement to convey cannot be set up as a defense in an action at law, by one holding the legal title, for the possession thereof.—*Bartlett v. Bartlett* (Mich.) 61 N. W. 500.

103 Mich. 293.

[c] (Mich.: 1896.)

Part performance of a parol contract relating to land takes it out of the statute of frauds.—*Delavan v. Wright* (Mich.) 67 N. W. 1110.

[d] (Mich.: 1896.)

Part performance of an oral contract for the exchange of lands, whereby one party is required to reduce an incumbrance on the land to be conveyed by him, is shown by the fact that the parties gave to each other their deeds to the lands.—*Bennett v. Knowles* (Mich.) 69 N. W. 491.

[e] (Mich.: 1897.)

Where, in consideration of a parol agreement that its rights should not be affected, the owner of a right of way for a sidetrack on defendant's lands consented that the track should be moved a short distance, and reconstructed, and afterwards continued to use the track as relocated, there was such part performance as will take the agreement out of the statute of frauds.—*Kent Furniture Manuf'g Co. v. Long* (Mich.) 69 N. W. 657.

[f] (Minn.: 1895.)

Where the vendee in an oral contract for the purchase and sale of land took possession under the contract, and erected buildings on the land, with the vendor's consent, and resided thereon, the contract was taken out of the statute.—*Mourain v. Trainor* (Minn.) 65 N. W. 441, 63 Minn. 230.

[g] (Minn.: 1896.)

An agreement by a guarantor of mortgage notes that if the mortgagee will, on foreclo-

sure, bid in the property for the full amount due, he will pay the amount of the notes and costs, is not taken out of the statute by performance on the mortgagee's part.—*Veazie v. Morse* (Minn.) 69 N. W. 637.

[h] (Neb.: 1896.)

A court of equity will give effect to a parol grant of an easement, where there has been a valid consideration, where the grant is certain in its terms, and where there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds.—*Gilmore v. Armstrong* (Neb.) 66 N. W. 998, 48 Neb. 92.

[i] (Wis.: 1895.)

The receipt by the principal's executors of the purchase price of lands, conveyed by the agent without authority, does not entitle the grantee to enforce a proper conveyance.—*Jourdain v. Fox* (Wis.) 62 N. W. 936, 90 Wis. 99.

§ 18. Contract by agent.**[a] (Mich.: 1896.)**

Rev. St. Ill. 1845, p. 258, § 1 (Laws 1869, p. 363, § 1), providing that no action shall be brought to charge any person upon any contract for the sale of any interest in land for a longer term than one year, unless such contract shall be in writing, and signed by the party to be charged therewith, or some other person thereunto authorized in writing signed by such party, does not apply to leases; and therefore an agent whose authority was not in writing could make a valid lease for four years, though the lease was under seal, as the seal was mere surplusage.—*McIntosh v. Hodges* (Mich.) 68 N. W. 158.

[b] (Neb.: 1896.)

A contract of an agent in the name of his principal for the sale of lands is void under the statute of frauds (Comp. St. c. 32, §§ 3, 25), unless the authority of the agent is in writing.—*Morgan v. Bergen* (1874) 3 Neb. 200, followed.—*O'Shea v. Rice*, 69 N. W. 308.

V. AGREEMENTS RELATING TO SALE OF GOODS.

Sufficiency of memorandum, see ante, §§ 3-6.

§ 19. Sales in general.**[a] (Mich.: 1895.)**

A parol contract for the sale of machinery, where there was no delivery or part performance, was void under the statute of frauds.—*Hudson v. Emmons* (Mich.) 65 N. W. 542.

[b] (Mich.: 1896.)

A contract for purchase, fixing no price to be paid for the property, will not be held to be within the statute of frauds, on the ground that the property is worth more than \$50, on the mere testimony of the purchaser that the seller told him it was worth from \$60 to \$150, the purchaser never having seen it.—*Slesinger v. Bresler* (Mich.) 68 N. W. 128.

§ 20. Delivery and acceptance.**[a] (Minn.: 1896.)**

An unaccepted tender of earnest money will not take a sale of goods of the value of \$50 out of the statute.—*Hershey Lumber Co. v. St. Paul Sash, Door & Lumber Co.* (Minn.) 69 N. W. 215.

[b] (Wis.: 1894.)

In an action to recover the purchase price named in an oral agreement to purchase a steamboat, it appeared that the boat was hauled out of the river under the instructions of one of the defendants, and blocked up in readiness for shipment, and that this work was done by one employed by him, and paid by the other defendant, who engaged the same person to look after the boat, and see that nothing was

taken from it, expressing his satisfaction with what had been done. *Held*, that the question of acceptance and receipt of the boat was for the jury.—*Becker v. Holm* (Wis.) 61 N. W. 397, 89 Wis. 86.

1c1 (Wis.; 1895.)

The fact that logs were banked and marked with the vendee's name, ready to be put in the river, under a verbal contract that they were to be paid for when put in the river, is not a sufficient delivery to take the contract out of the statute of frauds (Rev. St. § 2308).—*Crosby Hardwood Co. v. Tester* (Wis.) 63 N. W. 1057, 90 Wis. 412.

§ 21. Payment of earnest money.

(Wis.; 1895.)

Payment for logs sold under a verbal contract after the contract was made is not a sufficient payment of some part of the purchase money "at the time" to take the contract out of the statute of frauds (Rev. St. § 2308), when the logs were not delivered.—*Crosby Hardwood Co. v. Tester* (Wis.) 63 N. W. 1057.

90 Wis. 412.

§ 22. Contract to build upon or improve realty.

(Minn.; 1896.)

A verbal contract to furnish material, and, after performing labor thereon, attach it to the realty, as a part of a building in the course of construction, is not a sale of goods or chattels, and is not within the statute.—*Brown & Haywood v. Wunder* (Minn.) 67 N. W. 357, 64 Minn. 450.

§ 23. Contracts to manufacture goods.

(Minn.; 1896.)

A verbal contract for the manufacture of articles of special and peculiar design, not suitable for the general trade, and for the price of more than \$50, is not a contract for the sale of goods and chattels, within the statute of frauds. Gen. St. 1894, § 4210.—*Brown & Haywood Co. v. Wunder* (Minn.) 67 N. W. 357, 64 Minn. 450.

VI. AGREEMENTS NOT TO BE PERFORMED IN A YEAR.

§ 24. Contract capable of completion.

(Mich.; 1896.)

Where an oral contract is capable of being completed within a year, it is not within the statute of frauds, though the parties may have thought it probable that it would, as it did, extend over a longer period.—*Smalley v. Mitchell* (Mich.) 68 N. W. 978.

§ 25. Contracts of employment.

[a] (Neb.; 1894.)

A contract of employment, to begin at a subsequent date, and continue from thence one year, cannot be "performed within one year from the making thereof," as required by the statute of frauds (Comp. St. 1893, c. 32, § 8, subd. 1), when in parol.—*Kansas City, W. & N. W. R. Co. v. Conlee*, 61 N. W. 111, 43 Neb. 121.

[b] (Neb.; 1894.)

A contract of employment for one year, at a stipulated rate of wages per month, is not one of employment from month to month; hence, under the statute of frauds (Comp. St. 1893, c. 32, § 8, subd. 1), must be in writing, where the employment is to begin at a subsequent date, so that it cannot be performed within one year from the making thereof.—*Kansas City, W. & N. W. R. Co. v. Conlee* 61 N. W. 111, 43 Neb. 121.

1c1 (Neb.; 1896.)

A contract whereby one, for a consideration, agrees to employ another at certain wages so long as the works of the first are kept run-

ning, or until the other shall see fit to quit, is not within the statute.—*Carter White-Lead Co. v. Kihlin* (Neb.) 66 N. W. 536.

47 Neb. 409.

§ 26. Leases.

(Mich.; 1895.)

A parol contract for a lease of land for one year with the privilege of three, at \$100 per year, is within the statute of frauds.—*Hand v. Osgood* (Mich.) 64 N. W. 867.

VII. REPRESENTATIONS AS TO CREDIT.

§ 27. When within statute.

(Mich.; 1895.)

How. Ann. St. § 6188, provides that no action shall be brought to charge one upon a representation as to the character, credit, or trade of another person unless such representation is in writing, and signed by the person to be charged. *Held*, that representations by one that he was the owner of certain corporate stock, and that the corporation was paying large dividends, which representations were made for his own benefit to induce plaintiff to purchase, are not within the statute.—*Hubbard v. Long* (Mich.) 63 N. W. 644.

105 Mich. 412.

VIII. CONTRACT WITHIN STATUTE—ESTOPPEL AND RECOVERY ON IMPLIED CONTRACT.

§ 28. Estoppel.

(S. D.; 1896.)

Plaintiff held a relinquishment by G. of a tree-claim entry, which he delivered to G. for the purpose of permitting G. to make proof, and completing a sale of the land to a third person. The land was conveyed by G. to the person designated by plaintiff, and defendant, who acted with G., as agent of plaintiff, in negotiating the sale, retained a portion of the proceeds, falsely representing that it had been paid to a third person to induce him to withdraw a contest to the proving of the claim. *Held*, that defendant could not defeat a recovery of the money so retained on the ground that the sale of the tree-claim entry by G. to plaintiff was within the statute of frauds.—*Hagaman v. Gillis* (S. D.) 68 N. W. 192.

§ 29. Services rendered—Recovery on quantum meruit.

(Mich.; 1895.)

Where plaintiff had performed labor for deceased in consideration of an oral promise by the latter to convey to her by will or otherwise the farm upon which they lived, that contract, while void as being within the statute, may be employed by plaintiff as a means of determining the amount of her recovery on a quantum meruit against the estate.—*In re Williams' Estate* (Mich.) 64 N. W. 490.

IX. PLEADING AND PRACTICE.

§ 30. Pleading the statute.

[a] (Mich.; 1895.)

The complaint in an action for breach of a contract to purchase land need not allege an acceptance in writing.—*Kroll v. Diamond Match Co.* (Mich.) 63 N. W. 983.

[b] (Neb.; 1896.)

It is not necessary that the existence of a parol contract be denied in pleading, in order to render the defense of the statute of frauds available; but the pleader may admit the contract, and yet plead and insist upon the statute

and its application thereto.—*Thomas v. Thomas* (Neb.) 67 N. W. 182.
48 Neb. 266.

§ 31. — By demurrer.

(Iowa: 1895.)

Where a petition fails to aver that a contract within the statute of frauds is in writing, or to show facts to take it out of the statute, defendant, by failing to demur under Code, § 3648, subd. 6, allowing a defendant to demur to a petition which fails to show a contract to be in writing where it should be so evidenced, waives the defense of the statute.—*Wiseman v. Thompson* (Iowa) 63 N. W. 346.

§ 32. Evidence.—As to contract within statute.

[a] (Mich.: 1896.)

Plaintiff sold to defendant a farm which was to be paid for in part by deeding to plaintiff certain land which defendant represented as worth a certain sum, and defendant agreed that, if it was not worth said sum, he would pay the difference between it and its actual value. The deed to the farm was left with the scrivener, to be held until defendant executed a paper agreeing to make good any such deficiency. Afterwards defendant obtained said deed without leaving the agreement. The land was not of the value represented. *Held*, in an action to recover the unpaid purchase price, that plaintiff could show by parol the agreement to pay said deficiency.—*Gillett v. Knowles* (Mich.) 66 N. W. 497.

[b] (Minn.: 1895.)

The answer, in an action for services rendered in removing a building, alleged that plaintiff made a contract with defendant for the purchase of the building and of the land to which it was removed, and that he moved the building under the contract. *Held*, that the fact that the contract was void under the statute of frauds did not authorize the direction of a verdict for plaintiff, since the terms of the contract were admissible to show that defendant never employed plaintiff.—*Mahan v. Close* (Minn.) 65 N. W. 95.

63 Minn. 21.

§ 33. Waiver of defense of statute.

(Neb.: 1896.)

The failure to object, on a trial, to the introduction of evidence of a parol agreement to reconvey real estate, will not amount to a waiver of the right to invoke the statute of frauds as to such agreement, when the statute has been properly pleaded as a defense.—*Thomas v. Thomas* (Neb.) 67 N. W. 182.
48 Neb. 266.

FRAUDULENT CONVEYANCES.

I. WHAT CONSTITUTES, §§ 1-24.

1. In General, §§ 1-9.
2. Change of Possession, §§ 10-12.
3. Consideration, §§ 13-16.
4. Knowledge and Fraudulent Intent of Grantee, §§ 17-22.
5. Confidential Relations, §§ 23, 24.

II. RIGHTS OF CREDITORS IN GENERAL, §§ 25-27.

III. RIGHTS OF PARTIES TO TRANSACTION, § 28.

IV. RIGHTS AND LIABILITIES OF PURCHASER AND THIRD PERSONS, §§ 29-31.

V. WHO MAY ATTACK CONVEYANCE—CONSIDERING PRECEDENT, §§ 32-34.

VI. ACTIONS TO SET ASIDE, §§ 35-38.

VII. PLEADING, §§ 39-41.

VIII. EVIDENCE, §§ 42-52.

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See, also, "Fraud."

Affidavit for arrest of debtor, see "Arrest," § 2. By firm, priorities between firm and private creditors, see "Partnership," § 39.

Duties of administrator as to recovery of property fraudulently conveyed by decedent, see "Executors and Administrators," § 8.

Election of remedies by seller in case of fraudulent disposition of goods, see "Sale," § 73.

Fraudulent disposition of property as ground for attachment, see "Attachment," § 6.

Imprisonment of debtor intending to defraud, see "Constitutional Law," § 60.

Lien of attachment on property fraudulently conveyed, see "Attachment," §§ 28, 29.

Right of assignee to attack conveyance, see "Assignment for Benefit of Creditors," § 30.

— of creditors to avoid conveyance by assignor, see "Assignment for Benefit of Creditors," § 37.

Vested rights of attaching creditor, see "Constitutional Law," § 35.

When property conveyed is subject to garnishment, see "Garnishment," § 11.

I. WHAT CONSTITUTES.

1. IN GENERAL.

§ 1. Transfers and transactions invalid.

[a] (Iowa: 1895.)

In an action against a mother and son to subject land conveyed to them jointly to the payment of a deficiency judgment against the father and mother, there was evidence that the mother held the title as security for an agreement of the son to support herself and husband, created by a transfer to him, by mesne conveyances, through other brothers, of personal property which, after plaintiff's judgment, the parents conveyed to one of their sons pursuant to such agreement; that the first son paid off a chattel mortgage on the personal property; that neither father nor mother contributed to the purchase price of the land. *Held*, that plaintiff was not entitled to relief.—*Hecht v. Eherke* (Iowa) 64 N. W. 650.

[b] (Mich.: 1895.)

That a chattel mortgage, besides securing an actual indebtedness then due, embraces a sum as future advances, without that fact being disclosed on its face, does not alone render it fraudulent and void as to creditors.—*Brace v. Berdan* (Mich.) 62 N. W. 568.

104 Mich. 356.

[c] (Mich.: 1895.)

Where land is conveyed in consideration that the grantee support the grantor for life, a reconveyance by the grantee at the request of the grantor, the grantee having become indebted, a proper allowance being made for the support already furnished, is not fraudulent in law as to the grantee's creditors, though the land is then conveyed to the wife of the first grantee under a similar agreement.—*R. P. Gustin Co. v. Arn* (Mich.) 65 N. W. 112.

[d] (Minn.: 1896.)

The mere fact that the parties to a conveyance do not apprise the public of the sale does not necessarily cast suspicion on the transaction.—*Cain v. Mead* (Minn.) 68 N. W. 840.

[e] (Neb.: 1895.)

A sale of goods, with intent on the part of the vendor, known to the vendee, of defrauding creditors, is void as to such creditors, though the vendor be solvent.—*Snyder v. Dangler* (Neb.) 63 N. W. 20.

44 Neb. 600.

[f] (Neb.: 1896.)

The property of an insolvent, either person or partnership, is not such a trust fund in his hands, in favor of his creditors, as will preclude a sale of it by him in good faith.—*Crites v. Hart* (Neb.) 68 N. W. 362.

§ 2. Preferring creditors.

[a] (Iowa; 1897.)

A debt due a brother of the debtor remained outstanding and unsecured for more than two years before the mortgage in suit was given to secure it. Immediately prior to execution of the mortgage, the mortgagor was threatened with a prosecution for seduction, and believed that all his property would be taken to support the woman and child. The woman brought a civil proceeding to which the mortgagee was not a party, after the execution of the mortgage, and procured a decree giving her title to the mortgaged land for the support of herself and child. *Held* that, in the absence of fraud on the part of the mortgagee, the mortgage was not fraudulent as against her, since an insolvent may lawfully mortgage all his property to secure a portion of his debts, though nothing remains for payment of debts not secured.—Johnson v. Johnson (Iowa) 70 N. W. 598.

[b] (Mich.; 1896.)

A mortgage executed to the brothers of the mortgagor to secure for the mortgagor's son and another a note which was given for a bona fide indebtedness is not fraudulent as to the mortgagor's creditors, though it was executed as a preference to the mortgagees in case of the future insolvency of the mortgagor.—Webber v. Webber (Mich.) 66 N. W. 960.

[c] (Neb.; 1895.)

A co-partnership, though insolvent, has the right to pay a part of its creditors in full to the exclusion of others, so long as such payment is made with an honest purpose.—Richards v. Le Velle (Neb.) 62 N. W. 304.

44 Neb. 38.

[d] (Neb.; 1895.)

Where a stockholder of an insolvent bank, immediately before the bank suspended, obtained assignments to himself of the bank's bills receivable, to secure claims owing to himself and a partnership of which he was a member, leaving almost no assets for payment of other creditors, a verdict that the preference was fraudulent will not be set aside.—Wortendyke v. Salladin, 64 N. W. 215, 45 Neb. 755.

[e] (Neb.; 1896.)

It is not presumed that a preference made by an insolvent debtor is the result of an intention on his part to defraud other creditors.—Dempster Mill Manuf'g Co. v. First Nat. Bank (Neb.) 68 N. W. 477.

[f] (Neb.; 1897.)

An insolvent debtor may lawfully secure a portion of his creditors to the exclusion of the others, if in so doing he act in good faith and without a fraudulent intent.—Smith v. Bowen (Neb.) 70 N. W. 949.

[g] (S. D.; 1895.)

In the absence of fraud, an insolvent debtor may execute a chattel mortgage to secure a just debt, although the collection of other valid claims is thereby defeated.—Jones v. Meyer (S. D.) 63 N. W. 773.

[h] (Wis.; 1896.)

A debtor delivered to plaintiff what was in form an absolute bill of sale of certain property, with the understanding that it was given to secure certain claims; plaintiff to enforce the security, if necessary, and settle between the parties. *Held*, that the instrument was void as an assignment for certain of the debtor's creditors.—Bugbee v. Lombard (Wis.) 68 N. W. 955.

§ 3. Allowing entry of judgment by default.

[a] (Minn.; 1897.)

Because a technically insolvent merchant suffers an action to be commenced against him upon a claim against which he had no defense, by creditors who know him to be technically insolvent, and suffers a judgment by default, which judgment becomes a lien upon real property, it cannot be *held* that he intended to per-

mit the judgment creditors to obtain an unlawful preference.—Bean v. Scheffer (Minn.) 70 N. W. 574.

[b] (Minn.; 1897.)

A debtor had debts equal in value to two-thirds of his property. He was sued by a creditor on a debt against which he had no defense, and judgment was entered by default. When his goods were seized on execution he was sick, and attempted to borrow money to satisfy the execution, but, failing, promptly made an assignment. *Held* insufficient to sustain a finding that, knowing that he was insolvent, and that the action was brought against him to obtain an unlawful preference, he willfully permitted the judgment to be so obtained and docketed against him.—Bean v. Scheffer (Minn.) 70 N. W. 554.

§ 4. Chattel mortgage—Reservation to mortgagor.

(Neb.; 1896.)

A chattel mortgage which covered all the property of an insolvent debtor, executed under an agreement between the parties thereto that the mortgage should not be filed for record; that the mortgagee should take formal possession of the mortgaged property, and hold possession thereof for the benefit and subject to the direction of the mortgagor, until, by sale or lease of the mortgaged property to the advantage of the mortgagor, the debt secured should be paid, and then account to the mortgagor for the balance, is fraudulent as to other creditors of the mortgagor.—Bacon v. P. Brockman Commission Co. (Neb.) 67 N. W. 304.

48 Neb. 365.

§ 5. Conveyance of exempt property or homestead.

[a] (Iowa; 1896.)

Earnings of a husband, being exempt, can be transferred to his wife free from claims of his creditors.—Nash v. Stevens (Iowa) 65 N. W. 825.

[b] (Iowa; 1896.)

In an action by a judgment creditor to set aside a conveyance as fraudulent as made to hinder and delay creditors, where it appears that the land conveyed by the debtor was his homestead, and that a portion of the purchase money received was devoted to the payment of debts, there was nothing indicating fraud, and plaintiff's judgment not being a lien on the land, he has no ground for complaint.—Wheeler & Wilson Manuf'g Co. v. Bjelland (Iowa) 66 N. W. 885.

[c] (Iowa; 1897.)

A debtor can convey his homestead free from liability for his creditors' claims.—Roane v. Hamilton (Iowa) 70 N. W. 181.

[d] (Neb.; 1896.)

A homestead is not susceptible of a fraudulent alienation.—Roberts v. Robinson (Neb.) 68 N. W. 1035.

[e] (N. D.; 1895.)

It was not a fraud on creditors that the debtor surrendered the contract for the purchase of his homestead to the vendor, who thereupon leased the homestead to the debtor's wife for the debtor's benefit, though the debtor thereby intended to defraud his creditors.—Kvello v. Taylor (N. D.) 63 N. W. 889.

5 N. D. 76.

[f] (Wis.; 1896.)

A homestead being exempt, no disposition of it can be *held* fraudulent as to creditors.—Bank of Commerce v. Northwestern Nat. Bank (Wis.) 67 N. W. 423, 93 Wis. 241; Same v. Fowler, *Id.*

§ 6. Intention of grantor to defraud.

[a] (Mich.; 1896.)

Where a husband conveys property to his wife, the moving cause being to place it beyond the reach of his creditors, it will be sub-

jected to the judgments against him.—*Ryan v. Meyer* (Mich.) 66 N. W. 667.

[d] (Neb.: 1896.)

The question of fraudulent intent of a debtor in making a preference, is, under Comp. St. c. 32, § 20, a question of fact.—*Campbell v. Farmers' & Merchants' Bank* (Neb.) 68 N. W. 344.

§ 7. Failure to record instrument.

[a] (Iowa: 1896.)

The fact that a bank failed for two years to record a chattel mortgage, which was, after an assignment by the bank, recorded by a bank official without authority, is not sufficient to render fraudulent, as to creditors of the mortgagor who extended credit to him on the faith that he owned the property free from incumbrances, a bill of sale by the mortgagor of the mortgaged property to the assignee, in payment of his indebtedness, taken by the assignee without knowledge of the mortgage.—*Everingham v. Harris* (Iowa) 68 N. W. 804.

[b] (Mich.: 1896.)

Where a deed conveying certain real estate to grantor's wife was duly executed and delivered, grantor leasing at the time perfectly solvent, and it appeared that grantor, though he collected the rents from the property, accounted for them to his wife, the fact that the deed was inadvertently left unrecorded for a number of years does not tend to show fraudulent intent.—*Michigan Trust Co. v. Adams* (Mich.) 66 N. W. 1094.

§ 8. Withholding instrument from record.

[a] (Iowa: 1895.)

Where a chattel mortgage was executed to plaintiff to protect him as surety on the mortgagor's note, and after plaintiff paid the note the mortgagor executed to him a bill of sale of the property, if the consideration for the bill of sale was the same as that for which the mortgage was given, and the mortgage was held from record to benefit the credit of the mortgagor, it was fraudulent as to creditors of the mortgagor after the execution of the mortgage.—*Snodder v. Kinley* (Iowa) 64 N. W. 770.

[b] (Iowa: 1895.)

Evidence that plaintiff had told another that an unrecorded mortgage executed to him was to protect him from liability for becoming surety on the mortgagor's note, and cautioned the other to say nothing about it, and that the plaintiff told the mortgagor that he would not use the mortgage unless something happened to the note, was sufficient to sustain a finding that the mortgage was withheld from record for the purpose of not injuring the mortgagor's credit.—*Snodder v. Kinley* (Iowa) 64 N. W. 770.

[c] (Iowa: 1897.)

The fact that a mortgage is not recorded for some time after its execution does not render it invalid as against subsequent creditors unless it was withheld by agreement of the parties, for the purpose of giving the mortgagor a fictitious credit.—*In re Bloomfield Woolen Mills* (Iowa) 70 N. W. 115; *Allender v. State Bank of Bloomfield*, Id.

[d] (Mich.: 1895.)

Where a partner conveyed his interest in partnership realty to one who acted in good faith, and paid full value therefor, the creditors of the firm are not entitled to have such conveyance set aside as being in fraud of their interests, though the conveyance was not recorded until many years afterwards.—*Michigan Trust Co. v. Bennett* (Mich.) 64 N. W. 330.

[e] (Mich.: 1897.)

Withholding from record a deed executed by a husband to his wife, for value, without a common purpose to give the grantor a false credit, does not render it fraudulent as to subsequent creditors, whose liens are acquired after the instrument is recorded, though the

grantor represented, at the time he contracted the debt, that he owned the property.—*Campbell v. Remaly* (Mich.) 70 N. W. 432.

[f] (Mich.: 1897.)

Where a husband who was in a business that was somewhat hazardous, and was indebted to some extent, though solvent, executed a voluntary conveyance of real estate to his wife, and the deed was kept in his secretary for 17 months, and was not placed on record until, deducting the value of the property conveyed, he was insolvent, the conveyance will be set aside at suit of his creditors.—*Preston Nat. Bank v. Pierson* (Mich.) 70 N. W. 1013.

[g] (Neb.: 1896.)

A chattel mortgage was fraudulent where it was withheld from record for more than a month pursuant to an agreement so to withhold it unless some change should occur in the mortgagor's business making it necessary to protect the mortgagee, in which event the mortgagor was to notify the mortgagee, who was to then file the mortgage.—*Ackerman v. Ackerman* (Neb.) 69 N. W. 388.

[h] (Wis.: 1896.)

Evidence that one advancing money to an embarrassed debtor took provisional security ample on its face; that afterwards a mortgage was taken, which was kept from record, the debtor continuing business as if the property was clear; and that, on the insolvency of the debtor, all his property not exempt was conveyed to the mortgagee,—is sufficient to sustain a judgment holding the mortgage void as to one extending credit on the faith of the mortgaged property.—*Collins v. Corwith* (Wis.) 69 N. W. 349.

§ 9. Secret trust.

(Iowa: 1897.)

A conveyance actually fraudulent as to existing creditors, and merely colorable, the property being held in secret trust for the grantor, who is permitted to use it as his own, will be set aside at the instance of subsequent creditors.—*Brundage v. Cheneworth* (Iowa) 70 N. W. 211.

2. CHANGE OF POSSESSION.

Possession by chattel mortgagor, see, also, "Chattel Mortgages," §§ 14, 15.

§ 10. Retrospective effect of statute.

(N. D.: 1897.)

Rev. Code, § 5033, providing that every sale of personalty not accompanied by immediate delivery and change of possession shall be presumed void as to creditors or subsequent purchasers, unless those claiming under such sale make it appear otherwise, does not affect sales made before the passage of the act.—*Conrad v. Smith* (N. D.) 70 N. W. 815.

§ 11. Sufficiency of change of possession.

[a] (Iowa: 1895.)

Cattle bought by plaintiff were left in possession of the vendor, who later removed them to a field containing stalks, which he had bought ostensibly for himself, but secretly for plaintiff. *Held*, that there was no such change of possession as that required by Code, § 1923, in the absence of a recorded conveyance, to validate a sale as against creditors of the vendor.—*Harris v. Pence* (Iowa) 61 N. W. 927.
93 Iowa, 481.

[b] (Mich.: 1895.)

An instruction that a sale is prima facie fraudulent unless it was accompanied by an "immediate delivery" (How. Ann. St. § 6190) of the property was not ground for reversal, as inducing the jury to believe that an "instantaneous delivery" was necessary, where it appeared that the debt to the creditor attacking the sale was contracted on the third day after the sale, and while

the seller was still in possession.—*Jansen v. McQueen* (Mich.) 63 N. W. 72.
105 Mich. 199.

[c] (Mich.; 1897.)

An insolvent in the furniture business was served on one day with summons in several actions. The same night defendant, when no one was present, bought his stock, and gave his note, due in 14 months, taking a bill of sale, which he placed on record. The purchaser never had any experience in such business, but was a section foreman, and continued to act as such after the purchase. The daughter and former clerk of the insolvent continued to act as clerk, and the insolvent assisted in putting together furniture purchased in plaintiff's name. *Held*, that the sale was fraudulent as to the creditors.—*McCarvel v. Wood* (Minn.) 70 N. W. 871.

[d] (S. D.; 1896.)

Evidence that from the date of the alleged sale of a store, with its stock of goods, to plaintiff (who did not personally take possession), up to the time the goods were attached by a creditor of the vendor, the same manager and clerks remained in charge; that the vendor's name during this period remained on the window shades and in the newspaper advertisements; and that bills were made out to him, and paid by the manager, without objection,—sufficiently shows that there was no "immediate delivery, followed by an actual and continued change of possession," within Comp. Laws, § 4657, without which the transfer is conclusively presumed to be fraudulent.—*Howard v. Dwight* (S. D.) 66 N. W. 935.

§ 12. Presumption from nonchange.

[a] (Neb.; 1895.)

Where a sale of goods is not followed by a change of possession, the sale is presumed to have been made to defraud creditors, and, in a contest with such creditors, the burden of showing the good faith is on the vendee.—*Snyder v. Dangler* (Neb.) 63 N. W. 20.
44 Neb. 600.

[b] (Neb.; 1895.)

It was error to instruct that a vendee of chattels could not recover in replevin against an officer attaching the goods as the property of the vendor, if he did not obtain possession before the levy, though he had no notice of the vendor's intent to defraud his creditors.—*Powell v. Yezzel*, 64 N. W. 695, 46 Neb. 225.

3. CONSIDERATION.

§ 13. Sufficiency.

[a] (Mich.; 1895.)

Defendant, who owned the stock of goods of a firm composed of himself and brother E.,—the latter having only a working interest,—negotiated a sale of the stock to L., in exchange for a farm; but, the farm being of less value than the stock, it was agreed that E. should become L.'s partner, and a joint note was given by them to defendant for the difference between the price of the farm and the stock. Several years later, the firm of E. & L., becoming embarrassed, transferred the fixtures and accounts to defendant, the latter paying part cash, and turning back to E. & L. their joint note, upon which little had been paid. *Held*, that such transfer could not be assailed by creditors of the firm of E. & L.—*Oliver & Roberts Wire Co. v. Wheeler* (Mich.) 64 N. W. 195.

[b] (Minn.; 1895.)

Where there was no intent to defraud the grantors' creditors, a conveyance of land, made in consideration of past services of the grantee to one of the grantors, and of his promise to support the grantors during their lives,

should not be set aside.—*Wallerill v. Canney* (Minn.) 61 N. W. 818.
62 Minn. 341.

[c] (Neb.; 1896.)

The fact that a firm heavily indebted sells a large portion of its property, its stock in trade, and also its business, and receives in consideration the purchaser's notes merely, does not raise a conclusive presumption that the sale was in fraud of creditors.—*Crites v. Hart* (Neb.) 68 N. W. 362.

[d] (Wis.; 1897.)

Where children pay their father full value for an equity of redemption, amounting to \$300, in land worth \$2,000, the fact that they also agree to support him in consideration of the transfer and a conveyance of the homestead, does not render the transfer of the equity void as to creditors.—*Torrey Cedar Co. v. Eul* (Wis.) 70 N. W. 823.

§ 14. Paying or securing debts.

[a] (Neb.; 1896.)

A guardian may, as against his creditors, execute to the ward, or a trustee for the ward, a note and mortgage evidencing an indebtedness due the ward, though he has already given bond as guardian.—*Plummer v. Green* (Neb.) 68 N. W. 500.

[b] (Neb.; 1897.)

A bill of sale taken in payment of an antecedent debt, if in good faith, and without intention to defraud the other creditors of the vendor, is valid.—*Rachman v. Clapp* (Neb.) 70 N. W. 259.

§ 15. — Property in excess of debt.

[a] (Mich.; 1895.)

Taking a chattel mortgage for an amount in excess of the debt, for the purpose of protecting the debtor's interest from other creditors, is a fraud in law.—*Patrick v. Riggs* (Mich.) 63 N. W. 532, 105 Mich. 616; *Reid v. Same*, *Id.*; *Farwell v. Same*, *Id.*

[b] (Mich.; 1896.)

That a mortgage was given for a greater amount than was due the mortgagee does not conclusively show that it was in fraud of other creditors of the mortgagor.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

[c] (Neb.)

A disproportion between the value of chattels mortgaged and the amount secured does not of itself raise a presumption of fraud.—(1895) *Grand Island Banking Co. v. Costello* (Neb.) 63 N. W. 376, 45 Neb. 119; (1897) *Smith v. Bowen* (Neb.) 70 N. W. 949.

[d] (Neb.; 1895.)

The fact that a chattel mortgage covers property the value of which is largely in excess of the amount of the debt does not raise a conclusive presumption of fraud as to creditors of the mortgagor.—*Kilpatrick-Koch Dry-Goods Co. v. Strauss*, 64 N. W. 223, 45 Neb. 793.

[e] (Wis.; 1896.)

Defendants, owning property worth \$8,700, gave a mortgage thereon for \$7,000 to secure a bona fide, present indebtedness of \$6,200, and a sum, to be immediately advanced, sufficient to make the debt equal to at least the face of the mortgage. *Held*, that the mortgage was not fraudulent as to creditors.—*Bradley Co. v. Paul* (Wis.) 69 N. W. 168.

§ 16. Conveyance by husband to wife.

[a] (Iowa; 1894.)

Evidence that plaintiff furnished the money with which his son and another, who afterwards gave plaintiff a mortgage on the stock in trade, carried on a cigar business, and that the business was conducted in the name of such mortgagor, and that he paid to plaintiff interest on the money so advanced; that plaintiff acted as banker, and that all money passed through his hands; and that, when the mortgage was given, the amount thereby se-

cured was due plaintiff for money advanced,—will sustain findings that the mortgagor had a money interest in the business, that plaintiff was not the owner thereof, and that the mortgage was given to secure a bona fide debt, without intent to defraud creditors.—*Oberholtzer v. Hazen* (Iowa) 61 N. W. 365.

92 Iowa, 602.

[D] (Iowa; 1895.)

R. purchased land in his own name, paying therefor with money furnished by his wife. No agreement was made at the time by which R. was to repay the money so advanced, and, the land being subsequently sold, the proceeds were invested by R. in a firm of which he was a member, but the amount was withdrawn immediately before the firm became insolvent, and was used by R. in the purchase of other land, which he soon after conveyed to his wife. *Held*, that such conveyance was void as to R.'s creditors.—*Peninsular Stove Co. v. Roark* (Iowa) 63 N. W. 326.

[E] (Iowa; 1895.)

A wife invested her money in a partnership in which she was not a member, and her husband subsequently withdrew a sum of money from such firm. *Held* that, in absence of evidence that the husband promised to repay the money to the wife, the relation of debtor and creditor arose between the husband and the firm, and not between the husband and wife, so that a deed by the husband to the wife in consideration of such debt was void as to the husband's creditors.—*Tyler v. Budd* (Iowa) 64 N. W. 679.

[d] (Iowa; 1896.)

An advance of money by a wife to her husband, furnished at different times, without any agreement for repayment, and partly used for the support of the family, is not a valid consideration for the conveyance of real estate.—*Carbiener v. Montgomery* (Iowa) 66 N. W. 900.

[e] (Iowa; 1896.)

Where a husband takes title in himself to land bought with the wife's money, but gives her no note for the amount so used, and makes no promise to repay the same, the relation of creditor and debtor does not arise, so as to validate a subsequent deed of the land by the husband to the wife.—*Iseminger v. Criswell* (Iowa) 67 N. W. 289; *First Nat. Bank v. Same, Id.*; *Romans v. Same, Id.*

[f] (Iowa; 1897.)

A note for \$200, given by a husband to his wife for money loaned by her before their marriage, was renewed by a note for \$500, which was in turn replaced by one for \$1,000, each renewed note being for the principal and interest of the prior note, with credits claimed by the wife on sales of dairy products. The husband subsequently purchased merchandise from plaintiffs, and, while indebted to them, gave a chattel mortgage on the goods to his wife to secure the note for \$1,000, and another note given to her in payment of a loan which she procured by mortgaging a homestead which her father had given her. *Held*, that the mortgage was not fraudulent as to plaintiffs.—*Powder Co. v. McDonnell* (Iowa) 69 N. W. 873.

[g] (Mich.; 1895.)

A conveyance by a husband to his wife in consideration of her assuming the incumbrances on the land, and accounting to the children of the husband for the homestead, will not be set aside as in fraud of creditors, where the value of the land does not exceed the homestead right together with the incumbrances.—*Nash v. Geraghty* (Mich.) 63 N. W. 437.

105 Mich. 382.

[h] (Mich.; 1895.)

A conveyance by husband to wife, appearing to have been made to place the property beyond the reach of creditors, and founded on an indebtedness, if any there was, so much less than the value of the property as to make the consideration grossly inadequate, will be set

aside as in fraud of creditors.—*Case Manuf'g Co. v. Perkins* (Mich.) 64 N. W. 201.

[I] (Neb.; 1895.)

A conveyance of land from a husband directly to his wife is valid, when based on a sufficient consideration.—*Wanser v. Lucas* (Neb.) 62 N. W. 1108.

44 Neb. 759.

[j] (Neb.; 1896.)

A chattel mortgage given by an insolvent husband to his wife in good faith to secure a pre-existing bona fide debt is valid.—*Dayton Spice-Mills Co. v. Sloan* (Neb.) 68 N. W. 1040.

[k] (Neb.; 1896.)

A chattel mortgage to one's wife to secure a pre-existing bona fide debt is not invalid as to creditors because, at the time it was given, the debt was barred by limitations.—*Dayton Spice-Mills Co. v. Sloan* (Neb.) 68 N. W. 1040.

[l] (Wis.; 1894.)

Where one about to become a member of a business partnership conveys all his property, worth several thousand dollars, to his wife, in payment of a loan of \$400, the conveyance is void as against subsequent creditors of the firm.—*Sommermeier v. Sommermeier* (Wis.) 61 N. W. 311, 89 Wis. 66.

4. KNOWLEDGE AND FRAUDULENT INTENT OF GRANTEE.

§ 17. In general.

[a] (Mich.; 1895.)

Where the administrator notifies an intending purchaser of land conveyed by his decedent in fraud of creditors, before the execution of the deed to the purchaser, that he claims the land as having been so conveyed, such purchaser cannot claim the land as a bona fide purchaser.—*Walker v. Cady* (Mich.) 63 N. W. 1005.

[b] (Neb.; 1897.)

A conveyance, by a son to his mother, of property in payment of a pre-existing debt, if made without fraudulent intent known to or participated in by the mother, is valid.—*National Bank of Commerce v. Chapman* (Neb.) 70 N. W. 39.

[c] (Neb.; 1897.)

That a creditor of an insolvent debtor has taken legal steps to obtain security for or payment of his claim is neither fraud nor evidence of fraud, though the effect of his action is to leave other creditors wholly unpaid.—*H. T. Clarke Drug Co. v. Boardman* (Neb.) 70 N. W. 248.

[d] (Wis.; 1897.)

Where a mortgagee makes promises as an inducement to the execution of the mortgage, his mere failure to perform them does not establish a fraudulent intent in making them.—*Kronskop v. Kronskop* (Wis.) 70 N. W. 475.

§ 18. Necessity of proof before avoiding conveyance.

(Mich.; 1895.)

A conveyance by a debtor to his grandson in consideration of the payment of an annuity, whereby his creditors are deprived of means of enforcing their debts, is invalid as to them, irrespective of the bad faith of the grantee, though the latter may be protected to the extent of payments made by him in good faith.—*Walker v. Cady* (Mich.) 63 N. W. 1005.

§ 19. Effect of participation in fraud.

(Iowa; 1896.)

A mortgage given by a debtor to hinder and delay his creditors, to the knowledge of the mortgagee, and taken in part to aid in carrying into effect that purpose, is fraudulent as to creditors.—*Richards v. Schreiber, Conchar & Westphal Co.* (Iowa) 67 N. W. 569.

§ 20. Effect of notice of fraud.

(Mich.; 1896.)

In an action against a garnishee of an insolvent debtor, there was testimony that upon a sale of goods to the garnishee about one-half the purchase price was paid in cash, the balance being credited on the insolvent's indebtedness to the garnishee. *Held*, that an instruction which, though correctly stating the law as to transfer of property by an insolvent to pay a debt, failed to charge that if the transfer was made for a cash consideration, and the garnishee knew or had such notice as would put an ordinarily prudent man on inquiry that the insolvent intended by such transfer to defraud his creditors, plaintiff must recover, was erroneous.—*Gumberg v. Trench* (Mich.) 68 N. W. 236.

§ 21. Conveyance to creditor.

(Iowa; 1896.)

A mortgage of a debtor's entire stock to secure the claim of a creditor who had assumed other bona fide indebtedness of his debtor for the purpose of procuring a loan for the latter is valid, notwithstanding a fraudulent intent on the part of the mortgagor, if the mortgagee had no knowledge of such intent, nor of facts which should have put him on inquiry.—*Roberts v. Press* (Iowa) 66 N. W. 756.

(Mich.; 1896.)

A deed will not be declared fraudulent as to a creditor of the grantor, where it appears that such creditor knew of the deed as soon as it was made, but that the grantee was ignorant of the creditor's claim for two years after the execution of the deed, and that the consideration paid exceeded the value of the property.—*Delavan v. Wright* (Mich.) 67 N. W. 1110.

(Neb.; 1895.)

A preference made to one participating in the grantor's purpose to defraud other creditors is not valid, though given to secure a bona fide debt.—*Landauer v. Mack* (Neb.) 61 N. W. 597, 48 Neb. 430.

(Neb.; 1896.)

Where a purchase of an entire stock of goods, books of account, and fixtures of a merchant was made at a fair price, and with no knowledge that such merchant was at the time indebted to other parties, it should not be declared void, though the purpose of the purchaser was in part to secure payment of a debt due the bank of which he was at the time cashier.—*Goldsmith v. Erickson* (Neb.) 66 N. W. 1029, 48 Neb. 48.

§ 22. — Effect of knowledge of grantor's insolvency or intent.

(Iowa; 1895.)

The fact that a mortgage is executed for a valid consideration will not avail the mortgagee, where it is shown that he accepted it with the intent to defraud creditors.—*Bussard v. Bullitt* (Iowa) 64 N. W. 658.

(Iowa; 1897.)

Though the intention of a debtor in giving to a creditor as security a bill of sale, in which the consideration was recited at several times the amount of his claim, was to deceive and defraud creditors, yet the creditor is not thereby barred from attacking other conveyances of the debtor; he not having known what the recited consideration was, and the debtor having insisted to him that the bill of sale was made in good faith and to secure him.—*O'Brien v. Stambach* (Iowa) 69 N. W. 1133.

(Neb.; 1896.)

A mortgage to secure a pre-existing debt is not void because the mortgagee had notice of the mortgagor's intention to defraud creditors, where he did not participate in the fraud.—*Grosshans v. Gold* (Neb.) 68 N. W. 1031.

(Wis.; 1896.)

A mortgage creditor of an insolvent debtor, with knowledge of facts sufficient to give a prudent man notice of the debtor's insolvency, took an absolute conveyance of all the debtor's property. *Held*, that the creditor was liable, as garnishee, to other creditors, for the value of the property in excess of the indebtedness due him.—*Cartor, Rittenberg & Hainlin Co. v. McDonald* (Wis.) 68 N. W. 655; *Fisk v. Same*, *Id.*

(Wis.; 1896.)

The fact that a creditor accepts a conveyance from a failing debtor, knowing that the debtor is giving him a preference for the purpose of avoiding payment of other creditors, and that the latter will thereby fail to realize their claims, does not invalidate the instrument if it be taken in good faith to secure an honest debt. *David v. Birchard* (1881) 10 N. W. 557, 53 Wis. 492, overruled.—*Bleiler v. Moore*, 69 N. W. 164.

5. CONFIDENTIAL RELATIONS.

Burden of proof as to fraud in conveyance between relatives, see post, § 43.

— as to fraud in conveyance to wife, see post, § 44.

Consideration of transfer between husband and wife, see ante, § 16.

Weight of evidence as to transactions between relatives, see post, § 51.

— as to transactions between husband and wife, see post, § 52.

§ 23. Transactions between relatives.

(Minn.; 1896.)

Where a solvent member of a solvent firm conveyed his farm to his sons, pursuant to an agreement, made many years previously, that if the sons would work the farm, and help to pay a mortgage thereon, they should have the property on payment of the mortgage, the conveyance was not in fraud of partnership creditors.—*Leque v. Stoppel* (Minn.) 66 N. W. 124.

64 Minn. 152.

§ 24. Transactions between husband and wife.

(Iowa; 1895.)

A wife loaned an insolvent husband money from time to time in good faith, with the agreement that she should have realty which he then owned, the loans being in excess of its value. Thereafter, plaintiff recovered judgment against the husband on a debt of which the wife was not aware. *Held* that, though the deed to the wife was not delivered until after the rendition of the judgment, the conveyance, having been made in good faith, would not be set aside.—*Gaar, Scott & Co. v. Klein* (Iowa) 61 N. W. 918.

93 Iowa, 313.

(Iowa; 1897.)

Where a husband receives money from his wife, and agrees at the time to repay it with interest, he may pay the debt, though other creditors are delayed in the collection of their claims.—*Sprague v. Benson* (Iowa) 70 N. W. 731.

(Mich.; 1897.)

A sale by a father of his business to his sons, though in payment of a debt to them, is void as to creditors from whom the father had purchased part of the goods, if, with the knowledge and assent of the sons, he made such purchases on false representations as to his financial condition, or if, with the sons' knowledge, he purchased the goods to secure their debts therewith, and with intention to prevent such creditors securing theirs.—*Hill v. Mallory* (Mich.) 70 N. W. 1016.

II. RIGHTS OF CREDITORS IN GENERAL.

§ 25. In general.

[a] (Iowa; 1896.)

Property conveyed by a debtor in consideration of an agreement for his future support is chargeable with a lien in favor of existing creditors who have no other means of enforcing their claims, to the extent that the value of the property and of its use exceeds the amount of support actually furnished by the grantee in good faith.—*Harris v. Brink* (Iowa) 69 N. W. 684.

[b] (Iowa; 1897.)

Creditors cannot complain of an executed parol agreement to pay another creditor 10 per cent. interest, it not being illegal, though the latter creditor could not enforce it because the statute requires such contract to be in writing.—*Sprague v. Benson* (Iowa) 70 N. W. 731.

[c] (Mich.; 1895.)

A creditor has the right to follow the debtor's interest in real estate into the hands of a fraudulent vendee.—*Michigan Trust Co. v. Chapin* (Mich.) 64 N. W. 334.

[d] (Mich.; 1895.)

K. executed a bill of sale of his stock in trade to B., to conduct the business till he had satisfied the indebtedness of K. to him, and the indebtedness of K. for which B. was liable, when B. should turn the balance of the stock over to K. B.'s administrator gave a bill of sale to W., to whom K. was indebted, in consideration of W.'s paying the debts for which B. was liable. *Held* that, on a finding by the jury that the sale to W. was intended as an absolute sale, and the consideration was a fair one, other creditors of K. had no rights in the property.—*Globe Casket Manufg Co. v. Wolcott* (Mich.) 64 N. W. 10.

[e] (Minn.; 1896.)

The fact that the conveyance of a farm from husband to wife was fraudulent as to creditors did not render a crop subsequently raised by the wife on the farm in good faith for her own benefit subject to the husband's debts.—*Cain v. Mead* (Minn.) 68 N. W. 840.

§ 26. Rights of subsequent creditors.

[a] (Iowa; 1896.)

A conveyance made with intent to hinder, delay, and defraud creditors is invalid as to subsequent as well as to antecedent creditors.—*Carbiener v. Montgomery* (Iowa) 66 N. W. 900.

[b] (Iowa; 1897.)

Creditors whose claims did not exist till after a fraudulent conveyance was made may, on its being set aside by pre-existing creditors, share in the benefits of the litigation.—*O'Brien v. Stambach* (Iowa) 69 N. W. 1133.

[c] (Iowa; 1897.)

A conveyance actually fraudulent as to existing creditors may not for that reason alone be avoided by subsequent creditors.—*Brundage v. Cheneworth* (Iowa) 70 N. W. 211.

§ 27. Priorities between creditors.

[a] (Iowa; 1895.)

Where a judgment debtor has fraudulently transferred his property to hinder and delay creditors, the party who first invokes the aid of the court to set aside such conveyance acquires a prior lien for his judgment.—*Kesterson v. Tate* (Iowa) 63 N. W. 350.

[b] (Iowa; 1896.)

Plaintiff, a judgment creditor, obtained a decree setting aside, as fraudulent, a deed by the debtor, and adjudging that the rents of the property so conveyed (which accrued in 1890 and 1891) were subject to plaintiff's judgment, "if taken by due process of law," but that plaintiff had no lien thereon. Subsequently plaintiff garnished W., in whose possession the rents

were. D. intervened, claiming the fund on the ground that he had recovered judgment against defendant in 1892, and had garnished W. before the notice was served in plaintiff's case; but he failed to show whether he became a creditor of defendant before or after the fraudulent deed was made, or that the same was invalid as to him. *Held*, that plaintiff's claim was entitled to priority over that of D.—*Clark v. Raymond* (Iowa) 66 N. W. 86.

III. RIGHTS OF PARTIES TO TRANSACTION.

§ 28. Mutual rights and liabilities.

[a] (Wis.; 1895.)

An objection that the joinder of claims due to several in a note payable to one was fraudulent as to creditors cannot be raised by a party to the agreement.—*Sommers v. Hamburger*, 64 N. W. 880, 91 Wis. 107.

[b] (Wis.; 1896.)

Transfers and conveyances void as against creditors, because made with intent to hinder, delay, or defraud them, are, nevertheless, valid as between the parties.—*Gross v. Gross* (Wis.) 68 N. W. 469.

[c] (Wis.; 1897.)

Where a mortgage is in fraud of creditors, and the mortgagee obtains title by foreclosure, a complaint by the mortgagor to set aside the deed, and establish a trust for the benefit of creditors, must show that the conveyance was procured by fraud of the mortgagee.—*Krouskop v. Krouskop* (Wis.) 70 N. W. 475.

IV. RIGHTS AND LIABILITIES OF PURCHASER AND THIRD PERSONS.

§ 29. Rights in general.

[a] (Iowa; 1896.)

A purchaser of land against whom suits have been commenced by judgment creditors of his vendor to set aside the sale for fraud, and establish their judgments as liens on the land, may purchase a judgment on which such a suit is based, and will take with it the lien created by the filing of the creditors' suit, which is entitled to priority over the liens of other judgments on which suits were subsequently commenced.—*Boggs v. Douglass* (Iowa) 69 N. W. 689.

[b] (Iowa; 1896.)

In such case, the purchase of the judgment by the defendant, who is the owner of the land, in effect admits the validity of the lien, which renders the trial of the action unnecessary.—*Boggs v. Douglass* (Iowa) 69 N. W. 689.

[c] (N. D.; 1897.)

At suit of one judgment creditor of the grantors, the conveyances were declared fraudulent and void, and the lien of such creditor's judgment was declared superior to any claim of the grantee under the conveyance. Thereafter the grantee purchased such judgments, and had them assigned to a trustee for his benefit. In a subsequent action by other judgment creditors of the grantors, a decree was obtained setting aside the same conveyances, and ordering the land sold under executions issued on the latter judgments. *Held*, that the grantee was entitled to have the liens of the judgments purchased and held by him through his trustee declared senior and superior to the liens of any of the judgments held by the plaintiffs in the second action.—*Daisy Roller Mills v. Ward* (N. D.) 70 N. W. 271.

§ 30. How far conveyance set aside.

[a] (Minn.; 1896.)

Where a conveyance of mortgaged property by a debtor was not actually, but was

merely constructively, in fraud of creditors, and the grantee paid the mortgage, the court would, on setting aside the conveyance at the instance of a creditor, let the conveyance stand to secure the grantee for the amount expended by him in payment of the mortgage. — *Legve v. Stoppel* (Minn.) 66 N. W. 208.

64 Minn. 71.

[1d] (N. D.: 1897.)

Where, at the time of the execution of conveyances of realty, made and received to defraud creditors of the grantor, the grantee, as part of the transaction, agrees with the grantors to pay off certain valid incumbrances on the realty conveyed, and subsequently pays them in pursuance of the agreement, he cannot hold the conveyances, after they have been declared void, as security for the amounts paid. — *Daisy Roller Mills v. Ward* (N. D.) 70 N. W. 271.

[1e] (Wis.: 1894.)

A fraudulent conveyance by a husband to his wife will not be upheld even so far as to satisfy the husband's debt to her. — *Sommermeier v. Sommermeier*, 61 N. W. 311, 89 Wis. 66.

[1d] (Wis.: 1896.)

One who purchases property, in collusion with the seller, with the intent to hinder and delay the creditors of the latter, cannot claim, as against the creditors of the seller, even the amount he paid for the purchase. — *Bank of Commerce v. Northwestern Nat. Bank* (Wis.) 67 N. W. 423, 93 Wis. 241; *Same v. Fowler*, *Id.*

§ 31. Bona fide purchaser.

(Minn.: 1897.)

Where the goods were transferred by the debtor to M., and by him to plaintiff, a charge that plaintiff is not an innocent purchaser unless he purchased without notice of the debtor's intention to defraud his creditors is properly refused, as ignoring the fact that M. might have been an innocent purchaser whose rights plaintiff had acquired. — *Mix v. Ege* (Minn.) 69 N. W. 703.

V. WHO MAY ATTACK CONVEYANCE — CONDITIONS PRECEDENT.

§ 32. Who may attack.

[a] (Iowa: 1897.)

A fraudulent conveyance may be attacked by persons who were creditors before it was made, though their judgments were obtained thereafter. — *O'Brien v. Stambach* (Iowa) 69 N. W. 1133.

[b] (Mich.: 1897.)

The holder of a note does not lose the right to attack the validity of a conveyance of property by an indorser thereon by renewals of the note subsequently to the conveyance, where the liability of the indorser is continued by his indorsement of the renewal notes. — *Preston Nat. Bank v. Pierson* (Mich.) 70 N. W. 1013.

[c] (Neb.: 1895.)

A mortgage without consideration, and in fraud of the rights of creditors, cannot be assailed by one not prejudiced thereby. — *Baldwin v. Burt*, 61 N. W. 601, 43 Neb. 245.

§ 33. Rights of simple contract creditors.

(Wis.: 1895.)

A creditor who has no lien, and who has not reduced his claim to judgment, cannot attack judgments against his debtor as fraudulent and collusive. — *Weber v. Weber* (Wis.) 63 N. W. 757.

90 Wis. 467.

§ 34. Conditions precedent — Obtaining judgment by creditor.

(Wis.: 1895.)

The portion of an order appointing a receiver in a suit by a partner for dissolution of the firm which restrains creditors of the firm from commencing any action against the partners is a nullity, and therefore furnishes no reason why a creditor shall be permitted without first obtaining a judgment to sue to set aside, as fraudulent, judgments against the firm. — *Weber v. Weber* (Wis.) 63 N. W. 757.

90 Wis. 467.

VI. ACTIONS TO SET ASIDE.

See, also, "Creditors' Bill."

How far conveyance set aside, rights of purchasers, see ante, § 30.

Limitation of actions, see "Limitation of Actions," §§ 4, 10.

§ 35. Parties.

(N. D.: 1897.)

To an action by judgment creditors of the grantors to set aside conveyances of realty as fraudulent, no accounting for rents and profits being asked, a receiver of the rents and profits, appointed long after the conveyances were made, in an action to which none of the plaintiffs were parties, is not a necessary defendant. — *Daisy Roller Mills v. Ward* (N. D.) 70 N. W. 271.

§ 36. Province of jury.

[a] (Mich.: 1895.)

It being contended that defendant's conveyance to the garnishee was in fraud of creditors, and that defendant's indebtedness to the garnishee was created by the garnishee furnishing him with a stock of goods, that thereby, and with the assistance of false representations to commercial agencies, he might get a fictitious rating, and thus obtain goods on credit, which he should turn over to the garnishee, the jury should have been allowed to consider all the facts and circumstances connected with their transactions. — *Gumberg v. Treusch* (Mich.) 61 N. W. 872.

103 Mich. 543.

[b] (Neb.: 1896.)

Whether or not a transfer of property is fraudulent as against the creditors of the vendor is a question of fact, determinable solely upon the evidence adduced in each case. — *Goldsmith v. Erickson* (Neb.) 66 N. W. 1029.

48 Neb. 48.

[c] (Neb.: 1897.)

It is a question of fact whether a business carried on by a husband for the wife was carried on in good faith for her benefit or as a means of defrauding his creditors. — *Harris v. Weir-Shugart Co.* (Neb.) 70 N. W. 1118.

§ 37. Instructions.

[a] (Iowa: 1895.)

In an action for wrongful attachment, plaintiff claimed that he bought oil through a firm of which his son was a member, which was stored for him by the firm apart from its oils; that by agreement the firm borrowed and replaced certain of the oil; and that that replaced was seized by defendant as property of the firm in an attachment sued out against it by the company of which the oil was purchased. Defendant denied that plaintiff purchased the oil, and that any oil was set apart for him by the firm, alleging fraud. *Held*, that a charge that, in considering the bona fides of the dealings between plaintiff and the firm, the former's relationship to his son, a member of the firm, "would invite your careful scrutiny," but, if the dealings were honestly conducted, the relationship would not render them the less binding,

was not erroneous, as charging that a presumption of fraud arises from the relationship.—*Mellinger v. Hunt* (Iowa) 62 N. W. 813.

[b] (Mich.: 1895.)

On an issue as to whether a sale by a husband to his wife was in fraud of creditors, the wife, to show that she had property, from which she derived the money claimed to have been loaned to her husband, and in payment of which she claimed the property was transferred to her, gave evidence to show purchases with her money of property, the title to which was taken in the husband, and subsequently conveyed by him to her. In one of the purchases a mistake was made in the deed to the husband, which was corrected by executing to the husband another deed, which deed, however, was not executed until after the conveyance by him to his wife. *Held*, that it was error to refuse to instruct that the conveyance of the land by the husband to the wife, if not fraudulent as to creditors, vested the title in her, though the land was bought with his money, and instead to charge that the transactions in regard to the real estate were to be considered, not to determine the title to the real estate, but only to ascertain the question of fraud.—*Jansen v. McQueen* (Mich.) 63 N. W. 73.

105 Mich. 199.

[c] (Wis.: 1895.)

Where there was evidence, on an issue whether a sale was in fraud of the vendor's creditors, that the purchase was made in good faith, it was error to characterize the sale in the instructions as a "pretended sale."—*Powell v. Yeazel*, 64 N. W. 695, 46 Neb. 225.

§ 38. Judgment or decree.

[a] (Iowa: 1896.)

A creditor who has not pleaded fraud as to a note given to a third person, which, with his own, was secured by a chattel mortgage from the common debtor, cannot claim the benefit of a decree which, as between other parties and the payee of the note, found the note and the mortgage pro tanto fraudulent.—*Enger v. Lofland* (Iowa) 69 N. W. 526.

[b] (Wis.: 1896.)

In an action by a receiver, appointed in proceedings supplemental to execution, against the judgment defendant and his grantee, to set aside a conveyance as fraudulent, the court has no power to render a personal judgment against the defendants.—*Van Blarcom v. Isaac* (Wis.) 66 N. W. 617.

92 Wis. 541.

VII. PLEADING.

§ 39. Matters put in issue.

(Iowa: 1895.)

In replevin by a mortgagee of chattels seized before the making of the mortgage under execution against one of the mortgagors, who, prior to the levy, had conveyed his interest to the other mortgagor, where plaintiff alleged that defendant wrongfully took and held possession under pretense of a levy, and defendant averred that he claimed under the levy, and alleged that the mortgage and the conveyance between the mortgagors were fraudulent, the validity of the levy was in issue, and it was hence error not to receive evidence in regard thereto.—*Chapman v. James* (Iowa) 64 N. W. 795.

§ 40. Complaint.

[a] (Minn.: 1896.)

A complaint set forth the rendition and docketing of a judgment in favor of plaintiff against the defendant debtor, but failed to state the nature of the liability on which it was obtained, or when the liability was incurred. The conveyance attacked as a mere sham, and without a real consideration, was

shown to have been made three years before the entry of the judgment. It was alleged that the judgment debtor still owned the property conveyed, and that, it was held in trust by his co-defendant for him; but it was not averred that the conveyance was made in trust for the grantor, who subsequently became the judgment debtor. *Held*, that it was insufficient under Gen. St. 1894, § 4218, and also under section 4222.—*Anderson v. Lindberg* (Minn.) 67 N. W. 538.

64 Minn. 476.

[b] (Wis.: 1895.)

Under Rev. St. § 2078, making a conveyance to one person when the consideration is paid by another presumptively fraudulent as to the creditors of the person paying the consideration, a complaint alleging that defendant holds the legal title to land purchased and paid for by another, who was at the time of the purchase and conveyance a debtor of plaintiff, states a cause of action.—*Allen v. McKee* (Wis.) 64 N. W. 889, 91 Wis. 226.

§ 41. Amendment.

(Neb.: 1895.)

A petition by a judgment creditor against the debtor, his vendee, and others, alleging that the sale of the debtor's goods was fraudulent as to creditors, and that all the defendants were seeking to secrete and dispose of the proceeds of the sale in hindrance of creditors, could be amended by allegations that defendants conspired to defraud the debtor's creditors, and that the apparent sale was made and the vendee took possession of the goods in furtherance of the conspiracy.—*Monroe v. Reid* (Neb.) 64 N. W. 983, 46 Neb. 316.

VIII. EVIDENCE.

Necessity of proof of fraud before avoiding conveyance, see ante, § 18.

§ 42. Presumption and burden of proof.

[a] (Mich.: 1895.)

In replevin by a chattel mortgagee against an attaching creditor of the mortgagor, the mortgagee is not required to show that his mortgage, on its face purporting to be given only as security for past debts, was not fraudulent, as in reality attempting to secure, in addition, future advances. Grant, J., dissenting.—*Brace v. Berdan* (Mich.) 62 N. W. 568.

104 Mich. 356.

[b] (Minn.: 1895.)

In an action by an assignee for creditors, under Gen. St. 1894, § 4219, to set aside a conveyance by his assignor as in fraud of creditors, the defendant vendee need not show that his vendor was innocent of fraud.—*Leqve v. Smith* (Minn.) 65 N. W. 121.

63 Minn. 24.

[c] (Neb.: 1895.)

Where the vendee or mortgagee of chattels takes immediate possession, and continuously retains possession, in a contest between such vendee or mortgagee and creditors of the vendor or mortgagor, the burden is on the creditors to show both a fraudulent intent on the part of the vendor or mortgagor and participation therein on the part of the vendee or mortgagee.—*Blumer v. Bennett* (Neb.) 63 N. W. 14.

44 Neb. 873.

[d] (Neb.: 1896.)

No presumption arises that a transaction was fraudulent merely because the property transferred was, in effect, all that the vendor owned.—*Goldsmith v. Erickson* (Neb.) 66 N. W. 1029.

48 Neb. 48.

§ 43. — Conveyance between relatives.

[a] (Iowa: 1894.)

The mere fact that transactions between relatives, in which the interests of creditors are

involved, show something out of the usual course of business, does not compel those claiming under such transactions to show that they were bona fide, and based on sufficient consideration.—*Oberholtzer v. Hazen* (Iowa) 61 N. W. 365.

92 Iowa, 602.

[b] (Neb.; 1897.)

When a transfer between relatives is attacked, the burden is on the parties thereto to show good faith.—*National Bank of Commerce v. Chapman* (Neb.) 70 N. W. 39.

[c] (Neb.; 1897.)

An insolvent son may prefer his mother to his other creditors by securing or paying her debt; but, when such preference is called in question by the other creditors, the burden is on the mother to show that such preference was accepted by her in good faith for her protection, and not for the purpose of defrauding any one.—*H. T. Clarke Drug Co. v. Boardman* (Neb.) 70 N. W. 248.

§ 44. — Conveyance to wife.

[a] (Minn.; 1896.)

On an issue between a wife and creditors of the husband as to the bona fides of a conveyance to her by the husband, where the evidence tended to show that it was made in consideration of a pre-existing indebtedness to her, it was proper to refuse to instruct that "a conveyance by an insolvent debtor to his wife, whereby other creditors are prevented from enforcing payment of their claims, is presumptively fraudulent as to such creditors, and the burden is on one claiming through it to prove the contrary."—*Cain v. Mead* (Minn.) 68 N. W. 840.

[b] (Neb.; 1895.)

A conveyance by an insolvent debtor to his wife, whereby other creditors are prevented from enforcing payment of their claims, is presumptively fraudulent as to such creditors, and the burden is on one claiming through it to prove the contrary.—*Glass v. Zutavern* (Neb.) 61 N. W. 579, 43 Neb. 334.

[c] (Neb.; 1897.)

In a contest between a wife and creditors of her husband, in respect to the transfer of property from the husband to the wife, the burden is on her to show good faith.—*Kirchman v. Coreoran* (Neb.) 70 N. W. 916.

§ 45. Admissibility.

[a] (Iowa; 1895.)

Evidence that personal property was assessed to the alleged vendor, and not to the alleged vendee, for many years after the sale, is inadmissible to show fraud in the sale.—*Eherke v. Hecht* (Iowa) 64 N. W. 652.

[b] (Iowa; 1895.)

Where, in an action of attachment against one who recently purchased the entire partnership interest, for rent on a store used in the business, one intervenes claiming the goods under a mortgage from defendant, the latter, as witness for plaintiff, may be asked whether it was a firm or individual debt that he owed intervenor.—*Bussard v. Bullitt* (Iowa) 64 N. W. 658.

[c] (Iowa; 1895.)

In replevin by the mortgagee of chattels seized before the making of the mortgage under execution against one of the mortgagors, who, prior to the levy, had conveyed his interest to the other mortgagor, where defendants alleged that the mortgagors conspired to defraud their creditors, it was proper to permit them to inquire of the mortgagor named as vendee in the bill of sale as to the disposition made by him of his property soon after the conveyance.—*Chapman v. James* (Iowa) 64 N. W. 795.

[d] (Minn.; 1896.)

On an issue between a wife and levying creditors of the husband as to the ownership of a crop grown on a farm alleged to have been fraudulently transferred to the wife by the hus-

band, it was proper to permit the wife to testify that the crop was grown on that part of the land which was the husband's homestead at the time of the conveyance.—*Cain v. Mead* (Minn.) 68 N. W. 810.

[e] (Minn.; 1897.)

In replevin by M. for property attached as belonging to P., the issue being whether it had been transferred to M. to defraud creditors, the record of a prior suit against P., in which part of the same property was attached just after M. took possession, was inadmissible; it appearing that, when the attachment was levied, M. had given his note for the price, and that he did not consult an attorney, his vendor taking the matter off his hands by crediting on such note the value of the goods seized.—*Mix v. Ege* (Minn.) 69 N. W. 703.

[f] (Neb.; 1896.)

A negotiable note and a chattel mortgage, securing the same, when properly identified, are admissible in evidence in an action in which their validity is attacked as against creditors, without a showing that they are based on a sufficient consideration.—*Plummer v. Green* (Neb.) 68 N. W. 500.

§ 46. Question of notice.

(Minn.; 1895.)

In an action by an assignee of an insolvent bank against a third person, the reputation of the bank in the city where it was doing business, as to its financial standing, is competent evidence that defendant dealing with it did not know, or have reasonable cause to believe, that it was insolvent.—*Hahn v. Penney* (Minn.) 62 N. W. 1129.

60 Minn. 487.

§ 47. Evidence as to motive or intent.

[a] (Iowa; 1895.)

Where one intervenes claiming attached goods under a mortgage, the attachment defendant, as a witness for plaintiff, may be asked whether he told the intervenor, when he executed the mortgage, that he had conveyed his homestead to his wife, to show his intent in executing the mortgage.—*Bussard v. Bullitt* (Iowa) 64 N. W. 658.

[b] (Mich.; 1896.)

On the issue as to whether a sale was in fraud of creditors, the vendee may show as a motive for the sale that the vendor was in ill health, and needed a change of climate.—*Vyn v. Keppel* (Mich.) 65 N. W. 966.

[c] (Minn.; 1897.)

On an issue as to whether a transfer to plaintiff through a third person was to defraud creditors, plaintiff could testify as to statements by such person to him that an attachment levied on the property by one of such creditors was void, that he would fight it, and would guaranty that they would get the goods back.—*Mix v. Ege* (Minn.) 69 N. W. 703.

[d] (Minn.; 1897.)

On the issue of fraud in the transfer of property, the claim being that property was sold by the debtor to M., and by M. to plaintiff, the bill of sale from the debtor to M. was admissible.—*Mix v. Ege* (Minn.) 69 N. W. 703.

§ 48. Declarations and admission of parties.

[a] (Iowa; 1895.)

Declarations of a vendor in a bill of sale, made in the absence of the vendee, are admissible in replevin by the latter against an attaching creditor of the vendor, to show a fraudulent intent on the part of the vendor.—*Chapman v. James* (Iowa) 64 N. W. 795.

[b] (Iowa; 1895.)

Declarations by an insolvent, after an alleged fraudulent sale of his property, that he did not have any property, that the property conveyed belonged to his father (the vendee), and that he intended to fight his creditors with

their own money, did not impeach the sale.—*Evans v. Boyle* (Iowa) 61 N. W. 619.

[c] (Iowa; 1895.)

In an action by a creditor to set aside a deed as fraudulent, declarations by the grantor, after the delivery of the deed, as to his fraudulent intent in making it, are not admissible against the grantee where it is not shown that the grantee had notice of such intent.—*Neuffer v. Moehn* (Iowa) 65 N. W. 334; *Moehn v. Neuffer*, *Id.*

[d] (Mich.; 1896.)

Statements of an alleged fraudulent vendor after the sale are inadmissible against the vendee.—*Vyn v. Keppel* (Mich.) 65 N. W. 936.

§ 49. Cross-examination.

[a] (Iowa.)

Where, in an action against a sheriff, for attached property, by a purchaser before levy of the writ, defendant alleges fraud in the sale as a defense, and the original owner, as plaintiff's witness, gives evidence to prove the bona fides of the sale, it is proper to allow a full cross-examination as to the transaction, as bearing on its bona fides.—(1895) *Klotz v. James*, 61 N. W. 648; (1896) *Id.*, 66 N. W. 190.

[b] (Mich.; 1897.)

A wife who has testified, on an issue whether a bill of sale by her husband to her was without consideration and fraudulent, that moneys previously paid by her to her husband were intended as loans, and were the consideration for the sale, may be cross-examined as to the sources from which she received the money to pay for real estate conveyed to her by her husband several years before the alleged loans were made, in order to show the relations of the husband and wife in respect to money matters.—*Jansen v. McQueen* (Mich.) 70 N. W. 552.

[c] (Minn.; 1895.)

It is reversible error, in an action to set aside a transfer as in fraud of creditors, not to permit an extensive cross-examination.—*Nicolay v. Mallery* (Minn.) 64 N. W. 108. 62 Minn. 119.

[d] (Minn.; 1896.)

Great latitude should be allowed in the cross-examination of the immediate parties to an alleged fraudulent transaction, and it is error to refuse to allow any such cross-examination having a reasonable tendency to throw light on the transaction, though the inquiry is as to matters not touched in the direct examination.—*Cohen v. Goldberg* (Minn.) 67 N. W. 1149.

§ 50. Weight and sufficiency.

[a] (Iowa; 1895.)

In an action by trustees of a mortgage which covered all the property of an iron firm, and which permitted the firm to continue to do business, to avoid a sale to defendant, it appeared that the latter had manufactured nail kegs for the company for more than 10 years; that on the day of the company's failure they told defendant, when he demanded payment of money due him, that they could not pay him in money, but would allow him to take his indebtedness out in trade, and, upon his agreeing thereto, sold him articles needed by him in his business, exceeding in value the amount of his claim; that the quantity of goods furnished was not disproportionate to the size of his business; that he had not before made a purchase of this kind from the company, but had made similar purchases from other firms; and that the sale was made while the company was still doing business under authority from plaintiffs. *Held*, that the sale was valid.—*Starker v. McCosh Iron & Steel Co.* (Iowa) 62 N. W. 848.

[b] (Iowa; 1895.)

Where one intervenes claiming attached property under a mortgage, and there is evidence that he knew that the debtor was in fail-

ing circumstances when the mortgage was executed, the fact that the mortgage secures a larger amount than the actual debt will support a finding that the mortgage was executed in fraud of creditors.—*Bussard v. Bullitt* (Iowa) 64 N. W. 658.

[c] (Iowa; 1896.)

In a proceeding to charge defendant garnishee with certain property alleged to belong to codefendants, plaintiff's debtors, it appeared that the garnishee received from the codefendants a mortgage on their stock of goods; that it was kept from record for a year, during which plaintiff sold codefendants goods, believing that their stock was unincumbered; that the garnishee stood in intimate relation to codefendants; and that the mortgage was not recorded until he learned that a claim was about to be prosecuted against them. *Held*, that the question whether there was an agreement not to record the mortgage was for the jury.—*Kohn v. Johnston* (Iowa) 66 N. W. 76.

[d] (Mich.; 1895.)

Where, on exchange of lands by a real-estate agent, a deed is made to the agent, instead of to his principal, and he afterwards conveys to the principal, who pays the consideration, and has the land assessed in her name for taxes, and makes improvements thereon, the evidence is sufficient to sustain the claim of the principal to the land as against a judgment against the agent levied while the land stood in his name, without the knowledge of either the principal or agent.—*Petit v. Hubbell* (Mich.) 63 N. W. 407. 105 Mich. 405.

[e] (Mich.; 1895.)

A partnership was formed by defendant and R. on February 1st, the latter withdrawing therefrom the day after the firm began to do business; and on May 22d defendant gave R.'s wife a chattel mortgage on the stock for \$2,900, to secure a much smaller sum alleged to have been advanced by R. to start the business, but such mortgage was not filed until June 26th. During the several months following the opening of the store, both defendant and R. reported to creditors and to mercantile agencies that the stock on hand was worth over \$5,000, the only indebtedness being \$1,200 to R.; and on June 9th R. made a report to a mercantile agency, in which he failed to mention the mortgage. *Held*, that such mortgage was void as to defendant's creditors.—*Patrick v. Riggs* (Mich.) 63 N. W. 532; *Reid v. Same, Id.*; *Farwell v. Same, Id.* 105 Mich. 616.

[f] (Minn.; 1895.)

The fact that a chattel mortgage was given to secure a larger sum than was actually due was not conclusive evidence of fraud, but merely cast the burden on the mortgagee of explaining that circumstance and showing good faith.—*Heim v. Chapel* (Minn.) 64 N. W. 825. 62 Minn. 338.

[g] (Neb.; 1894.)

In an action to set aside a conveyance by a son to his father as fraudulent, the father need not establish good faith by more than a preponderance of evidence; to establish it beyond "uncertainty" not being necessary.—*McEvony v. Rowland*, 61 N. W. 124, 43 Neb. 97.

[h] (Neb.; 1896.)

The burden of proof on a chattel mortgagee, who has not taken possession of the mortgaged property, to show good faith, is not sustained by evidence that there were notes in existence such as those described in the mortgage, without proof of consideration thereof, or of the bona fides of the debt represented thereby.—*Darnell v. Mack*, 65 N. W. 805, 46 Neb. 740.

[i] (Neb.; 1896.)

The fact that a co-partnership, largely indebted, sells most of its property and its business to one of small means, in consideration of a small amount of cash and the purchaser's promissory notes, is a circumstance tending to

show that the transaction was fraudulent, but not conclusive, nor, alone, sufficient evidence that it was fraudulent. *Nebraska Moline Plow Co. v. Klingman* (Neb.) 66 N. W. 1101.
48 Neb. 204.

[1] (Wis.; 1895.)

Evidence that a debtor exchanged non-exempt property for exempt property of slightly less value, is not, in the absence of evidence that the debtor was insolvent at the time, conclusive that the exchange was in fraud of creditors.—*Kapernick v. Louk* (Wis.) 62 N. W. 1057.
90 Wis. 232.

§ 51. — Transactions between relatives.

[a] (Iowa; 1895.)

Defendant's brother, who was an insolvent, owned certain lots by unrecorded contract of sale, which were later mortgaged and conveyed to defendant, but the conveyances, by inadvertence, were not recorded until a few days prior to the entry of plaintiff's judgment against the insolvent, at which time the insolvent transferred to defendant all his remaining property. Defendant paid indebtedness of the insolvent in excess of the value of the property received by him. Defendant agreed to turn over to plaintiff the property received, together with an additional sum of money, if plaintiff would undertake the payment of the insolvent's obligations. Plaintiff, while extending credit, had information to put it on inquiry as to the solvency of its debtor. *Held*, that an action to set aside the conveyances for fraud was properly dismissed.—*Smith v. Mack* (Iowa) 63 N. W. 181.

[b] (Neb.; 1895.)

In an action by judgment creditors to set aside a conveyance by the debtor to his son, and subject the proceeds of such sale, it appeared that when the land was conveyed to the son the debtor retained control thereof; that it was subsequently conveyed by the son to a third person, the debtor receiving the amount of the consideration paid; that on a foreclosure of the mortgage for the balance of the purchase price the son became purchaser; that on a second sale by the son the debtor received the amount of cash realized; that at the time of the conveyance to the son the debtor was being pressed by creditors, and expected to be sued. *Held*, that a judgment for plaintiffs was justified.—*Steinkraus v. Korth* (Neb.) 62 N. W. 1110.
44 Neb. 777.

[c] (Neb.; 1896.)

The fact that at the time the son conveyed his property to his father for a valid consideration the father reconveyed a part of the same to the son's wife was not conclusive evidence of fraud.—*May v. Hoover* (Neb.) 66 N. W. 1134.

48 Neb. 199.

§ 52. — Transactions between husband and wife.

[a] (Iowa; 1895.)

In an action to set aside a conveyance by a husband to his wife as in fraud of creditors, the wife claimed that it was in satisfaction of a debt of 28 years' standing, and testified that the money loaned her husband was given her by her father-in-law. The evidence showed that nearly all of the money she received from her father-in-law had been expended. The money with which the land in question was purchased was received by the husband from his father's estate. The wife had joined with the husband in several mortgages on the land.

Held, that the evidence was insufficient to show that the relation of debtor and creditor existed between the husband and wife.—*Letz v. Smith* (Iowa) 62 N. W. 745.

[b] (Iowa; 1896.)

In an action to set aside a deed by a husband to a wife as in fraud of creditors, the wife claimed that the land had been originally paid for with her money, and that title had been taken in the husband, and that a trust relation arose, creating in her an equitable interest in the land. It was shown that, prior to the purchase of the land in suit, land belonging to the wife had been turned into money, but such money was not directly traced as the purchase price of the land in suit; and it also appeared that, prior to such purchase, the husband had received money from the sale of his separate lands, had purchased drafts there-with, and had cashed the drafts on the day that the purchase of the land in suit was made. *Held*, that the evidence was insufficient to show an equitable interest in the wife.—*Iseminger v. Criswell* (Iowa) 67 N. W. 289; *First Nat. Bank v. Same, Id.*; *Romans v. Same, Id.*

FREEHOLDERS.

Jurisdiction to assess damages in condemnation proceedings, see "Eminent Domain," § 34.

FREIGHT.

See "Carriers," §§ 28-32.

FRIGHTENING HORSES.

See "Negligence," §§ 6, 7.

FRIVOLOUS APPEAL.

See "Appeal," § 277.

FRIVOLOUS PLEADINGS.

See "Pleading," §§ 28, 36.

FUGITIVE FROM JUSTICE.

See "Extradition."

FURNITURE.

Exemptions, see "Exemptions," § 2.

FUTURE CROPS.

Mortgage of, see "Chattel Mortgages," §§ 8, 13.

FUTURE EARNINGS.

Assignability, see "Assignment," § 5.

G.

GAMBLING CONTRACTS.

See "Gaming," § 3.

GAME LAWS.

Act forbidding consignment by common carrier to commission merchant, class legislation, see "Constitutional Law," § 24.

— deprivation of property without due process of law, see "Constitutional Law," §§ 41, 42.

Recovery on policy for injuries received while violating laws, see "Insurance," § 137.

GAMING.

See, also, "Disorderly House."

Gambling house as public nuisance, see "Nuisance," § 1.

§ 1. Recovering money won.

(Mich.; 1896.)

One who furnishes money to another to bet on the result of an election cannot maintain suit for the winnings.—*Helber v. Schantz* (Mich.) 67 N. W. 913.

§ 2. Action to recover money lost.

(Wis.; 1895.)

In an action under section 4532, Rev. St., providing for the recovery, from stakeholders, of money staked or lost on a wager, by the person so staking it, or by "any other person in his behalf and in his name," where the evidence was conflicting as to what part of the money deposited with the stakeholder belonged to the person in whose behalf plaintiff sued, it was error to direct a verdict for plaintiff for the whole amount.—*Harnden v. Melby* (Wis.) 62 N. W. 535.

90 Wis. 5.

§ 3. Gambling contracts.

[a] (Iowa; 1896.)

Under Code, § 4029, providing that all notes or other contracts, mortgages, etc., when any part of the consideration thereof is money laid, staked, or bet at or upon any game or wager, are absolutely void, a note and chattel mortgage, part of the consideration of which is the price of tickets for a raffle of a piano, are absolutely void.—*Koster v. Seney* (Iowa) 68 N. W. 824.

[b] (Iowa; 1896.)

The illegal character of the transaction is not affected by the fact that the raffle never took place.—*Koster v. Seney* (Iowa) 68 N. W. 824.

[c] (Iowa; 1896.)

The question whether a contract for the purchase of grain through a broker contemplated an actual delivery of the grain, or merely a purchase on margins, and was therefore invalid, is to be determined, not only from the contract, but also from the conduct of the parties themselves.—*Press v. Duncan* (Iowa) 69 N. W. 543.

§ 4. Horse racing—Right to prize.

(Wis.; 1895.)

Plaintiff, through one P., entered horses in races inaugurated by defendant, and advertised to be conducted "under the rules of American Trotting Association," one of which provided that members could withhold premiums if the entry was ineligible, to await the decision of the association. P. was barred from

participating in races held by any member of the association, and, as defendant was a member thereof, and claimed the horses belonged to P., the prizes were withheld, and a decision subsequently rendered against plaintiff by the association. *Held* that, if plaintiff owned the horses, he was entitled to the prizes, and was not bound by any agreement to submit the question to the association, since the advertisement was not notification to him that defendant was a member.—*Moshier v. La Crosse County Agricultural Soc.* (Wis.) 62 N. W. 932.

90 Wis. 37.

GARBAGE.

Public nuisance, see "Nuisance," § 1.

GARNISHMENT.

I. PERSONS AND PROPERTY SUBJECT TO. §§ 1-13.

II. ISSUANCE AND SERVICE OF WRIT. §§ 14-18.

III. PROCEDURE, §§ 19-29.

IV. CLAIMS BY THIRD PERSONS, §§ 30-32.

V. RIGHTS AND LIABILITIES OF GARNISHEE, §§ 33-35.

VI. PAYMENT BY GARNISHEE—RIGHTS AND LIABILITIES AFTER JUDGMENT, §§ 36-39.

See, also, "Attachment"; "Execution"; "Exemptions."

Of exempt earnings, see "Abuse of Process."

Of rents after appointment of receiver, on foreclosure, see "Mortgages," § 48.

Right to jury trial on question of existence of debt, see "Jury," § 24.

Service of process by publication, see "Writs and Notice of Suits," § 4.

Venue, see "Venue in Civil Cases," § 3.

Vested rights of plaintiff, see "Constitutional Law," § 34.

I. PERSONS AND PROPERTY SUBJECT TO.

§ 1. In general.

[a] (Iowa; 1895.)

A treasurer of a school district deposited in a bank a draft and enough cash to make the amount he owed the district, stating he left it for the treasurer of the school district, his successor. The draft was in part the proceeds of stock of a third person, recently sold by him. *Held* that, in an action brought against the treasurer to recover the price for which such stock was sold, plaintiff could not maintain garnishment against the bank for the amount of such deposit.—*Klocow v. Patten* (Iowa) 61 N. W. 926.

93 Iowa, 432.

[b] (Iowa; 1895.)

Money belonging to a principal, deposited by an agent in bank in his name as "agent," cannot be garnished by creditors of the agent.—*Des Moines Cotton Mill Co. v. Cooper* (Iowa) 61 N. W. 1084.

93 Iowa, 654.

[c] (Iowa; 1896.)

The fact that a plaintiff stipulates to dismiss an action on payment by the defendant of a certain sum to other persons does not, in the

absence of fraud, render such money subject to garnishment by his creditors. *Phillips v. Van Horn* (Iowa) 68 N. W. 152.

[1d] (Mich.; 1895.)

Where a county treasurer receives the license fee of a saloon keeper in installments, contrary to law, after the whole amount of the fee is due, and applies the money as license fees, he cannot be garnished as a debtor of the saloon keeper.—*Bay City Brewing Co. v. McDonell* (Mich.) 64 N. W. 12.

[1e] (Wis.; 1895.)

Plaintiff had recovered a judgment against a firm which held a village order. One of the firm presented the order, indorsed by the firm, to a bank, and asked for a loan on it. At the cashier's request, the member indorsed the order, and, while the cashier was counting out the money, an officer served a garnishment summons addressed to the bank on him, and the member who asked for the loan took the order. *Held*, that the bank was not liable as garnishee.

(*Gleason v. South Milwaukee Nat. Bank* (Wis.) 62 N. W. 519, 89 Wis. 531.)

[1f] (Wis.; 1895.)

In garnishment there was evidence warranting a finding that the garnishee, who was indebted to defendant on a contract for iron, had accepted drafts drawn by the latter, and had placed them in the hands of an employé, with directions to hold them till ordered by the garnishee to turn them over to defendant. *Held*, that this was not a delivery of the drafts, and that the debt due from the garnishee remained a contract debt, subject to garnishment.—*Lehigh Coal & Iron Co. v. West Superior Iron & Steel Co.*, 64 N. W. 746, 91 Wis. 221.

[1g] (Wis.; 1896.)

A treasurer of a corporation who has money of the corporation in his hands, which has not been demanded, is subject to garnishment in an action against the corporation, under Rev. St. § 3719, which provides that the garnishee shall stand liable to the amount of the money, belonging to the defendant, in his hands.—*Mayo v. Hansen* (Wis.) 69 N. W. 344.

[1h] (Wis.; 1897.)

A verdict against defendant in a suit for personal injuries does not create a liability which can be garnished.—*Lehmann v. Deuster* (Wis.) 70 N. W. 170.

§ 2. Judgment debtor.

(Neb.; 1895.)

A judgment debtor is liable to the process of garnishment when the two actions are brought in the same court, but not otherwise.—*Scott v. Robman*, 62 N. W. 46, 43 Neb. 618.

§ 3. Mortgagee or vendee of chattels.

(Wis.; 1896.)

A chattel mortgagee or vendee, after the sale and delivery by him of his interest in the property mortgaged or sold, and application of the proceeds in satisfaction of the debt due him from the mortgagor, cannot be held liable as garnishee for the goods of which he took possession under his mortgage or bill of sale, though the mortgage or bill of sale was invalid as in fraud of the creditors of the mortgagor or vendor, instituting the garnishment proceedings. *Spitz v. Tripp* (1893) 56 N. W. 230, 86 Wis. 25, followed.—*Jones v. Keller*, 65 N. W. 732, 92 Wis. 55.

§ 4. Certificates of stock in foreign corporation.

(Minn.; 1895.)

Under Gen. St. 1878, c. 66, § 167 (Gen. St. 1894, § 5309), providing that service of the summons on the garnishee shall bind all "property, money, and effects" in his hands belonging to defendant, certificates of stock in a foreign corporation, while in the hands of a third person within the state, are subject to garnishment.

Puget Sound Nat. Bank v. Mather (Minn.) 62 N. W. 396.

69 Minn. 362.

§ 5. Assets in hands of receiver.

[1a] (Mich.; 1895.)

A receiver is not a "public officer," within the meaning of How. Ann. St. § 8065, providing that "no person shall be a judged a garnishee * * * by reason of any money in his hands as a public officer."—*Cohnen v. Black* (Mich.) 63 N. W. 611.

[1b] (Mich.; 1895.)

Under How. Ann. St. § 8065, providing that, if the garnishee has property of defendant subject to pledge or mortgage, the same shall be delivered to the commissioner, to be disposed of under the direction of the court, and any balance, after paying the incumbrance, be applied to plaintiff's claim, a creditor may, by leave of court, garnish assets in the hands of a receiver appointed at the instance of a chattel mortgagee, where such assets are shown to be in excess of the mortgage debt.—*Cohnen v. Black* (Mich.) 63 N. W. 641.

§ 6. Property in hands of carrier.

(Minn.; 1895.)

Property in the hands of a common carrier in transit to a place outside of the state is not subject to garnishment; though it is within the state at the time of the service of the garnishee summons.—*Stevenson v. Eastern Ry. Co. of Minnesota* (Minn.) 63 N. W. 256.

61 Minn. 101.

§ 7. Property pledged.

(Neb.; 1896.)

Unsecured creditors by garnishment proceedings may compel a secured creditor to account to them for the surplus that remains of property pledged after satisfying the debt to pay which the property was pledged.—*Aetna Ins. Co. of Hartford, Conn. v. Bank of Wilcox* (Neb.) 67 N. W. 449.

48 Neb. 544.

§ 8. Contingent liabilities.

[1a] (Wis.; 1894.)

The claim of an assured against a fire insurance company cannot be garnished before proofs of claim have been filed with the company, and before the time has elapsed within which, by the terms of the policy, the company may, at its option, replace the goods destroyed.—*Dowling v. Lancashire Ins. Co.*, 61 N. W. 76, 89 Wis. 96.

[1b] (Wis.; 1896.)

A policy issued to an employer recited that it was issued on application for "indemnity against claims for compensation for personal injuries," and stipulated that assurer should pay to the employer "all sums for which it shall become liable to its employes." The conditions of the policy prohibited the employer from settling with its employes without the consent of the assurer, who was also to assume charge of actions against the employer; and also provided that the employes should not sue on the agreement after a certain time, unless an action against the employer was then pending. *Held* that, on entry of judgment by the injured employé against the employer, the liability of the assurer for payment of the judgment becomes "due absolutely" (Rev. St. § 2769), so as to render him liable thereon in garnishment proceedings by the employé.—*Hoven v. Employers' Liability Assur. Corp.* (Wis.) 67 N. W. 46, 93 Wis. 201.

§ 9. Debts not due.

(S. D.; 1896.)

A garnishment is ineffectual where it does not appear that anything is due the judgment defendant at the time the garnishment is served.—*Bedford v. Kissick* (S. D.) 67 N. W. 609.

§ 10. Assignment before garnishment.

(Mich.; 1896.)

S. transferred to B. a judgment and other property, by an assignment absolute in form, and apparently accompanied by delivery, though as to S. and his creditors it was probably a mortgage. *Held*, that a garnishment of the judgment debtor by S.'s creditors after the assignment to B. could not reach the judgment or its proceeds, in the absence of fraud in the assignment.—*Blumenthal v. Simons* (Mich.) 67 N. W. 1102.

§ 11. Property fraudulently transferred.

[a] (Mich.; 1895.)

Under 3 How. Ann. St. § 8091, providing that if a person garnished has property of the principal defendant, under a conveyance void as to creditors of defendant, or if he has received and disposed of such property, which is held by such a conveyance, he may be adjudged liable as garnishee, though defendant could not have sued him therefor, the liability of the garnishee depends on the conveyance being in fraud of the general creditors of defendant, and not on fraud being perpetrated on the particular person from whom defendant bought the property.—*Gumberg v. Treusch* (Mich.) 61 N. W. 872.

103 Mich. 543.

[b] (Mich.; 1895.)

Under such statute, the garnishee is liable if the indebtedness of the defendant to him, for which the property was given to him, was not bona fide; and it was not bona fide if it was created by the garnishee furnishing defendant with a stock of goods, and assisting him to get a false commercial rating, that defendant might buy goods on credit, and turn them over to him.—*Gumberg v. Treusch* (Mich.) 61 N. W. 872.

103 Mich. 543.

[c] (Wis.; 1896.)

One who, as authorized agent of the assignee of two mortgages, has, under a power therein, taken possession of the mortgaged chattels, to sell, and apply the proceeds in satisfaction of the debt, and return the surplus, if any, to the mortgagor, but who, immediately on being garnished by a judgment creditor of the mortgagor, voluntarily surrenders the property to the assignee of the mortgages, is not liable as garnishee, though one of the mortgages was executed with intent to defraud the mortgagor's creditors, and the other was valid only for a sum less than the amount for which the chattels were subsequently sold by such assignee, notwithstanding *Saub. & B. Ann. St. § 2768*, providing that, from the time of the service of the summons, the garnishee "stands liable to the plaintiff in the amount of the property, moneys, credits and effects in his possession, or under his control, belonging to the defendant," and that such property, moneys, credits, and effects embrace those "held by a conveyance of title void as to creditors of the defendant."—*Gore v. Sklute* (Wis.) 68 N. W. 396.

§ 12. Effect of foreign judgment against garnishee.

(Iowa; 1896.)

A judgment recovered against a railroad company for wages due an employé is no bar to prior garnishee proceedings against the company in another state.—*Willard v. Sturm* (Iowa) 65 N. W. 847.

§ 13. Question for jury.

(Mich.; 1896.)

In an action against a garnishee of an insolvent debtor, the bookkeeper of the insolvent testified that all the entries of goods sold to the garnishee were in his own handwriting; that he knew of no instance where goods ordered in the morning were not sent out before noon, nor of any instance where a memorandum of goods sent out during the noon hour was

turned in to him. A drayman testified that he had often during the noon hour been employed by the insolvent to haul goods to the garnishee, and that these goods were in the original packages. It also appeared that goods received were not entered on the books until they were unpacked. *Held*, that the question whether goods were delivered to the garnishee, of which no entry was ever made, and which were not paid for, should have been left to the jury.—*Gumberg v. Treusch* (Mich.) 68 N. W. 236.

II. ISSUANCE AND SERVICE OF WRIT.

Notice, see post, § 20.

§ 14. When principal suit is commenced.

(Mich.; 1895.)

A suit is commenced, within the meaning of How. Ann. St. § 8058, so as to authorize the issuance of a writ of garnishment, when the declaration is filed, though defendant has not been served with process.—*McDonald v. Alanson Manuf'g Co.* (Mich.) 64 N. W. 730.

§ 15. Writ sued out by defendant.

(Mich.; 1896.)

Under 3 How. Ann. St. § 8058, providing that, "in all cases" where there remains any sum unpaid on "any" judgment or decree, garnishment may issue on affidavit of the "plaintiff," his agent, etc., the word "plaintiff" refers to the party moving in the garnishment proceedings, and therefore a defendant who has recovered judgment against the plaintiff may sue out a writ of garnishment.—*Esler v. Adsit* (Mich.) 66 N. W. 485.

§ 16. Mistake in garnishee summons.

(Mich.; 1895.)

Though 2 How. Ann. St. § 8058, requires the garnishee to be warned to pay no more money to the principal debtor, a garnishee summons, by clerical mistake, warning the agent of plaintiff, who drew the affidavit, to pay no more money to the principal debtor, was not fatal to the validity of the proceedings.—*Millard v. Lenawee Circuit Judge* (Mich.) 64 N. W. 1046.

§ 17. Jurisdiction of principal defendant.

(Mich.; 1896.)

The failure to obtain jurisdiction of the nonresident principal defendant within the required time does not, where jurisdiction is subsequently acquired, prevent judgment from being taken against the garnishee, the garnishment proceedings not having been dismissed previous to the time jurisdiction was acquired over the principal defendant.—*Coe v. Hinkley* (Mich.) 67 N. W. 915.

§ 18. Issuance to another county.

(Neb.; 1895.)

Under Code Civ. Proc. § 207, authorizing garnishment against any person or corporation "within the county where the action is brought," who has property in his possession belonging to defendant, an order of garnishment cannot issue to any county other than that in which the principal action is pending.—*South Omaha Nat. Bank v. Farmers' & Merchants' Nat. Bank* (Neb.) 63 N. W. 128.

45 Neb. 29.

III. PROCEDURE.

Effect of judgment against garnishee on claim of third person, see post, § 32.

Evidence on claim by third person, see post, § 31.

§ 19. In general.

[a] (Mich.; 1895.)

Where a garnishee appeals from a judgment against him in a justice court, the principal debtor cannot also bring up the garnishee proceedings for review by certiorari.—*Lichtenberg v. Hosmer* (Mich.) 63 N. W. 903.

[b] (Mich.; 1896.)

Where two corporations, under a business name, which they use when acting together, issue a policy of insurance for a certain amount, reciting that half thereof is insured by each, they may be garnished under that name for their liability, and a single judgment rendered against them in that name.—*Ferry v. Cincinnati Underwriters* (Mich.) 69 N. W. 483.

[c] (Minn.; 1895.)

After judgment for plaintiff in the main action, a motion to dismiss ancillary garnishee proceedings because the action was prematurely brought was properly denied.—*Iselin v. Simon* (Minn.) 64 N. W. 143.

62 Minn. 128.

§ 20. Notice.

(Iowa; 1897.)

A notice of suit in a justice court stated that an attachment had been issued, and a railroad company named had been attached as garnishee. *Held* sufficient notice of the garnishment proceedings, under Miller's Code, § 2975, providing that no judgment shall be entered in the garnishment proceedings until the principal defendant shall have had personal notice thereof.—*Ammernan v. Vesburg* (Iowa) 70 N. W. 620.

§ 21. Affidavit.

[a] (Mich.; 1895.)

Under 2 How. Ann. St. § 8058, providing that the affidavit for garnishment shall be filed "at the time of or after the commencement of a suit," an affidavit made upon the same day with, but before, the commencement of the suit, and reciting that the suit was "about to be commenced," is sufficient.—*Millard v. Lenawee Circuit Judge* (Mich.) 64 N. W. 1046.

[b] (Minn.; 1895.)

In an action against two defendants, an affidavit of garnishment stating that the garnishee "is indebted to the said defendants in an amount exceeding the sum of fifty dollars" is sufficient to charge the garnishee for a debt due by him to one defendant only.—*Aultman, Miller & Co. v. Markley* (Minn.) 63 N. W. 1078.

61 Minn. 404.

§ 22. Effect of appearance.

(Minn.; 1895.)

Where the court has jurisdiction of defendant, the voluntary appearance of a garnishee waives, as to him, defects in the affidavit of garnishment.—*Aultman, Miller & Co. v. Markley* (Minn.) 63 N. W. 1078.

61 Minn. 404.

§ 23. Answer of garnishee.

(Wis.; 1895.)

Where it appeared from the garnishee's answer that it held a draft for collection for defendant, and that the moneys, when collected, were to be used "only for account of" defendant, and there was no allegation that defendant transferred his title thereto, there was at least a prima facie indebtedness from the garnishee to defendant.—*John R. Davis Lumber Co. v. First Nat. Bank* (Wis.) 63 N. W. 1018.

90 Wis. 464.

§ 24. Evidence.

[a] (Mich.; 1895.)

There being evidence that the transactions of defendant and the garnishee were collusive, defendant's testimony was admissible against the garnishee, as in a case of conspiracy.—*Gumberg v. Treusch* (Mich.) 61 N. W. 872.

103 Mich. 543.

[b] (Mich.; 1895.)

In garnishment proceedings, plaintiff cannot show that the garnishee had settled with other creditors of defendant, or introduce the record of the judgment between the garnishee and other creditors.—*Gumberg v. Treusch* (Mich.) 61 N. W. 872.

103 Mich. 543.

[c] (Mich.; 1896.)

On an issue whether the garnishee was in possession of the debtor's effects when garnished, it was proper to admit evidence that, on the day after he was garnished, he made a written demand on the debtor for possession of the property, and that the board of directors of the debtor formally acted on the demand, and turned the goods over to him.—*Krementz v. Howard* (Mich.) 67 N. W. 526.

§ 25. Evidence of debt—Effect of judgment.

(Wis.; 1896.)

A judgment in favor of a creditor and against the debtor is conclusive evidence, in a subsequent garnishment suit, of the relationship of debtor and creditor, and of the amount of the debt, in the absence of fraud or collusion, or want of jurisdiction, or error in the entry of the judgment.—*J. & H. Claugens Co. v. Silber* (Wis.) 67 N. W. 1122.

93 Wis. 579.

§ 26. Instructions.

(Mich.; 1896.)

In garnishment proceedings against one to whom goods were conveyed in trust for creditors named, not including plaintiff, plaintiff claimed that the mortgage was fraudulent as to S., one of such creditors, to whom defendant had paid part of the proceeds of the property, and claimed that the garnishee was in possession when garnished. The garnishee claimed that he took possession the day after he was garnished. It appeared that the property was insufficient to pay the creditors, other than S., who were named in the mortgage. *Held*, that it was not error to charge that the only question for the jury was whether the garnishee was in possession when garnished.—*Krementz v. Howard* (Mich.) 67 N. W. 526.

§ 27. Costs.

[a] (Mich.; 1895.)

Under How. Ann. St. § 8073, providing that if judgment shall be rendered against a garnishee, in an action against him, for a greater amount than he would have been chargeable for on his disclosure, it shall carry full costs, a garnishee, after denying any indebtedness on his disclosure, is liable for costs where judgment was rendered against him in such action.—*Jackson v. Leelanaw Circuit Judge* (Mich.) 65 N. W. 230.

[b] (Mich.; 1895.)

2 How. Ann. St. § 8098, providing that, "if the garnishee shall appear and make disclosure, * * * he shall be allowed his costs * * * and counsel fees," must be construed with 2 How. Ann. St. § 8073, providing that on a trial, if "judgment shall be rendered against the garnishee for a greater amount * * * than he would have been chargeable for on his disclosure, it shall carry full costs," and applies only when no issue is framed, and the garnishee is adjudged liable on his answer or is discharged.—*Montgomery and Hooker, JJs., dissenting.*—*Wolcott v. Lenawee Circuit Judge* (Mich.) 65 N. W. 286.

§ 28. Supplemental disclosure or proceedings.

(Iowa; 1896.)

Where, at the time an order is entered in garnishment proceedings, the garnishee has in his hands uncollected securities of the debtor, which he is required to account for when collected, supplemental proceedings may be had in

the matter on his failure to account, and the court may make further orders.—*McDonald v. Creager* (Iowa) 65 N. W. 1021.

§ 29. Action on bond—Burden of proof.

(Minn.; 1896.)

In an action on a bond given to procure the discharge of a garnishee, under Gen. St. 1894, § 3342, the burden is on defendants to identify the indebtedness due, or the property or effects in the hands of the garnishee, which were impounded by the garnishment proceeding.—*Greengard v. Fretz* (Minn.) 65 N. W. 949, 64 Minn. 10.

IV. CLAIMS BY THIRD PERSONS.

Protection of garnishee from other suits, see post, § 35.

§ 30. Demand for trial of issues.

(Mich.; 1896.)

Under 2 How. Ann. St. § 8068, providing that the affidavit for garnishment shall be considered as a declaration, and that the disclosure by the garnishee shall be considered as a plea, and that admissions therein shall be prima facie evidence of the truth of the matter admitted, but that plaintiff or garnishee may, within 10 days after such disclosure, demand a trial of the cause, when construed with 3 How. Ann. St. § 8085, providing for the intervention of other claimants when the answer of the garnishee declares that other persons claimed the fund, a demand for a trial of issues as against a garnishee is not necessary where the disclosure is accepted as true, except as against the claim of a third party who voluntarily intervenes.—*Muncey v. Sun Ins. Office* (Mich.) 67 N. W. 562.

§ 31. Evidence.

(Minn.; 1897.)

The disclosure of the garnishee is competent in favor of a claimant, and against plaintiff, to identify the property to which the claimant asserts a right.—*Bradley v. Thorne* (Minn.) 69 N. W. 909.

§ 32. Effect of judgment against garnishee.

(Mich.; 1896.)

Where an assignee of a claim intervenes in garnishment proceedings by a creditor of his assignor, instituted against the guarantor of the claim assigned, a judgment in favor of the garnishing creditor against the guarantor is binding on the assignee, as a payment in favor of the principal debtor.—*Coe v. Hinkley* (Mich.) 67 N. W. 915.

V. RIGHTS AND LIABILITIES OF GARNISHEE.

Effect of judgment in favor of defendant, see post, § 39.

§ 33. Accounting.

[a] (Iowa; 1896.)

A garnishee, who is required by the order of the court to account for the proceeds of securities in his hands after their collection, is entitled to credit for all proper expenses of collection, and may contract with and pay attorneys in necessary litigation, subject, only, to the restriction that the charges shall be reasonable.—*McDonald v. Creager* (Iowa) 65 N. W. 1021.

[b] (Iowa; 1896.)

A garnishee cannot be required by a court to account for and pay into court more than is necessary to satisfy the plaintiff's claim.—*McDonald v. Creager* (Iowa) 65 N. W. 1021.

4 N.W.DIG.—27

[c] (Iowa; 1896.)

By an order requiring a garnishee to pay into court the surplus from the proceeds of certain securities of the debtor in his hands, after satisfying prior claims therefrom, such garnishee is made responsible for the proceeds of all the securities, whether actually received by him or not.—*McDonald v. Creager* (Iowa) 65 N. W. 1021.

§ 34. Interest.

(Minn.; 1897.)

The rule that a garnishee is not chargeable with interest (as damages for the detention of money) while he is, by attachment, restrained from making payment, applies only where he is a mere stakeholder, ready and willing to pay to whomsoever the court directs, and not where he assumes the attitude of a litigant.—*Ray v. Lewis* (Minn.) 69 N. W. 1100.

§ 35. Protection from other suits.

[a] (Minn.; 1897.)

An answer alleged that defendant had been garnished for the same demand claimed by the plaintiff in an action by a third party against the husband of plaintiff, that she appeared as claimant in the garnishee action, and judgment was entered therein in favor of the defendant, discharging him as garnishee, "from which judgment an appeal has been commenced by the plaintiff [in the garnishee action], as provided by law." *Held*, that the answer did not state a defense.—*Larson v. Shook* (Minn.) 70 N. W. 775.

[b] (N. D.; 1895.)

In an action on an insurance policy by an assignee thereof, it was no ground for abatement that a garnishment proceeding instituted against the company a year before, in another state, in an action against insured, was still pending, when it appeared that at the time the proceeding was commenced the company knew that insured had assigned the policy to plaintiff.—*Purcell v. St. Paul Fire & Marine Ins. Co.* (N. D.) 64 N. W. 943.

5 N. D. 100.

Pendency of action in another state, see "Abatement and Revival," § 7.

VI. PAYMENT BY GARNISHEE—RIGHTS AND LIABILITIES AFTER JUDGMENT.

§ 36. Application of statute.

(Iowa; 1895.)

In a suit by a landlord for the conversion of grain sold by his tenants to defendant upon which he had a lien, it appeared that he had, in a previous action against his tenants, garnished defendant, and that it paid over an amount due for other grain to the sheriff, and took a receipt from him. *Held*, that Code, § 2986, providing that a garnishee may exonerate himself from further responsibility by paying over to the sheriff the amount owing by him, and section 3047, which provides for the discharge of a person indebted to a defendant in execution upon the payment of the amount of the debt to the sheriff, discharged defendant only from its obligations to the debtor, and had no application to a subsequent suit by the plaintiff against it for conversion of other property.—*Kramer v. J. Q. Adams & Co.* (Iowa) 63 N. W. 180.

§ 37. Payment into court.

[a] (Iowa; 1897.)

Plaintiff in garnishment cannot complain of an order directing garnishees to pay into court the money in dispute, the order not being final.—*Stetson v. Northern Inv. Co.* (Iowa) 70 N. W. 595.

[b] (Neb.; 1896.)

Error cannot be predicated by a judgment debtor upon the making of an order upon a garnishee to pay money into court, or the refusal to vacate such order, when such debtor disclaims any interest in the money garnished.—Burnham v. Range (Neb.) 61 N. W. 277.

17 Neb. 175.

§ 38. Liability to defendant after payment.

[a] (Iowa; 1896.)

A judgment against a garnishee provided that it should be satisfied by the garnishee's turning over to the constable all the property in his hands, or under his control, after satisfying the liens of the garnishee. *Held*, that plaintiff had no right to enforce the judgment where nothing remained to turn over after the garnishee's claims were satisfied out of the property.—Brakke v. Hoskins (Iowa) 67 N. W. 235.

[b] (Neb.; 1896.)

Garnishees who, in good faith, pay into court money due from them to an attachment defendant, not exceeding the attachment creditor's claim in such court, are not liable afterwards to pay the same amount at the suit of the attachment debtor, though such payment was made before jurisdiction had been acquired of the attachment debtor.—Scott v. Kirschbaum (Neb.) 66 N. W. 443.

47 Neb. 331.

§ 39. Effect of judgment in favor of defendant.

[a] (Mich.; 1895.)

Sess. Laws 1891, p. 228, § 28, providing that in all cases before a justice where defendant prevails or takes an appeal in the principal suit the court shall make an order releasing moneys garnished, must be read in connection with How. Ann. St. §§ 8037, 8038, 8040, 8041, and a garnishee is not released from plaintiff's claim by a judgment in favor of defendant from which plaintiff has appealed.—Erickson v. Duluth, S. S. & A. Ry. Co. (Mich.) 63 N. W. 420.

105 Mich. 415.

[b] (Mich.; 1895.)

Under How. Ann. St. § 8041, providing that if plaintiff fails to recover judgment against defendant it shall be deemed a discontinuance of all proceedings against a garnishee, when construed in connection with How. Ann. St. §§ 8037, 8038, 8040, providing for proceedings against a garnishee after "final determination" against defendant, a garnishee is not released from plaintiff's claim by a judgment in a justice's court in favor of defendant, from which plaintiff has appealed.—Erickson v. Duluth, S. S. & A. Ry. Co. (Mich.) 63 N. W. 420.

105 Mich. 415.

GAS COMPANIES.

Construction of contract with city, see, also, "Municipal Corporations," § 62.

[a] (Iowa; 1895.)

In an action to restrain defendant from withholding gas from plaintiff, it appeared that defendant bought a gas plant of plaintiff, and agreed, as a part of the consideration, to furnish him with gas "for ordinary purposes," including a gas log and two street lamps, for 20 years; that plaintiff's residence contained 32 rooms, and required the use of much gas, and that the gas log consumed nearly 60 cubic feet per hour, and was lighted a large part of the time in chilly weather; that, during the year previous to the bringing of the action, plaintiff used 300,000 cubic feet of gas, but that that amount was in excess of the amount being used when the contract was made; and that no other consumer of defendant's gas situated similarly to plaintiff used over 64,000 cubic feet per year. *Held*, that plaintiff's use of gas should be lim-

ited to 150,000 cubic feet per annum.—Graves v. Key City Gas Co. (Iowa) 61 N. W. 937.

93 Iowa, 479.

[b] (Mich.; 1895.)

Where an ordinance provides that a gas company shall not charge consumers more than a certain rate, payment by a private consumer of a charge in excess of such rate may be recovered, though no right of action is declared by the ordinance in his favor.—Pinegrove v. Mutual Gas Co. (Mich.) 65 N. W. 6.

[c] (Mich.; 1897.)

A gas company, under a contract to place pipes in a building and furnish gas, has the right to remove its meter from the building on refusal of the owner to pay under such contract the cost of furnishing and laying the pipes, and may maintain replevin for it.—Detroit Gas Co. v. Moreton Truck & Storage Co. (Mich.) 69 N. W. 659.

GENERAL APPEARANCE.

See "Appearance," § 2.

GENERAL ASSIGNMENT.

See "Assignment for Benefit of Creditors."

GENERAL DEMURRER.

See "Pleading," § 23.

GIFTS.

I. INTER VIVOS, §§ 1-3.

II. CAUSA MORTIS, §§ 4-6.

Adverse possession by donee, see "Adverse Possession," § 16.

Antenuptial gifts, see "Husband and Wife," § 23.

Between husband and wife, see "Husband and Wife," § 27.

By county to state institution, see "Counties," § 37.

Capacity to take charitable gifts, see "Charities," § 2.

I. INTER VIVOS.

§ 1. Delivery.

[a] (Iowa; 1895.)

Where plaintiff, who lived with defendant, to whom he was bound, claimed certain chattels kept at their common home as a gift from defendant, and exercised control of the property, which defendant recognized as belonging to plaintiff, the jury may properly find that the gift was delivered.—Olson v. Gifford (Iowa) 65 N. W. 294.

[b] (Mich.; 1896.)

Delivery of a mortgage by a mortgagee to her husband, to be delivered to complainants on her death, followed by due delivery to complainants, is a sufficient delivery of the gift.—Hagerman v. Wigent (Mich.) 65 N. W. 756.

§ 2. Evidence.

[a] (Iowa; 1895.)

On an issue as to the ownership of certain chattels claimed by plaintiff as a gift from defendant, with whom he was living, evidence that when appraisers were called to divide defendant's property between him and his wife defendant pointed out the chattels in question as the property of plaintiff was admissible.—Olson v. Gifford (Iowa) 65 N. W. 294.

[b1] (Mich.: 1895.)

A letter in which deceased promised "to give" claimant a home, and a lump sum of money, is not competent to show that he had made her a present of a like sum 11 years previous.—*Frank v. Morley's Estate* (Mich.) 64 N. W. 577.

§ 3. Parol gift of land.**[a] (Iowa: 1896.)**

A parol gift of land by father to son is not shown by evidence that the father stated after the marriage of his son that he intended to give him the land, but would retain the deed until the son became of age, and that he had given the son the entire management of the land, after having put him in possession, and permitted him to lease the land and receive the rents.—*Wilson v. Wilson* (Iowa) 68 N. W. 910.

[b] (Neb.: 1895.)

A parol gift of land, accompanied by possession and improvements by the donee, will be protected in equity.—*Wylie v. Charlton* (Neb.) 62 N. W. 220, 43 Neb. 840.

II. CAUSA MORTIS.**§ 4. Validity.****(Minn.: 1895.)**

An indorsement and delivery of a note in apprehension of death, "to be paid after my death," gives no title.—*Logenfeil v. Riehrer* (Minn.) 61 N. W. 826.

60 Minn. 49.

§ 5. — Capacity of donor.**(Minn.: 1895.)**

The fact that a donor, at the time of making a gift causa mortis of certificates of deposit, by indorsing the same to the donee, was not competent to make a will, as a result of an operation performed shortly before, did not render the gift invalid, where he had long intended to make the gift, and immediately before going into the operating room had delivered the certificates, unindorsed, to the donee.—*Sass v. McCormack* (Minn.) 64 N. W. 385.

62 Minn. 234.

§ 6. — As against creditors of donor.**(N. D.: 1896.)**

When the personal representative of the donor of a gift causa mortis lays claim to the subject of the gift in the hands of the donee on the ground that it is necessary for the payment of the debts of the donor, he must state facts showing a deficiency of assets of the donor's estate with respect to debts, and his recovery will be limited to the extent of the deficiency.—*Seybold v. Grand Forks Nat. Bank* (N. D.) 67 N. W. 682.

5 N. D. 460.

GOOD FAITH.

Of applicant for insurance, see "Insurance," §§ 32-33.

Of complainant, see "Specific Performance," §§ 7-9.

Of mortgagee, see "Chattel Mortgages," § 23.

Of purchasers, see "Negotiable Instruments," §§ 42-57; "Sale," §§ 89-92; "Vendor and Purchaser," §§ 37-40.

GOODS.

Confusion of, see "Confusion of Goods."

Hiring of, see "Bailment."

Mortgage of, see "Chattel Mortgages."

Pledge of, see "Pledge."

Sale of, see "Frauds, Statute of," §§ 19-23; "Sale."

GOOD WILL.**(Iowa: 1896.)**

An assignment of a lease of a coal mine, with the "good will of the trade," does not carry with it an obligation that the assignor will not again engage in the same business in the vicinity.—*Findlay v. Carson* (Iowa) 66 N. W. 759.

GOVERNMENT.

See "States and State Officers."

Division of governmental powers, see "Constitutional Law," §§ 5-15.

GOVERNOR.

See "States and State Officers."

GRADE CROSSINGS.

See "Railroad Companies," §§ 10-12.

GRAIN ELEVATORS.

See "Warehousemen."

GRAND JURY.

Competency of grand juror as witness, see "Witness," § 5.

Finding new indictment on dismissal, see "Indictment and Information," § 3.

Indorsing minutes of testimony before, see "Criminal Law," § 93.

§ 1. Exemption from duty.**(Iowa: 1896.)**

Code, § 228, exempting persons over 65 years of age from liability to serve as jurors, does not render such persons incompetent, and, unless they claim the exemption, they are liable to serve. *State v. Adams* (1866) 20 Iowa, 486, followed. —*State v. Edgerton*, 69 N. W. 280.

§ 2. Apportionment.**(Iowa: 1896.)**

Under Code, § 236, requiring the county auditor to apportion the number of grand jurors to be selected from each election precinct "as near as practicable in proportion to the number of votes polled therein at the last general election," slight irregularities in the apportionment will not vitiate the panel, it appearing that no precinct had a less number of names apportioned to than it was entitled to.—*State v. Edgerton* (Iowa) 69 N. W. 280.

§ 3. Drawing.**[a] (Iowa: 1896.)**

Act April 26, 1894, which amended Code 1873, c. 10, tit. 3, providing for the selection and drawing of jurors, and repealed all statutes in conflict with its provisions, was, by its express terms, not to take effect till July 1, 1895. *Held*, that grand juries legally organized under chapter 10 as it originally stood for the year 1895 constituted the grand juries for the entire year.—*State v. Graff* (Iowa) 66 N. W. 779.

[b] (Iowa: 1896.)

The fact that Frank McCormick and Walrick D. Broers acted as grand jurors, while "F. W. McCormick" and "W. D. Broers" were the names drawn for the grand jury, and returned by the township officers, is no ground for setting aside the indictment; the presumption being that the officer who served the precept did so by summoning the persons named therein,

and that they were known by the initials so used.—*State v. Van Anken* (Iowa) 68 N. W. 454.

§ 4. Charge by court.

[a] (Iowa; 1896.)

An indictment will be set aside on proof that it was found under express directions of the court that such indictment should be returned against defendant.—*State v. Will* (Iowa) 65 N. W. 1010.

[b] (Iowa; 1896.)

It is error for the court, when the grand jury asks to be discharged, in directing them to return and investigate violations of the temperance law, to state that he feels sure evidence can be obtained warranting them in returning indictments for such violations, and that he does not believe that they, as citizens, can justify themselves in going to their homes without making an attempt to bring the guilty parties to justice.—*State v. Will* (Iowa) 65 N. W. 1010.

[c] (Iowa; 1896.)

That a portion only of the grand jury were, at their request, advised by the court as to the law applicable to a case upon which the jury was then deliberating, will not vitiate the indictment.—*State v. Edgerton* (Iowa) 69 N. W. 280.

§ 5. Special venire.

(Minn.; 1895.)

Under Gen. St. 1894, § 4850, providing that the judge "may direct grand and petit jurors to be drawn and summoned for any adjourned or special term," the court may discharge the grand jury impaneled at a regular general term, adjourn the term to a future day, and order a new venire of grand jurors to be drawn and summoned for such adjourned term.—*State v. Peterson* (Minn.) 63 N. W. 171.

61 Minn. 73.

GRAND LARCENY.

See "Larceny."

GRANT.

See "Boundaries"; "Dedication"; "Deed"; "Easements"; "Public Lands."

GRAVEL ROAD.

See "Highways."

GUARANTY.

Assignability, see "Assignment," § 2.

Contract by married woman, see "Husband and Wife," § 9.

Fund of mutual benefit company, see "Insurance," § 159.

Insurance, see "Insurance," § 13.

Of note, see "Negotiable Instruments," § 58.

§ 1. What constitutes.

(Minn.; 1896.)

The general manager and the general freight agent of a railroad company requested an owner of stock to ship the same to a certain party at a certain town, agreeing that if he did so the company would guaranty the payment to him of the price of the stock. *Held*, that the promise was a guaranty of the debt of the consignee, and not an original undertaking on the part of the railroad company.—*Weikle v. Min-*

neapolis, St. P. & S. S. M. Ry. Co. (Minn.) 66 N. W. 963.

64 Minn. 296.

§ 2. Construction and effect.

[a] (Neb.; 1897.)

L. sold stock to D., guarantying that it could be resold within a year for \$2,000, and agreeing that if it were not so resold he would make good any loss on a subsequent sale; D. agreeing to use due diligence to secure a larger price. *Held*, that the contract contemplated a sale for cash, and therefore D. was not required to try to exchange it for other property.—*Lobeck v. Duke* (Neb.) 70 N. W. 36.

[b] (Neb.; 1897.)

Whether the efforts made by D. to sell the stock showed due diligence was a question for the jury.—*Lobeck v. Duke* (Neb.) 70 N. W. 36.

§ 3. Fraud.

(Minn.; 1896.)

An answer, in an action on a guaranty of payment of rent, alleging that plaintiff presented the lease to defendant in a folded form, and informed him that he had not signed his name previously as witness in the proper place, designating at the time the place where the name should be signed as a witness to the lease; that defendant, relying on the false representation, and believing he was signing as a witness merely, signed the guaranty of payment of the rent indorsed on the back of the lease; and that plaintiff made the false representations to induce defendant to sign the guaranty.—sufficiently showed fraud and deceit on the part of plaintiff.—*Egan v. Jordan* (Minn.) 68 N. W. 103.

§ 4. Consideration.

[a] (Minn.; 1895.)

Extension of time of payment of a past-due note is a sufficient consideration for a promise by a third party to pay the note.—*Peterson v. Russell* (Minn.) 64 N. W. 555.

62 Minn. 220.

[b] (Minn.; 1896.)

The consideration of a note is sufficient consideration for a contract of guaranty by a third party indorsed thereon, and delivered with it.—*D. M. Osborne & Co. v. Gullikson* (Minn.) 66 N. W. 965.

64 Minn. 218.

[c] (Neb.; 1896.)

It is a sufficient consideration for a guaranty of performance of a contract that the party for whose protection the guaranty was executed has extended credit to the principal on the faith of the guaranty.—*Lininger & Metcalf Co. v. Wheat* (Neb.) 68 N. W. 941.

[d] (S. D.; 1894.)

The recital in a written guaranty that it was made "for value received" is prima facie evidence of a consideration for the guaranty.—*Austin, Tomlinson & Webster Manuf'g Co. v. Heiser* (S. D.) 61 N. W. 445.

6 S. D. 429.

§ 5. Notice of acceptance.

[a] (Minn.; 1895.)

Where a written guaranty is delivered, not as an offer, but as an acceptance of a proposition, no further notice to the guarantor of acceptance by the grantee is necessary.—*Lehigh Coal & Iron Co. v. Scallen* (Minn.) 63 N. W. 245.

61 Minn. 63.

[b] (Neb.; 1896.)

A guarantor, as a condition precedent to his liability, is not entitled to notice of the acceptance of the following guaranty: "The undersigned does hereby guaranty the faithful and full performance of the party of the second part to the contract of all the agreements and engagements therein entered into by the party of the second part."—*Lininger & Metcalf Co. v. Wheat* (Neb.) 68 N. W. 941.

§ 6. Signature in blank by guarantor—Filling in.

(Minn.: 1895.)

One who indorsed a note in the hands of the payee in blank, for the purpose of assuming liability as guarantor, thereby authorized the payee to write over the signature the contract of guaranty.—*Peterson v. Russell* (Minn.) 64 N. W. 555.

62 Minn. 220.

§ 7. Scope.

[a] (Iowa: 1895.)

Plaintiff bought a draft drawn by A. on B. for the price of a car load of oranges sold by A. to B., on receiving defendant's guaranty in the words, "Will guaranty B.'s draft for car of oranges from A.," and took the bill of lading, which was made out in A.'s name, and attached to the draft. There was no actual or constructive delivery of the oranges to B., and he did not accept the draft. *Held*, that defendant's liability on the guaranty depended on B.'s liability on the draft, and, no liability having arisen against B., defendant was not liable.—*Merchants' Nat. Bank v. Citizens' State Bank* (Iowa) 61 N. W. 1065.

93 Iowa, 650.

[b] (Iowa: 1896.)

Under a guaranty that a principal will take and pay for certain goods as needed from week to week, and take and pay for all before a certain date, delivery of the goods before that date is essential to the liability of the guarantor.—*Springer Lithographing Co. v. Graves* (Iowa) 66 N. W. 66.

[c] (Mich.: 1896.)

A contract of guaranty guaranteed the payment of all moneys collected by one V. for account of the guarantees, and of all moneys which they might advance to V., and all indebtedness due or which might become due the guarantees in excess of the amount due V., under any agreement between the guarantees and V. *Held*, that the guaranty applied to all future modifications of the employment contract between the guarantee and V., and therefore a change in the contract was immaterial.—*John A. Tolman Co. v. Griffin* (Mich.) 69 N. W. 649.

[d] (Mich.: 1896.)

Under such a guaranty, the guarantors are not liable for indebtedness between V. and the guarantees, arising outside of the employment.—*John A. Tolman Co. v. Griffin* (Mich.) 69 N. W. 649.

[e] (Mich.: 1896.)

A provision in a guaranty contract that the account between the guarantee and the employer, kept by the guarantee, payment of which was guaranteed, should be conclusive on the guarantors, does not preclude them from attacking the account as including items relating to business not covered by the guaranty.—*John A. Tolman Co. v. Griffin* (Mich.) 69 N. W. 649.

[f] (Minn.: 1895.)

Whether it was reasonable for the grantee to extend credit to the amount of \$1,200 on a guaranty that "I hereby agree to become responsible for any amount of credit you may give him" is a question for a jury.—*Lehigh Coal & Iron Co. v. Scallen* (Minn.) 63 N. W. 245.

61 Minn. 63.

[g] (Minn.: 1896.)

A letter of credit in part as follows: "I request that should J. order books from you at any time within two months from date of this letter of credit, that you ship the same to his order; and I hereby obligate myself to see that they are paid for within 30 days after the books arrive at destination, provided J. should fail to pay, and the amount of the bill does not exceed \$100,"—did not authorize the addressee to give credit to J. in an unlimited amount within the designated period of time, and then compel the writer to respond to the extent of \$100

for any delinquency on the part of J., without regard to the amount of credit which may have been given him, or to the amount of his payments.—*Historical Pub. Co. v. La Vague* (Minn.) 66 N. W. 1150.

64 Minn. 282.

[h] (Neb.: 1897.)

Where defendant guaranteed the faithful performance by a third party of agreements entered into by such third party with plaintiff, and such third party, by his contract of employment, agreed to guaranty to plaintiff all notes taken by him on sales of its goods, defendant is not liable on notes not taken on sales made by such third party for plaintiff, but received by him in other business transactions, and turned over to plaintiff in adjustment of his accounts with him.—*Lininger & Metcalf Co. v. Webb* (Neb.) 70 N. W. 519.

[i] (Wis.: 1896.)

A guaranty, after providing that "we and each" of the guarantors agree to pay, or cause to be paid, "all of the liabilities" of a corporation, provided that the guarantors were to pay any sum accruing thereunder in the proportion which the amounts of stock then held by each of them bore to the whole amount of the capital stock. *Held*, that they were jointly and severally liable for all the corporate liabilities, and not merely severally liable in the proportion which the amount of stock held by each bore to the whole amount of capital stock.—*Wisconsin Marine & Fire Ins. Co. Bank v. Wilkin* (Wis.) 69 N. W. 354.

§ 8. Continuing guaranty.

[a] (Iowa: 1896.)

Defendant executed a guaranty authorizing W., who owed plaintiff \$13,429.45, to use his name "as security on all loans you [plaintiff] may make, up to and including \$6,000." At the same time plaintiff signed an agreement, which referred to the guaranty and the amount of W.'s indebtedness, which was secured by mortgage, and provided that W. shall have the "same credit at your [plaintiff's] bank, and may have (as previously), should he so desire, one to three years in which to pay" the indebtedness, and that, on payment by the debtor of \$7,500 of the indebtedness, defendant's liability should cease. Defendant also executed with W. a note for \$6,000, the balance of the indebtedness over another note executed by W. *Held*, that the guaranty was not a continuing one, but for \$6,000 of the present indebtedness, and the guarantor, therefore, on payment of the \$6,000 note, was released from further liability.—*Campbell Banking Co. v. Worman* (Iowa) 68 N. W. 912.

[b] (Minn.: 1895.)

Though a continuing guaranty is unlimited as to duration and the amount for which the guarantor shall be liable, such time and amount must be reasonable, under the circumstances of the particular case.—*Lehigh Coal & Iron Co. v. Scallen* (Minn.) 63 N. W. 245.

61 Minn. 63.

§ 9. Conditional guaranty.

(Minn.: 1895.)

Where, before a note secured by chattel mortgage was delivered, defendant, for the purpose of giving it credit, indorsed on it, "For value received, I hereby guaranty the payment of the within note upon assignment to me of the mortgage accompanying the same," an assignment of the mortgage to defendant was not a condition precedent to the guaranty's becoming operative.—*Maxwell v. Capehart* (Minn.) 64 N. W. 927.

62 Minn. 377.

§ 10. Modification of liability.

(N. D.: 1895.)

Where a contract of guaranty provided that it could be avoided only in certain ways,

the guarantors could not insist on a modification of their liability in their favor on excluded grounds.—*William Deering & Co. v. Russell* (N. D.) 65 N. W. 691.
5 N. D. 319.

§ 11. Release and discharge of guarantor.

[a] (Iowa; 1896.)

At the time chattel mortgage notes were transferred by defendants to plaintiff, with guaranty of payment, the maker was insolvent. Defendants represented that the maker would pay the notes, and that the security was sufficient, and the notes were at the time of the transfer placed with a bank for collection. One of the notes was past due, but nearly paid, the second due in one month, and the third in five months. Two weeks after the third note was due the mortgage was placed in the sheriff's hands for collection, but the property could not be found, and four months afterwards an action to foreclose the mortgage and to recover a deficiency judgment against defendants was commenced, and the property sold six months afterwards. It was not shown that the property would have brought more if sold sooner. *Held*, that a finding that plaintiff had exercised due diligence in the collection of the notes, so as to render defendants liable on their guaranty, would not be disturbed.—*Davey v. Waughtal* (Iowa) 68 N. W. 904.

[b] (Mich.; 1895.)

Where the defense to an action on a guaranty of a note was that defendant made the guaranty only upon the representations of plaintiff's agent that the company which said agent organized, and which made the note, and of which defendant was president, would make certain profits, and that no profits were made, and it appeared that, before defendant guaranteed the note, plaintiff wrote defendant that it could not guaranty that the profits of the company would equal its agent's estimates, and that stockholders must take their own risks, a verdict was properly directed for plaintiff.—*Western Electric Co. v. Hart* (Mich.) 61 N. W. 867.
103 Mich. 477.

[c] (Mich.; 1895.)

Where one who guaranteed a note, relying upon false representations, repeatedly asked for extensions of time within which to pay the note, after learning of the falsity of such representations, he cannot set up their falsity in avoidance of his guaranty.—*Western Electric Co. v. Hart* (Mich.) 61 N. W. 867.
103 Mich. 447.

[d] (Minn.; 1895.)

Where, before a note secured by chattel mortgage was delivered, defendant, for the purpose of giving it credit, indorsed thereon, "For value received, I hereby guaranty the payment of the within note upon assignment to me of the mortgage accompanying the same," and after maturity the payee, after tendering defendant an assignment of the mortgage and demanding payment of the note, which was refused, foreclosed the mortgage and applied the proceeds towards payment of the note, defendant was not thereby released.—*Maxwell v. Capehart* (Minn.) 64 N. W. 927.
62 Minn. 377.

[e] (Neb.; 1895.)

Where a building contract provides for payment as the work progresses, on the certificate of the architect as to the amount due, payment without such certificates discharges the guarantor of the contractor to the amount thus paid.—*O'Rourke v. Burke* (Neb.) 63 N. W. 17.
44 Neb. 821.

[f] (Neb.; 1895.)

The fact that, by agreement between the seller and purchaser made after the guaranty of payment of the price of the goods, the seller substituted in lieu of a certain brand of goods another brand, of the same quality, kind, and price, did not constitute such a change in the

contract as to release the guarantor.—*Quinn v. Moss* (Neb.) 63 N. W. 931.
45 Neb. 614.

[g] (Neb.; 1896.)

A delay of 55 days in notifying a guarantor of his principal's default does not discharge the guarantor, in the absence of a showing that in that time there was a change in the financial condition of the principal.—*Liminger & Metcalf Co. v. Wheat* (Neb.) 65 N. W. 941.

[h] (N. D.; 1895.)

The facts that commissions of the agent for handling goods for his principal were to be applied to reduce a prior indebtedness to the principal, and that the guarantors of performance of the contract of agency by the agent were not informed of that fact, did not release the guarantors.—*William Deering & Co. v. Russell* (N. D.) 65 N. W. 691.
5 N. D. 319.

§ 12. — Extension of time of payment.

[a] (Iowa; 1896.)

An extension of an indebtedness granted the debtor for a valuable consideration releases a guarantor thereof, unless it is affirmatively shown to have been made with his consent.—*Springer Lithographing Co. v. Graves* (Iowa) 66 N. W. 66.

[b] (Iowa; 1896.)

The writing of letters by the guarantor of an account, after its maturity, to the creditor, stating that he should expect the creditor to give the debtor "time and opportunity to pay"; asking that the debtor be given a "reasonable chance," but urging that he be pressed for payment,—do not amount to a consent to the taking of a note from the debtor, some months afterwards, extending the time of payment six months.—*Springer Lithographing Co. v. Graves* (Iowa) 66 N. W. 66.

§ 13. — Failure to pursue principal.

[a] (Minn.; 1895.)

Mere neglect of the holder of a note to pursue the maker does not discharge a guarantor of payment.—*Peterson v. Russell* (Minn.) 64 N. W. 555.
62 Minn. 220.

[b] (Minn.; 1896.)

The mere neglect of the holder of a note to pursue a remedy against the maker does not discharge a guarantor of the payment of the note. *Hungerford v. O'Brien* (1887) 34 N. W. 161, 37 Minn. 306, followed.—*D. M. Osborne & Co. v. Gullikson*, 66 N. W. 965, 64 Minn. 218.

[c] (Neb.; 1895.)

One who unconditionally guaranteed the payment of a note before maturity thereof was absolutely liable, on default of the maker, though the holder neglected to sue the maker until after the maker became insolvent.—*Flenham v. Steward* (Neb.) 63 N. W. 924.
45 Neb. 640.

§ 14. Conditions precedent to enforcing.

(N. D.; 1895.)

Where an agent turned over to his principal notes and accounts as collateral to his indebtedness under the contract of agency, the principal was not obliged to exhaust the collateral before proceeding against the guarantors of the agent, nor to credit the guarantors with its value.—*William Deering & Co. v. Russell* (N. D.) 65 N. W. 691.
5 N. D. 319.

§ 15. Action on guaranty.

(Minn.; 1897.)

A bond, in which the maker agrees to guaranty the obligee therein named against certain liability, is not an agreement for the benefit of the third party in whose favor such liability was incurred; and the latter cannot sue thereon.—*Walsh v. Featherstone* (Minn.) 69 N. W. 811.

§ 16. — Evidence.

[a] (Minn.; 1896.)

Where the defense to an action on a guaranty of payment of rent was that defendant signed the guaranty through plaintiff's fraud, supposing that he was merely witnessing the lease, there was no error in permitting defendant to show that he had no interest in the lease, or in the business carried on at the leased premises.—Egan v. Gordan (Minn.) 68 N. W. 103.

[b] (Minn.; 1896.)

In a suit against one who has transferred, and guaranteed collection of, a note, the maker of which has removed from the state in which it was made, the plaintiff need only prove the removal. If the maker has property in such state subject to attachment, the burden is on defendant to show that fact.—Fall v. Youmans (Minn.) 69 N. W. 697.

[c] (Neb.; 1895.)

In an action on a writing by which defendant, in consideration of plaintiff furnishing a certain person merchandise on credit to a certain amount, thereby guaranteed "due payment thereof," parol evidence is inadmissible to show an agreed limitation, in advance, of the duration of the guaranty.—Maxwell v. Burr (Neb.) 62 N. W. 236.

44 Neb. 31.

GUARDIAN AD LITEM.

See "Infancy," § 6.

GUARDIAN AND WARD.

I. APPOINTMENT AND REMOVAL, §§ 1, 2.

II. RIGHTS AND POWERS, §§ 3-5.

III. DUTIES AND LIABILITIES, § 6.

IV. SETTLEMENT AND ACCOUNTING, §§ 7-11.

V. SALE OF WARD'S REALTY, §§ 12-15.

VI. BONDS AND ACTIONS THEREON, §§ 16, 17.

See, also, "Infancy"; "Parent and Child."

Abatement of action on attainment of majority, see "Abatement and Revival," § 2.

Jurisdiction of probate court over, see "Courts," § 20.

Setting aside fraudulent purchase by guardian, see "Equity," § 34.

I. APPOINTMENT AND REMOVAL.

§ 1. Appointment.

(Wis.; 1897.)

Sanb. & B. Ann. St. § 4587b, provides that a county or municipal judge shall remove a child from the custody of its parent, guardian, etc., on proof that the moral or physical welfare of the child is endangered, and provide a home for such child; that the parents, etc., shall not remove the child from such place without the judge's consent; and that it is a penal offense to in any way interfere with such child. *Held*, that proceedings under such statute, and orders of such judge taking a child from its parents and giving it into the care of a certain person, are no bar to the appointment by the circuit court of a different person as guardian, on his application, and the awarding of the care and custody of the child to such guardian.—In re Klein (Wis.) 70 N. W. 64.

§ 2. Removal.

(Neb.; 1896.)

Evidence of a failure to properly protect the ward's property rights is sufficient proof of

"unsuitability," within Comp. St. c. 34, § 28, relating to the removal of guardians,—corruption or malfeasance not being necessary to authorize a removal.—Crooker v. Smith (Neb.) 66 N. W. 19.

47 Neb. 102.

II. RIGHTS AND POWERS.

Power to sell ward's realty, see post, §§ 12-15.

§ 3. Right to sue.

[a] (Minn.; 1896.)

A guardian may sue in his own name on a note payable to himself, although the consideration paid for it was funds of his ward, and the note was taken by him for the benefit of the ward.—McLean v. Dean (Minn.) 69 N. W. 140.

[b] (Wis.; 1896.)

The objection that a minor cannot sue in his own name by his general guardian is waived if not taken by demurrer or answer. Rev. St. § 2649, subd. 2; Id. § 2654.—Webber v. Ward (Wis.) 69 N. W. 349.

§ 4. Custody and control of person.

(Mich.; 1896.)

Where a mother with a minor son and daughter, after being denied the custody of her daughter in one county, because she was unfit to rear her, went to reside in another county, and there procured the appointment of a resident of the town of her own residence as guardian of both children, the guardian was properly denied the custody of the daughter, where it did not satisfactorily appear that his petition was made in good faith, to secure exclusive care of her, and it did appear that he left the boy in possession of his mother.—In re Clancy (Mich.) 66 N. W. 341.

§ 5. Disposition of property.

[a] (Iowa; 1895.)

In an action to recover the proceeds of a note given to plaintiff's guardian during her minority, and disposed of by him to defendant, an answer which fails to allege that such disposition was made by direction of the probate court, as provided by Code, § 2250, is properly stricken out.—Slusher v. Hammond (Iowa) 63 N. W. 185.

[b] (Iowa; 1895.)

The fact that the deceased guardian's accounts had not been settled would not defeat a recovery by the ward in such case.—Slusher v. Hammond (Iowa) 63 N. W. 185.

III. DUTIES AND LIABILITIES.

§ 6. Investments and deposits.

[a] (Iowa; 1895.)

Where a guardian, without authority, loans his wards' money, and, on foreclosure of the mortgage taken as security, purchases the land nominally for the wards, the court may direct a sale of the land to enforce the claim of the wards for the funds unlawfully used by the guardian.—Reed v. Lane (Iowa) 65 N. W. 380.

[b] (Iowa; 1897.)

Where a guardian wrongfully deposits his ward's money in a bank which becomes insolvent, his acceptance of a dividend from the assignee does not estop the ward from demanding a return of the full amount as a preferred claim.—In re Knapp (Iowa) 70 N. W. 626.

[c] (Wis.; 1897.)

To entitle a guardian to protection from a loss of funds of his ward by the failure of a bank in which he deposited them, the deposit must clearly show that it was made by him as such guardian, and the letters "Guar." after his name in a certificate of deposit, are insufficient.—O'Connor v. Decker (Wis.) 70 N. W. 284.

IV. SETTLEMENT AND ACCOUNTING.

Accounting by guardian of insane person, see "Insanity," § 2.

§ 7. Credits—Support of ward.

(Mich.; 1895.)

A guardian is not deprived of his right to an allowance for the expenses of the ward's maintenance, paid by him, by the fact that he kept no account and was not called upon by the probate court to render annual accounts.—*Tudhope v. Avery* (Mich.) 63 N. W. 969.

§ 8. Actions for accounting—Limitation.

[a] (Iowa; 1895.)

A petition which alleges that defendant was appointed guardian of plaintiff, and received certain money as such, and asks that he be required to report to the court, and that an order be made compelling him to pay over to plaintiff the amount found due, is merely an action for an accounting, and therefore must be brought within the time limited for an accounting.—*Wycoff v. Michael* (Iowa) 64 N. W. 608.

[b] (Mich.; 1897.)

Where a guardian, since deceased, has fraudulently appropriated funds of the ward to his own use, equity has jurisdiction to require his executors to account to the ward and to decree a sale of land of the estate to pay the amount found due, though, because of lapse of time, the probate court cannot allow the claim nor decree a sale of land to pay it.—*Allen v. Conklin* (Mich.) 70 N. W. 339.

§ 9. Operation and effect.

(Iowa; 1895.)

A final accounting with a guardian cannot be collaterally attacked on the ground that no allowance was made the guardian for his services.—*Reed v. Lane* (Iowa) 65 N. W. 380.

§ 10. Decree.

[a] (Iowa; 1895.)

On the final accounting of a guardian, a judgment in favor of "the minor heirs" of a certain person, the various other records of the case showing beyond doubt the beneficiaries of the judgment, is not void.—*Reed v. Lane* (Iowa) 65 N. W. 380.

[b] (Wis.; 1897.)

The judgment of a county court settling the accounts of a guardian, and fixing the amount due his ward, is a bar to any defense in a subsequent action by the ward to recover it.—*O'Connor v. Decker* (Wis.) 70 N. W. 286.

§ 11. Review.

(Minn.; 1895.)

Gen. St. 1894, c. 45a, § 4665, which provides for an appeal from an order of the probate court allowing, or refusing to allow, an account of a guardian, was intended to apply to the annual or final accounts rendered and filed in compliance with the preceding sections 4572 and 4573, and not to allow an appeal from an order based upon a finding that an alleged accounting and settlement between a guardian and his ward, made after the latter became of age, had never been had or made.—*In re Guardianship of Watson* (Minn.) 68 N. W. 44; *Watson v. Watson*, Id.

V. SALE OF WARD'S REALTY.

Collateral attack on sale, see "Judgment," § 75.

§ 12. Application by unqualified guardian.

(Neb.; 1897.)

An order for the sale of a minor's land on application by one assuming to act as guardian,

but who has never qualified, is a nullity.—*Wells v. Steckleberg* (Neb.) 70 N. W. 242.

§ 13. Jurisdiction.

(Neb.; 1896.)

By "a district court of competent jurisdiction," mentioned in Comp. St. c. 23, § 61, subd. 1, relating to sales by guardians of real property of the ward, is meant the district court of the county in which the guardian was appointed.—*Huberman v. Evans* (Neb.) 65 N. W. 1015, 46 Neb. 781.

§ 14. Petition.

(Neb.; 1896.)

A petition by a guardian for a license to sell the ward's real estate, which contained a general description of the premises,—as, all the real estate of the ward situated in Nebraska, or in any particular county or city therein,—and thereby provided the means of identifying the property, was sufficient as to description. *Huberman v. Evans*, 65 N. W. 1045, 46 Neb. 781.

§ 15. Validity of sale.

[a] (Neb.; 1896.)

Defects in proceedings by a guardian for the sale of real property of the ward will not affect the title of a purchaser in good faith, if so much of Comp. St. c. 23, § 64, has been complied with as is thereby made essential to the validity of the sale.—*Huberman v. Evans* (Neb.) 65 N. W. 1045, 46 Neb. 781.

[b] (Neb.; 1896.)

Proceedings by a guardian for license to sell land of his ward are not invalidated by a manifestly false statement in the description of the property in the application and license, when the remainder of the description is sufficiently certain to enable the land to be located.—*Huberman v. Evans*, 65 N. W. 1045, 46 Neb. 781.

[c] (Neb.; 1897.)

Comp. St. c. 23, § 64, providing that sales by a guardian shall not be avoided for "any irregularity in the proceedings" if certain facts appear, does not cover jurisdictional defects.—*Wells v. Steckleberg* (Neb.) 70 N. W. 242.

VI. BONDS AND ACTIONS THEREON.**§ 16. Actions—Limitation.**

(Wis.; 1896.)

A guardian is "discharged," within Rev. St. § 2368, providing that an action against the sureties on a guardian's bond must be begun within four years from the time he was discharged, when his guardianship has terminated by the arrival of the ward at the age of 21 years, though the trust relation as to the property continued, and final accounting was not made until a later date.—*Paine v. Jones* (Wis.) 67 N. W. 31.

93 Wis. 70.

§ 17. — Pleading.

[a] (Iowa; 1895.)

A petition which alleges that defendant was appointed guardian of plaintiff, and received certain money as such, and asks that he be required to report to the court, and that an order be made compelling him to pay over to plaintiff the amount found due, is not converted into an action on a guardian's bond by an amendment of the petition which states that defendant gave a bond, as guardian and surety, by the terms of which he agreed to account to plaintiff when he should become 21 years old.—*Wycoff v. Michael* (Iowa) 64 N. W. 608.

[b] (Minn.; 1895.)

In an action on a guardian's bond, it is unnecessary to allege that permission to prosecute the bond was obtained from the judge of probate.—*Hantzch v. Massolt* (Minn.) 63 N. W. 1069.

61 Minn. 301.

[c] (Wis.; 1896.)

A complaint alleging the settlement of the guardian's final account, the determination of the amount that he should pay, an order entered for its payment, and neglect or refusal of the guardian to comply with such order, sufficiently shows that the liability of the sureties has been established.—*Schoenleber v. Burkhardt* (Wis.) 69 N. W. 343.

[d] (Wis.; 1896.)

A complaint on a guardian's bond alleging the appointment of the guardian sufficiently shows that the bond was approved by the county judge, under Rev. St. § 3966, providing that, "before" appointing a guardian, the court shall require a bond in such sum, and with such sureties, as the court shall approve.—*Schoenleber v. Burkhardt* (Wis.) 69 N. W. 343.

H.

HABEAS CORPUS.

Appenable order, see "Appeal," § 19.

Decision as res judicata, see "Judgment," § 61.

§ 1. When writ issued.

[a] (Mich.; 1895.)

A conviction under a valid city ordinance, on a valid complaint, by a court having jurisdiction of the case, cannot be disturbed on habeas corpus.—*In re Bushey* (Mich.) 62 N. W. 1036.

105 Mich. 64.

[b] (Neb.; 1895.)

One imprisoned in unauthorized contempt proceedings may obtain a release by habeas corpus.—*In re Havelik*, 64 N. W. 234, 45 Neb. 747.

§ 2. Petition for writ.

(Minn.; 1896.)

The writ of habeas corpus does not issue as a matter of course to every applicant, but the petition for the writ must show reasonable grounds for its issuance.—*Hoskins v. Baxter* (Minn.) 66 N. W. 969.

64 Minn. 226.

§ 3. Hearing and determination.

[a] (Mich.; 1895.)

A judgment in a criminal case imposing a fine and costs, and commitment until payment thereof, is not subject to collateral attack on habeas corpus where it appears regular on its face, and the costs imposed are not shown to be more than were in fact incurred in the prosecution.—*In re Johnson* (Mich.) 62 N. W. 407.

104 Mich. 343.

[b] (Mich.; 1895.)

Where the evidence on a habeas corpus proceeding in the circuit court was not reported, and hence could not be reviewed, and the petitioner, in a subsequent application in the supreme court, based upon the same allegations, does not allege that fact, nor that the determination of the lower court in denying the writ was contrary to law, or not supported by the evidence, the proceeding must be dismissed.—*In re Sneed* (Mich.) 62 N. W. 1009.

105 Mich. 61.

[c] (Neb.; 1896.)

Errors and irregularities of the trial court in a criminal prosecution cannot be urged on habeas corpus.—*In re Petry* (Neb.) 66 N. W. 308.

47 Neb. 126.

[d] (N. D.; 1895.)

One who was ordered, as president of an insolvent corporation, to execute a conveyance, as president, of the corporation's property to a creditor, and who was, on his refusal, committed for contempt, cannot show on habeas corpus that the district court had before it in the contempt proceedings no legal or sufficient evidence to prove that applicant was president of the corporation, or that, assuming him to be president, he had power to execute the conveyance for the

corporation.—*State v. Barnes* (N. D.) 65 N. W. 688.

5 N. D. 350.

[e] (Wis.; 1895.)

On a habeas corpus proceeding by one committed for contempt, the order of commitment cannot be attacked if the court had power to make it in any supposable circumstance which might arise in the progress of the cause.—*In re Rosenberg* (Wis.) 63 N. W. 1065.

90 Wis. 581.

§ 4. Appeal.

(S. D.; 1896.)

In ordinary cases, application for the writ should first be made to the circuit court, from whose decision an appeal may be taken which will be preferred, and considered as soon as submitted in the supreme court.—*In re Hamill* (S. D.) 69 N. W. 577.

HANDWRITING.

Proof of, see "Evidence," § 120.

HARMLESS ERROR.

See "Appeal," §§ 243-260; "Criminal Law," §§ 231-233.

In instructions, see "Criminal Law," § 147; "Trial," § 79.

HAWKERS AND PEDDLERS.

Exaction of license by city, see "Municipal Corporations," § 29.

Licenses and privilege taxes, interference with interstate commerce, see "Constitutional Law," § 50.

(Mich.; 1895.)

One whose business consists in going from house to house with rugs, making contracts of leasing at a stipulated amount weekly, the title passing to the party renting when the whole amount of the rental is paid, is a peddler, within an ordinance requiring peddlers to have a license.—*People v. Sawyer* (Mich.) 64 N. W. 333.

HEAD OF FAMILY.

See "Exemptions," § 12; "Homestead."

HEALTH.

§ 1. Health board and officers.

[a] (Mich.; 1895.)

Act Feb. 27, 1895, § 3, establishing a board of health for the city of Detroit, provides

that the board shall prepare and file with the city controller estimates of its expenditures, and the same are to be appropriated by the board, when raised as therein provided, but it makes no provision for the manner in which the necessary amount is to be raised. *Held* that, though the act does not purport to be an amendment to the city charter, it clearly implies by its reference to the city controller that the funds needed for the ordinary expenses of the board shall be raised by him in the manner prescribed in the charter for the raising of other funds for the city government. — *Dayock v. Moore* (Mich.) 63 N. W. 424.

105 Mich. 120.

[b] (Mich.; 1896.)

1 How. Ann. St. § 1647, makes it incumbent on township boards of health to provide nurses and other assistance for an infected person. Local Acts 1895, No. 403, §§ 11, 12, provide that in case of pestilence the Detroit board of health shall do whatever may be for the public safety, and that the common council and board of estimates shall provide a fund for the maintenance of the board of health. *Held*, that it is the duty of the Detroit board of health to allow compensation to one whose property it has occupied or destroyed to prevent the spread of contagious disease. — *Safford v. Board of Health of City of Detroit* (Mich.) 67 N. W. 1091.

§ 2. — Compensation.

[a] (Mich.; 1897.)

The provision of 3 How. Ann. St. § 1681d, that health officers who are required to care for persons having infectious diseases shall be entitled to compensation from the municipality of which they are officers, is to be construed with sections 1647, 1648, which impose the same duties on the boards of health of townships as are imposed on those of cities and villages by section 1681, and provide that the care of indigent persons having such infectious diseases shall be at the charge of the county in which they reside; and a village which has paid its health officer, who was a physician, a reasonable compensation, in addition to his salary, for the care of such persons during an epidemic, is entitled to recover it from the county. — *Village of St. Johns v. Board of Sup'rs* (Mich.) 70 N. W. 131.

[b] (Mich.; 1897.)

The fact that the health officer of a village is a member of the board of health does not preclude such board from fixing his compensation by agreement for services performed by him in preventing the spread of smallpox; and the village may recover the amount so paid him, from the county, where such amount is reasonable. — *Village of St. Johns v. Board of Sup'rs* (Mich.) 70 N. W. 131.

§ 3. Violation of orders.

(Minn.; 1895.)

Where a regulation of the board of health prohibited "licensed persons" from doing certain work without a permit, and it did not appear what "license" was required, or that unlicensed persons were prohibited from doing the work without the permit, and it was not shown that one charged with a violation of the regulation was a licensed person, a conviction was not sustained. — *City of St. Paul v. Lawton* (Minn.) 63 N. W. 1112.

61 Minn. 537.

§ 4. Abatement of nuisance.

(Wis.; 1896.)

Rev. St. § 1411, directing a town health officer to take such measures for the prevention, suppression, and control of contagious disease as may be needful, does not authorize an action by him, in his own name, to enjoin the maintenance of an isolation hospital for contagious diseases near the town, as endangering the health of the

people of the town. — *Buckstaff v. City of Oshkosh* (Wis.) 66 N. W. 707.
92 Wis. 520.

§ 5. Delegation of legislative power to board.

(Wis.; 1897.)

Since the state board of health is merely an administrative body, Sanb. & B. Ann. St. §§ 1409b, 1409d, authorizing it to make such regulations "as may in its judgment be necessary for the protection of the people" from contagious disease, and providing that contagious diseases shall mean such "as the state board of health shall designate as contagious and dangerous to the public health," is an unwarranted delegation of legislative power. — *State v. Burdge* (Wis.) 70 N. W. 347.

§ 6. Compulsory vaccination of school children.

(Wis.; 1897.)

A rule by the state board of health that no child shall be allowed to attend school in the state without presenting a certificate of vaccination, made when there was no epidemic of smallpox in the state, and when the board had no reasonable apprehension that the disease would become prevalent, or that the regulation was necessary to preserve public health, was unreasonable and void. — *State v. Burdge* (Wis.) 70 N. W. 347.

§ 7. Police power.

[a] (Wis.; 1896.)

The assertion by Laws 1891, c. 202, conveying and relinquishing to one R., his heirs and assigns, all its right, title, and interest in and to all lands lying within the limits of Muskego Lake, and authorizing the drainage of such lake without the consent of riparian owners, that such drainage is required for the preservation of the public health, is not conclusive on the courts, and does not make the act a legitimate exercise of police power. — *Priewe v. Wisconsin State Land & Improvement Co.* (Wis.) 67 N. W. 918.
93 Wis. 534.

[b] (Wis.; 1897.)

In the absence of a statute making vaccination compulsory or a condition precedent to the right of children of proper qualifications to attend the public schools, a rule by the state board of health which was authorized to take general supervision over the public health (Rev. St. § 1407), and to make regulations to preserve it (section 1408), and to guard against contagious diseases (Sanb. & B. Ann. St. §§ 1409a, 1409b), that no child shall be allowed to attend a public or private school within the state without presenting a certificate of vaccination, cannot be sustained as an exercise of police power. — *State v. Burdge* (Wis.) 70 N. W. 347.

HEARING.

Preliminary hearing in criminal cases, see "Criminal Law," §§ 17-21.

HEARSAY EVIDENCE.

See "Evidence," §§ 16, 17.

HEIRS.

See "Descent and Distribution"; "Wills."

Adverse possession between, see "Adverse Possession," § 15.

HERD LAW.

See "Animals," § 1.

HIGHWAYS.

- I. IN GENERAL, §§ 1-3.
- II. PRESCRIPTION, §§ 4, 5.
- III. DEDICATION, see main head "Dedication."
- IV. ESTABLISHMENT BY STATUTORY PROCEEDINGS, §§ 6-16.
- V. VACATION, ALTERATION, AND ABANDONMENT, §§ 17-21.
- VI. ASSESSMENTS, §§ 22-24.
- VII. ROAD OFFICERS, § 25.
- VIII. OBSTRUCTIONS AND ENCROACHMENTS, §§ 26-32.
- IX. LIABILITY FOR DEFECTS, §§ 33-38.
- X. LAW OF THE ROAD, § 39.

See, also, "Bridges"; "Municipal Corporations."

As boundaries, see "Boundaries," § 3.

Burden of showing existence of highway, see "Evidence," § 8.

Constructing railroad across, see "Railroad Companies," §§ 10-12.

Injunctions pertaining to, see "Injunctions," § 16.

Jurisdiction of circuit court on appeal in proceedings laying out highway, see "Courts," § 17.

Obtaining highway for school purposes, see "Schools and School Districts," § 16.

I. IN GENERAL.

§ 1. Manner of construction — Diversion of surface water.

[a] (Neb.; 1896.)

A county may, in constructing a highway, divert surface water in a manner in which it could not be diverted by an individual, upon making compensation to those injured.—*Churchill v. Beethe* (Neb.) 66 N. W. 992.

48 Neb. 87.

[b] (Neb.; 1896.)

A petition to enjoin the erection by a county of an embankment on a highway which alleged merely that the embankment would divert the natural flow of surface water so as to turn it over plaintiff's lands, did not show plaintiff entitled to relief.—*Churchill v. Beethe* (Neb.) 66 N. W. 992.

48 Neb. 87.

§ 2. Propelling steam engines on highway.

[a] (Iowa; 1895.)

Acts 24th Gen. Assem. c. 68, providing that a person in charge of an engine being propelled along a highway by steam, who shall not stop within 100 yards of persons going on the highway, until such persons pass, and shall not keep a man in front of the engine to assist in controlling passing horses, shall be guilty of a misdemeanor, applies where horses are being driven in the direction in which the engine is going.—*State v. Kowolski* (Iowa) 65 N. W. 306.

[b] (Iowa; 1895.)

On trial of an indictment for failing to stop a steam engine propelled on a highway until persons driving on the highway had passed, the fact that the engine was sinking, on account of the condition of the ground at the side of the highway where it was stopped, did not excuse defendant's starting up before the persons passed, where he ran the engine on such ground to avoid crossing a culvert as required by law.—*State v. Kowolski* (Iowa) 65 N. W. 306.

[c] (Iowa; 1895.)

It was proper, on trial of an indictment for propelling a steam engine on the highway without having a man in front, not to permit defendant to show that he kept a man on the lookout in a way different than that prescribed.—*State v. Kowolski* (Iowa) 65 N. W. 306.

[d] (Iowa; 1895.)

A charge on a prosecution under Acts 24th Gen. Assem. c. 68, that a person operating a steam engine on a public highway must stop for the passage of teams, unless to do so would be dangerous to life or limb, was not objectionable as charging that a failure to stop would not be excused if the circumstances were such as would lead an ordinarily prudent man to believe it would be dangerous to stop.—*State v. Kowolski* (Iowa) 65 N. W. 306.

[e] (Iowa; 1895.)

As information under Acts 24th Gen. Assem. c. 68, providing that a person in charge of an engine being propelled along a highway by steam, who shall not stop within 100 yards of persons going on the highway, till such persons pass, and shall not keep a man in front of the engine, shall be guilty of a misdemeanor, was not bad for duplicity in charging defendant with having failed to keep a man in front, and also with having failed to stop.—*State v. Kowolski* (Iowa) 65 N. W. 306.

§ 3. Consolidation of districts.

[a] (Iowa; 1896.)

A taxpayer may maintain proceedings to set aside an illegal order of the board of township trustees, consolidating all the road districts of the townships, even though he is not directly prejudiced thereby.—*Dunham v. Fox* (Iowa) 69 N. W. 436.

[b] (Iowa; 1896.)

A signer of the petition required by Acts 20th Gen. Assem. c. 200, § 4, relating to the consolidation of the road districts of a township on petition of a majority of the voters, may withdraw his name at any time before action is taken.—*Dunham v. Fox* (Iowa) 69 N. W. 436.

[c] (Iowa; 1896.)

The signing of a remonstrance to such consolidation, by one who had signed the petition, operates to withdraw his signature from the petition.—*Dunham v. Fox* (Iowa) 69 N. W. 436.

[d] (Iowa; 1896.)

Under Acts 20th Gen. Assem. c. 200, § 4, providing that the board of township trustees may on petition, etc., consolidate the road districts of the township into one highway district, the proceeding so authorized is judicial in its nature, within the meaning of Code, § 3216, declaring that a writ of certiorari may issue when an inferior tribunal or board exercising judicial functions has exceeded its proper jurisdiction.—*Dunham v. Fox* (Iowa) 69 N. W. 436.

II. PRESCRIPTION.

§ 4. User for period of prescription.

[a] (Mich.; 1895.)

Where the public has acquired an easement by user in a highway, the listing of the land for taxes and payment thereof by the owner does not affect the rights of the public in the land.—*Campau v. City of Detroit* (Mich.) 62 N. W. 718.

104 Mich. 560.

[b] (Mich.; 1895.)

User of land for the statutory period as a public highway conclusively establishes dedication of the land for that purpose.—*Campan v. City of Detroit* (Mich.) 62 N. W. 718.

104 Mich. 560.

[c] (Mich.; 1896.)

Plaintiff's house stood on the lot line, and her porch and steps projected several feet over a strip claimed as a part of a public avenue. The strip was originally inclosed by a

fence, during which time plaintiff had acquired title by adverse possession. Plaintiff had removed her fence, as had all property holders on that avenue, at the request of defendant city. The porch and steps had never been removed, the traveled way of the street widened, nor the sidewalk disturbed. *Held*, that the city did not acquire the strip as a part of the avenue by user.—*Leonard v. City of Detroit* (Mich.) 66 N. W. 188.

[d] (Neb.; 1897.)

The public acquires no rights by mere user of a way over wild and unclosed prairie.—*Engle v. Hunt* (Neb.) 69 N. W. 970.

[e] (Neb.; 1897.)

To establish a highway by prescription, there must be a user by the public, under claim of right, and adverse to the owner's occupancy, and with his knowledge, of some defined track uninterruptedly, without substantial change, for a period sufficient to bar an action to recover the land.—*Engle v. Hunt* (Neb.) 69 N. W. 970.

§ 5. Evidence.

[a] (Iowa; 1896.)

Evidence that the owner of land lived thereon while a road was being used for 13 years by the public, over the land, and that he himself traveled the road, is sufficient to prove knowledge on the owner's part of the use of the road as a highway so as to establish a highway by prescription under the law prior to 1873.—*State v. Teeters* (Iowa) 66 N. W. 754.

[b] (Iowa; 1896.)

Under Code, § 2031, providing that, when an easement in land is claimed by prescription, the fact of adverse possession shall be proven by evidence distinct from the use, and that the party against whom the claim is made had express notice thereof, evidence of travel by the public over land, which commenced while it was uncultivated, the line of travel changing at times, and gates having been maintained across the road, is insufficient to show title to the road as a public highway by prescription.—*Gray v. Haas* (Iowa) 67 N. W. 394.

[c] (Iowa; 1897.)

A highway by prescription is not shown by evidence of public use for many years, if it was used during a portion only of each summer, and had been closed at times, and obstructed by fences.—*Mills & Allen v. Evans* (Iowa) 69 N. W. 1013.

III. DEDICATION.

See main head "Dedication."

IV. ESTABLISHMENT BY STATUTORY PROCEEDINGS.

§ 6. Power to establish.

(Neb.; 1896.)

The county board may, in one proceeding, open roads on different section lines, provided they connect with one another, and form a single scheme of highway improvement.—*Barry v. Delonghery* (Neb.) 66 N. W. 410.
47 Neb. 354.

§ 7. Qualification of commissioners or supervisors.

[a] (Mich.; 1895.)

Members of a township board, who heard a proceeding to establish a highway on the merits, and decided the necessity for the highway, and awarded damages, were disqualified to sit on the hearing of a subsequent proceeding to establish the same highway, after the quashing of the former proceeding.—*Locke v. Highway Commissioner of Wyoming Tp.* (Mich.) 65 N. W. 558.

[b] (Minn.; 1896.)

The three members of the town board of supervisors acted in laying out a highway. One of them was interested, as he owned one of the parcels of land over which the highway was laid out; but the other two, constituting a majority of the board, were not interested. *Held*, the proceedings were voidable, but not absolutely void.—*Kieckheaf v. Supervisors of the Town of Wheeling* (Minn.) 67 N. W. 662.
61 Minn. 547.

§ 8. Notice.

(Neb.; 1896.)

The county board may, without petition or notice, make a preliminary order establishing a section-line road, or declaring that it shall be opened; but, before it can be actually opened, there must be proceedings, upon proper notice, to ascertain damages.—*Barry v. Delonghery* (Neb.) 66 N. W. 410.
47 Neb. 354.

§ 9. Parties.

(Iowa; 1895.)

A board of county supervisors is not a proper party defendant in a proceeding to determine the validity of its action in establishing a highway.—*Everett v. Board of Suprs of Potawatamie County* (Iowa) 61 N. W. 1062.
93 Iowa, 721.

§ 10. Mistake in location.

[a] (Minn.; 1896.)

A. and B. owned adjoining 40-acre subdivisions, and for 21 years occupied to a line which each supposed was the true line between them, but which was in fact more than two rods in upon the land of B. In the meantime the town laid out a public highway on the true line, but opened it for travel on said supposed line, where it was traveled by the public for 14 years, when the town, within 15 years after the highway was so laid out, opened it for travel on the true line. *Held*, the public had not, by laches or acquiescence, lost its right to open the road on the true line.—*Bice v. Town of Walcott* (Minn.) 67 N. W. 360.
64 Minn. 459.

[b] (Minn.; 1896.)

Conceding that, as between A. and B., the 15-year statute of limitations had run in favor of A. as to the strip of land occupied by him between the true line and the road as traveled, still it had not run in his favor as against the public or the defendant town.—*Bice v. Town of Walcott* (Minn.) 67 N. W. 360.
64 Minn. 459.

§ 11. Establishment on government section line.

[a] (Neb.; 1896.)

Act 1873, making section lines in certain counties public highways, was so far modified by Laws 1879, p. 120 (Comp. St. c. 78), that section lines not used as roads for five years before the passage of the latter act cannot be opened as such without complying with the requirements of that act.—*Henry v. Ward* (Neb.) 68 N. W. 518.

[b] (S. D.; 1896.)

Under the territorial act of January 12, 1871 (Comp. Laws, § 1189), declaring that all section lines shall be public highways so far as practicable, "provided that nothing in the act shall be so construed as to interfere with existing highways in the settled portions of the territory," a person seeking to prevent the change or vacation of a highway must show that it was legally established in a settled portion of the territory, or existed by prescription, at the time such act was passed.—*Keen v. Board of Suprs of Fairview Tp.* (S. D.) 67 N. W. 623.

[c] (S. D.; 1896.)

Act Jan. 12, 1871 (Comp. Laws, § 1189), provides that all section lines shall be public

highways as far as practicable. Comp. Laws, § 1296, authorizes the supervisors of a town to lay out any new road; and section 1320 declares that "every road located by territorial or county authority is a county road, and shall only be changed or vacated by an order of the county commissioners." *Held*, that the town supervisors may open a road within their township on the section line of land belonging to the United States at the time section 1189 was enacted; such line not being a county road, within section 1320.—*Keen v. Board of Suprs of Fairview Tp.* (S. D.) 67 N. W. 623.

[d] (S. D.; 1896.)

Where a section-line road has been established along a controverted line, but substantially on the section line, it follows and is located on the true section line, whenever that is finally determined.—*Dowdle v. Cornue* (S. D.) 68 N. W. 194.

§ 12. Establishment through forbidden premises.

[a] (Iowa; 1895.)

A wild plum tree, about three feet high, a cottonwood tree, a small grapevine, a wild currant bush, and a few small rose bushes do not constitute an orchard or ornamental ground, within Code, § 925, providing that a highway shall not be established through such grounds, when contiguous to a dwelling house, without the consent of the owner.—*Ballou v. Elder* (Iowa) 64 N. W. 622.

[b] (Iowa; 1895.)

Evidence that, after the commencement of proceedings to establish a highway through plaintiff's land, he planted fruit trees and a garden within the space to be occupied by the highway, and stated that he did so to prevent its establishment, will support a finding that such improvements were not made in good faith.—*Ballou v. Elder* (Iowa) 64 N. W. 622.

§ 13. Width of road.

(Mich.; 1896.)

Ilow. Ann. St. § 1296, providing that highways shall not be less than four rods in width, does not restrict them to such width, and a commissioner may establish a wider road when required.—*Brown v. Township Board of Greenfield Tp.* (Mich.) 67 N. W. 566.

§ 14. Order laying out.

[a] (Neb.; 1896.)

To authorize the opening of a section-line road, a finding that the public good requires it need not be made of record by the county board.—*Barry v. Delonghery* (Neb.) 66 N. W. 410.

47 Neb. 354.

[b] (Neb.; 1896.)

An order of a board of supervisors instructing the county clerk to cause a section-line road to be surveyed, and enter such survey, when made, of record, is not an order for the opening of such section-line road, within Comp. St. c. 78, § 46.—*Oyler v. Ross* (Neb.) 66 N. W. 1099.

48 Neb. 211.

§ 15. Award of damages.

[a] (Iowa; 1895.)

Where, on appeal from an assessment of damages consequent upon the establishment of a highway, it appears to have been conceded that it would be necessary to take eight acres of appellant's land, the value of which would be at least \$280, and that a new fence which the highway would render necessary would cost about \$150, that he would lose 200 shade trees, and would be compelled to move a half mile of fence already built, besides having his farm divided by the road, a judgment awarding appellant \$200 damages will be reversed.—*Adkins v. Smith* (Iowa) 64 N. W. 761.

[b] (Neb.; 1895.)

The damages to a landowner for the location of a highway must be paid from the road fund of the district in which the highway is situated, and not from the county-road fund.—*Palmer v. Vance* (Neb.) 62 N. W. 857.

44 Neb. 348.

[c] (Neb.; 1896.)

The proceedings by which a highway is opened require a settlement of damages which may arise from the erection of culverts across the highway, so that an abutting property owner is not entitled to additional damages, on the erection of a culvert in an established highway, because of the fact that surface water is thereby thrown upon his lands.—*Churchill v. Beethe* (Neb.) 66 N. W. 992.

48 Neb. 87.

§ 16. Waiver of objections.

(Minn.; 1896.)

The appellant owned and occupied one of the parcels of land over which the highway was laid out, but was not named in the petition or served with written notice of the time and place of the meeting of the board. However, he appeared, took part in the proceedings, and was awarded damages. *Held*, he waived all defects in the proceedings.—*Kiekenapp v. Supervisors of the Town of Wheeling* (Minn.) 67 N. W. 662.

64 Minn. 547.

V. VACATION, ALTERATION, AND ABANDONMENT.

§ 17. Order for change of location.

(Minn.; 1896.)

The description of a highway in the order of county commissioners changing the location of the highway cannot be aided by extrinsic evidence of the intention of those who laid out the highway as changed.—*Rud v. Board of Com's of Pope County* (Minn.) 68 N. W. 1062.

§ 18. Discontinuance and vacation.

[a] (Minn.; 1895.)

A summons on appeal from an order vacating a highway was served, only four days before the time set for hearing, on the supervisor who voted against the vacation of the highway, no service being made on either of the other supervisors. The supervisor served failed to notify any one of the petitioners, or either of his associates on the board, of the appeal, and at the hearing appeared for the town, waived the defective service, and permitted the order of vacation to be reversed by a verdict, without offering evidence in behalf of the town. *Held*, that the verdict should be set aside.—*Street v. Town of Alden* (Minn.) 64 N. W. 157.

62 Minn. 160.

[b] (Minn.; 1895.)

An action to set aside a verdict rendered on appeal from an order vacating a highway on the ground that it was procured through fraud, could be maintained by the owner of the land across which the highway ran, he having been one of the legal voters who petitioned for the vacation of the highway.—*Street v. Town of Alden* (Minn.) 64 N. W. 157.

62 Minn. 160.

[c] (Wis.; 1896.)

Rev. St. 1858, c. 19, § 90, prohibits town supervisors from discontinuing a territorial road. *Sanb. & B. Ann. St. § 124a*, provides that any highway abandoned as a route of travel, and on which no highway tax has been expended for five years, shall be considered legally discontinued, and shall revert to the owners of the land through which the same passed. *Held*, that where half a mile of a territorial road was formally vacated by a town board, and another highway laid out, and such portion was fenced

up by the owners of the land through which it passed for 27 years, during which time it was not used as a highway, and no taxes were expended thereon, the town board could not reopen it as a highway.—*Herrick v. Town of Geneva* (Wis.) 65 N. W. 1021.

§ 19. Damages caused by alteration or vacation.

[a] (Iowa: 1894.)

Code, § 916, relating to the establishment of public highways by boards of supervisors, and providing that the board "may make such establishment, vacation, or alteration conditioned upon the payment in whole, or in part, of the damages awarded, or expenses in relation thereto," does not contemplate damages for vacation of a public highway.—*Grove v. Allen* (Iowa) 61 N. W. 175.

92 Iowa, 519.

[b] (Iowa: 1896.)

No damage being allowable for the vacation of a highway, an irregularity in the appointment of appraisers in proceedings for that purpose is immaterial.—*McKinney v. Baker* (Iowa) 69 N. W. 683.

§ 20. Abandonment.

(Wis.: 1895.)

Rev. St. § 1294, providing that every public highway shall cease to be such except as to such parts as are opened and worked within four years of the time it is laid out; and section 1294a, providing that every highway abandoned as a route of travel, and on which no highway tax is expended for five years, shall be considered discontinued, and the land shall revert to the abutting owners,—apply only to streets laid out by public authority, notwithstanding section 1347 provides that the provisions of the chapter to which the sections belong shall extend to all parts of the state, except when special provisions, inconsistent therewith, shall be made by law.—*Paine Lumber Co. v. City of Oshkosh*, 61 N. W. 1108, 89 Wis. 449.

§ 21. Certiorari

(Iowa: 1896.)

A petition in certiorari to review proceedings for the vacation of a highway, on the ground of their illegality because no notice was served on plaintiffs, who were the owners, or on the occupants, of the land through which the highway was located, is demurrable where it fails to allege that plaintiffs' ownership was shown by the transfer books in the auditor's office, or that plaintiffs resided within the county, or that the land was occupied by persons residing in the county; personal notice being required only in such cases. Code, § 936.—*McKinney v. Baker* (Iowa) 69 N. W. 683.

VI. ASSESSMENTS.

§ 22. Presumption as to regularity.

(Mich.: 1895.)

That the record of the highway commissioner of a town recited that the board of commissioners voted that the highway taxes be assessed at \$1 on the \$100 valuation, and that the clerk make the rolls therefor, does not create the presumption that the assessment roll subsequently prepared by the board, which is not introduced in evidence, was irregular in making the assessment as a money tax, and not as highway labor, as provided by Comp. Laws 1871, § 1220 et seq., requiring the assessment to be made as "one day's work for every \$100 valuation," and providing that for certain purposes a day's work may be deemed the equivalent of \$1.—*Hoffman v. Lynburn* (Mich.) 62 N. W. 728.

104 Mich. 494.

§ 23. Delegation of authority to make.

(Mich.: 1895.)

A vote by the board of commissioners that the highway tax for a certain year be assessed at \$1 on the \$100 valuation, and that the clerk of the board make the rolls, and render an account thereof when completed, is merely preliminary to the action of the board, and not an unlawful delegation to the clerk of authority to make the assessment list, under Comp. Laws 1871, § 1221, which expressly authorizes the making of the lists by the clerk under the direction of the board.—*Hoffman v. Lynburn* (Mich.) 62 N. W. 728.

104 Mich. 494.

§ 24. Duties of overseers of highways.

[a] (Mich.: 1895.)

Under 3 How. Ann. St. §§ 1331, 1332, 1423, relating to the duties of overseers of highways on assessing taxes for labor performed thereon, where the overseers, after assessment, return the lists furnished by the commissioner of highways substantially as received, without verification or signature, the defect is fatal.—*Hamilton & Merryman Co. v. Township of L'Anse* (Mich.) 65 N. W. 282.

[b] (Mich.: 1895.)

Where the overseers of highways, after assessment, returned the lists furnished by the commissioner of highways substantially as received, without verification or signature, contrary to 3 How. Ann. St. §§ 1331, 1332, 1423, the defect was not cured by section 1424, providing that no error or omission on the part of the overseers shall invalidate the highway tax.—*Hamilton & Merryman Co. v. Township of L'Anse* (Mich.) 65 N. W. 282.

[c] (Mich.: 1896.)

Where the highway labor tax is assessed by the commissioner instead of the overseer, it is an informality or neglect of duty by the overseer, within 3 How. Ann. St. § 1424, providing that no error or omission of duty of the overseer of highways shall invalidate the highway tax assessed by the supervisor on the township assessment roll.—*Auditor General v. Longyear* (Mich.) 68 N. W. 130.

VII. ROAD OFFICERS.

Duty as to assessments, see ante, § 24.

§ 25. Liabilities.

[a] (Iowa: 1897.)

A charge that a road supervisor was chargeable only for "gross negligence" in erecting a public bridge is erroneous, since he is chargeable for a want of ordinary or reasonable care.—*Gould v. Schermer* (Iowa) 70 N. W. 697.

[b] (S. D.: 1896.)

Township officers trespassing on land in the attempt to locate a section-line highway on a line other than its proper location are personally liable for the trespass.—*Webster v. White* (S. D.) 66 N. W. 1145.

VIII. OBSTRUCTIONS AND ENCROACHMENTS.

§ 26. In general.

[a] (Wis.: 1895.)

Town officials may remove obstructions on a highway without petition from taxpayers.—*Nicolai v. Davis*, 64 N. W. 1001, 91 Wis. 370.

[b] (Wis.: 1896.)

A town which permits the erection or maintenance of a wire fence across a previously traveled highway, after its discontinuance, without barriers or warnings to travelers, is guilty of negligence, and is liable for an injury resulting therefrom to one using reasonable care.—*Bills v. Town of Kaukauna* (Wis.) 68 N. W. 992.

[c] (Wis.: 1896.)

Persons were driving plaintiff's horse to a buggy in the nighttime, at a speed of five or six miles an hour, along the beaten track of a road, which could be seen, when they ran into a wire fence which had been built across the track, without any barrier or other warning which could be seen, and the horse was killed. *Held*, that there was no contributory negligence.—*Bills v. Town of Kaukauna* (Wis.) 68 N. W. 992.

§ 27. Action to abate—Pleading and proof.

(Minn.: 1895.)

Where a complaint to compel the removal of obstructions from an alleged street averred that the street was opened, planked, graded, and worked, for more than 15 years, but failed to state by whom, and did not allege that the street had been dedicated as such, a common-law dedication could not be proved.—*Village of Benson v. St. Paul, M. & M. Ry. Co.* (Minn.) 64 N. W. 393.

62 Minn. 198.

§ 28. — Defenses.

[a] (Iowa: 1896.)

The obstruction of a public highway by keeping and using cars and placing buildings thereon will not be excused on the plea that such use was made in the conduct and operation of a business on land abutting on the street.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

[b] (Iowa: 1896.)

That a railroad company is authorized to operate its road over a public highway is no defense in an action against a lumber company for obstructing the highway by keeping cars on such road in conducting its business located on property abutting on the highway.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

§ 29. Injunction.

(Iowa: 1897.)

In a suit by a county to correct a description in a deed of land conveyed to it for a road, injunction against obstruction of the highway may be also sought and had, though there be remedy at law therefor by abatement of nuisance, or though defendant be punishable criminally for the obstruction.—*Clayton County v. Herwig* (Iowa) 69 N. W. 1035.

§ 30. Railroad bridges.

(Wis.: 1894.)

Rev. St. § 1837, providing that bridges over streets shall be constructed so as to give a clear passageway of 20 feet, or two passageways of 14 feet each, does not authorize recovery by one injured under a street bridge in a passageway more than 14 feet wide, on the ground that the other passageways were less than 14 feet wide.—*Barron v. Chicago, St. P., M. & O. Ry. Co.*, 61 N. W. 303, 89 Wis. 79.

§ 31. Criminal prosecution.

(Iowa: 1896.)

In a prosecution for "willfully" obstructing a highway (Code, § 3979), the word "willfully" means "intentionally," and therefore an admission that defendant placed the obstruction across the road is an admission of a willful obstruction.—*State v. Teeters* (Iowa) 66 N. W. 754.

§ 32. — Indictment.

[a] (Iowa: 1896.)

Under an indictment averring generally the obstruction of a highway, a conviction may be had for obstruction of a highway established either by dedication or prescription.—*State v. Teeters* (Iowa) 66 N. W. 754.

[b] (Iowa: 1896.)

An indictment under Code, § 4089, for obstructing or incumbering a highway, may aver only that the streets obstructed were those of a

certain town, without designating the particular streets.—*State v. Finney* (Iowa) 68 N. W. 568.

[c] (Iowa: 1896.)

An indictment under Code, § 4089, for obstructing or incumbering a street, need not allege whether the town in which the street lay is incorporated.—*State v. Finney* (Iowa) 68 N. W. 568.

[d] (Iowa: 1896.)

Under Code, § 4089, declaring the "obstructing or incumbering," by buildings, the public highways to be nuisances, an indictment averring that defendant did "obstruct and incumber" charges but one offense, though charging it committed both ways.—*State v. Finney* (Iowa) 69 N. W. 568.

[e] (Iowa: 1896.)

Neither does it charge more than one offense by averring the obstruction by constructing and maintaining a building on the "highways and streets."—*State v. Finney* (Iowa) 68 N. W. 568.

IX. LIABILITY FOR DEFECTS.

§ 33. What constitutes actionable defect.

[a] (Mich.: 1897.)

Error in charging that the duty of defendant township to keep its highways in reasonable repair "not only extends to the traveled portion of the highway, but that portion within the main ditches of the same," was harmless, where the court added, "That is, all that portion of the highway worked, and which the public would naturally use by reason of its apparent fitness for use"; that "it is not expected that public travel will occupy all parts of a country highway"; and that the township was not required to put the road in condition, even if it were so expected, and correctly stated what plaintiff was required to prove in order to recover.—*Whoram v. Argentine Tp.* (Mich.) 70 N. W. 341.

[b] (Wis.: 1895.)

In an action against a town for injuries received by plaintiff while driving onto a highway from a way which had been cleared by the side of the highway for the passage of teams, owing to the presence of impassable snowdrifts on the highway, it was proper to charge that the town would not be liable if the highway at that point was, under all the circumstances, in a reasonably safe condition for the passage of teams.—*Vass v. Town of Wankesha* (Wis.) 63 N. W. 250.

90 Wis. 337.

[c] (Wis.: 1896.)

A petition in an action for the death of plaintiff's intestate, caused by a defective highway, alleged a want of repair in the highway at an intersection of two roads, and a gully in the track; that the highway was obstructed at such point by logs on both sides of the road; that as deceased approached the corner on a dark night, and as he turned at the corner, one of his wheels passed over one of the logs, and threw him out, causing his death. *Held*, that whether the traveled track, at the time and place of the injury, was insufficient or out of repair, was a question for the jury.—*Slivitzki v. Town of Wien* (Wis.) 67 N. W. 730.

93 Wis. 460.

[d] (Wis.: 1897.)

Where a person driving over a familiar highway at night drives against a stump which has stood there for years, it is a question for the jury whether the presence of the stump made the town liable for the accident.—*Hinkley v. Town of Rosendale* (Wis.) 70 N. W. 158.

§ 34. Proximate cause of injury.

[a] (Wis.: 1897.)

Where the buggy in which plaintiff was riding ran into a ditch across the highway, throwing out the driver, and causing the horses

to run away, and further down the highway plaintiff was thrown out and injured, the ditch was the proximate cause of the injury to plaintiff.—*Donohue v. Town of Warren* (Wis.) 70 N. W. 305.

[b] (Wis.; 1897.)

It is not necessary to prove the exact place where plaintiff was thrown from the buggy, but only that the defect which caused the accident was in the highway, and substantially at the place designated by the notice to the supervisors and by the complaint.—*Donohue v. Town of Warren* (Wis.) 70 N. W. 305.

§ 35. Action for damages.

[a] (Mich.; 1897.)

A declaration for injuries caused by a defective highway, averring that the highway was situated between two specified sections in G. township and two specified sections in defendant township, known as a "town-line road," and alleging that, "while plaintiff was riding along said highway between said sections," his "horse stepped into a hole on the north side, and in the traveled portion of said highway, and between said sections," sufficiently described the place of injury, under a plea of the general issue.—*Whoram v. Argentine Tp.* (Mich.) 70 N. W. 341.

[b] (Wis.; 1895.)

Whether old material left by the roadside upon repairing a bridge is such as to frighten a horse of ordinary gentleness, when properly driven, is a question for the jury.—*Laird v. Town of Otsego* (Wis.) 62 N. W. 1042.
90 Wis. 25.

§ 36. Contributory negligence of traveler.

[a] (Wis.; 1895.)

One who could have used other roads, but undertakes to ford a stream because the road, after crossing by a bridge, is covered by water and ice, accepts the danger of making the ford.—*Welsh v. Town of Argyle* (Wis.) 62 N. W. 517, 89 Wis. 649.

[b] (Wis.; 1895.)

Riding on a seat not anchored to the wagon is not negligence, as a matter of law, so as to prevent a recovery for injuries caused by the overturning backwards of the seat, due to the wagon dropping into a hole in the highway.—*Jennings v. Town of Albion* (Wis.) 62 N. W. 926.
90 Wis. 22.

[c] (Wis.; 1895.)

It is not negligence, as a matter of law, to travel over a corduroy road having deep holes, caused by wear and rot, the road being covered with water from a heavy rain, in a wagon sufficient and prudently driven, but with a broken spring, and well loaded, it not being clear that the broken spring or the load had any agency in producing the accident.—*Luedtke v. Town of Mukwa* (Wis.) 62 N. W. 931.
90 Wis. 57.

[d] (Wis.; 1896.)

One driving on a highway is required to use ordinary care as to driving over dangerous or defective places. Whether such care is exercised in a given case is a question of fact, and it is misleading to charge a jury that a driver was justified in driving over a place unless it was "rashness" to do so.—*Groundwater v. Town of Washington* (Wis.) 65 N. W. 871.
92 Wis. 56.

§ 37. — Question for jury.

[a] (Mich.; 1896.)

Where the driver of a vehicle, while passing over a culvert, noticed a defect therein, and drove around the same, but upon returning in the dark, ran into it, while driving rapidly, whereby the vehicle was injured, the question as to whether it was contributory

negligence to forget the defect in the meantime should have been submitted to the jury.—*Bonga v. Weare Tp.* (Mich.) 67 N. W. 557.

[b] (Mich.; 1897.)

Where plaintiff knew of the defect several months before the accident, but supposed it had been remedied, and, without thinking about the defect, rode his horse into it, the question whether he was negligent was for the jury.—*Whoram v. Argentine Tp.* (Mich.) 70 N. W. 341.

[c] (Wis.; 1896.)

A petition in an action for the death of plaintiff's intestate, caused by a defective highway, alleged a want of repair in the highway at an intersection of two roads, and a gully in the track; that the highway was obstructed at such point by logs on both sides of the road; that as deceased approached the corner on a dark night, and as he turned at the corner, one of his wheels passed over one of the logs, and threw him out, causing his death. *Held*, that whether deceased was guilty of contributory negligence was a question for the jury.—*Slivitzki v. Town of Wien* (Wis.) 67 N. W. 730.
93 Wis. 460.

§ 38. Notice of injury.

(Wis.; 1895.)

A notice to the supervisors of a town that plaintiff had been injured by an obstruction in the highway, "one-half mile east of the village of O., in such town, and near to and a little east from the farm house of one T. B.," together with the description of the obstruction, sufficiently complies with Rev. St. § 1339, making a notice describing the nature and location of an obstruction a condition precedent to recovery for an injury resulting therefrom.—*Laird v. Town of Otsego* (Wis.) 62 N. W. 1042.
90 Wis. 25.

X. LAW OF THE ROAD.

§ 39. Meeting vehicles.

[a] (Mich.; 1896.)

Where one driving north on the west track of the highway crosses the road, and wantonly drives into and injures the horse of one approaching from the other direction, he will be liable for such injury, though the other may himself have been careless in turning to the left instead of to the right.—*Tyler v. Nelson* (Mich.) 66 N. W. 671.

[b] (Wis.; 1894.)

In an action for injuries to plaintiff's horse, caused by a collision with defendant on a highway, evidence that there was a beaten wagon way on each side of the road, and that defendant was driving to his left of the center of the road, warrants a finding that defendant was negligent.—*Luedtke v. Jeffrey* 61 N. W. 292, 89 Wis. 136.

[c] (Wis.; 1894.)

Where plaintiff was driving at night in a slow trot, as far to his right-hand side of the road as possible, he was not, as a matter of law, guilty of contributory negligence.—*Luedtke v. Jeffrey*, 61 N. W. 292, 89 Wis. 136.

HIRING.

See "Bailment."

HOLDING OVER.

See "Landlord and Tenant," §§ 40-42.

In public office, see "Office and Officer," § 5.

HOLIDAYS.

See, also, "Sunday."

(Wis.: 1895.)

Where a cause in a justice's court is adjourned to a day afterwards proclaimed by the governor and president as Thanksgiving day, a judgment therein rendered on the next day, pursuant to the terms of a continuance ordered on Thanksgiving day, is void.—*Milwaukee Harvester Co. v. Teasdale*, 64 N. W. 422, 91 Wis. 59.

HOMESTEAD.

I. ACQUISITION AND ENFORCEMENT, §§ 1, 2.

II. NATURE AND EXTENT OF RIGHT, §§ 3-12.

1. Who May Claim, §§ 3-5.
2. Property in Which Right May be Claimed, §§ 6, 7.
3. Extent and Value, §§ 8, 9.
4. Liabilities Enforceable Against, §§ 10-12.

III. RIGHTS OF SURVIVING SPOUSE AND HEIRS, §§ 13-15.

IV. ABANDONMENT AND CONVEYANCES, §§ 16-22.

1. Abandonment, § 16.
2. Contracts, Conveyances, and Incumbrances, §§ 17-22.

Application for entry under federal laws, see "Public Lands," § 3.

I. ACQUISITION AND ENFORCEMENT.

§ 1. Character of occupancy and use.

[a] (Iowa: 1895.)

The fact that a building is used for a saloon will not deprive the occupant of homestead rights as against a creditor not claiming under a violation of the prohibitory law.—*Groneweg v. Beck* (Iowa) 62 N. W. 31. 93 Iowa, 717.

[b] (Mich.: 1894.)

One cannot claim, as against a mechanic's lien, that a house is his homestead, where, at the time of the contract for building it, under which the lien is claimed, he was occupying another house which he owned.—*McMonagle v. Wilson* (Mich.) 61 N. W. 495. 103 Mich. 264.

[c] (Wis.: 1896.)

B. bought 40 acres of land, in 1880, with intention of making it his homestead, cleared part of it, and dug a well. In 1881, he erected a small house on it, which was occupied by his father-in-law until June, 1882, from which time until April, 1883, it was occupied by a tenant, who paid rent by building an addition to the house. B. moved into the house at the latter date, and lived there with his family until his death in 1887. He kept live stock on the land from the time he purchased it, planted fruit and shade trees, and used the cellar for keeping his vegetables, etc. *Held*, that the land was B.'s homestead from the time he purchased it.—*Shaw v. Kirby* (Wis.) 67 N. W. 700. 93 Wis. 379.

§ 2. Rural homestead—Effect of incorporation into city.

(Minn.: 1896.)

The extension by an act of the legislature of the limits of a city so as to include a homestead did not diminish the rights of the owner thereof where the homestead was continued to be used for agricultural purposes, and was not platted, and was surrounded by lands which, though platted, were rural in character.—*Kiewert v. Anderson*, 67 N. W. 1031. 4 N.W.DIG.—28

II. NATURE AND EXTENT OF RIGHT.

1. WHO MAY CLAIM.

§ 3. Partners.

[a] (Mich.: 1895.)

Where a partner, upon the dissolution of the firm, conveyed his interest in firm real estate to the wife of the other partner, the latter cannot acquire a homestead therein as against the creditors of the firm.—*Michigan Trust Co. v. Chapin* (Mich.) 64 N. W. 334.

[b] (S. D.: 1896.)

Under Comp. Laws 1887, § 4034, providing that each member of a partnership may require the firm property to be applied to the discharge of its debts, and has a lien on the shares of the other partners for this purpose, a partner cannot, by obtaining possession of, and using as a residence, firm real estate, acquire a homestead right therein.—*Brady v. Kreuger* (S. D.) 66 N. W. 1083.

§ 4. Divorced persons.

(S. D.: 1896.)

Where real estate has been occupied as a homestead by husband and wife, the wife, upon being divorced from her husband, retains no right to a homestead in the premises, in the absence of a decree to that effect.—*Brady v. Kreuger* (S. D.) 66 N. W. 1083.

§ 5. Married woman.

(Iowa: 1896.)

The wife of a purchaser of land, who went into possession under a contract of purchase, but afterwards, being unable to make the payments, sold the land, and assigned the contract to another, who had furnished all the money paid thereon, acquired by the transaction no rights of homestead or dower in the premises which she can assert against the assignee, though she did not join in the assignment.—*Dahl v. Thompson* (Iowa) 67 N. W. 579.

2. PROPERTY IN WHICH RIGHT MAY BE CLAIMED.

§ 6. In general.

[a] (Iowa: 1896.)

The right of homestead may attach to land in possession of a vendee, though the vendor retains the legal title till full payment of the purchase price.—*Lessell v. Goodman* (Iowa) 66 N. W. 917.

[b] (Minn.: 1895.)

A debtor cannot carve his homestead out of the front part of a number of platted city lots of the ordinary depth, thereby leaving the rear part of the lots without any means of access except through an alley.—*How v. First Nat. Bank* (Minn.) 63 N. W. 632. 61 Minn. 238.

[c] (Minn.: 1895.)

Where a debtor owned several adjacent lots in a city, exceeding in area one-half an acre, on which is his dwelling, and also a business block, in selecting his homestead he could not reject a part of the dwelling for the purpose of including the business block.—*How v. First Nat. Bank*, 63 N. W. 632. 61 Minn. 238.

[d] (Neb.: 1895.)

A building, the first floor of which is used for mercantile purposes, and the second floor for a residence, is a "dwelling house," within the meaning of Comp. St. 1893, c. 36, § 1, making a homestead of a certain value, consisting of a "dwelling house" and the land on which it is built, exempt from execution in certain cases.—*Corey v. Schuster* (Neb.) 62 N. W. 470. 44 Neb. 269.

[e] (Neb.: 1896.)

A wife who, by mesne conveyance from her husband, acquires property exempt as a home-

stead, takes the title in no manner by judgments against the husband, though the purpose of the conveyance was to defraud the husband's creditors. *Munson v. Carter* (1894) 58 N. W. 431, 40 Neb. 117, followed. *Mundt v. Hagedorn*, 68 N. W. 610.

[14] (Neb.: 1897.)

The term "lot," appearing in Comp. St. c. 36, § 1, relating to homesteads, denotes a parcel of land within the limits of a city or village as surveyed and platted.—*Norfolk State Bank v. Schwink* (Neb.) 70 N. W. 970.

§ 7. Exchange or sale of homestead.

[1a] (Iowa: 1894.)

Code, §§ 2000, 2001, provide that the owner of a homestead may change his home, and hold the new acquisition exempt from execution, to the extent in value of the old, in all cases where the former homestead would have been exempt. *Held*, that, it appearing that the value of the homestead in controversy was \$900, and that it was purchased with the proceeds of the sale of a farm of 170 acres which included the former homestead, and which, together with a creamery thereon, was worth \$6,000, a finding that the homestead 40 acres therein equaled the value of the new homestead was proper.—*White v. Kinley* (Iowa) 61 N. W. 176.

92 Iowa, 598.

[1b] (Iowa: 1894.)

Code, §§ 2000, 2001, provide that the owner of a homestead may change his home, and hold the new acquisition exempt from execution, to the extent in value of the old, in all cases where the former homestead would have been exempt. *Held*, that the title of the new homestead may be taken in the wife's name without affecting either the rights of the husband or the wife.—*White v. Kinley* (Iowa) 61 N. W. 176.

92 Iowa, 598.

[1c] (Iowa: 1894.)

Under Code, §§ 2000, 2001, providing that a homestead once acquired may be exchanged for another, to which the rights of the first homestead attach, vacant land exchanged for a former homestead, or purchased with the proceeds of a sale thereof, if held in good faith for use as a home, may be claimed as a homestead.—*Mann v. Corrington* (Iowa) 61 N. W. 409.

93 Iowa, 108.

[1d] (Iowa: 1895.)

A husband and wife sold their homestead, intending some time to acquire a new one with the proceeds of the old; but more than a year after the sale the husband, with the wife's consent, invested the proceeds of the sale in a firm of which he was a member, and, after plaintiff had obtained a judgment against him for a firm debt, he withdrew an amount equal to that which he had invested, and purchased land, which he conveyed to his wife. *Held*, that the land was not exempt from execution on plaintiff's judgment as the homestead of defendants, under Code, §§ 2000, 2001, providing that a homestead may be changed, and exempting the new one to the extent of the value of the old.—*Peninsular Stove Co. v. Roark* (Iowa) 63 N. W. 326.

[1e] (Iowa: 1896.)

Where a husband sells his homestead with the intention of investing the proceeds in another homestead, on his death before the receipt thereof his wife is entitled, under Code, §§ 2000, 2001, to receive such proceeds, as against creditors of the husband, for investment in a homestead for herself and children.—*Schuttlöffel v. Collins* (Iowa) 67 N. W. 397.

[1f] (Neb.: 1896.)

Proceeds of the sale of a homestead being, for six months after said sale, entitled to the same protection against legal process as the homestead itself, if, during that period, they are invested in a city lot, such lot may be selected as a homestead, although not occupied

as such within that time.—*Prugh v. Portsmouth Sav. Bank* (Neb.) 67 N. W. 309.

48 Neb. 411.

[1g] (Neb.: 1890.)

When the homestead is sold, a judgment against the vendor after the contract of sale, and before delivery of the deed, on a debt for the payment of which such homestead is not liable, is not a lien on such land or the unpaid purchase money. *Schriber v. Platt* (1886) 28 N. W. 289, 19 Neb. 625, followed.—*Corey v. Plummer*, 67 N. W. 445, 48 Neb. 481.

3. EXTENT AND VALUE.

§ 8. Extent.

[1a] (Iowa: 1895.)

In an action to establish homestead rights it appeared that the building was two stories high, and had a cellar. Plaintiffs occupied the second floor as a dwelling and the first floor as a store. The cellar was used for the usual household purposes, and could only be reached through the store room, and the only door to the water-closet and woodshed in the back yard was through the store room. There was an entrance from the street to the stairs leading to the living rooms. *Held*, that the whole building and outhouses were exempt.—*Groneweg v. Beck* (Iowa) 62 N. W. 31.

93 Iowa, 717.

[1b] (Iowa: 1895.)

Where an addition to a homestead is not necessary for homestead purposes, and has an independent entrance from the street, and might be detached without interfering with the use of the homestead, neither such addition nor the ground on which it stands is exempt as part of a homestead.—*Groneweg v. Beck* (Iowa) 62 N. W. 31.

93 Iowa, 717.

[1c] (Minn.: 1895.)

The owner of an unplatted block of land in the midst of platted and laid-out parts, in an incorporated city, is entitled to claim as a homestead only a tract equal to the average size of platted lots in his neighborhood.—*Heidel v. Benedict* (Minn.) 63 N. W. 490.

61 Minn. 170.

§ 9. Value—How determined.

(Neb.: 1896.)

Under Comp. St. c. 36, § 1, exempting a homestead not exceeding \$2,000 in value, the exemption is determined, not from the value of the fee, but from the value of the claimant's interest in the premises. *Hoy v. Anderson* (1894) 58 N. W. 125, 39 Neb. 386, followed.—*Mundt v. Hagedorn*, 68 N. W. 610.

4. LIABILITIES ENFORCEABLE AGAINST.

§ 10. Liabilities in general.

[1a] (Iowa: 1896.)

Where a homestead belonging to the wife is mortgaged to secure a debt of the husband, the proceeds of which had gone into his business, and were in no way connected with the acquisition or improvement of the homestead, the payment of such debt out of his own resources does not place unsecured creditors in place of the mortgagee.—*Wells v. Anderson* (Iowa) 66 N. W. 102.

[1b] (Minn.: 1895.)

Where a grantee of 80 acres of land agreed as part of the price to pay his grantor's indebtedness to a third person, and thereafter occupied the land as his homestead, the land could not be sold on execution issued on a judgment obtained against him during such occupancy by the creditor of the grantor on his agreement to pay the debt.—*Kugath v. Meyers* (Minn.) 64 N. W. 1138.

62 Minn. 399.

[c] (Neb.: 1897.)

Although lands acquired as a government homestead are forever exempt from liability for the debts of the patentee created before the patent was issued, such lands in the hands of a subsequent owner are not exempt by the federal homestead law from the payment of the debts of the latter incurred prior to the issuance of the patent.—*Duell v. Potter* (Neb.) 70 N. W. 932.

§ 11. Claims for labor.**(Neb.: 1896.)**

Code Civ. Proc. § 531, providing that nothing therein contained shall exempt any property from execution for clerks', laborers', or mechanics' wages, has no application to property exempt as a homestead.—*Fox v. McClay* (Neb.) 67 N. W. 888.
48 Neb. 820.

§ 12. Mechanics' liens.**(S. D.: 1897.)**

Comp. Laws, §§ 5126, 5127, before the amendment of 1890, provided that there should be absolutely exempt from forced sale (7) "the homestead as created, defined and limited by law." Section 2452 provided that the homestead should be subject to mechanics' liens. Laws 1890, c. 86, amending section 5127, substituted for subdivision 7 a statement of what should constitute a homestead, and made no exceptions to its exemption. *Held*, in view of the fact that in 1893 the legislature submitted to popular vote a proposition to subject homesteads to mechanics' liens, which was rejected, that the homestead defined by Laws 1890, c. 86, was not subject to such liens.—*Fallihee v. Wittmayer* (S. D.) 70 N. W. 642.

III. RIGHTS OF SURVIVING SPOUSE AND HEIRS.**§ 13. Rights of survivors—Election between homestead and distributive share.****(Iowa: 1896.)**

Code, § 2007, provides that, "upon the death of either the husband or the wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law"; section 2008, that "the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section, but the survivor may elect to retain the homestead for life in lieu of such share," etc.; and section 2444, that an application to have the statutory distributive share set apart to the survivor may be made at any time after 20 days and within 10 years from death of decedent. *Held* that, in the absence of an unequivocal act or declaration of an election to retain the homestead, mere occupancy of a homestead by the survivor, for a period within section 2444, does not bar her right to the distributive share. *Deemer and Kinne, JJ.*, dissenting.—*Stephens v. Hay* (Iowa) 66 N. W. 1048.

§ 14. Title of surviving spouse.**(Wis.: 1896.)**

1 Rev. St. § 2171, provides that, when lands are devised to a woman by her husband, she shall elect whether she will take under the will or under the law, but that she shall not have both unless such appears to have been the intent of the testator. Section 2172 provides that, if she elect to take under the law, she shall have the same right to the homestead as if her husband had died intestate, leaving lawful issue. *Held*, that where a testator who was involved in debt, and whose estate was incumbered with mortgages, devised all his estate to his wife, with directions to continue his business, if possible, and pay his

debts out of the same, but the widow waived the provision made for her in the will, and prayed that the homestead be set apart to her, she thereby acquired only a life estate in said homestead.—*Melms v. Pabst Brewing Co.* (Wis.) 66 N. W. 244.

93 Wis. 140.

§ 15. Rights of children.**(Mich.: 1896.)**

A sale of the homestead, under order of court, by the widow, as administratrix, cannot be attacked by the children 11 years later, after they have arrived at full age, with the exception of one who resides with her husband on a home of their own.—*Louden v. Martindale* (Mich.) 67 N. W. 133.

IV. ABANDONMENT AND CONVEYANCES.**1. ABANDONMENT.****§ 16. Removal from premises.****[a] (Iowa: 1895.)**

A woman who married and went to live with her husband on a farm leased by him, leaving the greater part of her furniture stored in her homestead, and with the intention of returning after the expiration of the lease, did not abandon her homestead.—*Reeseaman v. Davenport* (Iowa) 65 N. W. 301.

[b] (Mich.: 1896.)

Complainant vacated his homestead, and took up his residence with his father, temporarily, and for the specific purpose of caring for the father, who was very old; complainant's own house being too small to accommodate both families. *Held*, that this was not necessarily an abandonment of his homestead.—*Hitchcock v. Misner* (Mich.) 69 N. W. 226.

[c] (Neb.: 1895.)

To establish abandonment of a homestead, the evidence must show, not only that the party removed therefrom, but that he did so with the intention of not returning, or that after removal he formed the intention of remaining away. *Mallard v. Bank* (1894) 59 N. W. 511, 40 Neb. 784, followed.—*Corey v. Schuster*, 62 N. W. 470, 44 Neb. 269.

[d] (Neb.: 1895.)

The fact that the owner of a homestead, after removing to another county, voted in such county, is evidence that he removed with the intention of not returning, but is not conclusive.—*Corey v. Schuster* (Neb.) 62 N. W. 470.
44 Neb. 269.

[e] (Neb.: 1895.)

Evidence that the owner of a homestead removed with his family to a town in an adjoining county, left a part of his household goods in the building on the lot, rented a house in the town removed to, and resided therein with his family; that he intended to return, and that he had not changed that intention; that while he resided in the adjoining county he voted once therein at a general election,—will support a finding that he had not abandoned his homestead.—*Corey v. Schuster* (Neb.) 62 N. W. 470.
44 Neb. 269.

[f] (N. D.: 1896.)

Where the owner of a homestead, with his family, removed to another state, where they continuously resided for four years, the presumption is that they abandoned the homestead.—*Kuhnert v. Conrad* (N. D.) 69 N. W. 185.

[g] (Wis.: 1895.)

Evidence that the owner of a homestead removed from the premises with his family, and went to another city to live, without any certain and abiding intention of returning, will support a finding that he abandoned the home-

stead. *Moore v. Smead*, 62 N. W. 426, 89 Wis. 558.

[1a] (Wis.: 1895.)

Plaintiff left certain premises with a purpose to return in six months, built and lived in another house on a lot which he paid for, witnessed and recorded a contract of sale of the same in which it was described as his homestead, and remained away from the property in question six years. *Held* an abandonment, and not a "temporary removal with the intention to reoccupy the same." under Rev. St. § 2983.—*Blackburn v. Lake Shore Traffic Co.* (Wis.) 63 N. W. 289. 90 Wis. 362.

2. CONTRACTS, CONVEYANCES, AND INCUMBRANCES.

Conveyance, see, also, "Fraudulent Conveyances," § 5; "Public Lands," § 19.
Exchange or sale, see ante, § 7.

§ 17. In general.

[1a] (Mich.: 1895.)

A deed of a tract of land, including a homestead, will be void as to the entire tract, where the homestead, on account of impossibility of location, cannot be severed from the entire tract.—*Sammon v. Wood* (Mich.) 65 N. W. 529.

[1b] (Mich.: 1897.)

Under Const. art. 16, § 2, and 2 How. Ann. St. § 7722 (which require the signature of the wife to an instrument to bar the homestead right), a life lease of a homestead, the title to which is in the husband, is valid and effective if signed and acknowledged by the husband and wife, though the husband's name only appears as lessor in the body of the instrument.—*Barrett v. Cox* (Mich.) 70 N. W. 446.

§ 18. Conveyance by husband.

[1a] (Iowa: 1896.)

A husband entered into possession of land and occupied the same with his family as a homestead, under a contract by which title was to be conveyed on payment of the full price by a specified date. Subsequently the vendor declared the contract forfeited, and the husband undertook in writing to acknowledge such forfeiture as valid. *Held*, that such acknowledgment was void, under Code, § 1990, forbidding the conveyance of a homestead except by the joint act of husband and wife.—*Lessell v. Goodman* (Iowa) 66 N. W. 917.

[1b] (Minn.: 1895.)

Where a creditor, holding land of the debtor under an absolute deed and an agreement to reconvey on payment of the debt, conveyed the land to one who paid the debt and made other advances to the debtor, and who agreed to reconvey to the debtor on being repaid the total advances, and the debtor released the creditor from the agreement to reconvey, the conveyance was valid, though the land was occupied by the debtor at the time as a homestead, and his wife did not consent to the conveyance.—*Spalti v. Blumer* (Minn.) 65 N. W. 454. 63 Minn. 269.

§ 19. Necessity and sufficiency of wife's joinder.

[1a] (Iowa: 1895.)

Code, § 1990, provides that the husband and wife must "concur in and sign the same joint instrument" conveying a homestead. The mortgage on a homestead was signed and acknowledged by both husband and wife, but the name of the wife alone appeared in the body of the instrument. Thereafter the parties duly executed a second mortgage to other persons, wherein they recited that it was subject to the first mortgage. *Held*, that the mere recognition of the void mort-

gage in the second mortgage did not make it valid.—*Seiffert & Wiese Lumber Co. v. Hartwell* (Iowa) 63 N. W. 333.

[1b] (Iowa: 1896.)

Where a husband and wife convey, in trust for the husband, land which afterwards becomes their homestead, with power in the trustee to convey without intervention or signatures of the grantors, and such trustee conveys it to another in trust for such husband, under an agreement that the latter trustee shall not convey or incumber it without the husband's consent, such trustee, at the husband's instance, and for his benefit, can execute a valid mortgage of the land without the wife's joining therein.—*Des Moines Ins. Co. v. McIntire* (Iowa) 68 N. W. 565.

[1c] (Neb.: 1896.)

Prior to the enactment of the homestead law of 1877, the failure of the wife to join in a conveyance of the homestead, the title to the same being in the husband, did not render such conveyance void. *Rector v. Rotton* (1874) 3 Neb. 171, followed.—*Schields v. Horbach*, 68 N. W. 524.

§ 20. Lien of judgment.

(Wis.: 1895.)

Judgments duly docketed against one holding the record title to land formerly owned by him as a homestead, but abandoned as such before the judgments were entered, are liens on the property without being enforced by a bill in equity.—*Moore v. Smead* (Wis.) 62 N. W. 426, 89 Wis. 558.

§ 21. Mortgage.

[1a] (Neb.: 1895.)

A decree foreclosing a mortgage does not bar the mortgagor's right to have the surplus paid to him in lieu of his homestead.—*Hooper v. Castetter* (Neb.) 63 N. W. 135. 45 Neb. 67.

[1b] (Neb.: 1897.)

Comp. St. c. 36, § 4, providing that the homestead of a married person cannot be incumbered unless the instrument is acknowledged by both husband and wife, does not render void a mortgage by the wife alone at the time of the purchase of real estate, to secure the unpaid purchase money, as the homestead has not then attached.—*Prout v. Burke* (Neb.) 70 N. W. 512.

§ 22. Devise—Charge of debts and legacies.

(Wis.: 1894.)

Laws 1864, c. 270, § 1, providing that a homestead disposed of by will should descend to the legatee according to the terms of the will, free from all claims against testator, except mortgages thereon, authorized a testator to charge his homestead with the payment of debts and legacies.—*Turner v. Oberheu* (Wis.) 61 N. W. 280, 89 Wis. 1.

HOMICIDE.

- I. IN GENERAL, §§ 1, 2.
- II. MURDER, §§ 3-10.
- III. MANSLAUGHTER, §§ 11-13.
- IV. EXCUSABLE AND JUSTIFIABLE HOMICIDE, §§ 14-18.
- V. ASSAULT WITH INTENT TO KILL, § 19.
- VI. INDICTMENT AND INFORMATION, §§ 20-22.
- VII. EVIDENCE, §§ 23-34.
 1. In General, §§ 23-31.
 2. Declarations and Admissions, §§ 32-34.
- VIII. TRIAL, §§ 35-44.

Intoxication as affecting capacity to commit, see "Criminal Law," § 6.
Right to bail, see "Bail," § 1.

I. IN GENERAL.

§ 1. Proof of corpus delicti.

(Mich.; 1897.)

Proof of the corpus delicti is sufficient to go to the jury where deceased, a young woman, was found dead in the woods, with a bottle of laudanum near her hand, but there was no trace of poison in the stomach; there were marks on the face and neck, the upper ring of the windpipe was crushed, the lungs collapsed, the brain congested, and the nose pressed to one side; and the two physicians who made the post mortem examination testified that death was from strangulation; and it appears that a cry was heard in the woods after deceased went there, that the ground was indented and limbs broken under her head, and that hairs claimed to be those of defendant were found on a twig near her head.—*People v. Parmelee* (Mich.) 70 N. W. 577.

§ 2. Defenses.

(Iowa; 1896.)

It is no defense that deceased might have recovered had he been treated according to the most approved surgical methods.—*State v. Edgerton* (Iowa) 69 N. W. 280.

II. MURDER.

Indictment, see post, § 20.

Instructions as to lower degrees, see post, § 37.

§ 3. In general.

[a] (Neb.; 1895.)

The crime of murder is regarded as committed at the time of the giving of the fatal blow or wound, though the death does not occur until a subsequent day; and the accused is to be tried by the laws in force at the time the injurious act is done.—*Debney v. State*, 64 N. W. 446, 45 Neb. 856.

[b] (Neb.; 1897.)

To sustain a conviction under Cr. Code, § 3, for murder in the first degree in killing another while engaged in a robbery, it is not necessary that the killing be such that, in the absence of the statute, it would amount to murder, as distinguished from manslaughter.—*Henry v. State* (Neb.) 70 N. W. 924.

§ 4. Malice.

[a] (Neb.; 1894.)

An instruction that "if one with deliberation and premeditation uses a deadly weapon, * * * and shoots another intentionally, and such other, * * * in consequence thereof, dies, the person thus shooting is held responsible for the death, and, if the killing is neither justifiable nor excusable in law, is liable to be punished for murder in the first degree," held erroneous, as the element of malice was omitted therefrom.—*Willis v. State* (Neb.) 61 N. W. 254, 43 Neb. 102.

[b] (Neb.; 1895.)

On a trial for murder, an instruction that: "Malice, in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind,"—is proper.—*Housh v. State*, 61 N. W. 571, 43 Neb. 163.

[c] (Neb.; 1897.)

Malice is an essential element in the crime of murder, both at common law and under the statute.—*Davis v. State* (Neb.) 70 N. W. 984.

[d] (Neb.; 1897.)

Malice as an element in murder means a wrongful act done intentionally without just excuse.—*Davis v. State* (Neb.) 70 N. W. 984.

Evidence as to malice, see post, §§ 25, 26.

§ 5. First degree—Premeditation and deliberation.

[a] (Mich.; 1895.)

On the trial of one charged with killing his brother in a saloon, the court instructed the jury that if, after defendant entered the saloon, he became aware that his brother was there, and then formed the intent to kill him, taking into account their previous quarrels, and that his brother was surrounded by friends, "if he then, even though but for a moment before he fired the fatal shot, formed in his mind the purpose of taking his brother's life, and pursuant to that purpose he shot and killed him, that would constitute the crime of murder." *Held* proper. —*McGrath, C. J., dissenting.*—*People v. Palmer* (Mich.) 63 N. W. 656.

105 Mich. 568.

[b] (Neb.; 1895.)

On the question of whether a homicide is murder in the first degree, the length of time that intervenes between the formation of the malicious purpose to kill and the killing is not material.—*Carleton v. State* (Neb.) 61 N. W. 699, 43 Neb. 373.

Evidence as to premeditation and deliberation, see post, § 27.

§ 6. Second degree.

[a] (Neb.; 1897.)

To displace a railroad track so as to cause a wreck in which a passenger is killed may be murder in the second degree, though there was no specific intent to kill the passenger or any other person on the train.—*Davis v. State* (Neb.) 70 N. W. 984.

[b] (Neb.; 1897.)

When the fact of unlawful killing is proved and no evidence tends to show express malice on the one hand, or any justification on the other, the law implies malice, and the offense is murder in the second degree.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 7. Third degree.

[a] (Minn.; 1896.)

Gen. St. 1894, § 6440, provides that the "killing of a human being, when perpetrated by an act eminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual," is murder in the third degree. *Held*, that more than one person need not have been put in jeopardy by the reckless act of accused.—*State v. Lowe* (Minn.) 68 N. W. 1094.

[b] (Minn.; 1896.)

It is necessary, however, that the act should have been committed without special design on the particular person or persons with whose murder accused is charged.—*State v. Lowe* (Minn.) 68 N. W. 1094.

§ 8. Sufficiency of evidence.

[a] (Iowa; 1894.)

In a murder case, it appeared that defendant was deceased's farm hand, and that deceased received the injuries of which he died while they were driving together, both being intoxicated. There was evidence that some time prior thereto defendant struck deceased a severe blow, "in the nature of rough sport"; that he and two other men insulted deceased's wife; that defendant was afterwards discharged, whereupon he gave vent to expressions of ill will against deceased; that deceased hired him again, and left his wife and children alone with defendant while he was absent 10 days; that while deceased was absent defendant once attempted improper liberties with the

wife, which she resisted; that when deceased returned, on the day he was killed, he greeted defendant kindly; and that they and a neighbor drank liquor furnished by deceased. Defendant claimed that deceased was injured by the team running away. *Held*, that the evidence did not support a verdict of guilty of murder in the first degree. *State v. Nolan* 61 N. W. 181, 92 Iowa, 491.

[D.] (Wis.; 1896.)

On a trial for homicide the evidence showed that defendant, who was at his neighbor's house, in a room with the man, his wife, and seven children, on the announcement by one of the children that one P., with whom defendant had had a difficulty, was coming, took up his shotgun, and said, "Let him come;" that as P. entered the room defendant cocked and raised the gun, and commanded P. not to advance, or he would kill him; that P., after remonstrating that he had not come to hurt defendant, grabbed the muzzle of the gun, and pushed it aside; that the gun was just then discharged, and one of the children killed. *Held*, that the evidence warranted a conviction of murder in the second degree, under Rev. St. § 4339, defining such murder as the killing of a person perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, without the design to effect the death of the person killed, or any other person.—*Frank v. State* (Wis.) 68 N. W. 657.

§ 9. — Murder by abortion.

(Iowa; 1895.)

On a prosecution for murder by abortion, it appeared that deceased, who was ill in bed, was visited by defendant, her suitor, who remained alone with her for several hours during the night; that, after he left, the landlady went to the room, and found deceased very ill; that deceased expired two days later, at about the time to be expected if an abortion was performed on the night of defendant's visit; and that, on post mortem examination, the womb was found to be punctured by a blunt instrument, the physicians being of opinion that this wound was inflicted before death, and that deceased was pregnant. *Held*, that a motion to direct a verdict for defendant was properly overruled.—*State v. Minard* (Iowa) 65 N. W. 147.

§ 10. Question for jury—Degree of offense.

(Mich.; 1898.)

Where, after a scuffle between defendant and deceased, in which defendant, who was much the smaller, was somewhat injured, he went upstairs to his room, and procured a revolver, and, walking down the stairs, and through two or three intervening rooms, to where deceased was washing his hands, without other words shot deceased three times, killing him, whether the homicide was murder in the first or second degree or manslaughter is a question for the jury.—*People v. Holmes* (Mich.) 69 N. W. 501.

III. MANSLAUGHTER.

Indictment, see post, § 21.

§ 11. Preventing escape of prisoner.

(Neb.; 1895.)

Where a sheriff, to prevent the escape of a prisoner from the jail, shot and killed him, when he might otherwise have easily been prevented from escaping, a verdict of manslaughter was warranted.—*Lamma v. State* (Neb.) 64 N. W. 956, 46 Neb. 236.

§ 12. Sufficiency of evidence.

[a] (Iowa; 1895.)

In a prosecution for murder, it appeared that defendant and deceased were in a saloon,

and that defendant picked up the proprietor's revolver, which was lying near by, pointed it at deceased, and that it was discharged, and kill d the latter. *Held* sufficient to sustain a conviction of manslaughter.—*State v. Tippet* (Iowa) 63 N. W. 115.

[b] (Wis.; 1897.)

While defendant was fighting with another, deceased interfered, and struck defendant, but the latter did not return the blow. After such fight was ended, deceased approached defendant, and struck him on the temple, causing him to stagger back several feet. Deceased followed defendant, while the latter was protesting that he did not wish to fight deceased. Defendant then pushed deceased away, and during the struggle which followed shot him. It appeared that after the first fight defendant had exhibited a revolver, and had threatened to shoot any person who interfered with him; that deceased was a dangerous antagonist, and that defendant was afraid of him; and that in the last struggle both were in the heat of passion. *Held*, that a charge that if the jury were not convinced that defendant was guilty of murder in the first degree, their verdict must be "Not guilty," unless they found defendant guilty of manslaughter in the second degree, was erroneous, since under such evidence the jury might have found him guilty of manslaughter in the second, third, or fourth degree.—*Terrill v. State* (Wis.) 70 N. W. 356.

§ 13. Necessity of charge on manslaughter.

[a] (Mich.; 1896.)

Where the evidence shows defendant guilty of murder, if any crime, the court need not charge as to manslaughter.—*People v. Beverly* (Mich.) 66 N. W. 379.

[b] (Wis.; 1895.)

In the absence of a request to instruct as to manslaughter, a failure to do so is not reversible error, though the evidence would justify such an instruction.—*Odette v. State* (Wis.) 62 N. W. 1054.

90 Wis. 258.

[c] (Wis.; 1895.)

During a quarrel with deceased, defendant procured a gun, and, while trying to get possession of it, deceased was shot. *Held* that, the court having charged that if a person voluntarily becomes so drunk as to be incapable of intending murder, and kills a person, he is guilty of murder in the second degree, unless the circumstances render the killing of a lesser degree, or justifiable; and that if the gun was accidentally discharged in the struggle for it, without design to do harm, the killing was excusable.—*Odette v. State* (Wis.) 62 N. W. 1054.

90 Wis. 258.

IV. EXCUSABLE AND JUSTIFIABLE HOMICIDE.

Instruction as to justification, see post, § 39.

§ 14. Resistance of arrest.

(Iowa; 1896.)

On a trial for murder, evidence that defendant, in attempting to make a lawful arrest, shot deceased, who was about six feet from him and making no resistance, in the back, precludes the defense that the shooting was done in self-defense, or justified by defendant's forcible resistance of arrest.—*State v. Weston* (Iowa) 67 N. W. 84.

§ 15. Self-defense—Apprehension of danger.

[a] (Neb.; 1895.)

The mere belief of one assaulted that he is about to suffer death or great bodily harm

will not of itself justify him in taking the life of his adversary. There must exist reasonable ground for such belief, and the existence of such ground is a question of fact for the jury.—*Housh v. State*, 61 N. W. 571, 43 Neb. 163.

[b] (Neb.; 1895.)

A person unlawfully attacked, so as to excite him to a reasonable belief that he is in danger of losing his life or receiving great bodily injury, may use such force to repel the attack as then appears to him to be reasonably necessary, though he may be mistaken as to the extent of the actual danger, providing other reasonable men would also have been mistaken.—*Barr v. State* (Neb.) 63 N. W. 856, 45 Neb. 458.

[c] (Wis.; 1896.)

The right to take another's life in self-defense is not to be tested by the honesty or good faith of defendant's belief in the necessity of the killing, but by the fact whether he had reasonable grounds for such belief.—*Frank v. State* (Wis.) 68 N. W. 657.

§ 16. — Duty to retreat and avoid danger.

[a] (Iowa; 1896.)

The killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of saving one's own life or preventing great bodily injury; and, if the danger can be avoided by retreat or otherwise, the killing is not excusable.—*State v. Warner* (Iowa) 69 N. W. 546.

[b] (Neb.; 1894.)

Where defendant, being on his own premises, honestly believes, as a reasonable man, that deceased is about to take his life or do him serious bodily harm, the law does not require him to retreat.—*Willis v. State* (Neb.) 61 N. W. 254, 43 Neb. 102.

[c] (Wis.; 1896.)

Where defendant is in fault in creating the situation of danger, his right of self-defense does not arise until he has done all that reasonably could be done by him to avoid the necessity of killing his assailant to protect himself.—*Frank v. State* (Wis.) 68 N. W. 657.

§ 17. Defense of property.

[a] (Iowa; 1896.)

The fact that a man sleeps and keeps his clothes in the back part of a room used as a store, under an arrangement with the tenant, does not justify him in defending the building against intruders, as his dwelling house or private habitation.—*State v. Smith* (Iowa) 69 N. W. 269.

[b] (Iowa; 1896.)

It is no defense that the shooting was done by defendant upon discovering deceased, a boy 13 years old, robbing his melon patch.—*State v. Edgerton* (Iowa) 69 N. W. 280.

[c] (Iowa; 1897.)

Where defendant shot an officer as the latter entered a building which defendant claimed to have sublet from the lessee, who occupied a part thereof with his goods, and for whose disposssession the officer had a writ, an instruction that the officer "was rightfully on the premises, and had the right to enter said building, so far as his duty required him to do in removing" the lessee, and in putting another in possession of the part occupied by him, was not prejudicial to defendant.—*State v. Smith* (Iowa) 70 N. W. 604.

§ 18. Instructions—Self-defense.

[a] (Neb.; 1895.)

Instructions embodying the law of self-defense are properly refused, in the absence of evidence tending to show that the assault charged was justifiable on that ground.—*Krebnay v. State*, 61 N. W. 628, 43 Neb. 337.

[b] (Wis.; 1895.)

The mere fact that when defendant came out of the house with a gun, and approached de-

ceased, the latter drew a knife, would not justify an instruction that, if defendant fired under the belief that it was necessary in self-defense, he should be acquitted.—*Odette v. State* (Wis.) 62 N. W. 1054, 90 Wis. 258.

V. ASSAULT WITH INTENT TO KILL.

Indictment, see post, § 20.

§ 19. Intent.

(Neb.; 1895.)

To constitute an assault with intent to commit murder, actual intent to take life is necessary.—*Botsch v. State* (Neb.) 61 N. W. 730, 43 Neb. 501.

VI. INDICTMENT AND INFORMATION.

§ 20. Sufficiency.

[a] (Iowa; 1896.)

An indictment charging that defendant feloniously and with malice aforethought made an assault upon his wife, "and did then and there willfully and feloniously, with said razor, cut, wound, and stab" his wife, "with a felonious intent then and there * * * to kill and murder her," is not objectionable as charging that the assault, and not the battery, was committed with intent to kill.—*State v. Clark* (Iowa) 69 N. W. 257.

[b] (Mich.; 1895.)

An information charging the crime of murder in plain and sufficient language is not defective because the crime of rape, in the alleged perpetration or attempted perpetration of which the murder was committed, is not charged in the language of the statute.—*People v. Willett* (Mich.) 62 N. W. 1115, 105 Mich. 110.

§ 21. Manslaughter.

[a] (Minn.; 1894.)

That the crime was committed "in the heat of passion" is a mitigating circumstance, merely, so that a failure to allege it in an indictment for manslaughter does not prejudice defendant.—*State v. Matakovich* (Minn.) 61 N. W. 677, 59 Minn. 514.

[b] (Minn.; 1894.)

An indictment alleging that defendant, without legal authority, but without a design to effect death, feloniously killed another, by striking him on the head with a shovel, inflicting a mortal wound, and that the killing was not justifiable, sufficiently charges manslaughter in the first degree, without averring, in the words of the statute, that the killing was in a cruel and unusual manner, or by means of a dangerous weapon.—*State v. Matakovich* (Minn.) 61 N. W. 677, 59 Minn. 514.

[c] (Minn.; 1896.)

An indictment for murder in failing to procure medicine, care, or medical treatment for deceased, who was sick and in defendant's care under such circumstances that it was his duty to provide for her, did not sufficiently charge that the acts and omissions of defendant were the cause of the death, where it was not alleged that deceased would have lived or have lingered longer had defendant done his duty, and the "blood poisoning and other diseases and sickness" which it was averred deceased had were not alleged to have been caused by defendant's negligence; and though it was alleged that, "by reason of the failure and neglect" of defendant, "hereinbefore mentioned," deceased "did languish, and, languishing, did live until" a certain day, "on which last-named day she died * * * of the said neglect, and the sickness induced thereby," there

was no direct allegation that the "sickness induced thereby" was caused by defendant's neglect, and the character of such sickness was not stated.—State v. Lowe (Minn.) 68 N. W. 1094.

§ 22. Variance.

(S. D.; 1895.)

Where an indictment for murder contains but one count, which charges the crime to have been committed with a premeditated design, as defined in Comp. Laws, § 6442, subd. 1, it was reversible error to instruct that the premeditated design need not be proved, but that the jury might convict if the act of defendant which resulted in the death of deceased was an act eminently dangerous to others, and evincing a depraved mind, regardless of human life.—State v. Reddington (S. D.) 64 N. W. 170.

VII. EVIDENCE.

Instruction as to burden of proof, see post, § 40.

— on weight of evidence, see post, § 42.

Proof of corpus delicti, see ante, § 1.

Sufficiency of evidence of manslaughter, see ante, § 12.

— of murder, see ante, §§ 8, 9.

To support instructions, see post, § 41.

1. IN GENERAL.

§ 23. Competency, relevancy, and materiality.

[a] (Iowa; 1895.)

Where a physician testifies that he took a bullet from the body of the deceased, that, when he went before the grand jury, he left it in possession of that body, and identifies it at the trial, it is proper to admit it in evidence.—State v. Tippet (Iowa) 63 N. W. 445.

[b] (Iowa; 1895.)

A revolver which was not identified as the one which defendant had at the time of the shooting is not admissible in evidence.—State v. Tippet (Iowa) 63 N. W. 445.

[c] (Iowa; 1895.)

To show that defendant had knowledge of where the deceased was going, and knew where to waylay him, evidence that defendant knew that deceased on the day of the murder received a letter about which he proposed going to see his son-in-law, was admissible, and defendant's knowledge as to the letter could be shown by evidence that it was discussed after the murder in the presence of and by defendant.—State v. Seymore (Iowa) 63 N. W. 661.

[d] (Iowa; 1895.)

The fact that the state failed in its attempt to identify a revolver did not make the evidence received regarding it so immaterial as to render its admission error.—State v. Weems (Iowa) 65 N. W. 387.

[e] (Iowa; 1897.)

Where defendant's theory in a murder trial was that deceased had committed suicide, it was error to limit to the particular revolver found by the side of deceased, evidence that a pistol fired in close contact with a person, and at him, might not burn the flesh or singe the hair.—State v. Cater (Iowa) 69 N. W. 880.

[f] (Mich.; 1897.)

Where the prosecution claims that the motive of a murder was that defendant was the author of deceased's pregnancy, cross-examination of defendant as to whether deceased had been a witness for him in a divorce suit is proper to show their relations.—People v. Parmelee (Mich.) 70 N. W. 577.

[g] (Minn.; 1895.)

A statement of deceased, made a few hours before the homicide, in the absence of defendant, that she had a business engagement with defendant, was properly admitted in connection

with other evidence that shortly after making the statement she met defendant.—State v. Hayward (Minn.) 65 N. W. 63.

62 Minn. 474.

[h] (Neb.; 1895.)

On a prosecution for murder, it was competent for the state to prove the description and location of the wounds inflicted by defendant on deceased, to establish that death resulted therefrom.—Basye v. State (Neb.) 63 N. W. 811.

45 Neb. 261.

§ 24. Identity of deceased.

(Iowa; 1895.)

In a homicide case, a photograph of deceased, taken after he was shot, is admissible as a means to identify him, there being a question as to his name.—State v. Windahl (Iowa) 64 N. W. 420.

§ 25. Motive, animus, and mallee.

[a] (Iowa; 1895.)

It may be shown that the relations between defendant and deceased were not friendly, and that they got angry in discussion.—State v. Seymore (Iowa) 63 N. W. 661.

[b] (Iowa; 1895.)

It was proper to show, as a motive for the murder, that defendant had committed larceny, that deceased knew that the goods stolen were in the house where both resided, and that defendant was in fear that deceased would disclose this fact to the authorities.—State v. Seymore (Iowa) 63 N. W. 661.

[c] (Iowa; 1895.)

Testimony that some time before the homicide defendant stated that the next time he shot he would not shoot to scare, but to kill, is admissible, in view of his defense that it was accidental, and that he fired merely to scare, though at the time of the remark he did not have deceased in mind.—State v. Windahl (Iowa) 64 N. W. 420.

[d] (Mich.; 1896.)

On a trial for murder, the motive for which was claimed to be the obtaining of insurance on the life of deceased, it is not error to refuse an instruction calling attention to evidence that, four years before, when deceased was sick, and carrying a large amount of insurance, defendant properly administered medicine to him, though an overdose would have resulted in his death.—People v. Pope (Mich.) 66 N. W. 213.

[e] (Neb.; 1895.)

Evidence that defendant had quarreled with decedent's wife shortly before the commission of the murder was admissible to show motive.—Gravely v. State (Neb.) 64 N. W. 452, 45 Neb. 878.

§ 26. — Previous quarrels.

(Iowa; 1896.)

On a murder trial, where it appeared that deceased and his friends formed one faction in a neighborhood feud, and that defendant and his friends formed the other, evidence that prior to the homicide there were frequent quarrels and fights between the factions was admissible, where it also appeared that defendant was present and took part.—State v. Helm (Iowa) 66 N. W. 751.

§ 27. Premeditation and deliberation.

(Minn.; 1895.)

A hack driver testified that about five months before the commission of the crime defendant held a conversation with him as to placing a party in witness' back, and letting the horses run away over a certain bluff into a lake, and as to what witness would take for his hack and team. There was already evidence that at that time defendant was intimately associated with deceased, and that she was his dupe in financial affairs, and one witness had testified that shortly after the conversation testified to by the hack driver, defendant, while discussing ways

of murdering deceased, told witness of a hack driver whose assistance could be obtained. *Held*, that the hack driver's testimony was properly admitted, as showing that defendant, at the time of the conversation, contemplated commission of the crime.—*State v. Hayward* (Minn.) 65 N. W. 63.

62 Minn. 474.

§ 28. Threats.

[a] (Iowa; 1894.)

On a trial for murder, where the question was whether deceased was not the aggressor in the conflict which led to his death, evidence of recent uncommunicated threats by deceased against defendant's life was admissible to show that in the conflict deceased was seeking to execute such threats.—*State v. Helm* (Iowa) 61 N. W. 246.

92 Iowa, 540.

[b] (Neb.; 1895.)

In a prosecution for murder, where there was evidence of self-defense, evidence that deceased was quarrelsome, and had made threats against defendant, which were communicated to defendant prior to the killing, was admissible.—*Basye v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

§ 29. Res gestæ.

(Mich.; 1895.)

Where threats made against defendant by deceased on the day of the homicide were admissible, the response of the person to whom they were addressed that the latter had nothing to do with their quarrels, and that he had taken defendant to another city the day before to get him away from deceased, was admissible as part of the res gestæ. *Montgomery, J.*, dissenting.—*People v. Palmer* (Mich.) 63 N. W. 656.

105 Mich. 568.

§ 30. Opinion testimony.

(Iowa; 1895.)

A physician who examined the deceased may testify that the wound could have been made by a club like the one in evidence, that it was made by something of that character, and that the injuries were not, in his judgment, due to a fall.—*State v. Seymour* (Iowa) 63 N. W. 661.

§ 31. Weight and sufficiency.

(Iowa; 1896.)

There was evidence that, a few nights prior to the affray in which deceased was killed, one M. stated, in defendant's hearing, that he "had it in" for deceased, and suggested to defendant that they catch deceased on his way home, and that he (M.) lick him, while defendant stood off the other boys with M.'s revolver, to which defendant replied that he could stand them off with his fists; that on the night of the killing, while defendant, M., and several others were riding to the schoolhouse where the homicide occurred, M. remarked (referring to deceased) that there was "a big Dutchman coming there to lick him that night," and he "didn't want any help unless the whole family jumped in;" that some one else remarked that, if a mêlée occurred, they would all fight for each other; that, after arriving at the schoolhouse, defendant called a certain person aside, and told him there was liable to be trouble; that the affray began by C., one of defendant's party, addressing insulting language to B., a brother of deceased, which was unresented, whereupon defendant said B. was a coward and would not fight; that, immediately thereafter, deceased came out of the house, knocked C. off the porch, followed up the attack, and was stabbed by M.; and that defendant was soon after seen conversing with M. and C. in whispers. *Held* sufficient to warrant a finding that defendant conspired with M. to inflict personal injury on deceased, or at least, knowing of M.'s unlawful purpose, was present to aid and encourage him in it, thereby

justifying a verdict of manslaughter.—*State v. Mushrush* (Iowa) 66 N. W. 746.

2. DECLARATIONS AND ADMISSIONS.

§ 32. Dying declarations.

[a] (Iowa; 1894.)

In a murder case the prosecution may introduce, as dying declarations, written and verbal declarations made at different times.—*State v. Walton* (Iowa) 61 N. W. 179.

92 Iowa, 455.

[b] (Mich.; 1896.)

It is no objection to the admission of dying declarations that the exigencies of the case do not require it, that they were taken immediately after the injury to deceased, or that defendant had no notice of the taking of the statement.—*People v. Beverly* (Mich.) 66 N. W. 379.

[c] (Mich.; 1896.)

Where defendant was charged with killing his wife, it was not error to admit her dying declarations that defendant repeatedly threatened to shoot her if she should leave him, and refuse to cohabit with him, in connection with testimony that she did leave him, and that, being unable to induce her to return, defendant shot her.—*People v. Beverly* (Mich.) 66 N. W. 379.

§ 33. — Belief in impending death.

[a] (Mich.; 1896.)

The action of the court in admitting dying declarations will not be reversed on the ground that deceased was under the influence of opiates at the time they were made, where it appears that her condition was before the court and jury, both as to the influence of opiates and her belief in impending death.—*People v. Beverly* (Mich.) 66 N. W. 379.

[b] (Neb.; 1895.)

Since dying declarations, to be admissible, must have been made under a sense of impending death, it was competent for the party offering them to prove the physical condition of deceased at the time they were made.—*Basye v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

[c] (Neb.; 1895.)

Where, about 2½ hours after deceased was shot, and after he had been removed from the place of the shooting, he stated to those in attendance on him that a certain person had shot him accidentally, and it did not appear that he made the declaration in the belief that he was mortally wounded, the statement was not admissible as a dying declaration, or as part of the res gestæ.—*Collins v. State* (Neb.) 64 N. W. 432, 46 Neb. 37.

§ 34. — Time intervening before death.

(Mich.; 1896.)

On a trial for murder by shooting, evidence that deceased, half an hour after being shot, told the doctor that she believed she could not live, and that he then informed her that her case was hopeless, warrants the admission, as dying declarations, of her statements then made to the doctor, and her sworn statement made four hours later, though she did not die till six days later.—*People v. Weaver* (Mich.) 66 N. W. 567.

VIII. TRIAL.

Defense, see ante, § 2.

Degree of offense, question for jury, see ante § 10.

Instructions on self-defense, see ante, § 18.

Necessity of charge on manslaughter, see ante, § 13.

§ 35. Conduct of persons present.

(Neb.; 1895.)

The fact that deceased's mother charged the accused, in the presence of the jury, with

having caused the death of her son, was no ground for reversal, where she was immediately removed from the court room, with the prompt approval of the prosecuting attorney, and did not return thereto during the trial.—*Lindsay v. State*, 61 N. W. 716, 16 Neb. 177.

§ 36. Instructions.

[a] (Iowa; 1895.)

Where one is accused merely of manslaughter, an instruction defining "willfully" as "intentionally" is correct, malice not being involved in the offense.—*State v. Windahl* (Iowa) 64 N. W. 420.

[b] (Neb.; 1896.)

Where, on trial of a murder case, in which the defense is temporary insanity, the court undertakes to detail to the jury what evidence may be considered in determining whether defendant knew that the killing was wrong, it is prejudicial error to group together the important material facts shown by the state as to the prisoner's sanity, and omit all mention of the evidence produced by defendant.—*Williams v. State*, 65 N. W. 783, 46 Neb. 701.

§ 37. — On what points necessary.

[a] (Iowa; 1895.)

Where the defendant, if not innocent, is guilty of murder or manslaughter, a failure to instruct as to crimes lower in degree than manslaughter is not error.—*State v. Tippet* (Iowa) 63 N. W. 445.

[b] (Mich.; 1895.)

In a case of manslaughter by abortion, the testimony tending to show the body of the crime was circumstantial, and the theory and evidence of the defense were that death resulted from natural causes. *Held*, that it was error to refuse to charge that if deceased aborted from natural causes, or any one of the several causes testified to by the medical witnesses, the jury should acquit.—*People v. Seaman* (Mich.) 65 N. W. 203.

[c] (Mich.; 1895.)

In a case of manslaughter by abortion, there was evidence that, a short time before the premature birth resulting in her death, deceased came from England. *Held*, that it was error to refuse to charge that if deceased aborted by reason of the ordinary sickness and vomiting, augmented by nervous excitement and the change of climate, the jury should acquit.—*People v. Seaman* (Mich.) 65 N. W. 203.

§ 38. — Argumentative, confused, and misleading instructions.

[a] (Iowa; 1897.)

In a trial for murder, where the sole defense was that deceased had committed suicide, it was misleading to charge as to accidental and justifiable homicide, concluding with the statement that "the party charged with the crime must prove the facts in defense, or, if he fails to do so, he must be a murderer," and that "the presumption of killing with intent to kill remains until it is rebutted by competent proof."—*State v. Cater* (Iowa) 69 N. W. 880.

[b] (Iowa; 1897.)

In a murder case, where the defense was that deceased had committed suicide, it was error to instruct that, "Defendant sets up no affirmative defense, and no matters in extenuation. He relies wholly upon the denial of his guilt, and upon his anticipation of a failure by the state to prove a case against him,"—since the instruction is unfair in phraseology, and insinuates defendant's guilt.—*State v. Cater* (Iowa) 69 N. W. 880.

[c] (Mich.; 1895.)

Where, in the charge, every available defense was covered, it was not error to refuse to charge that, in determining which was the aggressor, the jury should consider the testimony that deceased was drunk, and, when so, was quarrelsome, while defendant up to the time of

the tragedy was good-tempered. *McCrath v. J.*, dissenting.—*People v. Palmer* (Mich.) 63 N. W. 656.

105 Mich. 568.

[d] (Mich.; 1895.)

Where defendant had been previously acquitted of murder in the first degree, and the court, after defining murder in the several degrees, charged that on a trial for murder the jury should first consider the higher crime and then the different degrees, and subsequently withdrew from the jury all consideration of the higher degree, *held*, that the charge was not misleading.—*People v. Palmer* (Mich.) 63 N. W. 656.

105 Mich. 568.

[e] (Wis.; 1897.)

After charging, in accordance with Rev. St. § 4351, that defendant was guilty of manslaughter in the second degree if he unnecessarily killed deceased while resisting an assault, the court charged that if defendant was not justified by the law of self-defense, and the killing was therefore unlawful, and when defendant killed deceased he did so pursuant to an intent to kill, then distinctly formed, "you cannot lawfully find defendant guilty of manslaughter in the second degree, for, if he killed deceased from premeditated design to kill him, he is guilty of murder in the first degree." *Held*, that the second charge was erroneous, as placing the criminality of unnecessarily killing another while resisting an attempt to commit a felony on the same ground as a killing from premeditated design, and as failing to distinguish between intentional and unnecessary killing under the circumstances stated in section 4351 and a killing by premeditated design. *Marshall, J.*, dissenting.—*Terrill v. State* (Wis.) 70 N. W. 356.

§ 39. — Justification.

(Iowa; 1896.)

On trial of a town marshal for murder while attempting to arrest one creating a disturbance at a public dance in a hall located outside the town, where defendant pleaded justifiable homicide as a defense, instructions that defendant, as an employé of the proprietors, or as a private citizen, had authority to arrest the deceased, if engaged in a breach of the peace, render an instruction as to defendant's right to exercise the duties of his office outside the town limits immaterial.—*State v. Weston* (Iowa) 67 N. W. 84.

§ 40. — Burden of proof.

(Neb.; 1895.)

It was not error in a murder case, where defendant pleaded justification, for the court to fail of its own motion to instruct that the burden of proof was on the state to establish that the homicide was not justifiable.—*Lamma v. State*, 64 N. W. 973, 46 Neb. 236.

§ 41. — Applicability to evidence.

(Iowa; 1895.)

Where it appeared that defendant pointed a loaded pistol at deceased, and that it was discharged, thereby killing him, an instruction as to murder in the second degree is proper.—*State v. Tippet* (Iowa) 63 N. W. 445.

[b] (Mich.; 1896.)

An instruction that if at the time defendant shot deceased he thought of his purpose to kill him, "and had time to think that he would execute it, and did so, and formed fully in his mind the conscious design of killing, and had time to think of the weapon he procured for that purpose, and that he would use it, he is guilty of murder in the first degree," is erroneous, as authorizing the jury to infer from facts scarcely in dispute that if defendant was responsible at all he would be guilty of murder in the first degree, while there was ample room within such facts for a verdict finding him guilty of murder in the second degree or of

manslaughter.—*People v. Holmes* (Mich.) 69 N. W. 501.

[c] (Neb.; 1895.)

Where the circumstances warrant the submission to the jury of the theory of self-defense, it is not error to charge that, if defendant provoked the difficulty for the purpose of wreaking vengeance on deceased, he cannot avail himself of the law of self-defense, there being no direct evidence of such an attack, but only circumstances to warrant the inference of one.—*Carleton v. State*, 61 N. W. 699, 43 Neb. 373.

§ 42. — On weight of evidence.

(Iowa; 1897.)

In a trial for murder, where defendant denied the killing, the court charged that "the drawing of the pistol shows premeditation; the cocking of it, leveling it at a particular vital spot, shows deliberation"; and that "the conclusion is irresistible that under the law and the undisputed facts in this case the killing of [deceased] was an act possessing all the elements of murder in the first degree, as defined by our statute. It was murder in the first degree. It is nothing less." *Held*, erroneous, as on the weight of the evidence.—*State v. Cater* (Iowa) 69 N. W. 880.

§ 43. — Harmless error and construction as a whole.

[a] (Iowa; 1896.)

Where, from the whole record, it appears that evidence of threats by defendant prior to the homicide was admitted solely to impeach his testimony, it was not reversible error for the court to fail to charge, limiting its effect to impeachment.—*State v. Helm* (Iowa) 66 N. W. 751.

[b] (Iowa; 1896.)

An instruction defining involuntary manslaughter is not erroneous because it fails to define voluntary manslaughter also, if there are other instructions covering the omission.—*State v. Edgerton* (Iowa) 69 N. W. 280.

[c] (Neb.; 1895.)

An instruction in a prosecution for murder that the jury may, if the evidence warrants, convict of murder in the first or second degree, or manslaughter, is not objectionable on the ground that it excludes a verdict of acquittal where an instruction on reasonable doubt is given in another paragraph.—*Housh v. State*, 61 N. W. 371, 43 Neb. 163.

[d] (Neb.; 1895.)

It is not error to instruct that it is sufficient to constitute murder in the first degree "if there was such design and determination to kill, distinctly formed in the mind at any moment before or at the time the blow was struck," where the remainder of the instruction properly defines purpose, deliberation, and premeditation.—*Carleton v. State*, 61 N. W. 699, 43 Neb. 373.

[e] (Neb.; 1897.)

Where defendant was charged in one count with murder in the second degree and in the other count with manslaughter, and the court had instructed the jury as to such fact, a further instruction defining murder in the second degree and manslaughter was sufficient, though the court did not state to the jury that the definitions applied to either the first or second count.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 44. Verdict.

(Wis.; 1896.)

Where an information charged that defendant did "willfully, feloniously, and of his malice aforethought, kill and murder" a certain person, a verdict of guilty "in the manner and form as charged in the information," which does not state the degree of guilt, is insufficient

to authorize the court to pronounce judgment.—*La Tour v. State* (Wis.) 67 N. W. 1138, 93 Wis. 603.

HORSE AND STREET RAILROADS.

I. IN GENERAL. §§ 1-7.

II. LIABILITY FOR NEGLIGENCE. §§ 8-18.

Exemption of franchise and property from taxation, see "Taxation," § 22.
Frightening horses, see "Negligence," § 6.
Mandamus to street-car company, see "Mandamus," § 22.

1. IN GENERAL.

§ 1. Grant of franchise by city.

[a] (Mich.; 1896.)

A municipality has not the authority to grant a street-railway company exclusive rights in a street unless such authority is expressly granted by the legislature, or arises by implication so directly as to be equally clear.—*Detroit Citizens' St. Ry. Co. v. City of Detroit* (Mich.) 68 N. W. 304.

[b] (Mich.; 1896.)

An ordinance granting a street-railway company exclusive authority, at its option, to construct street railways on all streets within the city as may be fixed by the common council, is, in effect, an exclusive franchise.—*Detroit Citizens' St. Ry. Co. v. City of Detroit* (Mich.) 68 N. W. 304.

[c] (Mich.; 1896.)

The train railway act (section 34), providing that all street-railway companies shall have the exclusive right to operate any street railways constructed by them, provided that no such companies shall be authorized to construct a railway through the streets of any town without the consent of the municipal authorities, and upon such terms and conditions as said authorities may prescribe, does not authorize municipalities to grant an exclusive privilege to operate street railways on its streets.—*Detroit Citizens' St. Ry. Co. v. City of Detroit* (Mich.) 68 N. W. 304.

§ 2. Nonuser of franchise—Extinguishment.

(Wis.; 1897.)

A certain portion of the track of a street railroad was not used for a period of four years and eight months, during which time the franchise was owned by successive corporations, which were in financial difficulties. An ordinance was introduced in the city council repealing the franchise covering such portion of the road, but, on representations of the company, was not passed. The street was also paved during the time, and the track was taken up by the city, with the knowledge and consent of the railroad company, and not replaced, but the poles and wires placed for use in operating the road by electricity were left. The track removed, however, was constructed for a horse railway, and had proved insufficient for use by electric cars. *Held*, that the nonuser for such time, not being accompanied by any act clearly indicating an intention to abandon the right, and there having been no consent on the part of the public to such abandonment, did not extinguish the franchise.—*Wright v. Milwaukee Electric Railway & Light Co.* (Wis.) 69 N. W. 791.

§ 3. Location and mode of construction.

[a] (Mich.; 1894.)

An injunction to restrain the operation of a street railway will not issue on the ground that a franchise to operate it elsewhere than in the center of the traveled portion of a highway was not properly granted.—*Niemann v. De-*

troit Suburban St. Ry. Co. (Mich.) 61 N. W. 519.

103 Mich. 256.

[1b] (Mich.; 1894.)

The use of a T rail by an electric railway company does not determine that its railway is commercial in character.—*Niemann v. Detroit Suburban St. Ry. Co.* (Mich.) 61 N. W. 519.

103 Mich. 256.

[1c] (Mich.; 1896.)

Abutting property owners may require that a street railway be built in the center of the street, if possible, as required by the ordinance granting the company permission to lay its tracks upon the street.—*Kennedy v. Detroit Ry.* (Mich.) 66 N. W. 435.

[1d] (Mich.; 1896.)

A city ordinance authorized a street-railway company to lay its track along A. street to B. street, thence along B. street to the head of C. street, thence along C. street, and required that the tracks be laid in the center of the street. B. and C. streets intersected at a very acute angle, thereby leaving the thoroughfare at their junction, and until the eastern street lines of the two streets intersected, considerably wider than either of the two streets. The street beyond the intersection was known as B. street, and in an ordinance providing for the paving of B. street the entire thoroughfare beyond the intersection, to its full width, was treated as B. street. *Held*, that the tracks were to be located in the center of the thoroughfare caused by the intersection, and could not be placed on the center line of C. street extended.—*Kennedy v. Detroit Ry.* (Mich.) 66 N. W. 435.

§ 4. Maintenance and repair of streets.

[1a] (Iowa; 1896.)

Acts 25th Gen. Assem. c. 7, repealing prior acts on the same subject-matter, and providing (section 10) that whenever any street railway may have been constructed and shall remain on any street "which the council may direct to be paved," and when the owner of such railway may be bound to pave any portion of said street, etc., and if the owner shall fail or refuse to comply with the order to pave, then the portion of the costs assessable against such railway shall be assessed against it, does not authorize an ordinance requiring a street-railway company, as a condition precedent to laying its track on a street which it has the right to occupy, and which is already paved, to pay the cost of such paving.—*Oskaloosa Street-Railway & Land Co. v. City of Oskaloosa* (Iowa) 68 N. W. 808.

[1b] (Mich.; 1896.)

City of Lansing Ordinance No. 61 (granting a street-railway company the franchise to lay its tracks upon the street), by section 15, provides that the railway company, in constructing its tracks, shall pave between the tracks with the same material as that adjoining said tracks; and, if the city provides for paving or repairing any street, the company shall use within the railway tracks the same material, and keep the same in good repair. *Held*, that the company is bound to repave between the tracks, in case a street is repaved with different material, with the material used in the new pavement.—*City of Lansing v. Lansing City Electric Ry. Co.* (Mich.) 66 N. W. 949.

§ 5. Extension of system—Condition as to repairs of streets.

[1a] (Iowa; 1896.)

Under Acts 22d Gen. Assem. c. 16, § 1, giving cities power to compel street-railway companies to pave part of a street, and Acts 23d Gen. Assem. c. 14, § 10, providing for assessment against a street railway of its portion of the cost of paving the street, provided its owner is bound to pave any portion of the street, no part of the cost of paving is assessable against a

horse railway, the successor in ownership of which has, before the paving contract was entered into, been granted the right to lay new tracks and operate its cars by electricity, by ordinance expressly providing that it should not be required to do any paving.—*Lacey v. City of Marshalltown* (Iowa) 68 N. W. 726.

[1b] (Minn.; 1895.)

An ordinance granting a street-car company the right to construct and operate lines in streets other than those mentioned in the company's charter, and imposing on the company duties as to the surface of the streets between and near the rails of the tracks, provided that "no right or franchise now owned or enjoyed by said company shall be forfeited or prejudiced by" an acceptance of this ordinance. *Held*, that the conditions of the ordinance as to the care and repair of streets apply to all the lines operated by the company, whether within the territory in which it was authorized to construct and operate lines under its charter or not.—*City of Duluth v. Duluth St. Ry. Co.*, 62 N. W. 267, 60 Minn. 178.

§ 6. Rights of abutting owners.

(Iowa; 1896.)

Where a city has by ordinance established a new grade for a street, but has done nothing towards raising the street surface to conform to it, a street-railway company, which is granted the right to construct a track through the street, is liable to abutting property owners for damages resulting from laying the track at the later grade, in the absence of an express provision authorizing the act.—*Stritesky v. City of Cedar Rapids* (Iowa) 67 N. W. 271.

§ 7. Use of plank road.

(Mich.; 1895.)

A company authorized by the legislature to take possession of a road for the purpose of maintaining a plank road thereon has the exclusive right to the possession of the road as against a street-railway company desiring to construct its tracks thereon.—*Detroit & Birmingham Plank-Road Co. v. Detroit Suburban Ry. Co.* (Mich.) 61 N. W. 880.

103 Mich. 585.

II. LIABILITY FOR NEGLIGENCE.

§ 8. Regulations as to movement of cars.

(Minn.; 1896.)

Sp. Laws 1881 (Ex. Sess.) c. 200, § 15, conferring a charter on the Duluth Street Railway Company, in providing that no car shall remain standing on any of the stations more than 10 minutes, except at "each end of the lines," means stations at each end of the track, and not at the end of the run of particular cars.—*Wilson v. Duluth St. Ry. Co.* (Minn.) 67 N. W. 82.

64 Minn. 363.

§ 9. Who liable for injuries.

(Iowa; 1896.)

In an action against a street-railway company for personal injuries received in being thrown from a street car, evidence that defendant paid plaintiff \$1.50 and received a receipt discharging it from liability, and that the conductor of the car from which plaintiff fell did not know for what corporation he was working, is insufficient to show that the car was operated by defendant, where defendant's manager testified that the car belonged to another corporation, of which he was also manager; the two corporations being operated under an arrangement that the total operating expenses of both should be apportioned between them in proportion to the number of cars run by each, the earnings from the lines being kept separate.—*Anderson v. Des Moines St. R. Co.* (Iowa) 66 N. W. 64.

§ 10. Injuries to persons on or near track.

[a] (Iowa: 1896.)

Whether a motorman is guilty of negligence in assuming that a laborer on the street, not so near the track as to be in danger of being struck by the car, did not require a signal to keep him from putting himself in a place of danger, is for the jury.—*Eddy v. Cedar Rapids & M. C. Ry. Co.* (Iowa) 67 N. W. 676.

[b] (Mich.: 1895.)

Plaintiff's decedent, while trying to man age a colt, which, being frightened at an ap proaching street car, had wheeled upon the track, was struck by the car, receiving injuries from which he died. The evidence tended to show the decedent was on the track trying to lead the colt off when the car was 100 feet away. *Held* sufficient to show negligence on the part of the company.—*McClellan v. Ft. Wayne & B. I. Ry. Co.* (Mich.) 62 N. W. 1025.

105 Mich. 101.

[c] (Wis.: 1896.)

A street-railroad company is not liable for the death of one thrown beneath the car from his buggy while his horse was running away in a direction opposite to that in which the car was running merely because the motorman, instead of stopping the car, only slowed up as he noticed the approach of the horse, he having apparently adopted this course in the presence of the immin ent danger.—*Bishop v. Belle City St. Ry. Co.* (Wis.) 65 N. W. 733.

92 Wis. 139.

[d] (Wis.: 1897.)

Plaintiff, a child 31 months old, while crossing a street, was run over by a street car. He started in the rear of a coal wagon which was moving north, and was struck by a car going south on a track 15 or 20 feet distant from the wagon. There was evidence that the wagon had been driven some 100 feet north after plaintiff passed from behind it, and was stopped before plaintiff was struck. Passen gers on the car testified that they saw plaintiff when he started to cross the street, and also after he passed from behind the wagon. *Held* that, though the motorman testified that he did not see plaintiff until he was going under the car, a finding that he failed to exercise ordinary care after he saw the child would not be disturb ed.—*Slensby v. Milwaukee St. Ry. Co.* (Wis.) 70 N. W. 67.

§ 11. Collision with vehicles.

[a] (Iowa: 1896.)

Evidence that plaintiff, on getting into his wagon, which had an inclosed top, making it necessary for him to lean out to see back of him, looked and saw no car coming; that, a block further on, he looked back and saw no car; that, a block further, he was struck by a car coming from the rear; that he was driving between the street-car track and the curbing, the distance between which was 9 feet 4 inches, into which the car projected 18 inches; that his horse was walking, and that he, though attentive, heard no sound indicating the approach of the car; that the car was running down grade at a high rate of speed, and no signal of the ap proach of the car was given,—justifies a verdict for plaintiff.—*Wilkins v. Omaha & C. B. Rail way & Bridge Co.* (Iowa) 65 N. W. 987.

[b] (Mich.: 1897.)

Negligence was a question for the jury, where plaintiff, driving a wagon loaded with barrels near defendant's street-car track, was injured by the frightening of his horses caused by an electric car, which came from behind, striking the barrels, there being evidence that the wagon, before being struck, traveled 35 feet while within the line of the car, and that the motorman, though seeing the wagon in time to stop, increased his speed to six miles an hour, thinking he had room to pass.—*Blakeslee v. Consolidated St. Ry. Co.* (Mich.) 70 N. W. 408.

[c] (Neb.: 1895.)

As to the relative rights and duties of street cars and vehicles at the intersections of streets, it was proper to instruct the jury that: "Each have the right to cross, and must cross. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other."—*Omaha St. Ry. Co. v. Cameron* (Neb.) 61 N. W. 606, 43 Neb. 297.

[d] (Wis.: 1896.)

In an action for personal injuries due to the collision of an electric car with a sleigh in which plaintiff was riding, it appeared that the horses became frightened at the noise made by the car while it was yet some distance away. As the car approached, the motorman saw that the horses were frightened, and turned off the cur rent, and applied the brake. The horses backed towards the sidewalk, throwing the rear end of the sleigh upon the track, where it was struck by the car, which could not be brought to a stop quick enough to avoid it. The car, when first seen, was about 175 feet away, and when the brakes were applied it was about 80 feet away. *Held*, that the facts did not justify an inference that the motorman was negligent.—*Eastwood v. La Crosse City Ry. Co.* (Wis.) 68 N. W. 651.

§ 12. Injuries caused by defective track.

[a] (Minn.: 1895.)

The ordinance granting a franchise to a street-car company provided that the tracks of the railroad should not be raised above the sur face of the street, and that the rails should be so laid that vehicles could freely cross; that the company should repair any injury to the street caused by the construction of the tracks, and save the city harmless from any claim of damages caused by the maintenance of the rail road. *Held* that, the company having accepted the franchise under such ordinance, it is li able for injuries caused by its allowing the tracks to remain several inches above the gen eral surface of the street.—*Baumgartner v. City of Mankato* (Minn.) 62 N. W. 127.

60 Minn. 244.

[b] (Minn.: 1895.)

Plaintiff, with a load of hay, on which he was riding, attempted to drive across defend ant's street-railroad track, and in doing so, be cause the track was about three inches above the surface of the street, the wagon was tipped over, throwing plaintiff to the ground; and his horses, being thus frightened, ran away, and he was thereby injured. *Held*, that the question of defendant's negligence was for the jury.—*Baumgartner v. City of Mankato* (Minn.) 62 N. W. 127.

60 Minn. 244.

§ 13. Contributory negligence.

[a] (Iowa: 1896.)

Plaintiff, a regular repairer of city cross ings, knowing that defendant's cars passed along the street at frequent intervals, placed a plank on the top of crossing sleepers to level them, one end so near the track as to come in contact with passing cars; and, standing with his back towards approaching cars, he leaned over the end near the track to see whether the sleepers were level. His hearing was good. He only became aware of the car's approach when close on him, and then jumped to the other side of the plank, and the car knocked the plank against his ankle and injured it. *Held*, that plaintiff was guilty of contributory negli gence.—*Eddy v. Cedar Rapids & M. C. Ry. Co.* (Iowa) 67 N. W. 676.

[b] (Mich.: 1895.)

Plaintiff, who was employed by the city in sweeping a street crossing over which several street-car lines passed, and with which he was

familiar, in getting out of the way of a north-bound car, stepped between the tracks, and was struck by the front of a south-bound car, back of the platform. Plaintiff's back was turned towards the north-bound car, and he was not aware of its approach until warned by a policeman. *Held*, that plaintiff was guilty of contributory negligence.—*Daly v. Detroit Citizens' St. Ry. Co.* (Mich.) 63 N. W. 73.
105 Mich. 193.

[1c] (Mich.: 1896.)

Plaintiff, while driving across a street, saw a south-bound car coming, but kept on his way, thinking he could cross safely in front of it. As he was about to cross the track, he saw a north-bound car coming a short distance away. He attempted to stop and turn, but, the pavement being slippery, could not do so quickly enough. The horse was struck by the north-bound car, and thrown down, falling on the south-bound track. The horse was killed, and plaintiff was injured. *Held*, that the plaintiff was guilty of contributory negligence in attempting to cross in front of the south-bound car, precluding recovery.—*Graff v. Detroit Citizens' St. Ry. Co.* (Mich.) 67 N. W. 815.

[1d] (Minn.: 1895.)

One who rushes on a street-car track without looking or listening for a car which he knows is approaching, is guilty of contributory negligence.—*Hickey v. St. Paul City Ry. Co.* (Minn.) 61 N. W. 893.
60 Minn. 119.

[1e] (Minn.: 1895.)

The degree of care required of pedestrians at the crossing of a highway and a steam railway in looking up and down the track is not necessarily the test of care required in crossing the track of a street railway on a public street. *Shea v. Railway Co.* (1892) 52 N. W. 902, 50 Minn. 395, followed.—*Holmgren v. St. Paul City Ry. Co.*, 63 N. W. 270, 61 Minn. 85.

§ 14. — Drivers of vehicles and persons therein.

[1a] (Mich.: 1895.)

Where plaintiff, driving on a street-car track, in turning to cross the track, because of the delay caused thereby, is struck by a car in his rear, which he had not observed, he is guilty of contributory negligence. *McGrath, C. J.*, dissenting.—*Fritz v. Detroit Citizens' St. Ry. Co.* (Mich.) 62 N. W. 1007.
105 Mich. 50.

[1b] (Mich.: 1895.)

The driver of a vehicle is bound, before crossing a street railway, to assure himself that no car is approaching, and a failure to make an investigation will constitute negligence on his part.—*Fritz v. Detroit Citizens' St. Ry. Co.* (Mich.) 62 N. W. 1007.
105 Mich. 50.

[1c] (Mich.: 1895.)

Plaintiff, while driving a team attached to a load of barrels, on a narrow street, turned upon defendant's trolley road, to pass a carriage standing by the roadside, and a car, coming from behind, struck the load. Plaintiff sat in front of the load of barrels, which was so high and wide that he could not see what was behind without moving to the edge of the load, and he failed so to look before turning upon the track. *Held*, that plaintiff was negligent. *McGrath, C. J.*, dissenting.—*Blakeslee v. Consolidated St. Ry. Co.* (Mich.) 63 N. W. 401.
105 Mich. 462.

[1d] (Mich.: 1895.)

Where a person drives in front of an electric car, and is struck by it while attempting to turn off the track, the street railway is not liable, where there was no evidence that the speed was dangerous, or that the gong was not sounded.—*Guilboz v. Ft. Wayne & B. I. Ry. Co.* (Mich.) 65 N. W. 656.

[1e] (Mich.: 1897.)

Contributory negligence was a question for the jury, where plaintiff, driving a wagon so loaded with barrels that he could not see behind it without leaning to the side, failing so to look, pulled in towards defendant's street-car track to pass a carriage standing by the curb, so that the barrels were struck by an electric car which came from behind, frightening his horses, and causing them to run away and injure him.—*Blakeslee v. Consolidated St. Ry. Co.* (Mich.) 70 N. W. 408.

[1f] (Mich.: 1897.)

It is negligence for the driver of a fire-department truck, in going to a fire, to approach a street traversed by street cars, without having his horses under such control as to permit his stopping them, though he has the right of way by ordinance.—*Griely v. Detroit Citizens' St. Ry. Co.* (Mich.) 70 N. W. 1018.

[1g] (Mich.: 1897.)

Deceased drove a truck of the fire department, in going to a fire, at such rate that he could not stop the horses as they approached a crossing of defendant's tracks, and a car collided with the truck, and killed him. *Held*, that where there was evidence that the car was at a distance within which a jury might find that it could have been stopped, and that deceased might have driven across in the expectation that it would be stopped in view of his having the right of way, the question as to his negligence was for the jury.—*Garrity v. Detroit Citizens' St. Ry. Co.* (Mich.) 70 N. W. 1018.

[1h] (Minn.: 1896.)

Where the driver of a wagon, knowing that an approaching cable car would be at a crossing point in four or five seconds, and without necessity, deliberately took the chance of safely crossing the track in front of the car, with knowledge that it would take him two or three seconds to make the crossing, he was guilty of contributory negligence barring him from recovering damages resulting from a collision.—*O'Connell v. St. Paul City Ry. Co.* (Minn.) 67 N. W. 363.
64 Minn. 466.

[1i] (Minn.: 1897.)

Plaintiff, an aged woman riding in a funeral procession, in a carriage driven by her daughter-in-law, was injured by a collision of defendant's car with the carriage at a street crossing, as the procession was crossing the tracks. Defendant claimed that plaintiff's driver did not cross where the other carriages had crossed, but turned out, as though intending not to cross, and suddenly attempted to cross when within a few feet of the advancing car. There was no evidence that plaintiff directed, or knew in advance, the driver's action, or that she had any control over the driver, or that the latter was not competent. *Held*, that, even assuming defendant's statement to be true, there was no evidence of plaintiff's contributory negligence to go to the jury.—*Johnson v. St. Paul City Ry. Co.* (Minn.) 69 N. W. 900.

[1j] (Wis.: 1895.)

In an action to recover for injuries received while crossing a street-car track in a buggy, an instruction that plaintiff had the right to rely upon J., who was driving the horse, to exercise ordinary care to avoid danger; that, if J. looked for approaching cars, that was enough to answer the purpose; that both did not have to look; and that the jury must regard plaintiff "just exactly as if she had hold of the reins herself, and had done just as J. did," is erroneous.—*Johnson v. Superior Rapid-Transit Ry. Co.*, 64 N. W. 753, 91 Wis. 233.

[1k] (Wis.: 1896.)

Plaintiff was riding in a wagon which was attempted to be driven by his father in a northwesterly direction, obliquely across the track of defendant's electric railway. In crossing, a wheel slipped along the north rail. The wagon was struck by a car going west, and

plaintiff was injured. From the point where the wagon started to cross the track to the east it could be seen for 200 feet, and the driver saw the car approaching before driving on to the track, but plaintiff did not. The car was moving 6 miles an hour. When 40 or 50 feet from the wagon, the motorman attempted to stop it by the usual means, which could ordinarily be done in going 35 or 40 feet, but, through the slipping of the lever or some mismovement, he did not succeed until just as the wagon was struck. The car was in good repair. *Held*, that plaintiff could not recover. *Valin v. Railway Co.* (1892) 51 N. W. 1084, 82 Wis. 1, distinguished. *Pinney, J.*, dissenting.—*Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 866, 92 Wis. 97.

[1] (Wis.: 1896.)

The fact that, just before deceased drove over a horse-railway track at a street crossing in the dusk of evening, a car moving along the near track intervened between deceased and the car by which she was struck, which was coming in the opposite direction on the further track, makes the question of contributory negligence one of fact for the jury.—*Thoresen v. La Crosse City Ry. Co.* (Wis.) 68 N. W. 548.

§ 15. — Effect.

[a] (Iowa: 1895.)

Where defendant's motoneer saw plaintiff when the car was a block from the crossing, but failed to use ordinary care to avoid the accident, defendant is liable for resulting injuries to plaintiff, though plaintiff was negligent in failing to look for an approaching car.—*Orr v. Cedar Rapids & M. C. Ry. Co.* (Iowa) 62 N. W. 851.

[b] (Iowa: 1896.)

In an action against a street-railway company for personal injuries, the fact that plaintiff was negligent in attempting to cross defendant's track in front of a car approaching from behind, in a collision with which plaintiff's wagon was overturned, will not prevent a recovery for injuries received on account of defendant's negligence in restarting the car after it had come to a full stop after the collision, and again striking the wagon as plaintiff was attempting to extricate himself.—*McDivitt v. Des Moines St. R. Co.* (Iowa) 68 N. W. 595.

[c] (Mich.: 1894.)

In an action against a street-railway company to recover for personal injuries, it appeared that plaintiff, with the other members of a band, were parading in the street, and that while a high wind was blowing, and the band was playing, defendant's electric car approached it from behind; that plaintiff was marching so near the track as to necessitate his being struck, but supposed he would hear the approaching signal in time to escape; and that the motoneer saw him in time to have avoided running him down. The motoneer testified that the car was going slowly, but a former employé of the company testified that the lever was in the notch next to the one which would give the car its greatest speed when within one-half a length of plaintiff, and it appeared, further, that the car ran 34 feet after striking him. Deceased heard no signal. *Held*, that, though plaintiff was negligent, the motoneer was guilty of such "reckless disregard of the consequences to" plaintiff as to make the company liable.—*Montgomery v. Lansing City Electric Ry. Co.* (Mich.) 61 N. W. 543.
103 Mich. 46.

§ 16. Pleading.

(Minn.: 1895.)

The allegations, in a complaint in an action for injury received from being run into by a street car, that the car was running six miles an hour, and that plaintiff heard no bell, were insufficient to show negligence on defendant's part.—*Lydecker v. St. Paul City Ry. Co.* (Minn.) 63 N. W. 1027.

61 Minn. 414.

§ 17. Sufficiency of evidence.

(Neb.: 1895.)

Plaintiff, a lad 13 years of age, was injured while attempting to board a moving street car, and, in an action therefor, alleged that the cause of the injury was his being caught by the motorman on a car going in the opposite direction, which caused him to fall to the ground. This allegation was supported only by plaintiff's own testimony, and was denied by the motorman. The evidence showed that both cars were stopped as quickly as possible. *Held*, that plaintiff could not recover.—*Omaha St. Ry. Co. v. Baker* (Neb.) 63 N. W. 25.

44 Neb. 511.

§ 18. Instructions.

[a] (Iowa: 1896.)

An instruction, in an action for injury to a person who, while driving between the tracks of an electric street-car line and the curbing, was struck by a car coming from the rear, that if, when plaintiff was seen by the employé in charge of the car, he was partly on the car track, and thereupon the bell was rung, and thereafter plaintiff left the track, and went to the side thereof, and the speed of the car was then increased, complaint could not be made of such increase in the speed, as the employé would have the right to suppose plaintiff left the track because of the warning, is properly refused, because ignoring the fact that the employé may have known or had reason to believe plaintiff was not aware of the approach of the car.—*Wilkins v. Omaha & C. B. Railway & Bridge Co.* (Iowa) 65 N. W. 987.

[b] (Iowa: 1896.)

So, too, an instruction, in such action, that if the noise of the car, without regard to any signals, would be so great that it could be heard from 100 to 500 feet away by a person in a vehicle such as plaintiff was in, verdict should be for defendant, was properly refused, as, if the noise could have been heard 100 feet away, the question whether plaintiff was negligent in not hearing it would depend somewhat on the speed of the car, and his ability to avoid the danger, if he first knew of the approach of the car at that distance, and, if plaintiff's danger and negligence were known to the motorman, he was not justified in making no effort to avoid the collision.—*Wilkins v. Omaha & C. B. Railway & Bridge Co.* (Iowa) 65 N. W. 987.

[c] (Wis.: 1895.)

In an action for injuries received while crossing a street-car track in a buggy, an instruction that, even if plaintiff was chargeable with a lack of ordinary care, she might recover, if defendant's motorman "saw plaintiff approaching the track, unconscious of his coming, and he then, seeing her in that attitude, did not exercise ordinary care for her safety," is erroneous. *Little v. Railway Co.* (1894) 60 N. W. 705, 88 Wis. 402, followed.—*Johnson v. Superior Rapid-Transit Ry. Co.*, 64 N. W. 753, 91 Wis. 233.

HORSE RACING.

See "Gaming," § 4.

HOSPITAL.

Location of hospital for insane, see "Asylums."

HOTELS.

See "Innkeepers."

HOUSEBREAKING.

See "Burglary."

HOUSEHOLDERS.

See "Exemptions"; "Homestead."

HOUSEHOLD GOODS.

Exemptions, see "Exemptions," § 2.

HOUSE OF ILL FAME.

See "Disorderly House."

HUSBAND AND WIFE.

I. RIGHTS, DUTIES, AND LIABILITIES, §§ 1-6.

II. CONTRACTS OF WIFE, §§ 7-10.

III. WIFE'S SEPARATE PROPERTY, §§ 11-20.

1. In General, §§ 11-14.

2. Charges on Property, §§ 15-20.

IV. TORTS AND CRIMES OF WIFE, §§ 21, 22.

V. MARRIAGE SETTLEMENTS, § 23.

VI. CONTRACTS, CONVEYANCES, AND GIFTS BETWEEN, §§ 24-27.

VII. ACTIONS, §§ 28-33.

VIII. SEPARATION AND MAINTENANCE, § 34.

IX. ABANDONMENT, § 35.

X. CRIMINAL CONVERSATION AND ACTION FOR ALIENATING AFFECTIONS OF SPOUSE, §§ 36-41.

See, also, "Adultery"; "Divorce"; "Dower"; "Homestead"; "Marriage."

Admissibility of declarations by, see "Evidence," § 25.

Adverse possession by wife, see "Adverse Possession," § 17.

Competency as witnesses, see "Witness," §§ 6, 7.

Conveyance of homestead by husband, see "Homestead," § 18.

Estoppel to set up coverture, see "Estoppel," § 7.

Homestead rights of surviving spouse, see "Homestead," §§ 13-15.

Measure of damages in action by wife for personal injuries, see "Damages," § 32.

Privileged communications between, see "Witness," § 14.

Proof of marriage, see "Adultery," § 3.

Right of wife to claim exemptions, see "Exemptions," § 13.

Rights as survivors, see "Descent and Distribution," §§ 6, 7.

Specific performance of antenuptial contract, see "Specific Performance," § 2.

I. RIGHTS, DUTIES, AND LIABILITIES.

§ 1. Necessaries and family expenses.

[a] (Iowa; 1896.)

A husband who has separated from his wife is not liable as at common law for necessities for the wife's children by a former husband, living with her, sold solely on the wife's credit; especially where it is not shown that the wife has no means with which to pay for them.—*Menefee v. Chesley* (Iowa) 66 N. W. 1038.

[b] (Iowa; 1896.)

Nor is the husband liable in such case, under Miller's Code, § 2214, providing that the

expenses of the family and the education of the children are chargeable on the property of both husband and wife, or either of them.—*Menefee v. Chesley* (Iowa) 66 N. W. 1038.

[c] (Iowa; 1897.)

A wife's liability under Code, § 2214, making husband and wife jointly and severally liable for family expenses, is measured by the husband's contract in respect to such expenses, and hence his settlement of the account by note, and the running of limitations against both note and account, inure equally to her benefit.—*Morse v. Minton* (Iowa) 70 N. W. 691.

[d] (Iowa; 1897.)

A claim for medical services rendered the husband is a family expense, for which the husband and wife are jointly and severally liable.—*Murdy v. Skyles* (Iowa) 70 N. W. 714.

[e] (Mich.; 1895.)

A husband is not liable for necessities furnished his wife by one inducing her to remain away from him for the purpose of a divorce.—*Corry v. Lackey* (Mich.) 63 N. W. 418. 105 Mich. 333.

[f] (Minn.; 1895.)

Evidence that a wife living apart from her husband with his consent occupied lodgings of a reasonable character procured by an agent of the husband, and that the owner of the lodgings was told that the husband would pay the rent, is sufficient to support a judgment against the husband for the rent, though, on his refusal to pay, the wife promised the owner to do so, and the owner attempted to collect from her.—*Oltman v. Yost* (Minn.) 61 N. W. 564. 62 Minn. 261.

[g] (Neb.; 1897.)

The professional services of an attorney in conducting a suit by the wife for divorce are not "necessaries," within the common-law meaning of the term, for which the husband is liable.—*Yeiser v. Lowe* (Neb.) 69 N. W. 847.

§ 2. Husband as wife's agent.

[a] (Iowa; 1895.)

Where lumber for a woman's house is sold and charged to her husband personally, and it does not appear that she authorized him to contract for it in her name, she is not personally liable therefor, though she had given him full control of the property on which the house was erected.—*Rees v. Shepherdson* (Iowa) 64 N. W. 286.

[b] (Iowa; 1896.)

A wife's knowledge that materials bought by her husband on credit were used in her house does not show ratification of the husband's act, it appearing that she furnished him with money to pay for all purchases made for her house, and did not know that any were made on credit.—*Young v. Swan* (Iowa) 69 N. W. 566.

[c] (Neb.; 1896.)

Where a husband purchased land, and caused it to be conveyed to his wife, giving back a mortgage in his own name to secure a portion of the price, the wife, by accepting the deed, adopted the mortgage, whether or not the husband was authorized in writing to act for her in the matter.—*Hall v. Hooper* (Neb.) 66 N. W. 33. 47 Neb. 111.

[d] (Neb.; 1897.)

A husband's acts do not bind the wife unless authorized or ratified by her.—*Norfolk Nat. Bank v. Nenow* (Neb.) 69 N. W. 936.

[e] (Neb.; 1897.)

A husband may act as the agent of his wife in the management of her separate business.—*Harris v. Weir-Shugart Co.* (Neb.) 70 N. W. 1118.

[f] (S. D.; 1895.)

Where a husband and his wife executed a mortgage to secure a note of the former, the husband could, without the wife's consent,

cause the mortgage and note to be assigned by the mortgagee as security to one who advanced money at the husband's instance to pay the note.—*Smith v. Commercial Nat. Bank* (S. D.) 64 N. W. 529.

[g] (Wis.; 1895.)

The fact that a husband, when contracting to purchase certain lands, had privately planned to sell them to his wife, who had been negotiating for the purchase of other similar lands, and that after the purchase he made such sale, and had his vendor convey the land direct to her, does not raise the inference that he was acting as her agent in making the purchase.—*Tyson v. Ranney* (Wis.) 62 N. W. 931. 89 Wis. 518.

§ 3. Property of husband.

[a] (Iowa; 1896.)

An oral agreement was made between a husband, who was then solvent, and his wife, that from the proceeds of some land sold by the husband, contracts for the sale of which the wife signed, she should have money to buy another farm. The other farm was contracted for, and, when the sale of the one was consummated, a part of the proceeds was used to pay for the other, which was conveyed to the wife. *Held*, that the rights of the wife in the property did not accrue until the conveyance to her, and that, her husband being then insolvent, the land was subject to the claims of his creditors.—*Baxter v. Hecht* (Iowa) 67 N. W. 407.

[b] (Iowa; 1897.)

Where a husband purchases land with his wife's money, and takes title with her knowledge, and she testifies that she always regarded him as the owner, and there was no agreement for the return of the money nor transfer of the property to the wife, it constitutes the property of the husband as regards creditors.—*Roane v. Hamilton* (Iowa) 70 N. W. 181.

[c] (Minn.; 1896.)

A judgment creditor of a married man is not entitled to have his judgment made a general or specific lien upon the husband's one-third interest in the real property of the wife during coverture.—*Sudho v. Rusten* (Minn.) 68 N. W. 513.

[d] (Neb.; 1896.)

Prior to the passage of the married woman's act of 1871, a wife delivered money to her husband without agreement for its repayment, and the husband invested it. *Held*, that the money became the husband's on delivery to him, so that a subsequent transfer by him to her was without consideration as against his creditors.—*Eggleston v. Slusher* (Neb.) 69 N. W. 310.

§ 4. Property of wife—Rights of husband's creditors.

(Mich.; 1896.)

Where a wife loaned money to her husband to buy certain goods, and there was no understanding that they were to be hers, they are liable under the execution for a debt of the husband.—*Goeschel v. Fisher* (Mich.) 65 N. W. 965.

§ 5. Conveyances of husband and wife.

(Iowa; 1896.)

Code, § 1937, provides that a husband or wife, joining in a deed of the other's property, shall not be bound by covenants therein, unless it is expressly so stated in the deed. *Held* improper to enter judgment against a wife on a warranty in a deed of the husband's property, in which the wife, though joining, did not, by its express provisions, assume to be bound.—*Moore v. Graves* (Iowa) 65 N. W. 1008.

§ 6. Joint mortgage of land in entirety.

(Mich.; 1895.)

A joint mortgage by a husband and wife, of land held by them as tenants in the entire-

ty, given to secure a loan to the husband, is valid as against the wife.—*People's Bldg. & Loan Ass'n of Saginaw County v. Billing* (Mich.) 62 N. W. 373.

104 Mich. 186.

II. CONTRACTS OF WIFE.

Mortgage to secure husband's debts, see post, § 19.

Relating to wife's separate estate, see post, § 15.

§ 7. In general.

[a] (Mich.; 1895.)

A married woman living with her husband is liable for medical services for herself and a child by a former marriage, rendered at her request, directly charged to her, and for which she agreed to pay.—*Goodman v. Shipley* (Mich.) 63 N. W. 412.

105 Mich. 439.

[b] (Mich.; 1896.)

A married woman, who has the management of a farm owned by her husband, cannot bind herself by the employment of a servant to work on the farm.—*Kirt v. Kropp* (Mich.) 67 N. W. 1680.

[c] (Mich.; 1897.)

Where one entered into a contract of partnership with a married woman, knowing her to be such, and received benefits thereunder, he cannot, on a bill for an accounting brought by her, object that the contract was void because of the coverture, though, when the contract was made, he did not know that coverture placed her under disability; he not having raised such objection, however, for two years after he in fact had gained knowledge of the disability.—*Feige v. Babcock* (Mich.) 70 N. W. 7; *Babcock v. Feige*, Id.

[d] (Minn.; 1897.)

Where a wife, during the absence of her husband, trades off a sewing machine which is his property for a new machine, agreeing to pay a certain sum to boot, and the husband, when learning of it, repudiates the contract and notifies the sewing-machine company, he is not bound by her agreement.—*Ness v. Singer Mannf'g Co.* (Minn.) 70 N. W. 1126.

§ 8. Notes to pay husband's debts.

(Wis.; 1895.)

A married woman cannot bind herself by a note signed by her to secure an antecedent debt of the husband, and to insure his faithful performance of a contract of agency made with plaintiff, to which the wife was a party.—*Emerson Talcott Co. v. Knapp* (Wis.) 62 N. W. 945.

90 Wis. 34.

§ 9. Guaranty and suretyship.

[a] (Mich.; 1895.)

Defendant, to whom her husband had assigned a duellist, at his request, and without consideration, to enable him to have it discounted, indorsed on the bill a guaranty in blank. The bill was discounted by plaintiff with knowledge that the husband desired to use the proceeds in payment of his own debts. *Held*, that defendant was not liable on her guaranty on the ground that plaintiff was justified in believing that the husband was acting as defendant's agent in the transaction.—*First Nat. Bank v. Hanscom* (Mich.) 62 N. W. 167.

104 Mich. 67.

[b] (Minn.; 1896.)

Where a wife joined with her husband in executing a mortgage to secure a pre-existing debt of the husband, in the consideration for which she did not share, and for which her separate property was not liable, and neither she nor her estate was thereby to be benefited, she was a surety merely.—*Seibert v. Quesnel* (Minn.) 67 N. W. 803.

[c] (Neb.; 1894.)

A wife who delivers a mortgage on her separate property to secure her husband's debt is to that extent such a surety of her husband as will be released by a wrongful extension of time for payment.—*Watts v. Gantt* (Neb.) 61 N. W. 101, 12 Neb. 869.

[d] (Neb.; 1896.)

A husband gave a note in settlement of liability, in which his wife joined. In an action thereon, the wife testified that she did not sign the note with reference to her separate estate, and did not intend to bind the latter. But there was evidence that, while the husband enjoyed a good practice as a physician, all the property was in the wife's name; that the wife had previously signed notes as his surety; and that she knew the object of the note in suit, and that it was necessary that it should be secured; and she testified that she presumed that she was asked to sign it because she owned the property. *H. L.*, that a finding of suretyship was warranted.—*Spatz v. Martin* (Neb.) 65 N. W. 1063, 46 Neb. 917.

Suretyship, charge on separate estate, see post, § 17.

§ 10. Liability on joint notes and mortgages.

(S. D.; 1895.)

A wife who joins with her husband in the execution of a note and mortgage is personally liable thereon in connection with her husband; and, on foreclosure of the mortgage, the judgment may be rendered against both.—*Granger v. Roll* (S. D.) 62 N. W. 970.
6 S. D. 611.

III. WIFE'S SEPARATE PROPERTY.

Action on policy on separate estate, see post, § 23.

Agency of husband, see ante, § 2.

1. IN GENERAL.

§ 11. What constitutes.

[a] (Iowa; 1895.)

In garnishment, it appeared that the garnishee had a note to the order of defendant and his wife, given for personal property sold at auction on the wife's farm. The sale was advertised in the husband's name, and he transacted the business. Both husband and wife testified that the property sold belonged to the latter, but the testimony as to how she acquired the same was unsatisfactory. *Held*, that a judgment for plaintiff for one-half of the note would not be disturbed.—*Bolter v. Girton* (Iowa) 61 N. W. 919.

[b] (Wis.; 1895.)

Where land on which a husband and wife were living in 1848, it having been the property of the wife before their marriage, was sold in 1850, and other land purchased with the proceeds, and title taken in the name of the husband with his wife's consent, and four years later this second parcel was sold, and another purchased with the proceeds, title again being taken in the husband's name with his wife's consent, the latter had no separate estate in either parcel conferred upon her by Laws 1850, c. 41, § 2, which provided that property of women thereafter married should continue their separate property.—*Gallagher v. Gallagher*, 61 N. W. 1104, 89 Wis. 461.

§ 12. — Fruits of separate property.

(Minn.; 1890.)

On an issue whether a crop raised on land of the wife belonged to her, the wife testified that she had no interest in the crop, but that the half due from the party who raised the crop belonged to her husband. There was

also evidence that the husband, with the wife's consent, had farmed the land for years, furnished the seed and labor, and disposed of the crop, and used the proceeds as his own, and that the crop in controversy was raised by a third party under a contract for working the land on shares, made with the husband in his own name and for himself. *Held*, that though there was no express lease of the land from the wife, or agreement for payment of rent, the issue was for the jury.—*Hazlett v. Babcock*, 60 N. W. 971, 64 Minn. 254.

§ 13. Earnings of wife.

[a] (Iowa; 1895.)

A statute of Illinois providing that neither husband nor wife can recover compensation for services rendered for the other does not prevent a wife from claiming the profits arising from keeping boarders, where the husband has relinquished all claim thereto.—*Carse v. Reticker* (Iowa) 63 N. W. 461.

[b] (Wis.; 1895.)

Where a husband and wife jointly undertake an employment, each contributing labor and skill, it will be considered as the husband's business; and the profits therein are not the "individual earnings" of the wife, within the meaning of Rev. St. § 2343, which provides that such earnings, except those accruing from labor performed for her husband, or in his employ, shall be her separate property.—*Emerson Talcott Co. v. Knapp* (Wis.) 62 N. W. 945.
90 Wis. 34.

§ 14. Married women as sole traders.

(Mich.; 1896.)

An insolvent debtor may, as against his creditors, employ his time in aiding his wife to carry on a business owned by her, so that the accumulations will belong to her.—*Shelden v. Shattuck* (Mich.) 66 N. W. 220.

2. CHARGES ON PROPERTY.

§ 15. By contracts in general.

[a] (Iowa; 1897.)

The burden is on a married woman, when sued on a contract, to show that she did not contract with reference to her separate estate or intend to bind it.—*Union Stock Yards Nat. Bank v. Coffman* (Iowa) 70 N. W. 693.

[b] (Mich.; 1896.)

A subscription by a married woman to a bonus to induce the location of a building in the neighborhood of her separate land, entered into in consideration of the benefits to her land to be derived from such a location of the building, is not binding on her, under How. Ann. St. § 6295, giving a married woman a right to contract, sell, transfer, mortgage, and convey her separate estate. *Moore and Grant, JJ.*, dissenting.—*Detroit Chamber of Commerce v. Goodman* (Mich.) 68 N. W. 295.

[c] (Mich.; 1896.)

Where a husband and wife enter into a contract to plant and cultivate an orchard on land on which they are living, but the title to which is in a third person, the contract does not relate to the wife's separate estate, and cannot be enforced against her, though she subsequently acquires the title.—*Edison v. Babka* (Mich.) 69 N. W. 499.

[d] (Mich.; 1897.)

Where a debtor voluntarily conveys all of his property to his wife, and the wife, to relieve herself from a creditor's attack on the property conveyed, promises to pay the husband's debt, it is a contract in relation to her own property, and hence is valid.—*Whelpley v. Stoughton* (Mich.) 70 N. W. 1098.

[e] (Mich.; 1897.)

In an action on a note made by husband and wife, plaintiff testified that he learned that the husband had conveyed all of his property to his

wife (defendant); that he threatened to attack the transfer, and defendant promised that, if he would not, she would pay his debt; that thereupon a new note was made by defendant and her husband; and that this had been kept alive for 19 years by renewals. Defendant introduced no evidence, but her husband admitted the conveyance of his property to defendant, and testified that for the personal property there was a consideration of \$200, and that defendant paid some consideration for the land. *Held*, that it was a question for the jury whether the note was given to prevent a threatened attack on defendant's separate property.—*Whelpley v. Stoughton* (Mich.) 70 N. W. 1098.

[f] (Wis.: 1897.)

Rev. St. §§ 2342-2345, relating to conveyances and contracts by married women, and authorizing actions at law against them on their contracts, relate only to contracts necessary for the use of their separate estates or affecting their separate business or personal services.—*Mueller v. Wiese* (Wis.) 70 N. W. 485.

[g] (Wis.: 1897.)

In the absence of an enabling act, contracts of married women are cognizable only in equity, so that, except as affected by the married women's act (Rev. St. §§ 2342-2345), such contracts cannot be enforced at law.—*Mueller v. Wiese* (Wis.) 70 N. W. 485.

§ 16. Notes.

[a] (Mich.: 1895.)

In an action on a note signed by a husband and wife, where the evidence is insufficient to show that the money was advanced with the understanding on the part of the payee that it was for the benefit of the wife's separate estate, she is not liable on the note.—*Fisk v. Mills* (Mich.) 62 N. W. 559.
104 Mich. 433.

[b] (Mich.: 1897.)

In an action on notes given by a married woman for the rent of a store, "value received by me since I have been the sole owner of the stock. * * *" where there was evidence that defendant had owned the stock for a long time, and was in possession of the building, it was for the jury to say whether the notes had reference to her separate estate.—*Sherrod v. Costigan* (Mich.) 70 N. W. 140.

§ 17. Suretyship.

[a] (Iowa: 1897.)

The fact that at the time a married woman signed as surety a note given by her husband for a loan she owned a farm, does not show that she contracted with reference to her separate estate, or intended to bind the same; it appearing that the farm was in the exclusive control of the husband, and that the wife did not know what was done with the borrowed money.—*Union Stock Yards Nat. Bank v. Coffman* (Iowa) 70 N. W. 693.

[b] (Iowa: 1897.)

The fact that a note on which a married woman was a surety was renewed will not estop her from defending on the ground that she did not contract with reference to her separate estate.—*Union Stock-Yards Nat. Bank v. Coffman* (Iowa) 70 N. W. 693.

§ 18. Liability for husband's debts.

[a] (Neb.: 1895.)

Where a husband purchases a lot with his wife's money, and without her knowledge retains the title in his own name, it is not liable for the debts of the husband, where the credit was not extended to him on the faith of his ownership in the land.—*Hews v. Kenney* (Neb.) 62 N. W. 204, 43 Neb. 815.

[b] (Neb.: 1895.)

A bill to subject property held by a wife for the payment of her husband's debts is properly dismissed where the price was in part paid

by the wife, and there was no proof that the conveyance to her was in fraud of the creditors, and the husband has property sufficient to pay the debt.—*Trester v. Pike* (Neb.) 62 N. W. 211.
43 Neb. 779.

§ 19. — Mortgage on separate estate.

[a] (Mich.: 1896.)

A bank refused to carry a debt any longer without security, and the debtor thereupon represented to his wife that he could obtain money from the bank to put into his business, if she would give a mortgage to the bank on her separate property, and concealed the fact that the mortgage was to be used to pay an existing debt. *Held*, that the mortgage was void. *Smith v. Osborne* (1876) 33 Mich. 410, followed.—*Citizens' Sav. Bank v. Darling*, 68 N. W. 132.

[b] (Neb.: 1894.)

A married woman may mortgage her separate estate to secure the debts of her husband, and a loan to the husband is sufficient consideration therefor.—*Watts v. Gantt* (Neb.) 61 N. W. 104, 42 Neb. 869.

[c] (Neb.: 1897.)

A married woman may, by mortgage, bind her separate property for the payment of a debt of her husband.—*Holmes v. Hull* (Neb.) 70 N. W. 241.

§ 20. Rights of husband's creditors.

(Iowa: 1895.)

Defendants, husband and wife, purchased land with money belonging to the wife, and, the title having been by mistake conveyed to the husband, the latter agreed to repay her when the land was sold. This property was exchanged for an 80-acre tract, to be conveyed to the wife, but, neither being present when the deed was executed, the husband's name was inserted as grantee, the latter again promising that when the land was sold his wife should have the money. The husband afterwards purchased land adjoining the 80-acre tract, paying thereon \$500 borrowed from B., for which he gave his note. Subsequently defendants conveyed to W. the 80-acre tract and 25 acres of the land adjoining, receiving a cash payment of \$1,000, which the wife retained as her own. W. sold the land to K., and the latter reconveyed to the wife, who paid therefor the \$1,000 received from W., and a further sum, contributed by her husband. Plaintiff, to whom B. had assigned the note for \$500, and who had recovered judgment thereon, brought an action against defendants to subject the land so repurchased in the wife's name to the payment of his claim. It did not appear that B. lent the money on the strength of the husband's title to the 80 acres, nor that plaintiff relied thereon when he took an assignment of such note. *Held*, that plaintiff was entitled to judgment as against the 25-acre tract, but that the wife was entitled to the 80 acres, free from plaintiff's claim.—*Hollenbeak v. Peck* (Iowa) 64 N. W. 780.

IV. TORTS AND CRIMES OF WIFE.

§ 21. Torts.

[a] (Iowa: 1894.)

Where recovery is sought against a husband and wife on the ground that plaintiff's injuries, caused by the discharge of a rifle in the hands of the wife, were due to the negligence of both husband and wife, no presumption that the husband is liable arises from their relationship and the fact that he was present.—*Bethel v. Otis* (Iowa) 61 N. W. 200.
92 Iowa, 502.

[b] (Iowa: 1894.)

It was error to refuse to charge that if the husband gave the wife any directions or advice as to where to shoot, and she did not follow such directions, but shot at another place,

thereby causing the injury to plaintiff, the husband was not liable on account of such direction or advice.—*Bethel v. Otis* (Iowa) 61 N. W. 200.

92 Iowa, 502.

[c] (Minn.; 1895.)

The liability of a husband for slander uttered by his wife in his absence is not affected by the legislation in regard to married women.—*Morgan v. Kennedy* (Minn.) 61 N. W. 912.

62 Minn. 348.

§ 22. Responsibility for crime.

(Iowa; 1896.)

On the trial of one jointly indicted with her husband for the unlawful selling of intoxicating liquors, where the evidence shows that she acted under the express orders of the husband, who had complete control over her, it is proper to charge that, in order to raise the presumption of coercion, it is sufficient if the husband was about the premises, even though in another room, if the wife was so immediately near him as fairly to be held under his control or in his presence.—*State v. Fertig* (Iowa) 67 N. W. 87.

V. MARRIAGE SETTLEMENTS.

§ 23. Antenuptial gift.

[a] (Mich.; 1897.)

In replevin for a piano levied on as the property of plaintiff's husband, evidence that two weeks before the marriage he stated to her, in his apartments, that he had bought her a present, and that a piano was brought to such apartments, and that they both thereafter considered it as hers, sustains a verdict for plaintiff.—*Williams v. Hoehle* (Wis.) 70 N. W. 556.

[b] (Wis.; 1897.)

In replevin for a piano claimed by plaintiff as a gift from her husband before the marriage, a charge that the transaction was not between husband and wife, but that "the same principle of law prevails that would if they were husband and wife," was not prejudicial to defendant.—*Williams v. Hoehle* (Wis.) 70 N. W. 556.

VI. CONTRACTS, CONVEYANCES, AND GIFTS BETWEEN.

Fraudulent conveyance between, see "Fraudulent Conveyances," §§ 16, 24, 25.

Implied trust in property transferred by husband to wife, see "Trusts," § 5.

§ 24. Express contracts.

[a] (Iowa; 1895.)

A husband who has a contract with a county to furnish board to its prisoners has the right to assign it to his wife, and relinquish to her the profits arising therefrom.—*Carse v. Reticker* (Iowa) 63 N. W. 461.

[b] (Mich.; 1895.)

An agreement whereby a husband promised to pay his wife a specified sum per year for keeping house is contrary to public policy, and without consideration.—*Michigan Trust Co. v. Chapin* (Mich.) 64 N. W. 334.

[c] (Minn.; 1895.)

A declaration of trust, made and signed by the wife, reciting that the consideration for a conveyance to her was paid by her husband, that the land was conveyed to her for his use and benefit, and that she held it in trust for him, was of no effect under Gen. St. 1894, § 5534, providing that no contract between husband and wife relative to real estate shall be valid.—*Luce v. Reed* (Minn.) 65 N. W. 91.

63 Minn. 5.

§ 25. Loans or advances.

(Iowa; 1895.)

Where a wife permits the husband to expend her money for the support of the family and in his business, without any contract for its repayment, she cannot, in the absence of an express agreement, recover the amount so advanced.—*Hayward v. Jackman* (Iowa) 64 N. W. 667.

§ 26. Conveyances by husband to or for wife.

[a] (Minn.; 1896.)

Gen. St. 1891, § 5534, which, in effect, declares invalid conveyances of real estate between husband and wife, refers only to direct conveyances from one to the other, and not to indirect conveyances through third persons, though the conveyance from one to the other through a third person is in pursuance of a previously made and invalid agreement between husband and wife for such a conveyance.—*Jorgenson v. Minneapolis Threshing Co.* (Minn.) 67 N. W. 364.

64 Minn. 489.

[b] (Minn.; 1897.)

Gen. St. 1891, § 5534, providing that "no contract between a husband and wife, the one with the other, relative to the real estate of either or any interest therein shall be valid," invalidates a real-estate mortgage made by the husband to the wife after their separation.—*Phillips v. Blaker* (Minn.) 70 N. W. 1082.

[c] (S. D.; 1896.)

A conveyance by a husband directly to his wife is valid, where it does not affect the rights of creditors.—*Johnson v. Brauch* (S. D.) 68 N. W. 173.

§ 27. Gifts.

[a] (Mich.; 1896.)

Abandonment of a wife by her husband does not operate as a gift to the wife of personality left by him in her possession.—*Dawson v. Lindsay* (Mich.) 69 N. W. 495.

[b] (Neb.; 1896.)

The married woman's act of 1871 did not abrogate the equitable rule which upholds gifts from solvent husbands to wives.—*Dayton Spice-Mills Co. v. Sloan* (Neb.) 68 N. W. 1040.

[c] (Neb.; 1897.)

Where a husband purchases real estate with his own funds, and causes the legal title thereof to be conveyed to his wife, the presumption is that he intended it as a gift to his wife.—*Kobarg v. Greder* (Neb.) 70 N. W. 921.

VII. ACTIONS.

Action authorizing actions by deserted wife, depriving husband of property without due process of law, see "Constitutional Law," §§ 41, 42.

§ 28. Between husband and wife.

(Minn.; 1896.)

The effect of Gen. St. 1894, § 5530, is to preserve the separate legal existence of a married woman in respect to all her rights of person and property, and, to the extent necessary to the full exercise and protection of these rights, to give her in her own name all the remedies in the courts which she would have if unmarried. Hence she may sue her husband in her own name, in any form of action, to enforce any right affecting her property, the same as if he were a stranger.—*Gillespie v. Gillespie* (Minn.) 67 N. W. 206.

64 Minn. 381.

§ 29. Against wife—Joinder of husband.

(Wis.; 1895.)

Under Rev. St. § 2608, providing that a husband may be joined as a party defendant with his wife in an action against her concerning her

separate property. plaintiff has the option of joining the husband as a party defendant in a suit against a wife to have her declared a trustee for benefit of creditors of lands conveyed to her by a third person in fraud of his creditors.—*Allen v. McRae*, 64 N. W. 889, 91 Wis. 226.

§ 30. For injuries to wife.

[a] (Mich.; 1894.)

It is no defense to an action for loss of a wife's services through personal injuries that plaintiff has not lived with her since the accident, where the cause of the separation was that, plaintiff being unable to support her in her enfeebled condition, she went to her mother's house.—*Bowdle v. Detroit St. Ry. Co.* (Mich.) 61 N. W. 529.
103 Mich. 272.

[b] (Minn.; 1896.)

A husband may maintain an action against a municipal corporation proper to recover consequential damages sustained by him in the loss of the services of his wife on account of injuries received by her by reason of a defective sidewalk, and also for the recovery of moneys expended by him for medical attendance.—*McDevitt v. City of St. Paul* (Minn.) 68 N. W. 178.

[c] (Wis.; 1896.)

In proof of damages for injuries to a wife, it is error to receive testimony of the husband as to how much her services were worth to him, the true rule being what they were worth generally.—*Keller v. Town of Gilman* (Wis.) 66 N. W. 800.
93 Wis. 9.

§ 31. — Action by wife.

[a] (Neb.; 1895.)

A married woman may maintain an action for personal injuries, recovering therein the damages by her sustained, as distinguished from any sustained by her husband.—*City of Chadron v. Glover*, 62 N. W. 62, 43 Neb. 732.

[b] (Wis.; 1895.)

A married woman can recover in her own name for an injury which prevented her from attending to her separate business, both for loss of time, as well as pain and suffering, and such damages belonged to her as "her separate property," within the meaning of Rev. St. §§ 2343, 2345.—*Rife v. City of Oshkosh* (Wis.) 62 N. W. 541, 89 Wis. 540.

§ 32. — Damages.

[a] (Mich.; 1894.)

In an action for personal injuries brought by a husband as his wife's next friend, after the court, commenting on a question as to the wife's earning capacity, had stated that her wages belonged to her husband, and could not be recovered in the suit, it was error to charge that the jury, in estimating damages, should consider what she was able to earn before the accident.—*Tunncliffe v. Bay Cities Consol. Ry. Co.* (Mich.) 61 N. W. 11.
102 Mich. 624.

[b] (Neb.; 1896.)

Since, under Comp. St. c. 53, § 4, earnings of a wife, as laundress and seamstress for others than her family, are her separate property, they cannot be considered in estimating the husband's damages in an action for loss of the wife's services.—*Riley v. Lidtke* (Neb.) 68 N. W. 356.

§ 33. On insurance policy on separate estate.

(Wis.; 1895.)

A husband authorized by his wife to insure and manage her property, by virtue of his agency, may sue in her name on the policy in case of loss, where the wife has disappeared, and cannot be communicated with.—*Roberts v.*

Northwestern Nat. Ins. Co. (Wis.) 62 N. W. 1048.

90 Wis. 210.

VIII. SEPARATION AND MAINTENANCE.

§ 34. In general.

[a] (Mich.; 1895.)

Where, by articles of separation between husband and wife, the wife, for a stipulated consideration, releases the husband from all obligations of support, such release precludes the wife from recovering damages for the loss of her support from one whose conduct with the husband had led to the separation. *McGrath, C. J.*, dissenting.—*Metcalf v. Tiffany* (Mich.) 64 N. W. 479.

[b] (S. D.; 1896.)

A court may, in an action for separate maintenance, require defendant to provide counsel fees and temporary support for plaintiff, though provision is made therefor by statute only in case absolute divorce is sought, and though the allegations of the complaint are denied by the answer.—*Milliron v. Milliron* (S. D.) 68 N. W. 286.

IX. ABANDONMENT.

§ 35. Liability for support furnished abandoned wife.

(Iowa; 1895.)

In an action against a husband for board furnished his wife, where it appears that defendant, who had been boarding with plaintiff, abandoned his wife at plaintiff's house without just cause, and that one of the houses to which he desired his wife to accompany him was not a fit place for her to live in, charging that, if plaintiff permitted defendant's wife to remain with her, she cannot recover unless she shows that defendant refused to maintain his wife "elsewhere, or at all," is reversible error.—*Tibbetts v. Wadden* (Iowa) 62 N. W. 693.

X. CRIMINAL CONVERSATION AND ACTION FOR ALIENATING AFFECTIONS OF SPOUSE.

Action for alienating affections, competency of husband as witness, see "Witness," § 7.
Joinder of count for seduction, see "Action," §§ 5-7.

§ 36. Criminal conversation.

[a] (Iowa; 1896.)

It is no defense to an action for criminal conversation that the husband, suspecting his wife, left open opportunities for the wrong complained of, so long as he did not make new opportunities, or invite the wrong.—*Puth v. Zimbleman* (Iowa) 68 N. W. 895.

[b] (Iowa; 1896.)

In an action by a husband to recover damages for the alienation of his wife's affections, and for criminal conversation, a letter written by the wife to her paramour, after the alleged intercourse, but during the period of alienation, is admissible to show her feelings towards him during that time.—*Puth v. Zimbleman* (Iowa) 68 N. W. 895.

[c] (Minn.; 1895.)

In Minnesota a married woman cannot maintain an action in the nature of crim. con. against another woman.—*Kroessin v. Keller* (Minn.) 62 N. W. 438.
60 Minn. 372.

§ 37. — Damages.

(Iowa; 1896.)

In an action by a husband for the alienation of his wife's affections, and for criminal conversa-

tion, a verdict for \$15,000 is not so excessive as to indicate passion or prejudice.—*Puth v. Zimbleman* (Iowa) 68 N. W. 895.

§ 38. Action for enticing and alienating affections.

[a] (Mich.; 1895.)

A father is not liable in damages to his son's wife because he objected to his son's marriage to her because she belonged to a certain church, and afterwards advised him that it would be unwise for him to live with her if she again joined her church.—*Rice v. Rice* (Mich.) 62 N. W. 833.

104 Mich. 371.

[b] (Minn.; 1897.)

A married woman can maintain an action against persons who wrongfully entice her husband from her and alienate his affections, and thereby cause a separation between them.—*Lockwood v. Lockwood* (Minn.) 70 N. W. 781.

[c] (Neb.; 1895.)

Where a married woman may "sue and be sued in the same manner as if she were unmarried" (Comp. St. c. 53, § 3), a wife can sue, for damages, a person inducing her husband to desert her.—*Hodgkinson v. Hodgkinson* (Neb.) 61 N. W. 577, 43 Neb. 269.

§ 39. — Evidence.

[a] (Iowa; 1895.)

In an action by a wife for the alienation of her husband's affections, evidence that plaintiff was accustomed to use vulgar language, and taught her child to do so also, is admissible to show the state of domestic happiness in which plaintiff and her husband lived, and also to show her character.—*Bailey v. Bailey* (Iowa) 63 N. W. 341.

[b] (Iowa; 1895.)

In an action by a wife for the alienation of her husband's affections by her father-in-law, plaintiff testified that defendant induced her husband to break his promise to leave defendant's house, where they were at the time living, and move to a place of his own. *Held*, that it was error to exclude evidence of offers to the husband by defendant of a place on which to live with plaintiff, which offers were refused by the husband, he at the time stating that he would not live with plaintiff anywhere, though such offers were made in plaintiff's absence, as they are substantive evidence of verbal acts showing that defendant tried to induce plaintiff's husband to live with her.—*Bailey v. Bailey* (Iowa) 63 N. W. 341.

[c] (Iowa; 1896.)

In an action by a husband for the alienation of his wife's affections, a letter from the wife to defendant, inviting him to call on her, is admissible to explain his subsequent visit to her.—*Puth v. Zimbleman* (Iowa) 68 N. W. 895.

[d] (Mich.; 1895.)

In an action against plaintiff's father-in-law for the alienation of her husband's affections, defendant's wife cannot state what her objections to the marriage were.—*Rice v. Rice* (Mich.) 62 N. W. 833.

104 Mich. 371.

[e] (Mich.; 1895.)

In an action against plaintiff's father-in-law for the alienation of her husband's affections, where it appears that plaintiff is a Catholic and defendant a Protestant, evidence that defendant stated in plaintiff's presence that he would rather see his son dead than living with a Catholic is competent.—*Rice v. Rice* (Mich.) 62 N. W. 833.

104 Mich. 371.

[f] (Mich.; 1896.)

In an action for alienation of a wife's affections, evidence that, since the commencement of the suit, plaintiff had instituted proceedings for a divorce, and obtained a decree, was competent to negative any claim of a reconciliation between himself and wife.—*Mead v. Randall* (Mich.) 69 N. W. 506.

[g] (Wis.; 1896.)

Rev. St. § 4072, provides that "a husband or wife shall not be allowed to disclose a confidential communication made by one to the other, during their marriage, without the consent of the other. In an action for criminal conversation, the plaintiff's wife is a competent witness for the defendant as to any matter in controversy, except as aforesaid." *Held*, that letters written by plaintiff's wife to him prior to an alleged alienation of her affections are admissible in evidence on the question of damages alleged to have been sustained by plaintiff.—*Horne v. Yancey* (Wis.) 67 N. W. 720.

93 Wis. 352.

§ 40. — Damages.

[a] (Iowa; 1895.)

In an action by a wife for alienation of her husband's affections, the rank and condition of defendant cannot be considered in assessing damages.—*Bailey v. Bailey* (Iowa) 63 N. W. 341.

[b] (Mich.; 1895.)

A wife may recover for mental anguish, mortification, and injured feelings, caused by the alienation of her husband's affections, without showing actual loss of support.—*Rice v. Rice* (Mich.) 62 N. W. 833.

104 Mich. 371.

[c] (Minn.; 1897.)

In an action by a wife against her father-in-law and mother-in-law for alienating her husband's affections, where defendants' conduct is shown to have been willful and malicious, a verdict of \$15,000 is not necessarily excessive.—*Lockwood v. Lockwood* (Minn.) 70 N. W. 781.

§ 41. — Instruction.

(Iowa; 1896.)

A charge to allow plaintiff for the loss suffered "in the affection, society, companionship, or services of his wife" is not erroneous, in the absence of a request for more specific reference to the duty of the husband to support, care for, and clothe his wife.—*Puth v. Zimbleman* (Iowa) 68 N. W. 895.

HYPOTHETICAL QUESTIONS.

Examination of experts, see "Evidence," §§ 67, 68.

I.

ICE.

See "Waters and Water Courses," § 14.
On sidewalks, liability of city for injuries, see
"Municipal Corporations," § 84.

IDENTITY.

Of deceased, see "Homicide," § 24.
Of defendant, see "Criminal Law," § 106; "Rob-
bery," § 3.
Of offenses, former jeopardy, see "Criminal
Law," § 36.
Of property stolen, see "Larceny," § 9.
Parol evidence to identify property described in
writing, see "Evidence," § 94.

IDIOT.

See "Insanity."

ILLEGITIMATE CHILDREN.

See "Bastardy."

IMPANELING.

Grand jury, see "Grand Jury," § 3.
Jury, see "Jury," §§ 8-13.

IMPEACHMENT.

Of certificate of acknowledgment, see "Acknowl-
edgment," § 4.
Of record on appeal, see "Appeal," § 147; "Crim-
inal Law," § 215.
Of witness, see "Witness," §§ 49-68.

IMPLIED CONTRACTS.

See "Contracts," § 4.
Recovery on implied contract when express con-
tract is within statute, see "Frauds, Statute
of," § 29.

IMPLIED REPEAL.

Of statute, see "Statutes," § 26.

IMPLIED TRUSTS.

See "Trusts," § 5.

IMPLIED WARRANTY.

In sale, see "Sale," § 30.

IMPRISONMENT.

See "Arrest"; "Bail"; "False Imprisonment."
Commitment for contempt, see "Contempt," §§
19, 20.
Execution against the person, see "Execution,"
§§ 45, 46.
For debt, see "Constitutional Law," § 60.
Of militiaman, see "Militia," § 1.

IMPROVEMENTS.

Allowance for, see "Ejectment," §§ 13, 14.
By tenant, see "Landlord and Tenant," § 12.
By vendees, liability of vendors on mechanics'
liens, see "Mechanics' Liens," § 6.
In mines, see "Mines and Mining," § 2.
Rights and liabilities of life tenants, see "Es-
tates," § 4.

IMPUTED NEGLIGENCE.

See "Negligence," §§ 30, 31.

INCENDIARY.

See "Arson."

INCEST.

Election of counts, see "Indictment and Infor-
mation," § 28.
Joinder of count for rape, see "Indictment and
Information," § 27.
Whether female is accomplice, see "Criminal
Law," § 114.

§ 1. What constitutes offense.

[a] (Mich.; 1895.)

To constitute the crime of incest, the as-
sent of both parties is necessary.—*People v.*
Burwell (Mich.) 63 N. W. 986.

[b] (Wis.; 1895.)

A father who has sexual intercourse with
his daughter is guilty of incest, independent of
the question of force.—*Porath v. State* (Wis.)
63 N. W. 1061.
90 Wis. 527.

§ 2. Indictment.

(Iowa; 1897.)

Under Code, § 4030, providing that, "if any
person being within the degree of consanguinity
or affinity in which marriages are prohibited by
this section carnally know each other, they shall
be deemed guilty of incest," an indictment char-
ging, as the offense, that defendant had carnal
knowledge of his daughter, is sufficient, though
it does not charge that the parties had carnal
knowledge of each other.—*State v. Hurd* (Iowa)
70 N. W. 613.

§ 3. Evidence.

[a] (Iowa; 1897.)

On a trial of a man for incest with his
daughter, it was not error to exclude prelim-
inary informations for rape and incest commit-
ted with a stepdaughter, and for rape on the
daughter.—*State v. Hurd* (Iowa) 70 N. W. 613.

[b] (Iowa; 1897.)

On a trial for incest it was not error to ad-
mit evidence of an act which constituted rape,
since that crime includes incest.—*State v. Hurd*
(Iowa) 70 N. W. 613.

[c] (Iowa; 1897.)

It was not error to exclude a conversation
had with the prosecuting witness regarding her
conduct with men other than defendant, at a
period which could not have affected her preg-
nancy, as proved by the state.—*State v. Hurd*
(Iowa) 70 N. W. 613.

[d] (Wis.; 1895.)

On a prosecution for incest, evidence of
sexual crimes of the defendant with other per-

sons subsequent to the crime charged is incompetent.—*Porath v. State* (Wis.) 63 N. W. 1061.
90 Wis. 527.

INCOME.

From professional services, exemption from liability for alimony, see "Divorce," § 23.

INCOMPETENT PERSONS.

See "Insanity."

INCORPORATION.

See "Corporations," §§ 1-5.

INCRIMINATION.

Of witness, see "Witness," §§ 43-48.

INCUMBRANCES.

Conditions against, see "Insurance," §§ 55, 56.
Covenants against, see "Covenants."
On homestead, see "Homestead," § 22.
Representations in application for policy, see "Insurance," § 37.
Rights and liabilities of life tenants, see "Estates," § 3.
Sufficiency of vendor's title, see "Vendor and Purchaser," § 25.

IN CUSTODIA LEGIS.

Exemption of property, see "Exemptions," § 10.
Expense of taking care of property, see "Sheriffs and Constables," § 5.
Property assigned, see "Assignment for Benefit of Creditors," § 21.
—subject to attachment, see "Attachment," § 10.
Replevin of property, see "Replevin," § 3.

INDECENT ASSAULT.

(Mich.: 1895.)

Where it appears from the evidence in a prosecution under 3 How. Ann. St. § 9314b, for assaulting a female child under 14 years of age, and taking improper liberties with her person, that, while defendant put his arm round her waist, he did not take any liberties, an instruction that he might be convicted of an assault is error.—*People v. Sheffield* (Mich.) 63 N. W. 65.
105 Mich. 117.

INDEMNITY.

Against lien, see "Mechanics' Liens," § 1.
Contracts within statute, see "Frauds, Statute of," § 9.
For loss of wages by discharge, see "Master and Servant," § 9.
Insurance, see "Insurance," §§ 13, 88.
On furnishing new certificate of stock after loss of original, see "Corporations," § 49.

§ 1. In general.

[a] (Mich.: 1895.)

A chattel mortgage in trust recited that the mortgagor, being indebted on certain notes, some of which were indorsed by a certain person as surety, executed the mortgage to secure "payment of said debts" and the surety "against liability on said indorsements," and

authorized the trustee, on default in any of the debts, or if the surety was obliged to pay the indorsed note, to foreclose and sell sufficient of the property "to satisfy the debts and indorsements hereby secured." *Held*, that the mortgage created a personal indemnity as to the surety, and not a fund to pay the notes on which he was liable.—*Union Nat. Bank v. Rasch* (Mich.) 64 N. W. 339.

[b] (Minn.: 1894.)

Where a mortgagee holding a bond of indemnity against paramount liens forecloses his mortgage, and bids in the property with such liens on it, he purchases subject to the liens.—*Pioneer Savings & Loan Co. v. Freeburg* (Minn.) 61 N. W. 25.
59 Minn. 230.

§ 2. Of sheriff.

(Minn.: 1896.)

A sheriff made an excessive levy on merchandise belonging to a third person, and shortly after levied on the same property under two other executions in favor of different creditors against the same debtor. On the third person's demanding the property, the first execution creditor, without knowledge of the excessiveness of the levy or of the other executions and levies, gave the sheriff a statutory indemnity bond entitled in his own action only, the sheriff requiring no indemnity bond from the other execution creditors. The sheriff then sold the property in bulk for the amount of the three executions and costs, and paid each of the execution creditors the full amount of his judgment. The first execution creditor did not authorize a sale in bulk, however. The owner of the property having recovered judgment against the sheriff for the value thereof in an amount less than the amount of the bond, the first execution creditor paid the sheriff his pro rata share of the judgment, which was greater than the amount of his execution. *Held*, that the sheriff could not recover of the sureties on the bond the balance of the amount of the judgment against him, which he had paid.—*Sharvey v. Cash* (Minn.) 68 N. W. 1070.

§ 3. When liability accrues.

(Minn.: 1891.)

Where the mortgagee took a bond of indemnity against liens, conditioned, also, that the mortgagor would complete a building on the premises, the execution of the bond being a part of the same transaction with the making of the loan secured by the mortgage, the mortgagee cannot recover against the guarantors unless he has fully performed on his part; and his wrongful withholding of a part of the loan will defeat such recovery.—*Pioneer Savings & Loan Co. v. Freeburg* (Minn.) 61 N. W. 25.
59 Minn. 230.

§ 4. Scope of contract.

[a] (Minn.: 1896.)

A fidelity insurance company having given a bond to indemnify an employer against dishonesty of the employé while agent at a certain place, defendants executed to the company a counter bond to indemnify it. Thereafter the employé was transferred to another town, and defendants signified their consent thereto by letter to the company. *Held*, that they continued liable on their counter bond.—*Fidelity & Casualty Co. v. Lawlor* (Minn.) 66 N. W. 143.
64 Minn. 144.

[b] (Minn.: 1896.)

A fidelity insurance company having given a bond to an employer to indemnify him against dishonesty of an employé, defendants gave a counter bond to indemnify the company. The bond given by the company was to continue for one year, while no time was expressed in the other for its continuance; but, on renewal of the company's bond, defendants signified their intention, by letter to the company, of continuing liable on the counter bond. *Held*, that the bond given by defendants continued during the

continuance of the renewal bond given by the company.—*Fidelity & Casualty Co. v. Lawlor* (Minn.) 66 N. W. 143.
64 Minn. 144.

[c] (Neb.; 1896.)

Sureties of a cattle-dealing firm, who bound themselves to pay all loss or damage which a stock-yards company in whose yards the firm did business should sustain from any act of negligence on the part of the firm, were liable to the company for loss sustained by reason of its delivering to the firm cattle to which the latter was not entitled, in reliance on a false order of the consignee of the cattle, presented by the firm, and by it fraudulently represented to be genuine.—*Union Stock-Yards Co. v. Westcott* (Neb.) 66 N. W. 419.

47 Neb. 300.

[d] (Wis.; 1896.)

A surety on a fidelity bond, indemnifying a corporation against loss of money intrusted to its treasurer, through the "embezzlement or larceny" thereof by him, is not liable for money intrusted to him, and for which he failed to account, on which, while in his hands, the corporation charged him interest.—*Milwaukee Theater Co. v. Fidelity & Casualty Co.* (Wis.) 66 N. W. 360.

92 Wis. 412.

§ 5. Action on contract.

[a] (Mich.; 1896.)

An attorney, being employed to pass upon the validity of certain bonds, refused to return them until his fee was paid. Defendants made their note, and delivered it to the cashier of a bank, agreeing to pay the cashier whatever he might be compelled to pay in order to obtain the papers. Defendants delivered to the attorney a letter from the cashier, agreeing to remit the amount of his bill if he would deliver the papers to defendants, which he did. When the attorney called on the cashier for payment, defendants refused to pay their note, and the cashier delivered it to the attorney. *Held*, that the note was given to the cashier as an indemnity to him on his debt to the attorney, and, being properly assigned and delivered to the attorney, the latter could maintain an action thereon.—*Steere v. Trebilcock* (Mich.) 66 N. W. 342.

[b] (S. D.; 1894.)

In an action on indemnity bond against damages by reason of mechanics' liens on a building purchased, plaintiff cannot recover on the foreclosure of the lien after sale by him without showing that he was liable for damages therefor.—*Cranmer v. Building & Loan Ass'n of Dakota* (S. D.) 61 N. W. 35.

6 S. D. 341.

INDENTURE.

See "Bonds"; "Deed"; "Mortgages."

INDEPENDENT CONTRACTORS.

See "Master and Servant," §§ 15, 16.

INDICTMENT AND INFORMATION.

- I. IN GENERAL, § 1.
- II. FINDING AND FILING, §§ 2-4.
- III. FORM, §§ 5-8.
- IV. INDORSING NAMES OF WITNESSES, §§ 9-11.
- V. DESCRIPTION OF OFFENSE, §§ 12-17.
- VI. DESCRIPTION OF PERSONS AND PROPERTY, §§ 18-20.
- VII. TIME AND PLACE, §§ 21, 22.
- VIII. DUPLICITY, §§ 23-25.

IX. AMENDMENT, § 26.

X. JOINDER OF PARTIES AND OFFENSES, §§ 27, 28.

XI. CONVICTION OF OTHER OFFENSE THAN CHARGED, §§ 29, 30.

See, also, "Grand Jury."

Against accessories, see "Criminal Law," § 12.
— bank officers for receiving deposits after insolvency, see "Banks and Banking," § 35.

— state treasurer for failure to pay over money to successor, see "States and State Officers," § 8.

Information in nature of quo warranto, see "Quo Warranto," §§ 4, 5.

Necessity of instructions as to lower offense, see "Criminal Law," § 134.

Objections to indictment, see "Criminal Law," §§ 22-24.

Right to have charges made certain, see "Constitutional Law," § 71.

Separate trial of defendants jointly indicted, see "Criminal Law," § 61.

Trial on information rather than by indictment, see "Constitutional Law," § 71.

Variance between indictment and proof, see "Criminal Law," §§ 120, 121.

Waiver of objections, see "Criminal Law," § 24.

For

Cutting timber on government land, see "Public Lands," § 22.

Illegal sales of liquor, see "Intoxicating Liquors," §§ 32, 33.

Libel, see "Libel and Slander," § 36.

Obstructing highway, see "Highways," § 32.

Propelling steam engine on highway, see "Highways," § 2.

Sale of mortgaged chattels, see "Chattel Mortgages," § 60.

Particular Crimes.

See "Adultery," § 2; "Arson," §§ 2, 3; "Assault and Battery," § 7; "Bribery," "Burglary," §§ 4, 5, "Conspiracy," § 1; "Disorderly House," § 3; "Disturbance of Public Assembly," "Embezzlement," §§ 6-9; "Escape"; "False Pretenses," § 5; "Forgery," §§ 4-6; "Fornication"; "Homicide," §§ 20-22; "Incest," § 2; "Perjury," §§ 3-5; "Poison"; "Prostitution"; "Rape," §§ 2, 3; "Receiving Stolen Goods," § 1; "Robbery," § 1; "Seduction," § 3; "Threats and Threatening Letters," § 3.

I. IN GENERAL.

§ 1. Indictment or information.

(Neb.; 1895.)

Under Cr. Code, § 581, making the provisions relating to indictments and prosecutions thereunder applicable to prosecutions on informations filed by the county attorney, prosecutions for crime may be either on information or by indictment.—*State v. Miller* (Neb.) 62 N. W. 238. 43 Neb. 860.

II. FINDING AND FILING.

Indorsing names after filing, see post, § 10.

§ 2. Supplying lost indictment.

(Iowa; 1896.)

On a motion to substitute an alleged copy of a lost indictment, the attorney who made the motion testified that he never saw the original nor a copy of it, nor consulted with the attorney who drew it as to its contents; and that he drew the proposed substitute after examining, and having returned to their custodian, the minutes of the evidence before the grand jury. The attorney who drew the original testified that the substitute contained substantially all the allegations in the original, but that he could not

say it was a true copy, that it was more voluminous than the original, and contained allegations not in the latter; that there were descriptions as to instruments used by defendants in committing the offense charged which were not in the original; and that the latter did not contain the words "and of their malice aforethought," found in the substitute proposed. *Held*, that the evidence did not show that the proposed substitute was a substantial copy.—*State v. Thomas* (Iowa) 64 N. W. 743.

§ 3. Dismissal—New indictment.

[a] (Minn.; 1895.)

On the dismissal of an indictment on motion of the county attorney, a second indictment may be found by the same jury for the same offense on the evidence on which the former indictment was found, without additional evidence.—*State v. Peterson* (Minn.) 62 N. W. 171.

61 Minn. 73.

[b] (Minn.; 1895.)

The dismissal of an indictment on motion of the county attorney after the same has been attacked by demurrer is not equivalent to a decision sustaining the demurrer, so as to prevent the case from being resubmitted to the same or another grand jury, without order of the court.—*State v. Peterson* (Minn.) 63 N. W. 171.

61 Minn. 73.

§ 4. Information—Filing.

(Neb.; 1896.)

Laws 1885, c. 108, requiring that all informations shall be filed during term, in the court having jurisdiction of the offense specified therein, is mandatory, and an information upon which the accused is to be tried for felony is void if filed in vacation.—*In re Vogland* (Neb.) 66 N. W. 1028.

III. FORM.

§ 5. Caption.

(Minn.; 1896.)

Neither a misnomer of a crime, nor the omission to give it any name, in the caption of an indictment, affects the validity of the indictment.—*State v. Howard* (Minn.) 68 N. W. 1096.

§ 6. Indorsement.

(Neb.; 1896.)

The indorsement on an information of the words "rape and incest," in connection with the word "information," is not ground for reversal, where such words aptly summarized the facts stated in the information, and no objection thereto was made below.—*Fager v. State* (Neb.) 68 N. W. 611.

§ 7. Conclusion.

(Iowa; 1896.)

The phrase "contrary to the statute," etc., is not a requisite to an indictment, and cannot supply omitted averments of facts therein.—*State v. Stroud* (Iowa) 68 N. W. 450.

§ 8. Signature of district attorney.

(Iowa; 1894.)

The fact that an indictment is signed by the wrong person, as county attorney, is not ground for reversing a conviction.—*State v. Kovolosky*, 61 N. W. 223, 92 Iowa, 498.

IV. INDORSING NAMES OF WITNESSES.

As affecting admissibility of evidence, see "Criminal Law," § 94.

Compelling calling of witnesses indorsed, see "Criminal Law," § 71.

Continuance after indorsement of additional witnesses, see "Criminal Law," § 48.

Noticing witnesses not indorsed, see "Criminal Law," § 95.

§ 9. In general.

[a] (Iowa; 1895.)

The minutes of the evidence returned with the indictment, and duly filed, are made the test by which to determine whether the names of all the witnesses examined before the grand jury are indorsed on the indictment; and affidavits by grand jurors or other witnesses cannot be received to contradict the record.—*State v. Little* (1875) 42 Iowa, 51, followed.—*State v. Miller*, 64 N. W. 288.

[b] (Iowa; 1895.)

Under Code, § 4293, providing that "the names of all witnesses on whose evidence it is found" shall be indorsed on the indictment, the names of witnesses whose evidence did not contribute to the finding of the indictment need not be indorsed thereon, though such evidence was material.—*State v. Miller* (Iowa) 64 N. W. 288.

[c] (Iowa; 1895.)

Code, § 4337, providing that the indictment must be set aside "when the names of all the witnesses examined before the grand jury are not indorsed thereon; when the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith,"—does not require the name of a witness whose testimony is immaterial to be indorsed on the indictment, or his testimony to be returned therewith.—*State v. Lewis* (Iowa) 65 N. W. 295.

[d] (Mich.; 1895.)

Defendant was not prejudiced by the indorsement of the names of several witnesses on the information after it was filed where only one of such witnesses was sworn, and he was a person on account of whose absence defendant asked for a continuance.—*People v. Burwell* (Mich.) 63 N. W. 986.

[e] (Neb.; 1895.)

The indorsement on an information of a witness' surname and the initials of his Christian name is sufficient.—*Perry v. State* (Neb.) 63 N. W. 26.

44 Neb. 414.

[f] (Neb.; 1895.)

It is a sufficient compliance with the statute requiring the names of state's witnesses to be indorsed on the information before the trial that the surname and the initials of the Christian names of a witness were indorsed thereon.—*Basey v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

§ 10. After filing of information—Discretion of court.

[a] (Neb.; 1896.)

The names of additional witnesses may be indorsed by the county attorney on the information after the filing thereof and before the trial, in the discretion of the trial court.—*Rauschkolb v. State*, 65 N. W. 776, 46 Neb. 658.

[b] (Neb.; 1896.)

It is within the discretion of the trial judge to permit the names of additional witnesses to be indorsed by the county attorney on the information after the filing thereof, and before the trial.—*Fager v. State* (Neb.) 68 N. W. 611.

[c] (Neb.; 1896.)

Since permitting names of witnesses to be indorsed on an information after it was filed was in the discretion of the trial court, and accused made no motion for postponement of the trial because of such indorsement, there was no ground for reversal.—*Barney v. State* (Neb.) 68 N. W. 636.

§ 11. After commencement of trial.

(Mich.; 1897.)

Indorsement of the name of a witness on an information, after trial commenced on a proper showing, is not error.—*People v. Baker* (Mich.) 70 N. W. 431.

V. DESCRIPTION OF OFFENSE.**§ 12. In general.****[a] (Iowa; 1895.)**

Under Code, § 4305, providing that, as to the act charged, the indictment is sufficient if it is in ordinary and concise language, and so as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction according to the law, the omission of the word "to," before the word "keep," in an indictment for maintaining a building to keep intoxicating liquors for sale, is not fatal.—*State v. Caffrey* (Iowa) 62 N. W. 664.

[b] (Neb.; 1896.)

An information charged that defendant, in the county of S. on a certain date, "then and there being, did unlawfully practice medicine and surgery, * * * and did unlawfully treat in the capacity of a physician and surgeon one H., without having first obtained and procured registration, filing in the office of the county clerk of S. county a certificate, as required," etc. *Held*, that the words "without having first obtained" referred to the certificate itself, and not to the act of procuring registration thereof.—*Jones v. State* (Neb.) 68 N. W. 1034.

[c] (Neb.; 1897.)

The test by which to determine the sufficiency of an indictment is whether enough remains, after rejecting all unnecessary averments thereof, to satisfy the requirements of the statute.—*Blodgett v. State* (Neb.) 69 N. W. 751.

§ 13. Allegation as to former conviction.**(Mich.; 1896.)**

An information for a third offense of disorderly conduct in being a common prostitute (How. Ann. St. § 1997a1), reciting, "Said offense being, and is hereby charged as, a third offense," is insufficient without an allegation of prior convictions, though the statute does not expressly require such allegation.—*People v. Buck* (Mich.) 67 N. W. 982.

§ 14. Omission of word "feloniously."**(Neb.; 1894.)**

An information under Cr. Code, § 16, which prescribes the punishment of any person who "shall maliciously shoot, stab, cut, or shoot at any other person with intent to kill, wound or maim such person," need not allege that the act was done "feloniously."—*Wagner v. State*, 61 N. W. 85, 43 Neb. 1.

§ 15. Negating proviso of statute.**(Iowa; 1894.)**

Where the sale of liquor is prohibited, and a subsequent statute (Laws 25th Gen. Assm. c. 62) empowers municipalities to authorize its sale under certain conditions, in a prosecution it is not necessary to negative such conditions in the complaint, but the party desiring to take advantage of the happening of the conditions must plead them.—*State v. Van Vliet* (Iowa) 61 N. W. 241.

92 Iowa, 476.

§ 16. Surplusage.**(Iowa; 1894.)**

Where the body of the indictment sets out the offense of breaking and entering a building in which merchandise, etc., were stored, with intent to commit larceny therein, an allegation in the caption that defendant is accused of "burglary" is immaterial, and therefore it is not necessary to allege that the offense was committed in the nighttime.—*State v. Gillett* (Iowa) 61 N. W. 169.

92 Iowa, 527.

§ 17. Variance from complaint.**[a] (Iowa; 1895.)**

An information for an offense charged in a complaint may set out facts relating to the of-

fense, brought out on examination, which were not set out in the complaint.—*People v. Oscar* (Mich.) 63 N. W. 971.

105 Mich. 704.

[b] (Mich.; 1896.)

In a prosecution for keeping a house of ill fame, the indictment may fix a different date from that alleged in the complaint.—*People v. Russell* (Mich.) 67 N. W. 1099.

As to allegations of time, see post, § 21.

—description of persons or property, see post, § 18.

VI. DESCRIPTION OF PERSONS AND PROPERTY.**§ 18. Person injured.****[a] (Iowa; 1895.)**

An erroneous allegation, in an indictment for homicide, as to deceased's name, is immaterial.—*State v. Windahl* (Iowa) 64 N. W. 420.

[b] (Iowa; 1896.)

Under Code, § 4302, providing that, when an offense is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured is not material, the fact that an indictment, in naming the receivers of a railway company, from whose custody property is charged to have been stolen, states one of the names incorrectly, is not fatal.—*State v. Hall* (Iowa) 66 N. W. 725.

[c] (Iowa; 1896.)

Under Code, § 4302, providing that, in prosecutions for offenses against the person or property, erroneous allegations as to the name of the person injured shall be immaterial, a mistake in an indictment for burglary as to the name of the owner of the building is immaterial.—*State v. Porter* (Iowa) 66 N. W. 745.

§ 19. Property.**[a] (Neb.; 1895.)**

Since Crim. Code, § 420, provides that it shall not be necessary to describe the character of money in an indictment, an averment as to the character of money in an information for robbery was surplusage, and not necessary to be proved.—*Tracy v. State* (Neb.) 64 N. W. 1069, 46 Neb. 361.

Allegations of ownership, see "Embezzlement," § 8.

§ 20. Variance.**[a] (Iowa; 1896.)**

A complaint for embezzlement of school funds describing defendant as "secretary of the school board" of a certain city is not at variance with an information based thereon describing defendant as "secretary of the board of education" of said city.—*Hockenberger v. State* (Neb.) 68 N. W. 1037.

[b] (Neb.; 1896.)

There is no variance between a complaint charging the embezzlement of moneys belonging to "the school district of the city of G. I., H. county, Nebraska," and an information based thereon charging that the moneys belong to "the school district of the city of G. I., of the county of H., in the state of Nebraska."—*Hockenberger v. State* (Neb.) 68 N. W. 1037.

VII. TIME AND PLACE.**§ 21. Averment of time.****[a] (Iowa; 1895.)**

Code Cr. Proc. § 4306, provides that no indictment is insufficient for want of an allegation of the time of any material fact, when the time has been once stated. *Held*, that where an indictment for rape is in two counts,

the first charging that the crime was committed by force, and the second by carnally knowing a female child under 13 years of age, the same female being named in each count, and the date of the commission of the offense being the same in each, except that in the second the year is omitted, the date of the offense is sufficiently shown in the second count, though the state dismisses the first.—*State v. Gaston* (Iowa) 65 N. W. 415.

[b] (Mich.; 1895.)

Where, on the examination, the commission of a crime is shown to have been on a different date from that charged in the complaint, the information should follow the date shown on examination.—*People v. Whitney* (Mich.) 63 N. W. 765.

105 Mich. 622.

See, also, "Embezzlement," § 7.

§ 22. Averment of place.

[a] (Mich.; 1897.)

A complaint charging defendant with insulting conduct, by pecking in the window of a house on the corner of specified streets in the city, sufficiently designates the place of offense.—*City of Grand Rapids v. Williams* (Mich.) 70 N. W. 547.

[b] (S. D.; 1895.)

Where an indictment states that the offense charged therein was committed at a specified time at a certain place, no other time or place being mentioned, a subsequent averment, that the traversable facts constituting the offense were committed "at the time and place aforesaid," sufficiently lays the venue.—*State v. Taylor* (S. D.) 64 N. W. 548.

VIII. DUPLICITY.

Waiver of objection, see "Criminal Law," § 24.

§ 23. What constitutes.

[a] (Iowa; 1895.)

Code, § 3985, provides that "if any person * * * destroy, injure or secrete any goods * * * he shall be punished," etc. *Held*, that an indictment charging that defendants did injure "and" secrete certain property was not bad for duplicity.—*State v. Phipps* (Iowa) 64 N. W. 411.

[b] (Iowa; 1895.)

An indictment charged that defendants, being armed with revolvers, with the felonious intent then and there to kill and maim one C., if C. should resist them, did willfully make an assault on C., and did steal one gold watch from his person. *Held*, that such indictment was not open to the objection of duplicity, under Code, §§ 3858, 3859, which provide that, if any person, with force, by putting in fear, steal property from another, he is guilty of robbery, and that, if such offender is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed, he shall be punished by imprisonment in the penitentiary, etc.—*State v. Osborne* (Iowa) 65 N. W. 159.

[c] (Mich.; 1895.)

An information charging willful neglect of duty and corrupt conduct in canvassing election returns is not bad for duplicity, the statute (How. Ann. St. § 9367) describing the offense in the same words, but in the disjunctive.—*People v. Clarke* (Mich.) 62 N. W. 1117.

105 Mich. 169.

§ 24. — Burglary.

[a] (Iowa; 1895.)

An indictment for burglary, under Code, § 3891, charging that defendant broke and entered with intent to commit an assault, and that, after having entered, he committed the assault, is not bad for duplicity, though Code, § 4300, provides that an indictment shall charge

but one offense.—*State v. Phipps* (Iowa) 61 N. W. 410.

[b] (Neb.; 1896.)

Burglary with intent to steal certain property and larceny of such property may be charged in the same count of an indictment.—*Lawhead v. State*, 65 N. W. 779, 46 Neb. 607.

§ 25. — Threats.

(Iowa; 1895.)

An indictment, in a prosecution under a statute punishing any one threatening "to accuse another of a crime or offense or to do any injury to the person or property of another with intent to thereby extort money," alleging that defendants did threaten to accuse certain persons of a certain crime, and did further threaten to injure the property of such persons, with intent to extort money from them, does not charge two offenses.—*State v. Lewis* (Iowa) 65 N. W. 295.

IX. AMENDMENT.

§ 26. When allowable.

(Mich.; 1896.)

Under 2 How. Ann. St. § 9537, providing for an amendment of the indictment or information in the name of any person mentioned therein whenever the variance between the name alleged and that proved is not material to the case, where an indictment alleged the uttering of a forged check payable to G. W. B., and the check introduced was payable to G. M. B., it was proper to permit an amendment to conform to the proof.—*People v. Brown* (Mich.) 67 N. W. 1112.

X. JOINDER OF PARTIES AND OFFENSES.

§ 27. Joinder of counts.

[a] (Neb.; 1896.)

It was error under Cr. Code, § 54, to try defendant against his objection on a charge of burning a schoolhouse, joined with a charge for causing the burning to be done by another.—*Wendell v. State*, 65 N. W. 884, 46 Neb. 823.

[b] (Neb.; 1897.)

A charge of malpractice against an attorney and counselor at law may be joined with a prosecution for a contempt of court where both charges involve a single transaction.—*Blodgett v. State* (Neb.) 69 N. W. 751.

[c] (Neb.; 1897.)

A count charging an illegal sale of liquor may be joined with a count charging the keeping of liquor for illegal sale.—*Hans v. State* (Neb.) 69 N. W. 838.

[d] (Wis.; 1895.)

Under Sanb. & B. Ann. St. § 4653, requiring the district attorney to charge an offense according to the evidence given on examination, whether it be the offense charged in the complaint or not, and section 4650, providing that an information may join counts for different offenses when the same could be joined in an indictment, an information may join counts for incest and rape, when the complaint charged incest, and the evidence showed that the crime was committed with force.—*Porath v. State* (Wis.) 63 N. W. 1061.

90 Wis. 527.

[e] (Wis.; 1895.)

An information may join a count for rape with one for fornication with a female 14 years of age. *Porath v. State* (1895) 63 N. W. 1061, 90 Wis. 527, followed.—*Jackson v. State*, 64 N. W. 838, 91 Wis. 253.

§ 28. — Compelling state to elect.

[a] (Iowa; 1897.)

On a trial for incest, where several acts of intercourse were shown, extending over a

period of more than 18 months, it was not an abuse of discretion to refuse to require the prosecution, before the close of the direct evidence, to elect on which act it would rely.—*State v. Hurd* (Iowa) 70 N. W. 613.

[b] (Mich.; 1895.)

Where one count or an indictment charges forgery of a check therein set out, and the other count charges the uttering thereof, it is proper to refuse to compel the state to elect under which count it will proceed.—*People v. Warner* (Mich.) 62 N. W. 405.

104 Mich. 337.

[c] (Mich.; 1896.)

Under a charge of pretending to tell fortunes, the state cannot be compelled to elect upon which particular act proven it will rest the prosecution, the offense being a continuing one.—*People v. Elmer* (Mich.) 67 N. W. 550.

[d] (Neb.; 1896.)

It was not an abuse of discretion that the trial court withheld its ruling on a motion to require the state to elect on which of several counts charging several and distinct embezzlements of the funds of a county it would proceed, until the close of the introduction of the state's evidence in chief.—*Korth v. State* 65 N. W. 792, 46 Neb. 631.

[e] (Wis.; 1895.)

Where an information joins counts for distinct offenses arising out of the same transaction, the defendant is not entitled, as matter of right, to compel the prosecution to elect on which count they will proceed.—*Porath v. State* (Wis.) 63 N. W. 1061.

90 Wis. 527.

[f] (Wis.; 1895.)

The state cannot be compelled to elect between the counts of an information charging defendant with rape and one charging him with fornication with a female 14 years of age.—*Jackson v. State*, 64 N. W. 838, 91 Wis. 253.

XI. CONVICTION OF OTHER OFFENSE THAN CHARGED.

Effect of conviction of lesser offense, as acquittal of greater charge, see "Criminal Law," § 34.

§ 29. Conviction of lesser offense.

[a] (Iowa; 1895.)

Under an indictment charging an assault with intent to rape, and also actual carnal abuse of a child, defendant may be convicted of assault and battery, or of simple assault.—*State v. Hutchison* (Iowa) 64 N. W. 610.

[b] (Neb.; 1897.)

Under an information for burglary, defendant cannot be convicted under Cr. Code, § 53, of breaking and entering in the daytime.—*In re McVey* (Neb.) 70 N. W. 51.

§ 30. Conviction of offense included in charge.

[a] (Iowa; 1895.)

A defendant indicted under Code, § 3857, for maiming prosecuting witness, "with intent to maim and disfigure," may be convicted of the crime of "an assault with intent to commit great bodily injury," under Code, § 4465, since the former offense necessarily includes the latter.—*State v. Akin* (Iowa) 62 N. W. 667.

[b] (Iowa; 1897.)

Code, §§ 4465, 4466, providing that on an indictment for an offense consisting of different degrees the jury may find defendant guilty of a degree inferior to that charged, or of any offense necessarily included in that charged, does not apply where the facts show that defendant is either guilty of the crime charged or is innocent of any offense.—*State v. Cater* (Iowa) 69 N. W. 880.

[c] (Iowa; 1897.)

On a prosecution for uttering a forged check, the jury cannot find defendant guilty of forgery on the theory that it is a degree of the offense charged.—*State v. Bigelow* (Iowa) 70 N. W. 600.

[d] (Iowa; 1897.)

Forgery is not included in the offense of uttering a forged check, within McClain's Code, § 5851, providing that defendant may be found guilty of any offense which is necessarily included in the one charged.—*State v. Bigelow* (Iowa) 70 N. W. 600.

[e] (Iowa; 1897.)

Code, § 3902, provides that any person stealing the property of another is guilty of larceny. Section 3903 provides for the punishment of any person who, in the nighttime, commits larceny in any store. *Held*, that one indicted for larceny from a store in the nighttime may be convicted of larceny, under Code, § 4466, providing that defendant may be found guilty of any offense, the commission of which is necessarily included in that charged in the indictment.—*State v. Nordman* (Iowa) 70 N. W. 621.

INDORSEMENT.

Of bills and notes, see "Negotiable Instruments," §§ 24-41.

Of information, see "Indictment and Information," § 6.

INEBRIATES.

See "Drunkards."

INFANCY.

I. CONTRACTS, §§ 1-3.

II. NECESSARIES, §§ 4, 5.

III. ACTIONS, §§ 6, 7.

See, also, "Guardian and Ward"; "Parent and Child."

Competency of child as witness, see "Witness," § 3.

Contributory negligence of children, see "Negligence," § 26.

Custody and control of children, see "Parent and Child," § 2.

— and support of children after divorce, see "Divorce," §§ 41, 42.

Equity jurisdiction over trusts involving rights of infant, see "Trusts," § 32.

Homestead rights, see "Homestead," § 15.

Injuries to children by defects in sewer, see "Municipal Corporations," § 78.

Injury to children on railroad track, see "Railroad Companies," § 48.

Measure of damages for injuries to unemancipated minor, see "Damages," § 31.

Places attractive to children, negligence in maintaining, see "Negligence," § 17.

Proceedings for adoption of child, see "Adoption."

Provision in will for support of children, see "Wills," § 57.

Rape of female under age of consent, see "Rape," § 1.

Warning or instructing youthful employes, see "Master and Servant," § 28.

I. CONTRACTS.

§ 1. In general.

[a] (Iowa; 1896.)

A minor who holds the legal title to land in trust for an adult, under an agreement not to convey or incumber it without the latter's con-

sent, can execute a valid mortgage on the land at the instance and for the benefit of the beneficiary.—*Dcs Mones Ins. Co. v. McIntire* (Iowa) 68 N. W. 565.

[b] (Mich.; 1895.)

A chitted mortgage is not enforceable against a minor mortgagor.—*Barney v. Rutledge* (Mich.) 62 N. W. 369.

104 Mich. 289.

§ 2. Ratification.

(Mich.; 1896.)

In an action for the price of clothes sold defendant, he pleaded infancy. It appeared that, at the time of the sale, defendant was away from home, at work for himself; that there was nothing to indicate to plaintiff that he was not of age; that he did not plead infancy when presented with the bill, after becoming of age, or on the return day of the summons, or in a letter in which he promised to pay in full if he could get an extension of time; and that there was no claim of unfair dealing. *Held*, that whether defendant ratified the contract of sale was for the jury.—*Lynch v. Johnson* (Mich.) 67 N. W. 908.

§ 3. Avoidance.

[a] (Minn.; 1896.)

A minor is not estopped to set up his infancy as a defense to a mortgage by the fact that at the time of its execution he represented that he was of age. *Conrad v. Lane* (1880) 4 N. W. 695, 26 Minn. 389, followed.—*Alt v. Groff*, 68 N. W. 9.

[b] (Neb.; 1896.)

For a representation made by an infant as to his being of age to estop him from asserting infancy as a defense, the representation must have been fraudulently made by the infant, and believed in, relied on, and acted upon by the other party.—*Cobbey v. Buchanan* (Neb.) 67 N. W. 176.

48 Neb. 391.

Disaffirmance of note, rights of bona fide holder, see "Negotiable Instruments," § 53.

II. NECESSARIES.

§ 4. What are.

(Neb.; 1896.)

At the request of an infant an attorney examined the public records, and advised the infant as to his rights to certain property inherited from his deceased father. *Held*, that the services rendered by the attorney were not necessities.—*Cobbey v. Buchanan* (Neb.) 67 N. W. 176.

48 Neb. 391.

§ 5. Question for jury.

[a] (Mich.; 1896.)

In an action for the price of clothing sold defendant, he pleaded infancy. At the time of the sale he was living away from home. *Held*, that whether the clothes were necessities was for the jury.—*Lynch v. Johnson* (Mich.) 67 N. W. 908.

[b] (Neb.; 1896.)

An infant was, by a judgment of court, duly committed to the reform school. Before his term expired he was released on parol, during good behavior. He violated his parol, and was taken into custody by the sheriff for the purpose of being returned to the reform school. He then employed an attorney, who sued out a writ of habeas corpus, and tested the sheriff's authority to return him to the reform school. *Held*, in a suit by the attorney against the infant for services rendered him in the habeas corpus case, that the court did not err in submitting to the jury the question as to whether the services rendered by the attorney were nec-

essaries.—*Cobbey v. Buchanan* (Neb.) 67 N. W. 176.

48 Neb. 391.

III. ACTIONS.

Action by parent for injuries to child, see "Parent and Child," § 7.

§ 6. Guardian ad litem or next friend.

[a] (Mich.; 1896.)

The failure to appoint a guardian ad litem for infant legatees, on whose behalf application was made to the circuit court for leave to appeal from an order of the probate court allowing the account of the executor of their testator, was an irregularity which could be cured by the appointment of a guardian for them in circuit after appeal from the decision of the circuit court on the appeal from the probate court.—*In re Sanborn's Estate* (Mich.) 67 N. W. 128.

[b] (Mich.; 1896.)

Under 2 How. Ann. St. § 8124, providing that, before process shall issue in the name of an infant who is sole plaintiff, a competent person shall be appointed as next friend, who shall be responsible for the costs, it is not required that the person so appointed shall be absolutely responsible financially, but that he shall be answerable or liable for the costs.—*Rahidon v. Muskegon Circuit Judge* (Mich.) 68 N. W. 147.

[c] (Wis.; 1896.)

A guardian ad litem, appointed for an infant defendant by the court in which the action is prosecuted, pursuant to Rev. St. § 2613, may appeal from a judgment against the minor, without permission of court.—*Tyson v. Tyson* (Wis.) 68 N. W. 1015.

§ 7. Pleading and evidence.

[a] (Mich.; 1896.)

In an action for the price of goods, where defendant pleads infancy, the burden of proof is on him to show that fact.—*Lynch v. Johnson* (Mich.) 67 N. W. 908.

[b] (Neb.; 1896.)

Representations made by an infant as to his being of age, if relied on as estopping him from asserting infancy as a defense, must be pleaded.—*Cobbey v. Buchanan* (Neb.) 67 N. W. 176.

48 Neb. 391.

INFORMATION.

See "Indictment and Information."

In the nature of quo warranto, see "Quo Warranto," §§ 4, 5.

INFORMATION AND BELIEF.

Averments in affidavit for attachment, see "Attachment," § 13.

Sufficiency of denial, see "Pleading," § 35.

INHERITANCE.

See "Descent and Distribution."

Right of aliens, see "Aliens," § 1.

INHUMAN TREATMENT.

As ground for divorce, see "Divorce," §§ 9, 10.

INJUNCTION.

- I. JURISDICTION, §§ 1, 2.
- II. RIGHTS ENFORCED AND WRONGS PREVENTED, §§ 3-18.
 - 1. In General, §§ 3-7.
 - 2. Against Actions at Law and Proceedings Therein, §§ 8-10.
 - 3. Injunctions Pertaining to Contracts, §§ 11-13.
 - 4. Against Public Boards and Officers, §§ 14, 15.
 - 5. Injunctions Pertaining to Highways, § 16.
 - 6. Against Torts, §§ 17, 18.
- III. PLEADING AND PARTIES, §§ 19-21.
- IV. PROCEDURE, §§ 22-28.
 - 1. In General, §§ 22-24.
 - 2. Preliminary and Temporary Injunction, §§ 25, 26.
 - 3. Dissolution, §§ 27, 28.
- V. VIOLATION AND PUNISHMENT, §§ 29-31.
- VI. BONDS AND ACTIONS THEREON—DAMAGES, §§ 32-35.

Appealable orders, see "Appeal," § 24.
 Discretion of court, see "Appeal," § 202.

I. JURISDICTION.

Original jurisdiction of supreme court, see "Courts," § 15.

§ 1. Adequate remedy at law.

[a] (Iowa; 1896.)

Injunction will lie to restrain the wrongful maintenance of a drain, whereby an unusual amount of surface water is cast on plaintiff's premises, though defendant is fully responsible financially.—*Holmes v. Calhoun County* (Iowa) 66 N. W. 145.

[b] (Neb.; 1895.)

The transfer or collection of an altered negotiable note will not be restrained in equity, as the maker has an adequate remedy at law.—*Erickson v. First Nat. Bank* (Neb.) 62 N. W. 1078.

44 Neb. 622.

[c] (Neb.; 1895.)

Where an irrigation company appropriated water from a stream, and constructed a ditch to supply the same to nonriparian landowners, a lower riparian owner who knew of the appropriation, and permitted the company to construct its ditch without complaint, was not entitled to an injunction to prevent the use of the ditch by the company, but should be confined to his remedy at law.—*Clark v. Cambridge & A. Irr. & Imp. Co.*, 64 N. W. 239, 45 Neb. 793.

§ 2. Legal titles in dispute.

[a] (Mich.; 1895.)

An injunction will not be granted to enjoin defendant from moving a fence to a line claimed by it as the boundary from a line claimed by plaintiff as the boundary, where the title to the intervening land has never been adjudicated at law.—*Andries v. Detroit, G. H. & M. Ry. Co.* (Mich.) 63 N. W. 526.
 105 Mich. 557.

[b] (S. D.; 1895.)

A preliminary mandatory injunction will not issue to remove a party from the possession of real property, pending an action for the recovery of the same, and to transfer the possession to the adverse party.—*Catholicon Hot Springs Co. v. Ferguson* (S. D.) 64 N. W. 539.

II. RIGHTS ENFORCED AND WRONGS PREVENTED.

By state court against proceedings in federal court, see "Courts," § 27.
 By taxpayer, see "Municipal Corporations," § 202.

Mode of testing legal existence of municipal corporation, see "Municipal Corporations," § 16.
 To enforce contract with city, see "Municipal Corporations," § 70.

Against

Collection of tax, see "Taxation," §§ 48, 49.
 Diversion of water, see "Waters and Water Courses," § 8.

Enforcement of street assessment, see "Municipal Corporations," § 149.

Execution, see "Execution," §§ 17, 36.

Exercise by corporation of corporate franchises, see "Corporations," §§ 101-103.

Flowage, see "Waters and Water Courses," §§ 11, 12.

Interference with ferry franchise, see "Ferry," § 2.

— with natural flow of surface water, see "Surface Water," § 3.

Issuance of license to sell liquors, see "Intoxicating Liquors," § 10.

Liquor nuisance, see "Intoxicating Liquors," §§ 46, 47.

Nuisance, see "Nuisance," § 8.

Obstruction of highway, see "Highways," § 29.

Shutting off gas, see "Gas Companies."

Violation of franchise of building association, see "Building and Loan Associations," § 1.

Wrongful use of trade-names, see "Trade-Marks and Trade-Names," § 2.

1. IN GENERAL.

§ 3. Aiding legal proceedings.

(S. D.; 1895.)

An allegation, in a complaint in an action for the recovery of real property, that defendant, without right or title, and by fraud and stealth, took possession and ejected plaintiff from the premises in suit, and has ever since withheld the same by force and violence, did not entitle plaintiff to ancillary equitable relief by injunction pending the litigation.—*Catholicon Hot Springs Co. v. Ferguson* (S. D.) 64 N. W. 539.

§ 4. Against invalid submission of constitutional amendment.

(S. D.; 1896.)

Injunction will not lie at the instance of a taxpayer and elector to enjoin the submission to the vote of the people of a constitutional amendment because the submission is invalid, as such taxpayer would receive no substantial injury from such submission.—*State v. Thorson* (S. D.) 68 N. W. 202.

§ 5. Restraining corporation from doing business.

(Wis.; 1896.)

An unauthorized payment to defendant corporation of dues and assessments belonging to plaintiff, or imminent danger of collection by and payment to the defendant of such dues, does not authorize the enjoining of defendant or its officers from carrying on its business.—*Supreme Court of Independent Order of Foresters of Canada v. Supreme Court of United Order of Foresters* (Wis.) 68 N. W. 1011.

§ 6. Complainant as wrongdoer.

(Mich.; 1896.)

The closing of a private alley will not be enjoined where it appears that complainant, to enable him to secure the injunction, destroyed the fence closing the alley, and after it was re-

built by defendant, without knowledge that the preliminary injunction had issued, again destroyed the fence, and then served the injunction. —*De Sale v. Millard* (Mich.) 66 N. W. 481.

§ 7. Where threatened acts have been performed.

(Iowa; 1896.)

The fact that an alleged unlawful structure was completed pending an action to enjoin its construction and maintenance does not affect the right of the court to enjoin its maintenance. —*Holmes v. Calhoun County* (Iowa) 66 N. W. 115.

2. AGAINST ACTIONS AT LAW AND PROCEEDINGS THEREIN.

§ 8. Against action at law.

[a] (Minn.; 1896.)

A creditor of an insolvent debtor proved its claim in the insolvency proceedings, and requested the assignee to commence an action, as such, in the courts of another state, to set aside, as in fraud of creditors, a conveyance of land in that state made by the insolvent to his wife. The assignee commenced the action, and subsequently the creditor, in its own name and for its exclusive benefit, sued the same defendants in the same court to subject the land to the payment of the greater part of its debt. *Held*, in an action by the assignee against the insolvent, his wife, and the creditor, all the parties being citizens of Minnesota, and it not appearing that there are any nonresident creditors of the insolvent, that the court properly directed the insolvent's wife to convey the land so conveyed to the assignee as such, and enjoined the bank from further prosecuting its suit. *Jenks v. Ludden* (1886) 27 N. W. 188, 34 Minn. 482, distinguished. —*Hawkins v. Ireland*, 67 N. W. 73, 64 Minn. 339.

[b] (Minn.; 1896.)

A court of equity of Minnesota has power to restrain one of the citizens of that state, of whom it has jurisdiction, from prosecuting an action in a foreign state when necessary so to do to enable justice to be done by the court, and prevent one citizen from obtaining an inequitable advantage of another. —*Hawkins v. Ireland* (Minn.) 67 N. W. 73, 64 Minn. 339.

§ 9. Against action in another state.

(Wis.; 1895.)

Injunction will lie to restrain a resident of the state from collecting from another resident, by means of garnishment proceedings in another state, wages exempt by the laws of the state of their residence. —*Griggs v. Doctor* 61 N. W. 761, 89 Wis. 161.

§ 10. Against entry of judgment on verdict.

(Minn.; 1896.)

The complaint, in an action by the stockholder of an insolvent corporation, on behalf of himself and the other stockholders, against the receiver of the corporation and his vendee, alleged that the receiver sold the property of the corporation on credit, and never received any part of the price, in violation of the order of sale, and prayed that an injunction issue restraining the vendee from disposing of the property, that the transfer be declared void, and that the property be restored to the court for the benefit of the creditors and stockholders. At the time the action was commenced another action in the same court was pending, wherein the receiver was plaintiff and the stockholder and others were defendants, upon an undertaking executed by those defendants to the receiver, whereby they promised to pay the price of the property if the receiver would deliver the

same to said vendee; and a verdict was returned therein for the receiver. *Held*, that the plaintiff stockholder was not entitled to an injunction restraining the receiver from entering judgment on his verdict. —*Tozer v. O'Gorman* (Minn.) 67 N. W. 696.

3. INJUNCTIONS PERTAINING TO CONTRACTS.

§ 11. Against breach of contract.

[a] (Mich.; 1896.)

One obtaining a chattel mortgage on a stock of goods to secure his debt, at the same time agreeing to take possession of the stock and continue the business for the benefit of himself and the mortgagors and their other creditors, will, in the absence of fraudulent representations or a violation of the agreement by the mortgagors, be enjoined from selling the property under his mortgage, to the detriment of the mortgagors and their other creditors. —*Rolfe v. Burnham* (Mich.) 68 N. W. 989.

[b] (Neb.; 1896.)

Breach of a contract by a judgment creditor with one of the judgment debtors, to first levy upon and exhaust property of the other debtor before levying upon that of the one with whom the agreement was made, could properly be enjoined. —*Gibson v. McClay* (Neb.) 66 N. W. 851.

47 Neb. 900.

§ 12. Agreements void as against public policy.

(Mich.; 1895.)

Plaintiffs, under an agreement of conveyance void as against public policy, entered into possession and made improvements upon land, and rested upon the land one end of a dam used in operating their mill, which dam caused a part of the land, of little value, to be flooded all the time. The mill was built on plaintiffs' land, and equipped at a large expense for the purpose of manufacturing timber which they owned in that section. These improvements largely increased the value of the rest of the land of plaintiffs' grantor. Defendants, after plaintiffs had thus held possession for several years, obtained a deed of the same land from the widow of plaintiffs' grantor. *Held* that, defendants having brought an action of ejectment, a bill in equity would not lie to restrain them from interfering with the dam until plaintiffs had time to cut and manufacture their timber. *Grant, J.*, dissenting. —*Carley v. Gitchell* (Mich.) 62 N. W. 1003.

105 Mich. 38.

§ 13. Restraining negotiations of notes.

(Neb.; 1895.)

The mere apprehension that the witnesses by whom defendant expects to establish his defense to a note may die or move away is not sufficient ground for restraining the transfer of the note, as the testimony of witnesses may be perpetuated under Code Civ. Proc. §§ 421-427. —*Erickson v. First Nat. Bank* (Neb.) 62 N. W. 1078.

44 Neb. 622.

4. AGAINST PUBLIC BOARDS AND OFFICERS.

§ 14. Against city council.

(Neb.; 1897.)

Where a city council, without authority, are about to remove the mayor, he is not required to wait until the council has actually ejected him from his office, but may by injunction prevent such removal. —*Stahlhut v. Bauer* (Neb.) 70 N. W. 496.

§ 15. Against county boards and officers.

[a] (Minn.: 1897.)
Injunction will lie to prevent unauthorized action by the county commissioners and county auditor on a second petition for a change of county seat.—*Streissguth v. Geib* (Minn.) 69 N. W. 1097.

[b] (Neb.: 1896.)
A court of equity will not, at the suit of a private individual, enjoin the county clerk, treasurer, and county judge from appointing county commissioners, under Comp. St. 1895, c. 18, art. 4, § 68, the remedy being complete at law, by quo warranto against the persons appointed.—*Fort v. Thompson* (Neb.) 69 N. W. 110.

5. INJUNCTIONS PERTAINING TO HIGHWAYS.

§ 16. Against construction of plank road.

[a] (Mich.: 1896.)
Injunction will lie to prevent a plank-road company from constructing its road of a material other than that required by statute, and which, if used, will render the roadbed dangerous.—*Detroit & Erin Plank-Road Co. v. Macomb Circuit Judge* (Mich.) 67 N. W. 531.

[b] (Mich.: 1896.)
Where such an injunction has been issued, the court may modify it, if satisfied that to do so would be to the advantage of the public, and would not result in the creation of a nuisance dangerous to the traveling public.—*Detroit & Erin Plank-Road Co. v. Macomb Circuit Judge* (Mich.) 67 N. W. 531.

6. AGAINST TORTS.

§ 17. Against conspiracy.

(Mich.: 1896.)
A wife, who was a nonresident, filed a bill against her husband and his co-defendant W., alleging that, while living in California, her husband owned a mortgage on W.'s property in Michigan; that W. came to them to secure a release of the mortgage, but, failing in this, afterwards obtained undue influence over her husband, induced him to turn over to him the mortgage and other property, and to return with him to Michigan; that there her husband gave a release of the mortgage to W., turned over to him household furniture belonging to complainant, and falsely reported that complainant had run away with a paramour and would not return to Michigan. The prayer was for an injunction restraining W. from disposing of or encumbering his property, for divorce and alimony from her husband, and that the decree for alimony should be a lien on W.'s property. Further, that if she could not legally file a bill for divorce because she was a nonresident, the injunction be continued till she could acquire a residence. *Held*, that the facts were sufficient to show such a conspiracy to deprive complainant of property rights as would entitle her to an injunction as prayed.—*Smith v. Waalkes* (Mich.) 66 N. W. 679.

§ 18. Against trespass.

[a] (Iowa: 1896.)
Equity will enjoin repeated and continued trespasses on land where the trespasser is insolent.—*Martin v. Davis* (Iowa) 65 N. W. 1001.

[b] (Neb.: 1896.)
It is no defense to an action to restrain a continuing injury to land that the injury is in part threatened by the acts of another than defendant, since plaintiff has his remedy against each one contributing to the injury.—*Jacobson v. Van Boening* (Neb.) 66 N. W. 993.

48 Neb. 80.

4 N.W.DIG.—30

[c] (Neb.: 1896.)

Injunction will issue to restrain a continuing injury to land, caused by an unlawful discharge of surface waters thereupon by an adjoining proprietor, though at the time the injunction is asked no actual injury has occurred.—*Jacobson v. Van Boening* (Neb.) 66 N. W. 993.

48 Neb. 80.

[d] (Neb.: 1896.)

One of two adjoining property owners, whose rights and estate are threatened by the proposed erection about to be made by the other of an additional story to a party wall, is entitled to an injunction.—*Calmelet v. Sichi* (Neb.) 67 N. W. 467.

48 Neb. 505.

III. PLEADING AND PARTIES.

§ 19. Petition.

(Neb.: 1894.)
One railroad company cannot be restrained from constructing a road on land because of defects in the proceedings to condemn a right of way over the same, prosecuted by another company, where the only connection of the two companies shown by the petition is that such other company is "the Nebraska extension of defendant company."—*Blakeslee v. Missonri Pac. R. Co.*, 61 N. W. 118, 43 Neb. 61.

§ 20. Motion to dismiss.

(Iowa: 1896.)
Where a petition to enjoin defendant from engaging in trade in violation of a contract with plaintiff sets out the contract, and avers that the stipulated amount agreed to be forfeited by defendant for a violation of the contract was intended by the parties as a penalty, and that defendant is insolvent, defendant's motion to dismiss the temporary injunction because the contract set out in the petition provides a fixed sum as stipulated damages recoverable only at law, admits all facts well pleaded by the petition, and cannot be sustained.—*Beeman v. Hexter* (Iowa) 67 N. W. 270.

§ 21. Parties.

(Neb.: 1896.)
A county board is not a proper party defendant in an action to enjoin the opening of a highway located and established by it.—*Hodges v. Board of Sup'rs of Seward County* (Neb.) 68 N. W. 1027.

IV. PROCEDURE.

Recovery of money collected in violation of injunction, see post, § 30.

1. IN GENERAL.

§ 22. Bond.

[a] (Iowa: 1895.)
Pending a suit for specific performance, it was error to make an order upon an unverified motion, without the introduction of any evidence or the filing of a bond, enjoining defendants from interfering with plaintiff's possession of the land in controversy.—*Pendleton v. Lamb* (Iowa) 64 N. W. 653.

[b] (Neb.: 1896.)
A bond given to secure a restraining order will not give effect to a temporary injunction subsequently allowed in the same case.—*State v. Green* (Neb.) 67 N. W. 162.

48 Neb. 327.

[c] (Neb.: 1896.)

Where a temporary injunction has never been operative, owing to the failure to give the undertaking required by statute, the giving

of a supersedeas bond, upon the dismissal of the suit by the court, under Code Civ. Proc. § 677, would not give the order of injunction any validity.—*State v. Green* (Neb.) 67 N. W. 162.

48 Neb. 327.

§ 23. Provisions of decree.

(Neb.; 1896.)

In an action by one of several judgment debtors to enjoin a sale by the creditor as being a breach of an agreement by the latter to first levy upon property of the other debtors, the decree, if for plaintiff, should not restrain any levy against plaintiff's property until such time as the property of the other debtors shall be exhausted, but should be confined to the matters in issue, and more particularly to stopping the sale threatened.—*Gibson v. McClay* (Neb.) 66 N. W. 851.

47 Neb. 900.

§ 24. Stay of injunction.

(Mich.; 1896.)

In an action to enjoin defendant from damming a creek along which both complainant and defendant owned timber land, on the filing of the answer admitting the material facts alleged by complainant, but denying that any serious injury would be caused to its land, and alleging that the dam was necessary to provide a flow of water to float defendant's logs, that its logs could not be brought down to its mill without the use of the dam, and that to restrain it from maintaining the dam would cause it an injury 20 times greater than the damage to complainant, the court suspended the temporary injunction before issued for 60 days, on defendant's giving bond to pay any damages which might result, and, at the end of such time, suspended it for 60 days more. *Held*, that a refusal to further suspend the same, at the end of the 120 days, to enable defendant to get out the remainder of its logs, would not be disturbed.—*Michigan Land & Iron Co. v. Cleveland Saw-mill & Lumber Co.* (Mich.) 66 N. W. 953.

2. PRELIMINARY AND TEMPORARY INJUNCTION.

§ 25. When granted.

(Iowa; 1895.)

A city having passed an ordinance fixing the rate at which a water company therein should furnish water, and it being stipulated that if such an ordinance was valid, though it had fixed a rate less than the average rate in other cities, which a previous ordinance provided should be the rate fixed, either by agreement or arbitration, it should be prima facie evidence that the rate therein prescribed was reasonable, a temporary injunction should be granted, compelling the company to furnish water at such rate.—*City of Des Moines v. Des Moines Waterworks Co.* (Iowa) 64 N. W. 269; *Des Moines Waterworks Co. v. City of Des Moines, Id.*

§ 26. Issuance of order.

(Neb.; 1896.)

A county judge possesses the power to allow a restraining order pending a hearing of an application for a temporary injunctive order.—*State v. Green* (Neb.) 67 N. W. 162.

48 Neb. 327.

3. DISSOLUTION.

§ 27. Motion to dissolve.

(Iowa; 1896.)

On application for injunction, a hearing was had on petition and affidavits, and a temporary injunction was granted. Afterwards, upon a supplemental petition being filed, another

temporary injunction was granted ex parte, after which defendants filed a motion to dissolve both injunctions. *Held*, that the hearing on the first petition was not equivalent to a hearing on a motion to dissolve, within Code, § 3102, providing that only one motion to dissolve or modify an injunction upon the whole cause shall be allowed.—*Hinkle v. Saddler* (Iowa) 66 N. W. 765.

§ 28. On filing bond.

(Neb.; 1896.)

Code Civ. Proc. § 677 et seq., providing for the execution of a supersedeas bond upon the dissolution of a temporary injunction, has no application to a mere restraining order granted to prevent the commission of an act until a hearing can be had upon an application for a temporary injunction.—*State v. Green* (Neb.) 67 N. W. 162.

48 Neb. 327.

V. VIOLATION AND PUNISHMENT.

§ 29. Violation.

(a) (Mich.; 1897.)

An injunction restraining the officers of a municipal corporation from issuing bonds of the corporation, because of irregularity in the election authorizing them, does not preclude the right to issue the bonds upon a new election.—*Daniels v. Long* (Mich.) 69 N. W. 1112.

(b) (Neb.; 1896.)

In a suit to enjoin the issuance of a treasurer's deed on the ground that the sale was made in violation of an injunction, plaintiff must show that at the time of the sale the decree for an injunction was in existence.—*Monell v. Irey* (Neb.) 66 N. W. 289.

47 Neb. 213.

(c) (S. D.; 1896.)

A mortgage executed by a party who has been enjoined from transferring or encumbering his property, real and personal, until the further order of the court, is not valid as against the interest of the plaintiff, in whose behalf the injunction order was granted, in the hands of a party having actual notice of the injunction order at the time the mortgage was so executed.—*Scamman v. Galligan* (S. D.) 66 N. W. 458.

§ 30. Recovery of money collected in violation of injunction.

(Wis.; 1895.)

Where money is collected in violation of a temporary injunction, a judgment making the injunction perpetual should provide that plaintiff recover of defendant the amount so collected.—*Griggs v. Doctor* (Wis.) 61 N. W. 761.

89 Wis. 161.

§ 31. Punishment—Contempt.

(a) (Mich.; 1896.)

A nonresident filed a bill against her husband and another, alleging a conspiracy to defraud her of property, pursuant to which the husband's co-defendant had obtained the same, and praying an injunction restraining the disposal or incumbrance of the property, for divorce and alimony from her husband, and that the decree for alimony should be a lien on the property, and that if she could not file a bill for divorce, because of her nonresidence, the injunction be continued until she acquired a residence. After service of the writ the husband's co-defendant executed a mortgage on the property, and thereafter the husband died. *Held*, that the suit did not thereby abate so as to purge the co-defendant of contempt.—*Smith v. Waalkes* (Mich.) 66 N. W. 679.

(b) (Neb.; 1895.)

Persons knowingly violating a preliminary injunction may be punished as for contempt of court, though they would be entitled to have the injunction vacated on a trial on the

merits of the case.—*Wilher v. Woolley* (Neb.) 62 N. W. 1095.

44 Neb. 739.

[c] (Neb.; 1895.)

One violating an injunction is liable to trial and sentence of fine and imprisonment by the court issuing the injunction, under Code Civ. Proc. § 260.—*Zimmerman v. State* (Neb.) 64 N. W. 375, 46 Neb. 13.

Violating injunction against maintenance of liquor nuisance, see "Intoxicating Liquors," § 53.

VI. BONDS AND ACTIONS THEREON—DAMAGES.

Bond to procure dissolution, see ante, § 28.

— to procure stay of injunction, see ante, § 23.

§ 32. Liability in general.

(Wis.; 1896.)

An order sustaining a motion to vacate or dissolve a temporary injunction is not a final decision within Rev. St. § 2778, providing for an undertaking by plaintiff that he will pay the parties enjoined such damages as they may sustain from the injunction if the court "finally decide" that plaintiff was not entitled thereto; damages to be ascertained by reference or otherwise, as the court may direct.—*Supreme Court of Independent Order of Foresters of Canada v. Supreme Court of United Order of Foresters* (Wis.) 68 N. W. 1011.

§ 33. Action on bonds.

[a] (Neb.; 1895.)

A right of action on a bond given on the granting of a temporary injunction in an action for a permanent injunction does not accrue until the final determination of the action.—*Browne v. Edwards & McCulloch Lumber Co.* (Neb.) 62 N. W. 1070.

44 Neb. 361.

[b] (Neb.; 1895.)

A right of action on a bond given on issuing of a temporary injunction does not accrue on the dissolution of such injunction, where such order of dissolution was made by the judge at chambers, he having no jurisdiction to make the same.—*Browne v. Edwards & McCulloch Lumber Co.* (Neb.) 62 N. W. 1070.

44 Neb. 361.

§ 34. — Evidence.

(Iowa; 1896.)

In an action on an injunction bond, plaintiff makes out a prima facie case by establishing the dissolution of the temporary injunction, and the dismissal of the original suit, and the burden is on defendant to show that the injunction was rightfully issued.—*Findlay v. Carson* (Iowa) 66 N. W. 759.

§ 35. Attorney's fees and expenses.

[a] (Iowa; 1897.)

In a suit to vacate a judgment, and to enjoin the enforcement thereof, the injunction is merely incidental to the main relief sought; and hence attorney's fees are not recoverable by defendant in an action on the injunction bond.—*Leonard v. Capital Ins. Co.* (Iowa) 70 N. W. 629.

[b] (Neb.; 1895.)

Attorney's fees for services rendered in an attempt to dissolve a temporary restraining order pending the hearing of a motion to allow a temporary injunction are not recoverable as damages.—*Carnes v. Heimrod* (Neb.) 63 N. W. 809.

45 Neb. 364.

INNKEEPERS.

[a] (Mich.; 1895.)

An hotel keeper in whose safe a regular boarder deposits money for safe-keeping is, at most, a bailee for hire, and is not liable therefor where his night clerk steals the money from the safe, in the absence of any proof of want of ordinary care in employing him.—*Taylor v. Downey* (Mich.) 62 N. W. 716.

104 Mich. 532.

[b] (Mich.; 1895.)

An hotel keeper has no inn keeper's lien for the board of horse under express agreement with one who was not the owner thereof, nor a guest at the hotel.—*Elliott v. Martin* (Mich.) 63 N. W. 525.

105 Mich. 506.

INNOCENCE.

Presumption of, see "Criminal Law," § 159.

IN PAIS.

See "Estoppel," §§ 6-30.

INQUEST.

See "Coroner."

INSANITY.

I. GUARDIANSHIP AND COMMITMENT TO ASYLUM, §§ 1-3.

II. CONTRACTS AND CIVIL DISABILITIES, §§ 4-8.

Action by guardian in behalf of ward for divorce, see "Divorce," § 14.

Capacity to commit crime, see "Criminal Law," §§ 7-9.

Effect on running of limitations, see "Limitations of Actions," § 21.

Libel in charging insanity, see "Libel and Slander," § 1.

Location of Asylum, see "Asylums."

Mental capacity of witness, see "Witness," § 2.

— weakness or insanity as ground for rescission of contracts, see "Equity," § 21.

Opinion evidence as to mental capacity or condition, see "Evidence," §§ 47, 48.

Removal of superintendent of hospital, see "Asylums."

Testamentary capacity, see "Wills," §§ 1-6.

Trial of issue specially, see "Criminal Law," § 9.

I. GUARDIANSHIP AND COMMITMENT TO ASYLUM.

§ 1. Guardianship—Jurisdiction.

(Iowa; 1896.)

The probate court has original jurisdiction of actions to require the guardian of an insane person to account for his management of the estate in all respects, and for his removal.—*Tiffany v. Worthington* (Iowa) 65 N. W. 817.

§ 2. — Accounting.

(Iowa; 1895.)

The guardian of an imbecile invested the funds of his ward in a bank in a manner not authorized by the court. Upon the appointment of his successor he surrendered the certificate of deposit to him, and the latter made no report to the court of the condition of the ward's estate, obtained no direction as to how investments should be

made, and allowed the money to remain where it was for 15 months, when the bank failed. *Held*, that the second guardian must account for the loss.—*Garner v. Hendry* (Iowa) 63 N. W. 359.

§ 3. Commitment—Right to appeal.

(Mich.: 1896.)

Ilow. Ann. St. § 6779, providing that, in all cases not otherwise provided for, any person aggrieved by an order of the judge of probate may appeal to the circuit court, does not apply to an order entered by the judge of probate on application for the commitment of a person to the insane asylum as a private patient, under Pub. Acts 1893, No. 204.—*Sparrow v. Ingham* Circuit Judge (Mich.) 67 N. W. 112.

II. CONTRACTS AND CIVIL DISABILITIES.

§ 4. In general.

(Iowa: 1896.)

The disallowance of alimony in a decree dismissing a petition for divorce against an insane husband does not bar the wife of right to support from her husband's estate.—*Tiffany v. Worthington* (Iowa) 65 N. W. 817.

§ 5. Contracts—Validity.

[a] (Minn.: 1896.)

If, at the time of making a deed of his property, one under guardianship as a lunatic was in fact of sound mind, and the contract was fair, and the guardianship had been practically abandoned, the deed was valid, though the guardian was not formally discharged.—*Thorpe v. Hanscom* (Minn.) 66 N. W. 1. 64 Minn. 201.

[b] (Minn.: 1896.)

A contract of one who is insane, but has not been so adjudged, is voidable only, and not void.—*Morris v. Great Northern Ry. Co.* (Minn.) 69 N. W. 628.

§ 6. — Disaffirmance.

[a] (Minn.: 1896.)

Where an executed contract has been made with an insane person in good faith for a valuable consideration and without notice of the insanity (there having been no inquisition and finding of insanity), the insane person must elect, within a reasonable time after regaining his mental capacity, whether he will affirm or disaffirm the contract.—*Morris v. Great Northern Ry. Co.* (Minn.) 69 N. W. 628.

[b] (Minn.: 1896.)

To entitle one to rescind an executed contract made, while he was insane, with another having no notice of the insanity, he must return whatever consideration he has received; and it is immaterial that the contract was made and consideration paid by a third person for the benefit of the party seeking to rescind.—*Morris v. Great Northern Ry. Co.* (Minn.) 69 N. W. 628.

§ 7. — Sufficiency of evidence of insanity.

(Wis.: 1895.)

In an action to recover on an insurance policy which the insured had exchanged for another, under which recovery was barred by the manner of his death, evidence intended to establish his insanity at the time of such exchange showed that during the later months of his life, and prior to the exchange, he had grown quarrelsome and sullen, treated his mother unkindly, had trouble with his fellow laborers, and at times had delusions that men were chasing him and trying to kill him, and that he finally committed suicide. There was no evidence that he had ever acted in an irrational manner relative to business matters. *Held*, that it was not error to take from the jury

the question of his sanity.—*Boorman v. Northwestern Mut. Relief Ass'n* (Wis.) 62 N. W. 921. 90 Wis. 141.

§ 8. Actions.

[a] (Iowa: 1896.)

Independent of statute, an action cannot be maintained by one as next friend of an insane person.—*Tiffany v. Worthington* (Iowa) 65 N. W. 817.

[b] (Iowa: 1896.)

Code, § 2369, requires actions by insane persons to be brought by their "guardians." Section 2570 provides that defenses for such persons must also be made by their "guardians." Section 2565 provides that actions of a minor must be brought by "his guardian or next friend." Section 2272 authorizes the appointment of guardians for insane persons. Section 2274 provides that all laws relating "to guardians for minors," in so far as they are applicable, shall apply to "guardians and their wards" appointed under the preceding section. *Held*, that an action by the next friend of an insane person is not authorized.—*Tiffany v. Worthington* (Iowa) 65 N. W. 817.

[c] (Wis.: 1897.)

At common law, a feeble-minded person of full age may sue in his own name without a guardian ad litem.—*Menz v. Beebe* (Wis.) 70 N. W. 468.

[d] (Wis.: 1897.)

Rev. St. § 2615, providing that the court may appoint a guardian for an "insane defendant," or for a party who becomes insane pending suit, and Sanb. & B. Ann. St. §§ 3976-3982, providing generally for the appointment of guardians for insane persons, do not preclude a plaintiff, who states in his complaint that he was "of a weak and feeble mind, and not of sufficient mental capacity to attend to ordinary transactions, or to protect and preserve his property rights," when defendant fraudulently procured an exchange of land, from suing in his own name without a guardian ad litem to set aside the exchange.—*Menz v. Beebe* (Wis.) 70 N. W. 468.

INSOLVENCY.

I. IN GENERAL, §§ 1-3.

II. PREFERENCES, §§ 4-6.

III. THE ASSIGNEE—ACTIONS, §§ 7-9.

IV. PROOF AND ALLOWANCE OF CLAIMS—ACTION BY CREDITOR, §§ 10-14.

V. DISCHARGE, §§ 15-17.

See, also, "Assignment for Benefit of Creditors"; "Compositions with Creditors"; "Receivers."

Of bank, see "Banks and Banking," §§ 28-39.
Of building association, see "Building and Loan Associations," § 11.
Of collecting bank, see "Banks and Banking," § 21.
Of corporation, see "Corporations," §§ 88-97.
Of co-surety, effect on right to contribution, see "Principal and Surety," § 27.
Of insurance company, see "Insurance," § 184.
Of mutual benefit company, see "Insurance," § 148.
Of purchaser, ground for rescission by seller, see "Sale," § 53.
Prosecution of bank officers for receiving deposits after insolvency, see "Banks and Banking," §§ 33-36.
Right to set-off against insolvent, see "Set-Off and Counterclaim," § 9.
What constitutes, see, also, "Assignment for Benefit of Creditors," § 3; "Corporations," § 89.

I. IN GENERAL.

§ 1. When proceedings authorized.

(Minn.; 1895.)

Where the property of a nonresident insolvent debtor has been attached, it is immaterial, in proceedings for the appointment of a receiver of his estate, that he had made an assignment for the benefit of creditors in the state of his domicile, before the property was attached.—*Rollins v. Rice* (Minn.) 62 N. W. 325.

60 Minn. 358.

§ 2. Effect of proceedings.

[a] (Minn.; 1896.)

The lien on the property of a judgment debtor, acquired by the commencement of supplemental proceedings against him, was dissolved by the making by him, within 10 days thereafter, of an assignment for the benefit of his creditors, under the insolvency law, even though the complaint of the judgment creditor was on file for more than 20 days before the entry of judgment.—*Wolf v. McKinley* (Minn.) 68 N. W. 2.

[b] (Minn.; 1897.)

A chattel mortgage executed before, but not filed until after, an assignment by the mortgagor for the benefit of his creditors under the insolvency law, is void as to the creditors.—*Shay v. Security Bank of Duluth* (Minn.) 69 N. W. 920.

[c] (N. D.; 1896.)

Though the insolvency law is unconstitutional as to creditors whose debts were contracted before its passage, in so far as it assumes to discharge claims without full payment, it is valid so far as it provides for the transfer of the debtor's property to an assignee to be distributed among his creditors. Hence no creditor, whensoever his debt was contracted, can levy upon such property after title thereto has vested in an assignee under the statute.—*Elton v. O'Connor* (N. D.) 68 N. W. 84.

§ 3. Nonresidents doing business in state.

(Minn.; 1895.)

A nonresident who, in connection with a partner, buys, sells, mortgages, improves, and leases lands within the state, carries on business in the state within the insolvency laws (Gen. St. 1878, c. 41, § 23; Gen. St. 1894, § 4227), so as to make it incumbent on him, under Gen. Laws 1881, c. 148, § 1, as amended (Gen. St. 1894, § 4240), when insolvent, to execute an assignment of his property for the benefit of creditors within 10 days after a part thereof has been attached by a creditor.—*Rollins v. Rice* (Minn.) 62 N. W. 325.

60 Minn. 358.

II. PREFERENCES.

See, also, "Corporations," §§ 92, 93; "Fraudulent Conveyances," § 2.

Payments by bank with intent to create preferences, see "Banks and Banking," § 32.

§ 4. In general.

[a] (Mich.; 1895.)

Where a partner, before the firm made an assignment, conveyed land to a creditor to secure his claim, and both parties acted in good faith, other creditors of the firm have no right to have such conveyance set aside as in fraud of their claims, where the receiver of such firm, by paying the amount of the secured claim, was entitled to have a reconveyance of the property.—*Michigan Trust Co. v. Bennett* (Mich.) 64 N. W. 330.

[b] (Minn.; 1895.)

In an action on a negotiable note by a bona fide indorsee from an insolvent bank before maturity, the maker cannot defend on the ground

that the insolvency law in regard to fraudulent preferences was violated when the note was transferred to plaintiff.—*Haugan v. Sunwal* (Minn.) 62 N. W. 398.

60 Minn. 367.

§ 5. What constitute.

[a] (Minn.; 1895.)

A transfer of property by an insolvent debtor to one of his creditors to secure an existing debt may constitute an unlawful preference, although the debtor was induced to make the transfer for the purpose of obtaining an extension of credit, in the hope of being thereby enabled to continue his business.—*Penney v. Haugan* (Minn.) 63 N. W. 728.

61 Minn. 279.

[b] (Minn.; 1895.)

Evidence that an insolvent bank transferred \$17,000 in promissory notes to a depositor to secure his deposit, and that there remained but \$22,000 in the bank, that the claims of other depositors amounted to over \$100,000, and that the bank suspended payment two days after the transfer, will not justify a finding that the transfer was not made as a preference.—*Penney v. Haugan* (Minn.) 63 N. W. 728.

61 Minn. 279.

[c] (Minn.; 1896.)

A creditor, knowing his debtor to be insolvent, took a chattel mortgage to secure two notes, one given for a past-due indebtedness, and the other for a present loan of less amount, made by the creditor to the debtor to enable the latter to continue his business, with the expectation that he might thereby pay his debts. *Held*, in the absence of fraud on the part of the creditor, though the mortgage was void as a preference under the insolvency laws as to the pre-existing debt, it was valid, as against the assignee of the debtor, so far as it secured the loan.—*Joseph Schlitz Brewing Co. v. Childs* (Minn.) 68 N. W. 65.

[d] (Minn.; 1897.)

More than 90 days before making an assignment under the insolvency law, the insolvent borrowed money, and agreed that, if he did not repay it at a certain time, he would secure it by a chattel mortgage. Thereafter, and within such 90 days, he executed such mortgage. He was then insolvent, which he and the lender then knew, and the mortgage was given and received to give the lender a preference over the insolvent's other creditors. Thereafter, and before the assignment, the insolvent paid the mortgage. *Held*, such payment was an unlawful preference.—*Grant v. Minneapolis Brewing Co.* (Minn.) 70 N. W. 868.

[e] (Minn.; 1897.)

Within 90 days of making a general assignment, and while insolvent, the assignor sold certain property, and the purchaser, as part of the price, agreed to pay an antecedent debt due from the assignor to defendant, but did not do so. *Held*, that defendant could not be required to refund this amount, as an unlawful preference, as he never received it.—*Grant v. Minneapolis Brewing Co.* (Minn.) 70 N. W. 868.

§ 6. Permitting judgment by default.

(Minn.; 1895.)

A default judgment against a debtor, entered 10 days before the debtor made an assignment in insolvency, is a "security given," within Gen. Laws 1881, c. 148, § 4, prohibiting preference by insolvents.—*Yanish v. Pioneer Fuel Co.*, 62 N. W. 387, 60 Minn. 321.

III. THE ASSIGNEE—ACTIONS.

§ 7. Compensation.

(Minn.; 1895.)

An assignee in insolvency who failed to make the business of insolvent, carried on by

him at the request of the creditors, successful, *held* not entitled to compensation in excess of the maximum fees allowed by Gen. St. 1894, § 4253.—*In re Westphal* (Minn.) 63 N. W. 108, 60 Minn. 527; *Gallagher v. Welch*, *Id.*

§ 8. Sale by assignee.

(Minn.: 1897.)

The purchaser of mortgaged property from an assignee in insolvency of the mortgagor has the same right as the assignee to avoid the mortgage for fraud.—*Shay v. Security Bank of Duluth* (Minn.) 69 N. W. 920.

§ 9. Action by assignee.

(Minn.: 1895.)

In an action by an assignee, a complaint is sufficient which alleges that plaintiff is the duly-qualified assignee, without alleging that he had given the statutory bond.—*Northern Trust Co. v. Jackson* (Minn.) 61 N. W. 908, 60 Minn. 116.

IV. PROOF AND ALLOWANCE OF CLAIMS—ACTION BY CREDITOR.

§ 10. Time of filing claim.

[a] (Minn.: 1895.)

Where a bank holding a note made by an insolvent, with security, failed to file the note within the time limited thereby by the court, relying on its security, and thereafter, in an action against it by the assignee, it was determined that the security was a fraudulent preference, and the bank neglected for seven months thereafter to apply for an order permitting it to file the note with the assignee, it was not entitled to such order.—*Clarke v. Squire* (Minn.) 64 N. W. 908, 62 Minn. 364.

[b] (Minn.: 1895.)

One who purchased a note made by an insolvent for value, from a bank, long after the insolvent's assignment, and after the expiration of the time limited by the court within which to file claims against the estate, and seven months after entry of judgment in favor of the assignee in an action by him to determine the right of the bank to hold security for the note, was no more entitled to an order permitting him to file the note against the estate than was the bank.—*Clarke v. Squire* (Minn.) 64 N. W. 908, 62 Minn. 364.

[c] (Minn.: 1896.)

It appearing on the hearing of an application for leave to file a claim after expiration of the limited time that the applicant's claim was just; that no creditor would be prejudiced by its allowance, except as it reduced the dividend; that its allowance would not delay the settlement of the estate; and that applicant had a sufficient excuse for not filing the same in time,—it was proper to permit the same to be filed.—*In re Nicolin* (Minn.) 67 N. W. 995; *Richter v. Merchants' Nat. Bank*, *Id.*

§ 11. Right of set-off.

[a] (Iowa: 1895.)

Where a foreign insurance company makes an assignment under a foreign statute, having no extraterritorial effect, its resident agents, on learning thereof, may cancel policies, and take assignments of the holders' claims against the company for unearned premiums, and set them off against their own liabilities to the company.—*Franzen v. Hutchinson* (Iowa) 62 N. W. 698.

[b] (Minn.: 1895.)

A claim acquired after the debtor's assignment in insolvency could not be set off in an action by the assignee to recover on a note which constituted part of the insolvent's es-

tate.—*Northern Trust Co. v. Hiltgen* (Minn.) 64 N. W. 909.

62 Minn. 361.

§ 12. Rights of secured creditors.

[a] (Minn.: 1896.)

Under the insolvency law, the creditor, before he has exhausted his security, or surrendered it to the assignee, is entitled to file his secured claim, and have the amount and validity of the same determined by the assignee or the court on appeal, but he is not entitled to share in the distribution of the insolvent estate until he has so exhausted or surrendered his security.—*In re Skoll* (Minn.) 66 N. W. 986, 64 Minn. 259; *Swedish Nat. Bank v. Davis*, *Id.*

[b] (Minn.: 1896.)

The creditor held, as collateral security, negotiable notes made by one third party, and indorsed by another; obtained judgment thereon against the maker, at his place of residence, in another state; issued execution, which was returned, "No property found"; then sold the judgment at public auction; but never had any power of sale from the insolvent pledgee. *Held* that, in the absence of a showing that the collateral security was wholly uncollectible, the creditor could not share in the distribution of the debtor's estate.—*In re Skoll* (Minn.) 66 N. W. 986, 64 Minn. 259; *Swedish Nat. Bank v. Davis*, *Id.*

§ 13. Necessity of filing releases.

[a] (Minn.: 1895.)

That the insolvent, a partnership, failed to keep books of account from which its true condition could be ascertained, does not entitle a creditor to share in the proceeds of the estate without filing a release as required by Gen. St. 1894, § 4249.—*In re Clerk-Dickinson Furniture Co.* (Minn.) 63 N. W. 109, 60 Minn. 528; *John V. Farwell Co. v. Beach*, *Id.*

[b] (Minn.: 1895.)

That the insolvent contracted the debt by false representations, does not entitle the creditor to a share in the estate without releasing the insolvent pursuant to Gen. St. 1894, § 4249.—*In re Clerk-Dickinson Furniture Co.* (Minn.) 63 N. W. 109, 60 Minn. 528; *John V. Farwell Co. v. Beach*, *Id.*

[c] (Minn.: 1896.)

Where the books kept by the insolvent contained nothing showing the extent or nature of his business transactions, except an imperfect account of what he owed for goods bought, and what was due him for goods sold on credit, they were not the books of account required to be kept by Gen. St. 1894, § 4249, in order to preclude the creditors from sharing in the insolvent's estate without filing releases.—*Wark v. Holmboe* (Minn.) 67 N. W. 205, 64 Minn. 383.

§ 14. Appeal.

[a] (Minn.: 1895.)

An order permitting creditors of an insolvent to share in his estate without filing releases of their claims is appealable.—*Eckberg v. Schloss* (Minn.) 64 N. W. 922, 62 Minn. 427.

[b] (Minn.: 1896.)

An order granting the petition of a creditor in insolvency proceedings to be permitted to file his claim for allowance with the assignee after the expiration of the time limited is not appealable.—*In re Nicolin* (Minn.) 67 N. W. 995; *Richter v. Merchants' Nat. Bank*, *Id.*

V. DISCHARGE.

By voluntary assignment, see "Assignment for Benefit of Creditors," § 25.

§ 15. Right to discharge—State of debtor's accounts.

[a] (Minn.; 1895.)

Where merchants having two branch stores kept no cash book, either at the branches or at the main store, and no inventories of goods sent from the main store to the branches were made, and no separate account of cash received from the branches was kept, and the accounts of sales and expenses at the branches were incomplete, there were no sufficient books of account or records from which the merchants' true condition could be ascertained, within Gen. St. 1894, § 4249, providing that those who fail to keep such books of account or records shall not be entitled to have creditors sharing in their insolvent estates release their claims.—*Eckberg v. Schloss* (Minn.) 64 N. W. 922.
62 Minn. 427.

[b] (Minn.; 1897.)

A merchant's books containing a record of merchandise bought and sold on credit and of daily cash receipts, but not showing merchandise bought for cash or any cash disbursements or account of bills receivable, are insufficient as books of account, within Gen. St. 1894, § 4249, providing that an insolvent shall not be discharged who has not "kept books of account and records from which his true condition can be ascertained."—*In re Messing* (Minn.) 70 N. W. 1128; *Messing v. Dunham*, Id.

§ 16. Debts affected.

[a] (Minn.; 1895.)

Where, in proceedings under the insolvency law of 1881, a creditor holding two claims—one secured by mortgage and one unsecured—released his latter claim, and took a dividend thereon, but neither filed nor released the secured claim, nor received a dividend thereon, and a judgment was entered releasing the insolvents from all claims held by creditors filing releases, though the personal liability of the insolvents was released as to both claims, the mortgage security was not released.—*Nicolay v. Mallory* (Minn.) 64 N. W. 108.
62 Minn. 119.

[b] (Minn.; 1896.)

A contract whereby a note given before the passage of Laws 1895, c. 67, providing for the discharge of insolvents, was extended until after that act took effect, did not supersede the contract embraced in the note; hence the act did not operate as against the debt represented by the note.—*Lambert v. Scandinavian-American Bank* (Minn.) 68 N. W. 834.

[c] (Minn.; 1896.)

Laws 1895, c. 67, provides that, on the filing by an insolvent of an application for discharge, a citation shall issue to creditors, and that any creditor desiring to oppose the discharge may answer, stating his grounds of objection. *Held*, that a creditor who appeared in obedience to a citation did not, by answering that the insolvent had within six years disposed of property to defraud creditors, waive an additional defense that his debt was contracted before the passage of the law, and hence was excluded by the constitution from its effect.—*Lambert v. Scandinavian-American Bank* (Minn.) 68 N. W. 834.

§ 17. — Liability of mortgage.

(Wis.; 1895.)

Under Sanb. & B. Ann. St. § 1702q, providing that, upon an assignor's discharge, debts due persons shown by the list of creditors to be residents of the state shall be discharged, such discharge is a bar to a personal recovery against the assignor in proceedings to foreclose a mortgage debt due a resident of the state, previously proved against the estate.—*Trustees of Wisconsin State Grange of Order of Patrons of Husbandry v. Kniffen* (Wis.) 62 N. W. 943.
90 Wis. 14.

INSPECTION.

Of appliances, see "Master and Servant," § 39. Of elections, see "Elections and Voters," § 33. Right of stockholders to inspect books and papers of corporation, see "Corporations," § 67.

[a] (Iowa; 1896.)

The action of the oil inspector in testing oil to determine at what temperature it will emit a combustible vapor, the manner of doing so being specifically provided for by statute, compliance with which is bound to lead to a correct test, is ministerial.—*Hatcher v. Dunn* (Iowa) 66 N. W. 905.

[b] (Iowa; 1896.)

Under McClain's Ann. Code, § 2493, providing that an inspector "falsely" branding oil tested, shall be liable for the injuries caused thereby, an inspector is liable, irrespective of whether he actually knew that the brand was false.—*Hatcher v. Dunn* (Iowa) 66 N. W. 905.

[c] (Iowa; 1896.)

In an action for damages caused by the explosion of oil, falsely branded as up to the required test, the defendant inspector is not liable if the explosion was caused by the defective condition of the lamp in which the oil was burned, though the oil was below the required test.—*Hatcher v. Dunn* (Iowa) 66 N. W. 905.

[d] (Iowa; 1896.)

An instruction that plaintiff claimed that "the sole cause of the explosion was because the oil was not up to the test required by law," and that the burden was upon him to establish his claim, did not sufficiently submit the issue whether the cause of the explosion was the defective condition of the lamp in which the oil was burned.—*Hatcher v. Dunn* (Iowa) 66 N. W. 905.

INSTRUCTIONS.

See "Criminal Law," §§ 127-168; "Trial," §§ 50-87.

INSURANCE.

- I. CONTROL AND REGULATION IN GENERAL, §§ 1, 2.
- II. THE CONTRACT, §§ 3-18.
- III. INSURABLE INTEREST, §§ 19, 20.
- IV. ASSIGNMENT OF POLICY, §§ 21-23.
- V. CANCELLATION AND SURRENDER OF POLICY, §§ 24-26.
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- VII. CONDITIONS, §§ 44-71.
- VIII. PROOF AND PAYMENT OF LOSS, §§ 72-91.
- IX. WHO ENTITLED TO PROCEEDS, §§ 92, 93.
- X. OFFICERS AND AGENTS, §§ 94-103.
- XI. ACTIONS AGAINST INSURANCE COMPANIES, §§ 104-123.
- XII. ACCIDENT INSURANCE, §§ 134-140.
- XIII. MUTUAL FIRE COMPANIES, §§ 141-148.
- XIV. MUTUAL BENEFIT INSURANCE, §§ 149-183.
 1. In General, §§ 149-170.
 2. Payment of Dues, Forfeiture of Membership, §§ 171-178.
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- XV. INSURANCE COMPANIES, 185-188.

See, also, "Benevolent Societies"; "Marine Insurance."

Conspiracy as to rates, see "Conspiracy," § 2.
Delegation of legislative power to insurance commissioners, see "Constitutional Law," § 12.

On separate estate of wife, see "Husband and Wife," § 33.

Rights of mortgagor and mortgagee, see "Mortgages," § 27.

I. CONTROL AND REGULATION IN GENERAL.

§ 1. Securities for benefit of policy holders.

[a] (Minn.; 1897.)

The insurance commissioner has no authority to transfer, surrender, or exchange securities deposited with him in trust for policy holders, without the approval of the state treasurer, as provided by Gen. St. 1894, § 3155, though their amount exceeds the minimum deposit required.—Hayne v. Metropolitan Trust Co. (Minn.) 69 N. W. 916.

[b] (Minn.; 1897.)

In an action by a receiver of an insurance company to recover securities deposited with the state which have been exchanged by the insurance-commissioner without authority, the receiver is required to tender back only such of the exchanged securities as have been received by his company and have come into his hands.—Hayne v. Metropolitan Trust Co. (Minn.) 69 N. W. 916.

§ 2. Board of fire underwriters.

(Minn.; 1896.)

The "board of fire underwriters" referred to in Laws 1895, cc. 175, 178, must be composed exclusively of those who, for the time being, are engaged in the business of fire insurance in the city where the board is organized, and all who are engaged in that business in such city are entitled to become members of the board, or to have a vote in the transaction of its business, and only one of such boards may be organized in any one city; hence the Minneapolis Board of Fire Underwriters and the Merchants' Board of Fire Underwriters, organized under Gen. St. 1878, c. 34, tit. 2 (Gen. St. 1894, §§ 2794-2912), are not entitled to the benefits of said chapters.—Childs v. Minneapolis Board of Fire Underwriters (Minn.) 69 N. W. 141.

II. THE CONTRACT.

Application and other papers as part of policy, see post, § 29.

Of mutual benefit insurance, see post, § 149.

Of fidelity insurance, public policy, see "Contracts," § 17.

Of marine insurance, see "Marine Insurance." Reformation of policy, see "Equity," § 13.

What law governs contract, see "Conflict of Laws," § 8.

§ 3. In general.

[a] (Minn.; 1897.)

Gen. St. 1894, §§ 3331-3337, regulating "the business of insurance other than fire, life, and marine," authorizes insurance against losses resulting from the insolvency of purchasers of goods.—Hayne v. Metropolitan Trust Co. (Minn.) 69 N. W. 916.

[b] (Wis.; 1897.)

A fire insurance policy issued under Laws 1891, c. 195 (Standard Policy Act), which was adjudged unconstitutional after the issuance of the policy, should be construed as a policy formulated by the parties, not as one prescribed by the state.—Flatley v. Phenix Ins. Co. (Wis.) 70 N. W. 828.

§ 4. What constitutes insurance.

(Wis.; 1896.)

A corporation which issues a contract whereby it guarantees a merchant against loss from sales on credit resulting from the insolvency of customers, to be determined in a manner specifically described, is an insurance company, within the meaning of Rev. St. §§ 1977, 1978, and the contract is one of insurance.—Shakman v. United States Credit System Co. (Wis.) 66 N. W. 528.

92 Wis. 306.

§ 5. Requisites of contract.

[a] (Mich.; 1896.)

The fact that a local agent of an insurance company, who stated to a general agent that he desired to write a policy on his own household goods and a barn he was building, was told to write it the usual way, supplemented by the writing of a policy by the agent three months later, when the barn was completed, in accordance with the usual custom of agents in the city, would not constitute a binding contract of insurance until the policy was accepted by the company.—Zimmermann v. Dwelling House Ins. Co. (Mich.) 68 N. W. 215.

[b] (Wis.; 1896.)

Evidence that T. C. J. applied for insurance on personalty belonging to L. M. J., without stating his name, or that he was not the owner of the property, and that the insurance agent asked him in whose name the policy should be taken out, and that he replied, "You may place it in L. M. J.'s," and that the agent, without asking further questions, stated that the policy would be so issued, shows a contract to insure the property of L. M. J.—Johnson v. Scottish Union & N. Ins. Co. (Wis.) 67 N. W. 416.

93 Wis. 223.

[c] (Wis.; 1896.)

A contract to insure is not shown by evidence that the application made to an agent specified the property and terms of insurance, and that the agent, who merely stated that he would see what he could do to determine whether the companies represented by him would take the risk, distributed the amount applied for among them, and sent his daily report to them in the usual way, which ordinarily indicated that the policies had been written.—John R. Davis Lumber Co. v. Scottish Union & National Ins. Co. (Wis.) 69 N. W. 156; Same v. Caledonian Ins. Co., Id.; Same v. Continental Ins. Co., Id.

§ 6. — Payment of premiums, and delivery and acceptance of policy.

[a] (Iowa; 1894.)

S., an insurance agent, agreed with M., who held his note, that the latter should secure an application for a policy, and that the premium should be paid by an indorsement of the amount on the note. M. induced deceased to apply for the insurance under an agreement that M. should pay the premium, and take an assignment of the policy as security. The policy was sent by S. to a third person to be delivered to M. when the indorsement was made on the note. Before such indorsement was made, and policy delivered to M., deceased died. The policy provided that the insurer should not be liable unless the premium was paid and the policy delivered during the lifetime of the insured. *Held*, that there was neither a payment of the premium to the company, nor delivery of the policy to the beneficiary.—Hawley v. Michigan Mut. Life Ins. Co. (Iowa) 61 N. W. 201.

92 Iowa, 593.

[b] (Mich.; 1895.)

Defendant insurance company's agent signed and authorized to be filled and delivered a policy of insurance in renewal of a former one issued by him to plaintiff, and plaintiff's agent,

on the date of the expiration of the old policy, applied for a renewal of the insurance, and was informed of the action of defendant's agent. Defendant's agent afterwards forwarded the policy to the general office as a valid and binding contract, without having asked payment of the premium. *Held*, that there was a valid contract of insurance.—*Lum v. United States Fire Ins. Co.* (Mich.) 62 N. W. 562.
104 Mich. 397.

[c] (Neb.; 1897.)

An agreement of a soliciting agent to procure a policy, no premium being paid, does not create a present liability against the company.—*Farmers' & Merchants' Ins. Co. v. Graham* (Neb.) 70 N. W. 386.

[d] (Wis.; 1895.)

Where deceased, in his application, agreed that the proposed insurance should not be binding on defendant company until the premium should be received by the company, during his lifetime, and defendant's agent afterwards wrote to deceased that he had his policy, and subsequently left with deceased's clerk a receipt reciting that the policy would be delivered within a specified time, upon payment of a certain sum, and acknowledging payment of a part of the first premium, in board of agent, and defendant's agent represented to deceased's brother that the insurance would hold good from that time, but it was not shown that deceased ever received the receipt, or assented to its terms, or that the premium had been paid in deceased's lifetime, or that the policy was delivered, there was no evidence of a completed contract of insurance, or to insure.—*Rossiter v. Aetna Life Ins. Co.*, 64 N. W. 876, 91 Wis. 121.

§ 7. Legality of object.

[a] (Iowa; 1896.)

Where a policy of insurance has been written on a stock of drugs and liquors, the use of a part of the property, that is susceptible of legitimate use, for an unlawful purpose, does not render the insurance void, as against public policy.—*Erb v. German-American Ins. Co.* (Iowa) 67 N. W. 583.

[b] (Iowa; 1896.)

Insurance on store fixtures is not void because they were used by insured, an unregistered pharmacist, in carrying on a drug business, though the statutes prohibit persons not registered pharmacists from conducting drug stores.—*Erb v. Fidelity Ins. Co.* (Iowa) 69 N. W. 261.

[c] (Minn.; 1896.)

A carrier may lawfully insure against liability for loss of goods carried, occasioned by the negligence of its servants.—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.* (Minn.) 66 N. W. 132.

64 Minn. 61.

§ 8. General rules of construction.

[a] (Iowa; 1896.)

In case of conflict between the provisions of a policy and the statements in the application for insurance, the former will control.—*Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 66 N. W. 157.

[b] (Iowa; 1896.)

Where the terms of a life insurance policy will bear two interpretations, that one will be adopted which sustains the claim for indemnity.—*Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 66 N. W. 157.

§ 9. Scope of contract and losses covered.

[a] (Iowa; 1895.)

A policy describing the insured property as "being situated on or confined to premises actually occupied by the assured," locating such premises, and the application asking for insurance on certain parts of the property "while on the premises only," did not cover a loss of such

property while on different premises, 20 miles distant.—*Lakings v. Phenix Ins. Co.* (Iowa) 62 N. W. 783.

[b] (Iowa; 1895.)

Binding twine is covered by a policy on implements, including binders "and all such goods * * * kept for sale in a general implement store."—*Davis v. Anchor Mut. Fire Ins. Co.* (Iowa) 64 N. W. 687.

[c] (Iowa; 1896.)

A policy on "carriages, * * * and all such goods usually kept in a livery barn and sale stable," does not include goods held in trust or on commission.—*Corkery v. Security Fire Ins. Co.* (Iowa) 68 N. W. 792.

[d] (Iowa; 1896.)

The term "household furniture, useful and ornamental," with the added term "family stores," includes books and games, writing materials, child's swing, and child's walker.—*Huston v. State Ins. Co.* (Iowa) 69 N. W. 674.

[e] (Mich.; 1897.)

Milk cans are "packages," within a fire policy on a creamery building, "butter and cheese, manufactured and in process of manufacture, and all materials and supplies for the same, including packages."—*Cronin v. Fire Ass'n of Philadelphia* (Mich.) 70 N. W. 448.

[f] (Minn.; 1895.)

Under a policy insuring against all "direct loss or damage by fire," and providing that if the building insured fell, "except as a result of fire," the insurance should cease, where a building adjacent to the one insured, the wall between the two being a party wall, was partially burned, and as a direct result fell, carrying down the partition wall and part of the insured building, there could be a recovery, though no part of the insured building was burned.—*Ermentraut v. Girard Fire & Marine Ins. Co. of Philadelphia* (Minn.) 65 N. W. 635.
63 Minn. 305.

By accident policy, see post, §§ 134, 135.

§ 10. — Amount of insurance.

(Iowa; 1895.)

A contract by a live-stock association to pay a member \$300 for the loss of a horse, in consideration of which settlement the promisee is to do anything he can to advance the interests of the association, is an unconditional promise to pay said sum, and will not be construed, in connection with the articles and by-laws of the association, and the member's application for insurance, as merely fixing the amount for which the promisee is entitled to have assessments made.—*Wright v. Farmers' Mut. Live-Stock Ins. Ass'n* (Iowa) 65 N. W. 308.

§ 11. — Limitation of risk as to place.

(Wis.; 1896.)

A shed, or lean-to, which formed part of a wooden store building at the times of the issuance of policies of insurance on goods therein, which was moved back to allow the building of an addition to the main building, and left standing three feet from such addition, to which it was connected by a wooden platform, nailed to both, and which continued to be used for the storing of goods as before, still remained a part of the building, and goods therein were covered by the insurance.—*Gross v. Milwaukee Mechanics Ins. Co.* (Wis.) 66 N. W. 712, 92 Wis. 656; *Same v. Western Assur. Co., Id.*

§ 12. — Title insurance.

[a] (Minn.; 1895.)

Where an insurer, by a policy of title insurance, agrees to indemnify a mortgagee against loss not exceeding \$2,200 by reason of incumbrances, and to defend the land against such claims, a loss occurring by reason of the negligence of the insurer is not limited to the \$2,200.

Quigley v. St. Paul Title Insurance & Trust Co. (Minn.) 62 N. W. 287.
69 Minn. 275.

[b] (Minn.; 1897.)

The stipulation in a title insurance policy that no right of action shall accrue thereon unless the assured has contracted to sell the land or the interest insured, and a court of last resort has declared the existence of a defect or incumbrance upon the title for which the company would be liable under the policy, does not apply where the land is held adversely, and the insured has lost it by reason of a defect in the insured title.—*Place v. St. Paul Title Insurance & Trust Co. (Minn.)* 69 N. W. 706.

[c] (Minn.; 1897.)

"Tenancy of the present occupants," stated in a title insurance policy as a defect in the title not insured against, will be construed to mean tenancy arising through occupation or temporary possession by a "tenant," in the ordinary sense of that word, where such intention appears from the whole policy. It does not include a claim of one asserting ownership in fee as against the insured title, and in actual adverse possession when the policy was issued.—*Place v. St. Paul Title Ins. & T. Co. (Minn.)* 69 N. W. 706.

§ 13. — Guaranty and indemnity insurance.

[a] (Mich.; 1897.)

A credit guaranty policy insured against loss by the insolvency of debtors owing for "merchandise sold between April 1, 1893, and March 31, 1894," and provided that the policy should "expire on March 31, 1894." It further provided that final proofs of loss must be presented within 90 days after the expiration of the policy, and that no loss should be payable unless included in such proofs, except that, should the policy be renewed on expiration, losses occurring after such expiration on sales made during its existence were payable. *Held*, that losses occurring after the expiration of the policy on sales made during its existence were payable, though the policy was not renewed, if final proof of loss was made as required.—*Sloman v. Mercantile Credit Guaranty Co. (Mich.)* 70 N. W. 886.

[b] (Minn.; 1895.)

A policy insuring an employer against liability for injuries to employes provided that the company, at its own expense, would take upon itself the settlement of claims, and all legal proceedings to enforce the same; that assured should not settle with any injured employe; and that no action should be brought against the company after the period within which the employe might sue the employer for injuries, unless a suit by the employe for that purpose was pending, in which case an action might be brought against the company by the employer within 30 days after judgment in favor of the employe. *Held*, that the contract was not one of indemnity merely, so that, where an employe obtained a judgment against the employer for injuries, the company was liable on the judgment in an action thereon against it, though the employer had not satisfied the same.—*Anoka Lumber Co. v. Fidelity & Casualty Co. of New York (Minn.)* 65 N. W. 353.
63 Minn. 286.

[c] (Wis.; 1896.)

A contract dated October, 1889, guaranteeing a merchant against loss resulting from the insolvency of customers, provided that he should give credit only to persons rated in Dun's reports. The contract was delivered November 8, 1889, and with it a slip providing that in case a person was not rated by Dun a rating by Bradstreet would suffice. The original contract, by its terms, covered the period of one year, commencing on July 1, 1889, and insured against losses accruing for merchandise sold and delivered during such period. *Held*,

that the indorsement of November 8th, as well as the original contract, applied to sales from July 1st.—*Shakman v. United States Credit System Co. (Wis.)* 66 N. W. 528.
92 Wis. 366.

[d] (Wis.; 1896.)

Such contract provided that, in calculating losses, no credit that may have been given should be included therein, exceeding a credit of 30 per cent. on the lowest capital rating such party or parties were rated at in such mercantile reports. *Held* that, where the insured gave debtors a larger credit than 30 per cent. of their lowest capital rating, the insured was entitled to be allowed 30 per cent. of such rating, and the excess, only, should be disallowed.—*Shakman v. United States Credit System Co. (Wis.)* 66 N. W. 528.
92 Wis. 366.

[e] (Wis.; 1896.)

A policy indemnifying an employer from liability for claims for personal injuries to its employes while engaged in "operations connected with the business of iron and steel works," covers injuries received by an employe by reason of the construction of a building by the employer for the use of his business.—*Hoven v. Employers' Liability Assur. Corp. (Wis.)* 67 N. W. 46.

93 Wis. 201.

§ 14. Renewal.

[a] (Iowa; 1894.)

An oral agreement between plaintiff and defendant's agent in regard to renewing a policy of fire insurance, in which the amount of the policy to be taken is not fixed, does not constitute a binding contract.—*Sater v. Henry County Farmers' Mut. Fire Ins. Co. (Iowa)* 61 N. W. 209.

92 Iowa, 579.

[b] (Minn.; 1896.)

In the application for life insurance, insured waived "all provisions of law forbidding any physician or surgeon from disclosing any information which he has acquired." The policy having lapsed, it was subsequently reinstated on a certificate of the insured and the beneficiaries, which was prepared by the insurer, reciting: "In consideration of the restoration and renewal of policy No. * * *, the undersigned hereby renews, reaffirms, and warrants each of the statements, answers, and representations as expressed in the original application for said policy, and doth further warrant that the person whose life was desired to be insured under said policy has been and continued since the time of the original application, and now is, of good health, and of correct, sober, and temperate habits." *Held*, that the waiver did not extend to information acquired by a physician prior to the renewal, but subsequent to the application.—*Geare v. United States Life Ins. Co. (Minn.)* 68 N. W. 731.

§ 15. Reinsurance—Bond of reinsurer.

[a] (Wis.; 1895.)

Where a domestic insurance company, on retiring from business, reinsured its risks in a foreign company, and deposited with the state treasurer a bond to protect the reinsurance, the courts of the state where the bond was deposited have jurisdiction of an action to subject the bond to the payment of a claim under a reinsured policy.—*Hughes v. Hunner*, 64 N. W. 887, 91 Wis. 116.

[b] (Wis.; 1895.)

Where a domestic insurance company, on going out of business, reinsured its risks in a foreign company, and to protect the reinsurance deposited with the state a bond, and the foreign company became insolvent, claims under policies other than those reinsured can be paid only from the surplus of the security after the reinsured policies have been paid.—*Hughes v. Hunner* 64 N. W. 887, 91 Wis. 116.

§ 16. Liability on premium notes.**[a] (Neb.: 1895.)**

A clause providing that the insurance shall be suspended during the nonpayment of the premium note, after maturity, may be waived by the insurer.—*Phenix Ins. Co. v. Rollins* (Neb.) 63 N. W. 46.

44 Neb. 745.

[b] (Neb.: 1895.)

Where a policy provided that the insurance should be suspended during the nonpayment of the premium note, but would be revived on the subsequent payment thereof, *held*, in an action on a note, that the company could recover its full amount.—*Phenix Ins. Co. v. Rollins* (Neb.) 63 N. W. 46.

44 Neb. 745.

[c] (Neb.: 1896.)

Though a policy of insurance and the premium note given therefor provide that on default in payment of any of the installments of the note the liability of the company under the policy shall be suspended during the continuance of the default, the company may, on insured's failure to pay an installment, waive the default, and recover on the note.—*McEvoy v. Nebraska & I. Ins. Co.*, 65 N. W. 888, 46 Neb. 782.

§ 17. Breach of contract—Recovery of premiums paid.**(Iowa: 1896.)**

Where a life assurance society violates its contract of insurance, the assured may recover the premiums paid, with interest.—*Van Werden v. Equitable Life Assur. Soc. of United States* (Iowa) 68 N. W. 892.

§ 18. Province of jury.**(Mich.: 1895.)**

After a contract of insurance was made and a note accepted for the premium, the policy was returned for the purpose of changing the terms of payment and the beneficiaries. In an action for the amount, defendant claimed that a new policy issued instead of the first one before the premium had been earned, and that, by a mistake, the full amount of the note was collected, which mistake was promptly corrected, and the amount tendered back. *Held*, that it was for a jury to determine from all the circumstances whether there was a new agreement or not.—*Krause v. Equitable Life Assur. Soc. of United States* (Mich.) 63 N. W. 440.

105 Mich. 329.

III. INSURABLE INTEREST.

Allegations in complaint on policy, see post, § 112.

Limitation of right to assign policy, see post, § 21.

§ 19. In property.**[a] (Iowa: 1894.)**

Where the consignee of goods to be paid for if sold, and, if not, to be returned to the consignor, applies for insurance thereon in his own name, intending to insure for the full value of the property, and the insurance agent writes the policy with that end in view, knowing the nature of the applicant's title, a clause in the policy limiting the liability to an amount not exceeding the interest of the applicant does not restrict the liability, in case of loss, to his personal interest, so as to prevent a recovery for their full value.—*Fox v. Capital Ins. Co. of Des Moines* (Iowa) 61 N. W. 211.

93 Iowa, 7.

[b] (Mich.: 1897.)

A person who has bought goods on credit may insure them for the benefit of the seller when the insurer agrees to the arrangement.—*Guterman v. German-American Ins. Co.* (Mich.) 70 N. W. 135.

[c] (Neb.: 1895.)

One who would be deprived of a security or lien on insured property, or would lose the profit therefrom, by a destruction of the property, has an insurable interest therein.—*Rochester Loan & Banking Co. v. Liberty Ins. Co.* (Neb.) 62 N. W. 877.

44 Neb. 537.

[d] (Neb.: 1896.)

One who mortgages his real estate to secure the payment of a debt for which he is personally responsible, and subsequently conveys the title of such real estate to another, subject to said mortgage, has an insurable interest remaining in said real estate.—*Hanover Fire Ins. Co. v. Bohn* (Neb.) 67 N. W. 774.

48 Neb. 743.

§ 20. In human life.**[a] (Mich.: 1895.)**

Where an insurance company admits liability on a policy payable by name to decedent's daughter if surviving, otherwise to the personal representatives, and pays the amount thereof in court, if the evidence establishes the identity of the defendant daughter with the beneficiary named in the policy, the administrator has no interest in the policy, and the question of the daughter's insurable interest is immaterial.—*Standard Life & Accident Ins. Co. v. Catlin* (Mich.) 63 N. W. 897.

[b] (Mich.: 1896.)

At common law a sister has an insurable interest in her brother's life.—*Hosmer v. Welch* (Mich.) 67 N. W. 504.

[c] (Mich.: 1896.)

Where a husband separated from his wife without a divorce, and thereafter, until his death, lived with his sister, paying no board, and was nursed and cared for by her as a member of the family, a policy on the brother's life, issued in favor of the sister by a company organized under an act authorizing the insured to name the beneficiary, who might be one of the "family" or an heir, was valid, though the wife of deceased survived him.—*Hosmer v. Welch* (Mich.) 67 N. W. 504.

IV. ASSIGNMENT OF POLICY.

Right of assignee to proceeds, see post, § 92.

§ 21. Right to assign.**[a] (Wis.: 1897.)**

Laws 1895, c. 20, restricting the right of assignment of life insurance to persons who have an insurable interest in the insured, is not retroactive, and does not affect insurance assigned before it was enacted.—*Strike v. Wisconsin Odd Fellows Mut. Life Ins. Co.* (Wis.) 70 N. W. 819.

[b] (Wis.: 1897.)

The right of one effecting insurance on his life at his own cost to make an assignment of the policy is not affected by Rev. St. § 2347 (Laws 1891, c. 376), providing that any person may effect insurance on his life for the benefit of a married woman, and that the same shall be her sole and separate property, free from the control, disposition, or claims of the insured.—*Strike v. Wisconsin Odd Fellows Mut. Life Ins. Co.* (Wis.) 70 N. W. 819.

§ 22. Qualified assignment.**(Iowa: 1896.)**

An assignment of an insurance policy to "B., of Reinbeck, of the state of Iowa, and his executors, administrators, and assigns, as their interest may appear," is a qualified, and not an absolute, assignment to B.—*Barrett v. Northwestern Mut. Life Ins. Co.* (Iowa) 68 N. W. 906.

§ 23. Consent of insurer.

(Minn.; 1895.)

An agreement by one to whom a fire insurance policy was assigned, with the insurance agent, that, if the latter would consent to the assignment, the assignee would pay the premium then due on the policy, was founded on a valid consideration.—*Hughson v. Hardy* (Minn.) 61 N. W. 389.

62 Minn. 209.

V. CANCELLATION AND SURRENDER OF POLICY.

Authority of agents, see post, § 98.

Surrender of ticket in mutual company, see post, § 166.

§ 24. Cancellation of policy.

(Wis.; 1897.)

A cancellation does not take place under a policy providing for cancellation on notice by the company, and a return of the unearned premiums, where the company tendered the premiums, and demanded a surrender of the policies, for the purpose of rescinding and canceling them from the beginning, and the insured refused to surrender them.—*John R. Davis Lumber Co. v. Hartford Fire Ins. Co.* (Wis.) 70 N. W. 84.

§ 25. — Notice.

(a) (Mich.; 1894.)

An agent who has entire charge of the insurance upon property of his principal may accept notice of the cancellation of a policy, and procure substitute insurance upon the same property in another company, without previous notice to his principal, and the policy last issued will be valid.—*Buick v. Mechanics' Ins. Co.* (Mich.) 61 N. W. 337.

103 Mich. 75.

(b) (Mich.; 1894.)

The waiver of a stipulation contained in the first policy providing for five days' notice of cancellation by the parties to it would not affect the liability of the company issuing the substitute policy.—*Buick v. Mechanics' Ins. Co.* (Mich.) 61 N. W. 337.

103 Mich. 75.

(c) (Mich.; 1895.)

Notice of cancellation of a policy sent to the insurance solicitor who procured the policy will not bind the insured when the insurer knows that the solicitor was only authorized to procure insurance, and that he has delivered the policy to the insured.—*Snedecor v. Citizens' Ins. Co.* (Mich.) 64 N. W. 35.

(d) (Wis.; 1897.)

A notice to the insured's agent "to cancel" a policy, or that the policy "will be canceled," is not a sufficient notice of cancellation.—*John R. Davis Lumber Co. v. Hartford Fire Ins. Co.* (Wis.) 70 N. W. 84.

(e) (Wis.; 1897.)

Notice of cancellation of a policy served on the insured's broker after the agency between the parties had ceased is ineffectual.—*John R. Davis Lumber Co. v. Hartford Fire Ins. Co.* (Wis.) 70 N. W. 84.

§ 26. Surrender.

(a) (Mich.; 1896.)

Under a life policy payable to insured in 20 years, if he was then alive; but in case of his death before that time payable to his mother, if living; if not, to his brothers and sisters; and providing that, on surrender thereof at the end of three years "received by the insured and beneficiaries," the cash value specified therein would be paid,—it is necessary, on making such surrender, that the receipt be signed, not only by insured and his mother, but by the other beneficiaries.—*Lockwood v. Michigan Mut. Life Ins. Co.* (Mich.) 66 N. W. 229.

(b) (Wis.; 1896.)

A life policy provided that, after the expiration of the third or any subsequent year "for which premium has been paid," the company would pay the cash value therein specified; that, if the first or any subsequent premium shall be "settled wholly or in part by note, * * * such settlement shall not be deemed a payment," but only an extension of time of payment; and that, if the premiums were not paid as provided, the company should not be liable, and the policy should cease, excepting only that, after three or more annual premiums "have been paid," the policy might be surrendered for its cash value. The application provided that neglect to pay the premium when due "shall vitiate the policy, and forfeit the payment made thereon, except as provided in the policy." The insured paid the first two years' premiums; and, on the day the premium for the third year was due, he gave a premium note, which was not paid when due, and the company gave him a renewal receipt, to the effect that the annual premium had been received on the policy, "continuing the same in force" until a year from that date, "provided that, if any note or other obligation has been given for such premium, * * * then, for any loss occurring during such nonpayment, the company shall not be liable." The policy contained a similar provision. *Held*, that the insured could not recover the surrender value of such policy at the end of the third year. *Insurance Co. v. Bowes* (1879) 51 N. W. 962, 42 Mich. 19, and *Taber v. Insurance Co.* (1880) 6 N. W. 830, 44 Mich. 324, distinguished.—*Kimme v. Michigan Mut. Life Ins. Co.*, 66 N. W. 359, 92 Wis. 335.

VI. APPLICATION—STATEMENT OF FACTS AFFECTING RISK.**§ 27. Scope of representation.**

(Neb.; 1897.)

A statement in the application that insurance is desired upon household goods while they are in a building does not involve a representation that the insured owns the building, or that the goods are then in it.—*Omaha Fire Ins. Co. v. Crighton* (Neb.) 69 N. W. 766.

§ 28. Representations or warranties.

(Neb.; 1896.)

An application recited: "The said applicant hereby warrants, covenants, and agrees * * * that the foregoing is a full, just, and true exposition of all the facts and circumstances, condition, situation, and value of and title to the property to be insured, and is offered as a basis of the insurance requested, and is made a special warranty, the same as if written on the face of the policy,"—and was made a part of the policy. The policy provided: "This entire policy shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof." *Held*, that answers in the application to questions as to the value of the personality to be insured, and as to the amount paid for the land on which the personality was situated, and as to the terms of payment therefor, were representations, and not warranties.—*Aetna Ins. Co. v. Simmons* (Neb.) 69 N. W. 125.

§ 29. Application and other papers as part of policy.

(a) (Iowa; 1896.)

McClain's Code, § 1733 (declaring that if an insurance company neglects to attach to the policy on "issue or renewal" thereof, a "true copy" of any application or representation of the assured which may in any manner affect the validity of the policy, it shall be precluded from pleading or proving the falsity of any statement in the application), applies where the copy of an application for reinstatement attached to the policy omits the examiner's report contained in the original, and also a part of the statements made

by the assured in regard to his previous physical condition, and incorrectly states the place to which notice of premiums shall be addressed.—*Goodwin v. Provident Sav. Life Assur. Soc. (Iowa)* 66 N. W. 157.

[b] (Wis.; 1896.)

A contract, dated October, 1889, by a corporation, whereby it guaranteed a merchant against loss resulting from the insolvency of customers on conditions specifically described, provided that no credit should be given by such merchant unless the customer was rated in Dun's latest reports, and unless his rating was not less than a sum specified. November 8, 1889, there was delivered, with the contract, a slip containing an additional agreement providing that, should Dun not rate a party, and Bradstreet should, within the system of the company, the latter should be binding on it. November 26th, the company sent the insured a like slip except that it permitted the use of Bradstreet's only after November 13, 1889. The insured kept the latter slip, and made no objections to it. *Held*, that the contract as perfected November 8, 1889, governed the rights of the parties, in the absence of anything to show that the company was influenced in its conduct by assured's silence on receiving the latter slips.—*Shakman v. United States Credit System Co. (Wis.)* 66 N. W. 528.

92 Wis. 366.

§ 30. Misrepresentations.

[a] (Neb.; 1895.)

A provision of an insurance policy that false representations in an application for insurance shall avoid the policy applies to statements as to title.—*J. B. Ehrsam Mach. Co. v. Phenix Ins. Co.*, 61 N. W. 722, 43 Neb. 554.

[b] (Neb.; 1896.)

Where the application for insurance, and the policy issued thereon by an insurance company doing business in a sister state, bear the same date, it will not be inferred, in the absence of evidence upon that point, that the officers of the insurance company, at its home office, were influenced, by misrepresentations contained in the application, to approve a risk which, had they known of such misrepresentation, they would not have approved.—*State Ins. Co. v. New Hampshire Trust Co. (Neb.)* 66 N. W. 9.

47 Neb. 62.

[c] (S. D.; 1895.)

False representations that the insured building was fully equipped with sprinklers and was insured in other companies will avoid the policy.—*Fromherz v. Yankton Fire Ins. Co. (S. D.)* 63 N. W. 784.

[d] (Wis.; 1896.)

An insurance company which issues a policy without attaching thereto or in-lorsing thereon a copy of the application, or the representations made by the insured, as required by Sanb. & B. St. § 1945a, is precluded, by the express provisions of the act, from setting up falsity in such application or representations.—*Johnson v. Scottish Union & N. Ins. Co. (Wis.)* 67 N. W. 416.

93 Wis. 223.

§ 31. Concealment.

[a] (Minn.; 1895.)

The fact that the insured failed to inform the company that he held the insured property under an assignment of a lease without the consent of the lessor, contrary to the terms of the lease, does not constitute a breach of a condition against misrepresentation or concealment of a material fact.—*Caplis v. American Fire Ins. Co. of New York (Minn.)* 62 N. W. 440.

60 Minn. 376.

[b] (Neb.; 1895.)

The acceptance by a mortgagor of a policy of insurance on his property providing against incumbrances is not a representation which renders the policy void where the policy

was issued without any inquiry as to the condition of insured's title.—*Insurance Co. of North America v. Bachler (Neb.)* 62 N. W. 911.

44 Neb. 549.

[c] (Neb.; 1896.)

Where an application for fire insurance is oral, and no inquiries are made by the agent of the insurer as to the condition of the title to the property, and the insured says nothing about the existence of a mortgage thereon, but does not keep silent from any sinister motive, or with the intention to deceive or mislead the insurer, then the fact that there exists a mortgage upon the insured property will not invalidate the policy of insurance, notwithstanding that it provides that it should be void if there existed any incumbrance, by mortgage or otherwise, against the insured property.—*Hanover Fire Ins. Co. v. Bohn (Neb.)* 67 N. W. 774.

48 Neb. 743.

[d] (Wis.; 1896.)

Where a fire policy is issued without any formal application by the insured, and without any questions being put to him as to matters material to the risk, and the policy contains a clause that it will be void if any material fact is concealed, it will not be invalidated by the unintentional concealment by insured of material facts as to which he was not questioned.—*Johnson v. Scottish Union & N. Ins. Co. (Wis.)* 67 N. W. 416.

93 Wis. 223.

§ 32. Good faith of applicant and materiality of misrepresentations.

[a] (Mich.; 1895.)

The mere fact that insured's maiden name is incorrectly stated in the application for insurance does not invalidate the policy, especially where such mistake was due to the fault of the insurance agent in writing the application.—*Plumb v. Penn Mut. Life Ins. Co. (Mich.)* 65 N. W. 611.

[b] (Neb.; 1895.)

A misdescription, in an insurance policy, of the land on which personal property insured was situated, is not material to the risk, and will not avoid the policy, if the property itself is properly described. *Insurance Co. v. Gebhart* (1891) 49 N. W. 333, 32 Neb. 144, followed.—*Omaha Fire Ins. Co. v. Dufek*, 62 N. W. 465, 44 Neb. 241.

[c] (Neb.; 1896.)

The fact that, in the application, insured overstated the value of the property to be insured, did not avoid the policy where it did not appear that he did so intentionally, or that, if with an intention, he did so with intent to deceive the company, or that the company relied on the valuation, and was induced thereby to issue the policy.—*Aetna Ins. Co. v. Simmons (Neb.)* 69 N. W. 125.

[d] (Neb.; 1896.)

False statements in an application for insurance of buildings and other personalty situate on land owned by insured, as to the amount paid for the land, and as to the terms of sale, do not avoid the policy, since they are immaterial to the risk.—*Aetna Ins. Co. v. Simmons (Neb.)* 69 N. W. 125.

[e] (Wis.; 1895.)

A misrepresentation by insured in his application for accident insurance as to his occupation, on the truthfulness of which representations the policy is conditioned, avoids the policy.—*Murphey v. American Mut. Acc. Ass'n (Wis.)* 62 N. W. 1057.

90 Wis. 206.

§ 33. — Title to property.

[a] (Mich.; 1895.)

It is proper to charge, when applicable to the evidence, that, if plaintiff fairly disclosed to the agents the condition of his title, the contract of insurance was valid; but if he informed them that he owned the property in

fee, and had a clear title to it, when in fact he had only an executory contract for purchase, such misrepresentation would vitiate the policy.

Woolver v. Boylston Ins. Co. (Mich.) 62 N. W. 119.

104 Mich. 132.

[b] (Minn.: 1897.)

Plaintiff did not know that he had erected the building insured two feet beyond the line of his lot until after the policy was issued (though he discovered it before the loss). He acted in good faith, and no one had ever asserted any adverse claim to the two feet in question. *Held*, that the insurer could not assert that the condition that the building should be on ground owned by insured in fee simple was broken by such mistake.—Haider v. St. Paul Fire & Marine Ins. Co. (Minn.) 70 N. W. 805.

§ 34. Breach of warranty in general.

[a] (Minn.: 1896.)

An applicant for life insurance, who warrants the truth of his answers in the application, is bound to answer accurately so far as he undertakes to answer, but his warranties cannot be extended beyond his answers as actually given; hence it was proper to so instruct.—Hale v. Life Indemnity & Investment Co. (Minn.) 68 N. W. 182.

[b] (S. D.: 1895.)

Where a certificate of insurance provided that the application and medical examination were a part of the contract, and should be deemed warranties, a breach of a statement made therein avoided the contract.—Knudson v. Grand Council of Northwestern Legion of Honor (S. D.) 63 N. W. 911.

§ 35. Other insurance.

(Neb.: 1896.)

A representation in an application for insurance that no other insurance existed on the property is not to be deemed false, so as to invalidate the insurance obtained on such application, merely because a former owner of the property, after having parted with his title, effected other insurance thereon in his own favor.—State Ins. Co. v. New Hampshire Trust Co. (Neb.) 66 N. W. 9.

47 Neb. 62.

§ 36. Title or interest of insured.

[a] (Minn.: 1896.)

The vendee of a horse purchased on credit for \$1,000 gave his notes to the vendor for that sum, secured them by a chattel mortgage on the horse, and insured the horse in the sum of \$500; loss, if any, payable to the vendor as his interest might appear. The contract of purchase contained a provision that, if the horse should die within a certain time thereafter, the vendee "is to take the insurance, which is \$500, and give up the notes." *Held*, this provision is not a breach of the clause in the policy of insurance which warrants that the vendee "is the sole, absolute, and unconditional owner" of the horse.—Kells v. Northwestern Live-Stock Ins. Co. (Minn.) 67 N. W. 215.

64 Minn. 390.

[b] (Minn.: 1897.)

A condition avoiding a policy, "if the interest of the insured be other than unconditional and sole ownership," was not broken by erecting the building insured partly on the street, since the public had no interest in the building, and, as between the owner and the public, he had a right to remove it.—Haider v. St. Paul Fire & Marine Ins. Co. (Minn.) 70 N. W. 805.

[c] (Minn.: 1897.)

Plaintiff, in building upon his lot, by mistake built the house so that it stood 20 feet on the street and 2 feet on the adjoining lot, in

which he had no interest. The defendant insured the house by a policy providing that it should be void if the interest of the insured was other than unconditional ownership, or if the subject of insurance was "a building on ground not owned by the insured in fee simple." *Held*, that the condition avoiding the policy, "if the subject of insurance be a building on ground not owned by the insured," was not broken, as long as some part of the building stood on land owned by the insured in fee simple.—Haider v. St. Paul Fire & Marine Ins. Co. (Minn.) 70 N. W. 805.

[d] (Neb.: 1895.)

Where insured holds the legal title to land, and no inquiries are made as to incumbrances, the insurance company cannot defend an action on the policy because of a mortgage, on the ground that insured is a mere trustee for an undisclosed beneficiary.—Rochester Loan & Banking Co. v. Liberty Ins. Co. (Neb.) 62 N. W. 877. 44 Neb. 537.

[e] (S. D.: 1895.)

A condition providing that the policy shall be void "if the assured is not the sole and unconditional owner of the property, or if the property or any part thereof be or become mortgaged or otherwise incumbered," applies to incumbrances existing at the time the policy is issued.—Peet v. Dakota Fire & Marine Ins. Co. (S. D.) 64 N. W. 206.

[f] (Wis.: 1896.)

The vendee of personal property under a bill of sale conveying absolute title, though given as security for debt, being in possession, and the debt being past due is a sole and unconditional owner of the property, within the meaning of a contract of insurance which provides that the policy shall be void if the interest of the assured be other than unconditional and sole ownership.—Carey v. Liverpool & London & Globe Ins. Co. (Wis.) 66 N. W. 693, 92 Wis. 538; First Nat. Bank v. Same, *Id*.

[g] (Wis.: 1896.)

A provision of an insurance policy that it shall be void in case the title of the insured to the property is less than a fee simple, unless otherwise provided by agreement indorsed thereon, is waived by the issuance of the policy without such indorsement, and the receipt of the premium thereon, by an agent authorized to issue policies, who had knowledge that the title of the insured was not a fee simple; and the insurer is estopped to claim that such acts were not intended by it to operate as a waiver.—Schnitz v. Caledonian Ins. Co. (Wis.) 68 N. W. 414.

§ 37. Incumbrances.

[a] (Neb.: 1897.)

A policy contained the following: "It is agreed that, if any false statements are made in said application, * * * or if the property be sold, transferred, or incumbered, * * * or in case any change shall take place in the title, possession, or interest of the assured in the above-mentioned property, or if the assured shall not be the sole and unconditional owner in fee of the said property, * * * this policy shall be null and void." It did not appear that any application had been made or required, or that any representations had been made as to title. *Held*, that the existence of a chattel mortgage on part of the property when the policy was written did not avoid the policy.—Omaha Fire Ins. Co. v. Thompson (Neb.) 70 N. W. 30.

[b] (S. D.: 1895.)

An agreement in a lease that, on failure to pay rent, buildings, improvements, and other property placed on the premises by the lessee shall be liable to distraint and sale under warrant, and that such property may be followed and distrained, constitutes an incumbrance on the property placed on the premises by the lessee, within the condition of an insurance policy against incumbrances, though at the time the

policy issued no rent was due.—*Peet v. Dakota Fire & Marine Ins. Co. (S. D.) 64 N. W. 206.*

[c] (Wis.; 1896.)

If a statement in an application that the property insured is mortgaged for \$500, when in fact it is mortgaged for \$525, is a warranty, as matter of law the breach avoids the policy; but if it be found by the jury to be merely a representation, and not to have been made in bad faith, it is a question for them whether it was substantial and material to the risk.—*Johnston v. Northwestern Live-Stock Ins. Co. (Wis.) 68 N. W. 868.*

[d] (Wis.; 1896.)

The statement in an application for insurance that the property was mortgaged for \$500, though on its face a warranty (all statements in the application being declared by the policy to be warranties), may be found by the jury to be a representation, if, as assured claims, he told the agent for soliciting and forwarding applications that he did not know the exact amount unpaid on the mortgage (which was \$525), but that it was "about \$500," and the agent understood that it was not intended to make an exact statement of the amount unpaid, but yet wrote it in that form in the application without insured's knowledge or consent.—*Johnston v. Northwestern Live-Stock Ins. Co. (Wis.) 68 N. W. 868.*

§ 38. Health and physical condition.

[a] (Mich.; 1895.)

In an action on a life insurance policy conditioned on insured being in good health at the time of the delivery of the policy, it appeared the policy was delivered on Tuesday; that on the preceding Saturday night insured was not feeling well, and took medicine; on Monday she had some disturbance of the bowels; on Tuesday and Wednesday she was about the house, doing her household work, resting occasionally; on Friday inflammation of the bowels set in, on Saturday she was seriously ill, and died the following Tuesday. *Held*, that it was a question for the jury whether insured was in good health when the policy was delivered.—*Plumb v. Penn Mut. Life Ins. Co. (Mich.) 65 N. W. 611.*

[b] (Mich.; 1895.)

Merely calling a physician to prescribe for a temporary indisposition, not serious in its nature, and not affecting the person's sound bodily health, is not being "attended" by the physician within the meaning of such word in an application for insurance.—*Plumb v. Penn Mut. Life Ins. Co. (Mich.) 65 N. W. 611.*

[c] (Mich.; 1895.)

That insured was attended by a physician for la grippe two years and nine months before her application for insurance, in which she stated that she had been so attended three years before, is not such a variation as will avoid the policy for breach of warranty.—*Plumb v. Penn Mut. Life Ins. Co. (Mich.) 65 N. W. 611.*

[d] (Mich.; 1896.)

A provision of a policy of life insurance that it should be void in case the insured was not in sound health at the time of its issuance is waived by a collection of premiums thereon after knowledge by an agent of the insurance company, having authority to cancel the policy, that the holder was not in sound health when it was issued, notwithstanding a provision that no waiver could be made except in writing signed by the president and secretary. *Hooker and Grant, JJ., dissenting.*—*Hilt v. Metropolitan Life Ins. Co. (Mich.) 68 N. W. 300.*

[e] (Neb.; 1896.)

Answers to questions, in an application for life insurance, as to the applicant's health in general, including a question as to whether he has, or has had since childhood, any of 57 named diseases, more or less common, including diseases of the bladder, bowels, heart, kidneys, liver, lungs, and stomach, or any other disease, are not warran-

ties, where, though the policy in places terms them such, it also refers to them as "statements."—*Kettenbach v. Omaha Life Ass'n (Neb.) 69 N. W. 135.*

[f] (Wis.; 1897.)

Where a certificate in a benefit society states that it is issued on the faith of the statements in the application, and the insured signs a declaration that her answers are true and form part of the application, a false affirmative answer to the question, "Are you now in sound health?" is a warranty rendering the policy void, though insured at the time believed that she was in sound health.—*Boyle v. Northwestern Mutual Relief Ass'n (Wis.) 70 N. W. 351.*

§ 39. Habits of insured.

(Minn.; 1896.)

Answers, in an application for a life insurance policy, as to the use of spirituous liquors by the applicant, and as to whether the applicant had always been temperate, refer to the habits of the insured, and not to exceptional and occasional acts; and the word "temperate" means abstinence from excessive or injurious use of liquor, and not total abstinence.—*Chambers v. Northwestern Mutual Life Ins. Co. (Minn.) 67 N. W. 367.*

64 Minn. 495.

§ 40. Parties affected by avoidance of policy.

[a] (Neb.; 1896.)

Where, by the terms of the policy of insurance, the loss, if any, is payable to a mortgagee as his interest appears at the time of the loss, the right of such mortgagee to maintain an action for such loss is not necessarily defeated by such misrepresentation in the application for insurance as, by the terms of the contract between the insurer and the insured, would defeat the right of the insured to maintain an action on his own behalf.—*State Ins. Co. v. New Hampshire Trust Co. (Neb.) 66 N. W. 9.*

47 Neb. 62.

[b] (Neb.; 1896.)

To a fire insurance policy was attached a "mortgage clause," making the loss payable to a named mortgagee of the insured property, and providing that the insurance should not be invalidated by any act or neglect of the mortgagor. *Held*, that the mortgage clause was an independent contract between the insurance company and the mortgagee, of which the interest of the mortgagee, and not the real estate itself, was the subject-matter, and that no act or omission of the mortgagor, whether occurring at the time of the issuance of the policy or prior or subsequent thereto, invalidated the contract.—*Hanover Fire Ins. Co. v. Bohn (Neb.) 67 N. W. 774.*

48 Neb. 743.

[c] (Neb.; 1896.)

A representation by two individuals that they were owners of the property sought to be insured, when in fact it was owned by a corporation, of the capital stock of which they were the sole proprietors, was not such a misrepresentation as avoided the right of a mortgagee to assert its right under a "union-mortgage" clause attached to the policy; the mortgagee having no knowledge of the misrepresentation.—*North British & M. Ins. Co. v. Bohn (Neb.) 68 N. W. 942.*

§ 41. Statements and warranties made by insurance agent.

[a] (Mich.; 1896.)

Where a life insurance agent asks a part only of the questions printed in the application, assuming the responsibility of filling in the rest of the answers himself, and the assured signs the application without having his attention called to the answers written by the agent, the falsity of some such answers will not avoid the policy.—*Van Houten v. Metropolitan Life Ins. Co. (Mich.) 68 N. W. 982.*

[Id.] (Neb.; 1895.)

It was no defense to an action on an insurance policy that the value of the property was misstated in the application, where the insured correctly informed the agent as to the value, and the misstatements were written by the agent without insured's knowledge.—*Horne Fire Ins. Co. v. Fallon* (Neb.) 63 N. W. 860, 45 Neb. 554.

[Id.] (Neb.; 1897.)

Where the insured is unable to read and write, and the application is made out by the agent of the insurer, the insured is not bound by statements in the application different from those made by him.—*Omaha Fire Ins. Co. v. Brighton* (Neb.) 69 N. W. 766.

§ 42. Knowledge of facts by agent.**(Neb.; 1895.)**

An insurance company that received the premium, and allowed a policy to remain in force four months, and until after a loss of the property, cannot cancel the policy because of an incorrect statement in the application, as to existing incumbrances, which was made inadvertently by insured, where the true amount of incumbrances was actually known by the agent who issued the policy.—*German-American Ins. Co. v. Hart*, 61 N. W. 582, 43 Neb. 441.

§ 43. Parol evidence as to statements.**(Neb.; 1895.)**

Actual representations as to the existence of precautions against fire, which were made to the agent who issued an insurance policy, may be proved by parol evidence, though such representations, incorrectly reduced to writing by such agent, were attested as true by insured, and by the terms of the policy such representations were warranties, and a part of the policy itself.—*German-American Ins. Co. v. Hart* 61 N. W. 582, 43 Neb. 441.

VII. CONDITIONS.

Limiting actions on policies, see post, § 106.

§ 44. Precautions against loss.**(Minn.; 1896.)**

A live-stock insurance policy provided that in case of sickness the owner shall, in every case, notify the insurer thereof, at its home office, by telegram. *Held*, this did not require the owner immediately to notify the insurer of a sickness which lasted only ten minutes or less, and did not recur again at least for seven weeks.—*Kells v. Northwestern Live-Stock Ins. Co.* (Minn.) 67 N. W. 215, 64 Minn. 390.

§ 45. Payment of premiums.**(Iowa; 1895.)**

A recovery on a fire policy is not defeated on the ground that the payment of the premium note of the insured was made after action brought, where the record shows that he filed a substituted petition, which was answered by the company, after the premium note was fully paid.—*Bloom v. State Ins. Co.* (Iowa) 62 N. W. 810.

§ 46. — Notice.**[Id.] (Iowa; 1895.)**

Postal Laws and Regulations, § 1056, provides that, "after a receipt has been given therefor and the matter has been numbered as prescribed in preceding sections, the letter or parcel becomes registered," etc. *Held*, that notice of the time a premium note falls due, to be given by "registered letter," is not complete until the number has been indorsed on the letter.—*Ross v. Hawkeye Ins. Co.* (Iowa) 61 N. W. 852.

93 Iowa, 222.

[Id.] (Iowa; 1896.)

A notice from an insurer that an assessment would fall due at a certain time is not notice that the policy will be canceled unless the assessment is paid.—*Finster v. Merchants' & Bankers' Ins. Co.* (Iowa) 65 N. W. 1001.

§ 47. — Waiver of forfeiture.**(Iowa; 1895.)**

The provision of McClain's Code, § 1731, that, to enable an insured to revive his policy after default by paying the amount of his premium note, he must do so before a loss occurs, is waived where the company never formally cancels the policy, and compels the insured, by legal process, after the loss, to pay his premium note, with full notice of the facts.—*Bloom v. State Ins. Co.* (Iowa) 62 N. W. 810.

§ 48. Use or occupation of premises.**[Id.] (Iowa; 1896.)**

Where a policy contains a provision for forfeiture in case the premises shall be occupied for an unlawful purpose, the mere fact that a person, not a registered pharmacist, occupied the building with a drug store, does not prove a breach of the policy, under McClain's Code, § 2523, making it unlawful for any person not a registered pharmacist to "conduct" a drug store; it not appearing but that such person employed a qualified pharmacist to conduct the business.—*Erb v. German Ins. Co.* (Iowa) 68 N. W. 701.

[Id.] (Iowa; 1896.)

Where a policy on store fixtures permits the property to be used by a tenant of the insured, evidence that the person who occupied the premises at the time of the fire was a tenant of the insured during the month in which the loss occurred, but that shortly before the fire the insured gave to one W., who had traded for the building, an order on the tenant for the last month's rent, is insufficient to show that the latter was not a tenant of the insured at the time of the fire, so far as the fixtures were concerned.—*Erb v. German Ins. Co.* (Iowa) 68 N. W. 701.

[Id.] (S. D.; 1895.)

Where a building was represented to be used for school and church purposes, the use of the basement thereof for the storage of unslacked lime, without the company's consent, avoided the policy.—*School Dist. No. 116 of Minnehaha County v. German Ins. Co.* of Freeport (S. D.) 64 N. W. 527.

§ 49. Alterations and repairs.**(Mich.; 1895.)**

Common painters are not "mechanics," within the meaning of such word in a policy which provides that the policy shall be void if "mechanics" be employed in repairing the building for over a certain length of time without the consent of the insurer.—*Smith v. German Ins. Co.* (Mich.) 65 N. W. 236.

§ 50. Occupation of premises.**[Id.] (Iowa; 1895.)**

Since the provision in a fire policy requiring the insured building to be occupied is for the safety of the building, occupancy by an insurer who has conspired to burn the building to procure insurance on personal property therein cannot be occupancy within such a provision in a policy.—*Names v. Dwelling-House Ins. Co. of Boston* (Iowa) 64 N. W. 628.

[Id.] (Iowa; 1896.)

In an action to recover on a policy of insurance on an ice house, containing a condition that it should be void in case the building, "whether intended for occupancy by owner or tenant," should become vacant and remain unoccupied for 10 days, it appeared that at the time of the fire, in October, there was no merchantable ice in the building, though the tools used in putting up ice were there, and the building had been offered for sale. *Held*, that the question of occu-

pany (if the condition was applicable to such building) was properly submitted to the jury.—*Des Moines Ice Co. v. Niagara Fire Ins. Co.* (Iowa) 68 N. W. 600.

[c] (Mich.: 1896.)

One who purchases a house, and takes an assignment of a policy thereon, is bound by a provision of the policy against vacancy.—*Ranspach v. Teutonia Fire Ins. Co.* (Mich.) 67 N. W. 967.

[d] (Neb.: 1896.)

A proof of loss reciting, partly in writing and partly in printing, that "the building described by said policy, or containing said property, was occupied in its several parts by the parties hereafter named, and for the following purposes: Used as a residence by Mill Adair, up to 3:30 p. m., Sept. 20, 1890, and for no other purpose whatever,"—was not an admission that the insured property remained unoccupied for 10 days thereafter (the fire having occurred in October), within the terms of the policy, providing that it should be void in case the premises insured were at any time unoccupied for more than 10 consecutive days.—*Hanover Fire Ins. Co. v. Parrotte* (Neb.) 66 N. W. 636.

47 Neb. 576.

§ 51. Keeping or using prohibited articles.

[a] (Mich.: 1895.)

A condition in a policy that it shall be void if gasoline be "kept, used, or allowed" on the premises does not prevent the keeping in the building of gasoline to be used in filling gasoline torches for use in removing paint from the building, in order to repaint it. *Grant, J., dissenting.*—*Smith v. German Ins. Co.* (Mich.) 65 N. W. 236.

[b] (Wis.: 1895.)

Where the written portion of a policy covers a furniture store and repair shop connected therewith, and the "furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store," the keeping of benzine for necessary use in the repair shop will not avoid the policy, though expressly prohibited in the printed conditions thereof.—*Faust v. American Fire Ins. Co. of Philadelphia* (Wis.) 64 N. W. 883, 91 Wis. 158.

[c] (Wis.: 1895.)

Whether the use of certain inflammable sulphur candles by insured, to fumigate the goods covered by insurance, increased the hazard by means within his control or knowledge, within the prohibition of the policy, is a question of fact for the jury.—*Pool v. Milwaukee Mechanics' Ins. Co.*, 65 N. W. 54, 91 Wis. 530.

§ 52. Change of title, interest, or possession.

[a] (Iowa: 1896.)

Where a policy of insurance is issued to a firm on its stock of goods, a dissolution of the firm, under an agreement whereby one partner remains in possession of the entire stock and gives his notes for the interest of the retiring partner therein, the latter retaining the right to see that the stock is kept up to its present value till the debt is paid, is a breach of a condition against change of possession of the property insured.—*Jones v. Phenix Ins. Co.* (Iowa) 66 N. W. 169.

[b] (Iowa: 1896.)

Where the insured agreed to exchange the property insured for land, the exchange to be effected not later than a given date, and the agreement was never executed, there was no change of interest or possession, within the meaning of a provision invalidating the policy "if any change take place in the interest, title, or possession of the subject of insurance."—*Erb v. German-American Ins. Co.* (Iowa) 67 N. W. 583.

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[c] (Iowa: 1896.)

The possession of the property of a firm by one partner is the possession of the firm until dissolved, within the meaning of a fire policy.—*Runkle v. Hartford Ins. Co.* (Iowa) 68 N. W. 712.

[d] (Iowa: 1896.)

A contract to sell property insured does not affect the provision of the policy that insured's interest be "unconditional and sole ownership," nothing having been paid or done under the contract at the time of the fire, though it was to have been performed before that time.—*Erb v. Fidelity Ins. Co.* (Iowa) 69 N. W. 261.

[e] (Iowa: 1896.)

Insured's interest is "unconditional and sole ownership," notwithstanding his agreement with J., under which J. took possession of the property, and carried on the drug business therewith, under the name of J. & Co., by the terms of which insured was the owner of all the property, and J. was to receive as compensation for his services a third of the profits.—*Erb v. Fidelity Ins. Co.* (Iowa) 69 N. W. 261.

[f] (Minn.: 1894.)

A contract to convey the insured premises, under which the vendee took possession, and paid a part of the purchase price, is a breach of the condition of an insurance policy that it should be void if any change took place in the "interest" of the insured in the premises.—*Gibb v. Fire Ins. Co. of the County of Philadelphia* (Minn.) 61 N. W. 137.

59 Minn. 267.

[g] (Minn.: 1897.)

A policy insuring the mortgagor, loss, if any, payable to the mortgagee, provided that, if the property was sold, or any change took place in the title, use, or occupation without written permission in the policy, the same should be void, and that as to the mortgagee the insurance should not be invalidated by any act or neglect of the mortgagor nor any change in title or possession, provided the mortgagee should notify the insurer of any change which should come to his knowledge, and have permission therefor indorsed on the policy. *Held*, that the provisions as to a change of title did not refer to one from the mortgagor to the mortgagee by a foreclosure.—*Pioneer Savings & Loan Co. v. St. Paul Fire & Marine Ins. Co.* (Minn.) 70 N. W. 979.

[h] (Neb.: 1895.)

A provision in a policy that alienation of title without the knowledge of the insurer shall avoid the policy will be enforced.—*J. B. Ehrsam Mach. Co. v. Phenix Ins. Co.* (Neb.) 61 N. W. 722, 43 Neb. 554.

[i] (Neb.: 1897.)

The voluntary execution, by the insured, of a bill of sale of part of the property, without consideration, and without the knowledge of or delivery to the vendee, or any change in possession, is not within a provision against any change "in title, possession, or interest."—*Omaha Fire Ins. Co. v. Thompson* (Neb.) 70 N. W. 30.

Title or interest, representations in application, see ante, § 36.

§ 53. — Effect of voluntary assignment.

(Wis.: 1897.)

A voluntary assignment by the insured for benefit of creditors, and possession by the assignee, constitute a change in interest, title, and possession, within conditions in insurance policies providing that they shall be void in case of such change, unless otherwise provided by agreement indorsed on the policies; and it is immaterial that the assignment is void as for fraud, or is declared void by statute, because not executed as required by it.—*Milwaukee Trust Co. v. Lancashire Ins. Co.* (Wis.) 70 N. W. 81.

§ 54. — Rights of mortgagee.

(Minn.; 1895.)

Where property is insured for the benefit of the mortgagee, and the mortgage has been foreclosed prior to the insurance, and the premium paid by the mortgagee, but the time for redemption has not expired, the nonredemption by the owner did not work an alienation of the property, so as to defeat the policy, though it provided that the mortgagee should notify the company of any change of ownership in the property insured.—*Washburn Mill Co. v. Fire Ass'n of Philadelphia* (Minn.) 61 N. W. 828. 60 Minn. 68.

§ 55. Condition against incumbrances.

[a] (Iowa; 1896.)

A mortgage to a fictitious person, never delivered, and not securing any indebtedness, is not a violation of a condition in a fire policy that it shall be void if the property is incumbered.—*Fitchner v. Fidelity Mut. Fire Ass'n* (Iowa) 68 N. W. 710.

[b] (Minn.; 1895.)

A clause in a lease stating "that said lessor should at all times have a first lien upon all buildings for any unpaid rental or taxes" does not create a chattel mortgage, within the meaning of a stipulation in a policy of insurance on the property that it should be void if the building "be or become incumbered by a chattel mortgage."—*Caplis v. American Fire Ins. Co. of New York* (Minn.) 62 N. W. 440. 60 Minn. 376.

[c] (Neb.; 1895.)

Though insured incumbered the property after the policy issued, contrary to a condition thereof, he may recover on the policy if, at the time of the loss, it was free from the incumbrance.—*Omaha Fire Ins. Co. v. Dierks* (Neb.) 61 N. W. 740. 43 Neb. 473.

[d] (Neb.; 1897.)

The filing of a claim for a mechanic's lien does not show such a lien, *prima facie*, so as to violate a provision in a policy that the property shall not be incumbered.—*Omaha Fire Ins. Co. v. Thompson* (Neb.) 70 N. W. 30.

Representations in application, see ante, § 37.

§ 56. — Continuing or promissory warranties.

(Iowa; 1895.)

A provision in a fire insurance policy that it should be void if, without the consent of the company, the property "be in any manner incumbered, * * * and such fact be not stated in this policy or the assured's application for insurance," covers only incumbrances existing when the contract was executed, and does not create a continuing warranty against future incumbrances.—*Collins v. Merchants' & Bankers' Mut. Ins. Co.* (Iowa) 64 N. W. 602.

§ 57. Additional insurance.

[a] (Iowa; 1896.)

Where a fire insurance policy provides that it shall be void if the assured contracts other insurance on the property without consent in writing indorsed on the policy by the company, and the assured procures additional insurance without such indorsement, the policy is void.—*O'Leary v. Merchants' & Bankers' Mut. Ins. Co.* (Iowa) 66 N. W. 175.

[b] (Iowa; 1896.)

Where a policy insuring "carriages, * * * and all such goods usually kept in a livery barn and sale stable," prohibits other insurance without permission therefor indorsed on the policy, but permits "\$3,000 additional concurrent insurance," the fact that the insured procures policies in other companies to the authorized amount, which cover not only the goods insured in the first company, but also "goods held in trust or on commission," does not render the subsequent policies nonconcurrent. *Cork-*

ery v. Security Fire Ins. Co. (Iowa) 68 N. W. 792.

[c] (Iowa; 1896.)

Violation of a condition against overinsurance will not defeat a recovery without proof of fraud, misrepresentation, or concealment on the part of the insured, or that he knowingly exceeded the limit fixed in the policy.—*O'Leary v. German American Ins. Co. of New York* (Iowa) 69 N. W. 686.

[d] (Mich.; 1895.)

A fire policy, conditioned that it shall be void if the insured "now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not," is avoided by obtaining subsequent insurance on the property, although such insurance is void by reason of a similar condition therein.—*Donogh v. Farmers' Fire Ins. Co.* (Mich.) 62 N. W. 721.

104 Mich. 503.

[e] (Neb.; 1897.)

A statement by the insured to the insurer's agent that he intends to procure additional insurance is not notice of such insurance when obtained.—*Home Fire Ins. Co. v. Wood* (Neb.) 69 N. W. 941.

[f] (Wis.; 1895.)

A fire policy provided that it should be void if insured procured additional insurance on the same property without consent to be indorsed on the policy, or added thereto, and that defendant should not be liable for a greater proportion of any loss than the amount of the policy should bear to the whole insurance. A written statement, of even date with the policy, was attached thereto, that "if, at the time of the fire, the whole amount of insurance on the property covered by the policy be less than 80 per cent. of the actual cash value thereof," defendant should "be liable for only such proportion of the damage as the amount insured by the policy shall bear to the 80 per cent." of the cash value. Defendant's agent, who made the contract, himself procured the placing of additional insurance on plaintiff's property. *Held*, that the writing attached to the policy impliedly authorized additional insurance.—*Pool v. Milwaukee Mechanics' Ins. Co.* (Wis.) 65 N. W. 54. 91 Wis. 530.

Representations in application, see ante, § 35.

§ 58. Suicide—Policy incontestable.

[a] (Iowa; 1896.)

An application for life insurance stated that the death of assured by his own hand was a risk not assumed by the company, and the policy declared that a claim thereunder by death occurring two or more years after its date would be "incontestable, except for fraud" in procuring it. *Held*, that the company was liable in case of death by suicide occurring after two years from the date of the policy.—*Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 66 N. W. 157.

[b] (Minn.; 1895.)

The provision in a life insurance policy that after five years from its date the policy shall be incontestable, applies to a provision that death by suicide is not an assumed risk, but that in such case there shall be paid only the amount of the assessments paid in by the members, with interest, so that payment of the full sum mentioned in the policy cannot, after five years from issuance, be contested on the ground that the insured committed suicide.—*Marek v. Mutual Reserve Fund Life Ass'n* (Minn.) 64 N. W. 68. 62 Minn. 39.

Sufficiency of evidence as to suicide, see post, § 126.

Suicide, question for jury, see post, § 127.

§ 59. Taking inventory.

(Mich.; 1895.)

Where a fire insurance policy provides that it shall be void if assured fails to take an

inventory at least once a year, the question whether, between the issuance of the policy and the fire, a reasonable time had elapsed to allow assured to have taken an inventory, is one of fact, if the court cannot determine the question from the undisputed evidence.—*Allen v. Milwaukee Mechanics' Ins. Co. (Mich.) 64 N. W. 15.*

§ 60. Special causes increasing risk.

[a] (Iowa: 1896.)

The fact that an insured stock belonging to a partnership was divided between the partners, in contemplation of a dissolution, and the portion of one partner removed to a building across the street from that in which the stock had been kept, did not, as a matter of law, increase the hazard, so as to avoid the policy on that ground.—*Runkle v. Hartford Ins. Co. (Iowa) 68 N. W. 712.*

[b] (Mich.: 1895.)

Insured procured a painter to remove the old paint from the building. The painter burned the paint off with a gasoline torch. There was evidence that it was the custom to remove paint by the use of torches. The fire originated in the cornice within 15 feet of where the painter had last used the torch. *Held*, that the use of such torch did not, as a matter of law, increase the hazard, within a provision in the policy avoiding it in case the hazard is increased without the consent of the insurer. *Grant, J., dissenting.*—*Smith v. German Ins. Co. (Mich.) 65 N. W. 236.*

§ 61. Default as ground of forfeiture in general.

[a] (Iowa: 1896.)

A policy of life insurance which is renewable from quarter to quarter, on payment of premiums for the actual age attained "less the return premiums awarded," and which provides that, subject to the stipulation as to payment of premiums, it shall be incontestable after two years, except for fraud in obtaining it, is a continuing policy, governed by the principles applicable to ordinary contracts of life insurance with regard to forfeiture for nonpayment of premiums.—*Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 66 N. W. 157.*

[b] (Neb.: 1896.)

A condition in an insurance policy that the policy shall remain inoperative during the time the premium note remains unpaid after its maturity is valid, and a breach thereof furnishes a valid defense to an action on the policy.—*Home Fire Ins. Co. v. Garbacz (Neb.) 67 N. W. 864.*

48 Neb. 827.

§ 62. Rights of insured after default.

[a] (Iowa: 1896.)

Where a policy of insurance issued in New York on the "renewable term" plan is forfeited by failure to pay premiums, a reinstatement of the policy, on the same terms, is not the making of a new contract, but merely a cancellation of the forfeiture, leaving the original policy in force as a New York contract.—*Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 66 N. W. 157.*

[b] (Mich.: 1895.)

Where a life policy had lapsed for nonpayment of premiums, and a written application for revival recited that no liability should exist until it was approved by the home office, and no money was paid at the time such application was filed with the agent, but a certain payment was made thereafter by plaintiff, who knew the money would be returned to her if the policy was not revived, and the revival policy was not returned until after the death of the insured, there was no revival.—*Clark v. Metropolitan Life Ins. Co. (Mich.) 65 N. W. 1.*

§ 63. Parties affected by forfeiture of policy.

(Neb.: 1896.)

A policy issued to an owner provided that a transfer of the property without consent avoided the policy, and that if, with the consent of the company, an interest under the policy should exist in favor of a mortgagee, the conditions therein contained should apply in the manner expressed as should be appended to the policy. *Held*, that where, attached to the policy, was a rider reciting merely that the loss, if any, should be payable to a party as its mortgage interest might appear, the mortgagee could recover, although, prior to the loss, the mortgagor transferred the property without the company's consent.—*Oakland Home Fire Ins. Co. v. Bank of Commerce (Neb.) 66 N. W. 646.* 47 Neb. 717.

§ 64. Waiver and estoppel.

[a] (Mich.: 1895.)

Where the insurer, after thoroughly examining the loss, and being aware at the time of the loss that painters were at work on the building, denies its liability solely on the ground that gasoline was stored in the building without its consent, it cannot set up as a defense that the policy was avoided by permitting painters to work on the building without its consent, in violation of a condition in the policy.—*Smith v. German Ins. Co. (Mich.) 65 N. W. 236.*

[b] (Minn.: 1896.)

Where the adjuster sold the salvage, and the company retained the proceeds after discovery of facts authorizing a forfeiture of the policy before the fire, it waived such forfeiture.—*First Nat. Bank v. Lancashire Ins. Co. (Minn.) 68 N. W. 1; Same v. Home Ins. Co., Id.*

[c] (Wis.: 1897.)

A waiver by an insurance company of the benefit of a contract made by the insured's agent not to procure a second line of policies on the same property, through different agencies of the same company, is negated by a finding that the company, as soon as it learned that a second line had been issued, ordered the issuing agent to return the premiums and cancel the policies, and the agent telegraphed the insured that the policies had been canceled, and tendered the full amount of the premiums, and demanded a return of the policies.—*John R. Davis Lumber Co. v. Hartford Fire Ins. Co. (Wis.) 70 N. W. 84.*

Waiver of forfeiture for nonpayment of premium, see ante, § 47.

— of provisions as to notice and proofs of loss, see post, §§ 76-81.

§ 65. — Form and requisites of express waiver.

[a] (Wis.: 1895.)

A provision in a policy that the sale or transfer, in whole or in part, of the property insured, shall avoid the policy, may be waived without a written indorsement on the policy.—*McFetridge v. American Fire Ins. Co. (Wis.) 62 N. W. 928.*

90 Wis. 138.

[b] (Wis.: 1896.)

An attempted restriction upon the power of the officers or agents of an insured company, acting within the scope of their general authority, to waive provisions of the policy, unless such waiver is written upon the policy itself, is ineffectual.—*Dick v. Equitable Fire & Marine Ins. Co. (Wis.) 65 N. W. 742.*

92 Wis. 46.

[c] (Wis.: 1896.)

Since Laws 1891, c. 195, authorizing the insurance commissioner to adopt a standard policy of fire insurance, is unconstitutional, the provision in the policy adopted by him that its provisions cannot be waived, except in writing indorsed thereon, is not binding on insured; but

such provisions may be waived, as before the statute. *Goss v. Agricultural Ins. Co. of Wauwatosa* (Wis.) 65 N. W. 1036.
92 Wis. 233.

[1d] (Wis.: 1896.)

Parol waiver by a local insurance agent of conditions of the policy is void where the policy requires such waiver to be indorsed on it in writing.—*Oshkosh Match Works v. Manchester Fire Assur. Co.* (Wis.) 66 N. W. 525.
92 Wis. 510.

§ 66. — Collection and retention of premiums or assessments.

[a] (Iowa: 1895.)

The violation of a condition in a fire policy that it shall be void if any suit be commenced for the enforcement of any incumbrance on the insured property without the written consent of the secretary of the company is waived where the company, with full knowledge of such violation, enforces the payment of a premium note by judicial process.—*Bloom v. State Ins. Co.* (Iowa) 62 N. W. 810.

[b] (Iowa: 1896.)

The provision in a life policy, dated February 19th, requiring quarterly payments of \$10.80, the first within 30 days of date, the second May 1st, the others quarterly thereafter, that, if the quarterly payments are not received within 60 days after notice (given April 1st, and at corresponding dates), the policy shall be void, is not waived by taking, at the time of issuing the policy, in addition to a cash payment for the first quarter, a note dated February 19th, for \$32.40,—premiums for the balance of the year, payable in three equal installments, the first 90 days after date, the others 90 and 180 days thereafter.—*Beezley v. Des Moines Life Ass'n* (Iowa) 69 N. W. 549.

[c] (Neb.: 1895.)

Where insured had an insurable interest, and the company received premiums on the policy issued, it will be presumed that the company waived all conditions of forfeiture because of defect in the title of insured to the property.—*German Ins. & Sav. Inst. v. Kline* (Neb.) 62 N. W. 857.
44 Neb. 395.

[d] (Wis.: 1895.)

An insurance company which, after notice that the construction of an insured building violates a condition in its policy, receives premiums on the policy, waives the conditions.—*McKinney v. German Mut. Fire Ins. Soc. of Liberty* (Wis.) 62 N. W. 413, 89 Wis. 653.

[e] (Wis.: 1895.)

Seven months after default in payment of the annual premium on a life insurance policy, the assured sent the money to the company, with a letter from its medical examiner as to his health. The money was placed to his credit, but the company wrote him at once, insisting on a medical examination and certificate. He refused to do anything further, and demanded a receipt for the premium, or a return of his money. The company immediately wrote its local agent, insisting on a medical examination; but the money was not returned, and the assured was not advised of the company's last letter before he died of consumption, six days after it was written. *Held*, that the company waived the forfeiture of the policy.—*Rasmussen v. New York Life Ins. Co.*, 64 N. W. 301, 91 Wis. 81.

§ 67. — Knowledge of facts in general.

[a] (Iowa: 1896.)

The fact that one making an oral application for a policy payable to her and her husband stated that the property, though formerly in her husband's name, had been conveyed to her, may be shown, to charge the company with notice of the fact.—*Carey v. Home Ins. Co.* (Iowa) 66 N. W. 920.

[b] (Mich.: 1896.)

An application for accident insurance had a printed clause reading, "I have no other insurance in this company." A prior application had been taken by the same agent, and the two policies were issued by the same company, which received the premiums on both. *Held*, that the company was estopped from denying the validity of either policy.—*Enlaw v. Travelers' Ins. Co.* (Mich.) 66 N. W. 469.

[c] (Mich.: 1896.)

Knowledge of an insurer that the premises were unoccupied at the time the policy was assigned to the vendee of the insured was not a waiver of a condition avoiding the policy in case of vacancy for more than 10 days.—*Kanspach v. Teutonia Fire Ins. Co.* (Mich.) 67 N. W. 967.

[d] (Neb.: 1895.)

Where an insurance company has knowledge, prior to loss, of additional insurance contrary to the conditions of the policy, neglecting to cancel the policy because thereof is a waiver of such conditions.—*Eagle Fire Co. v. Globe Loan & Trust Co.* (Neb.) 62 N. W. 895.
44 Neb. 380.

§ 68. — Knowledge by officers or agents.

[a] (Iowa: 1896.)

Knowledge of an insurance agent authorized only to contract insurance, acquired after the issuance of a policy, that the insured has taken additional insurance, is not notice to the company, so as to render its failure to cancel the policy a waiver of forfeiture, under conditions providing that such additional insurance shall avoid the policy without written consent thereto.—*Taylor v. State Ins. Co.* (Iowa) 67 N. W. 577.

[b] (Iowa: 1896.)

A provision against concurrent insurance is waived if the agent through whom the policy was issued knew that other insurance had been applied for and would be issued.—*Erb v. Fidelity Ins. Co.* (Iowa) 69 N. W. 261.

[c] (Mich.: 1895.)

A condition in a fire policy against the obtaining of subsequent insurance is not waived where an agent of the company stated, upon the insured informing him, after the loss, of such subsequent insurance, that he did not know what action the company would take concerning it, and the general agent wrote that he could not take any action towards adjustment, but that, if the insured had any claim, she should present it in the manner prescribed by the policy.—*Donogh v. Farmers' Fire Ins. Co.* (Mich.) 62 N. W. 721.
104 Mich. 503.

[d] (Wis.: 1896.)

Where insured discloses fully to the agent of the insurance company the existence of mortgages on the property insured, the company cannot avoid the policy therefor, under a provision avoiding it in case of incumbrances.—*Dowling v. Lancashire Ins. Co.* (Wis.) 65 N. W. 738.
92 Wis. 63.

[e] (Wis.: 1896.)

Knowledge, on the part of the local agent who issued the policy, of facts which render it voidable at the option of the insurance company, is the knowledge of the company itself.—*Dick v. Equitable Fire & Marine Ins. Co.* (Wis.) 65 N. W. 742.
92 Wis. 46.

[f] (Wis.: 1896.)

Where the agent of an insurance company is notified, at the time the application for insurance is made, that insured only owns an estate for years in the land on which the buildings to be insured are situated, insurer will be held to have waived a condition in the policy, when issued, avoiding it in case insured's interest in the land is not a fee simple, though the

policy also contain a condition that no agents can waive provisions of the policy, except in writing indorsed thereon.—*Goss v. Agricultural Ins. Co. of Watertown (Wis.)* 65 N. W. 1036. 92 Wis. 223.

[g] (Wis.; 1896.)

Defendant's agents, who were also engaged in banking, issued a fire policy covering certain property on which they, as bankers, held a chattel mortgage. *Held*, that this was sufficient notice to the company to support the presumption that the condition in the policy that it should be void if the subject of the insurance was personal property incumbered by mortgage was waived.—*McDonald v. Fire Association of Philadelphia (Wis.)* 67 N. W. 719. 93 Wis. 348.

[h] (Wis.; 1897.)

Knowledge by the officer who took the application that the applicant had taken the Keeley treatment for the liquor habit is a waiver of its conditions as regards the previous habits of the applicant.—*De Witt v. Home Forum Benefit Order (Wis.)* 70 N. W. 476.

§ 69. — Powers of officers or agents.

[a] (Iowa; 1896.)

Where the policy provides that it shall be void in case the insured procures additional insurance, "unless consent in writing is indorsed hereon by the company," and that no agent has any authority to waive or modify any of its conditions, the secretary of the company cannot be presumed, in the absence of proof, to have power to consent to additional insurance, or to waive indorsement of such consent on the policy.—*O'Leary v. Merchants' & Bankers' Mut. Ins. Co. (Iowa)* 69 N. W. 420.

[b] (Mich.; 1896.)

Where the insured is aware that the company has told the agent to give no more vacancy permits, an oral waiver by the agent of the provisions as to vacancies is ineffectual.—*Sutherland v. Eureka Fire & Marine Ins. Co. (Mich.)* 68 N. W. 985.

[c] (Minn.; 1896.)

It is presumed that a company's adjuster has authority to waive breach of a condition against incumbrances by conduct in reference to the salvage.—*First Nat. Bank v. Manchester Fire Assur. Co. (Minn.)* 66 N. W. 136. 64 Minn. 96.

[d] (Wis.; 1896.)

No forfeiture occurs for breach of a condition forbidding the insured to reside south of a particular parallel of latitude, when the general manager of the association, acting within the scope of his duties, after receiving proofs of loss which show on their face that the insured resided within the prohibited territory at the time of his death, returns them to the beneficiary for amendment, inclosing blanks for making new proofs, if necessary, and the beneficiary, at a substantial expense, makes the desired corrections.—*Kidder v. Knights Templars & Masons Life Indemnity Co. (Wis.)* 69 N. W. 364.

§ 70. — Participating in adjustment of loss.

[a] (Minn.; 1896.)

After a loss on a fire insurance policy, which was subject to forfeiture for a breach of a condition therein against incumbering the property, the defendant, by its adjuster, without knowledge of such breach, took possession of and sold the salvage by virtue of a claim under the policy; but after learning, on the next day after the sale, of the breach, it took no steps at any time to rescind the sale, or to provide for the payment of the purchase price to the assured, or to do any act to restore to him what it took from him under the policy. *Held*, that it thereby waived its right to treat the policy as

forfeited.—*First Nat. Bank v. Manchester Fire Assur. Co. (Minn.)* 66 N. W. 136. 64 Minn. 96.

[b] (Wis.; 1896.)

A provision in a fire insurance policy declaring that the insurer shall not be held to have waived a forfeiture thereof by any requirement or act on its part relating to the "appraisal," does not refer to a "carpenter's estimate" of the damage, required by the adjusting agent as a supplement to the regular proofs of loss.—*Dick v. Equitable Fire & Marine Ins. Co. (Wis.)* 65 N. W. 742.

92 Wis. 46.

[c] (Wis.; 1896.)

The examination of an agent of the insured as to the loss after proofs of loss have been submitted is not a waiver of a breach of the policy by the insured, where it is expressly provided that such an examination shall not be a waiver.—*Oshkosh Match Works v. Manchester Fire Assur. Co. (Wis.)* 66 N. W. 525. 92 Wis. 510.

§ 71. — Showing waiver at time of issuing policy.

[a] (Minn.; 1895.)

Where a policy of title insurance contains a condition which renders it void at its inception, and this is known to the insurer when he issues the policy, he thereby waives the condition.—*Quigley v. St. Paul Title Insurance & Trust Co. (Minn.)* 62 N. W. 287. 60 Minn. 275.

[b] (Minn.; 1895.)

Where a policy of insurance provides that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered in whole or in part by this policy," on the delivering the policy knowing the existence of other insurance on the premises the insurer waives the condition, though no such waiver be indorsed on the policy. 60 N. W. 1095, 59 Minn. 182 (1894) reversed.—*Anderson v. Manchester Fire Assur. Co.*, 63 N. W. 241, 59 Minn. 182.

[c] (Neb.; 1895.)

Provision of a policy that it shall be void if the insured property becomes vacant is waived where the insurer has notice that property is vacant when the policy issued.—*Rochester Loan & Banking Co. v. Liberty Ins. Co. (Neb.)* 62 N. W. 577.

44 Neb. 537.

[d] (Neb.; 1895.)

The statement of insured to the insurance agent that issues the policy that the former intends to take out additional insurance on the same property is not notice to the agent or his company of the existence of additional insurance when subsequently effected.—*Eagle Fire Co. v. Globe Loan & Trust Co. (Neb.)* 62 N. W. 895. 44 Neb. 380.

VIII. PROOF AND PAYMENT OF LOSS.

Under mutual policy, see post, § 170.

§ 72. Notice and proofs of loss.

[a] (Iowa; 1895.)

Where the policy provides that the proofs of loss should show how the fire originated, and the actual cash value of the property, and the statute provides that they should be made by affidavit, proofs of loss not so made are insufficient, and inadmissible in evidence.—*Brock v. Des Moines Ins. Co. (Iowa)* 64 N. W. 685.

[b] (Iowa; 1895.)

Bills by carpenters as to the cost of rebuilding a building destroyed by fire are not sufficient proofs of loss.—*Heusinkveld v. St. Paul Fire & Marine Ins. Co. (Iowa)* 64 N. W. 769.

[c] (Iowa; 1896.)

Proof of loss which meet the requirements of Acts 18th Gen. Assen. c. 211, § 3, are sufficient, though they do not comply with the conditions of the policy.—*Warshawsky v. Anchor Mut. Fire Ins. Co.* (Iowa) 67 N. W. 237.

[d] (Iowa; 1896.)

Under Acts 18th Gen. Assen. c. 211, § 3, requiring the holder of a fire policy in case of loss to state "the facts as to how the loss occurred, so far as they are within his knowledge, and the extent of the loss," an affidavit by the insured that "I do not know how the fire originated, but from all the circumstances I think it originated from the flue," is sufficient.—*Warshawsky v. Anchor Mut. Fire Ins. Co.* (Iowa) 67 N. W. 237.

[e] (Iowa; 1896.)

Where all that a fire policy or the statute requires of the assured is that they render to the company proofs of loss, such requirements are met if they are found in the company's possession, and it produces them on the trial of an action on the policy.—*Runkle v. Hartford Ins. Co.* (Iowa) 68 N. W. 712.

[f] (Mich.; 1895.)

A clause providing that assured shall furnish the company with an inventory of the damaged and undamaged goods does not require him to furnish an inventory of goods totally destroyed.—*Johnston v. Farmers' Fire Ins. Co. of York* (Mich.) 64 N. W. 5.

[g] (Minn.; 1897.)

Plaintiff may explain and contradict statements in the proofs as to the manner of the insured's death, where the policy requires proofs of death, but does not state what they shall contain.—*Beckett v. Northwestern Masonic Aid Ass'n* (Minn.) 69 N. W. 923.

[h] (Neb.; 1895.)

Where the insurance company received notice of loss from its local agent who issued the policy, the condition of the policy requiring insured to give such notice is sufficiently complied with.—*Omaha Fire Ins. Co. v. Dierks* 61 N. W. 740, 43 Neb. 473.

[i] (Neb.; 1895.)

An affidavit stating that deponent's house on a certain lot was destroyed by fire on a certain date, that the causes of the fire were unknown to him, stating the damage and the amount of the property, is a substantial compliance with a requirement for proofs of loss.—*Rochester Loan & Banking Co. v. Liberty Ins. Co.* (Neb.) 62 N. W. 877.

44 Neb. 537.

Evidence as to notice and proofs, see post, § 124.

§ 73. — Time for notice and proof.

[a] (Mich.; 1896.)

Under a clause in an employer's liability policy which extends the insurance to injuries caused to third persons, and provides that "the assured, upon the occurrence of any accident, and upon notice of any claim on account of any accident, shall give immediate notice in writing of such accident or claim," the assured need not give notice until after a claim for damages has been presented against it by the person injured.—*Grand Rapids Electric Light & Power Co. v. Fidelity & Casualty Co.* (Mich.) 69 N. W. 249.

[b] (Minn.; 1895.)

Under an employer's liability insurance policy, providing that assured, on occurrence of an accident, and on notice of claim on account thereof, shall give immediate notice of such accident or claim to the company, assured need give but one notice, which need not be given until claim is made on account of the accident.—*Anoka Lumber Co. v. Fidelity & Casualty Co. of New York* (Minn.) 65 N. W. 353.

63 Minn. 286.

[c] (Minn.; 1895.)

Failure to give notice of loss for nearly 60 days after the fire constituted, as a matter of law, a breach of condition requiring the giving of "immediate notice."—*Ermentraut v. Girard Fire & Marine Ins. Co. of Philadelphia* (Minn.) 65 N. W. 635.

63 Minn. 305.

§ 74. — Effect of misstatements.

[a] (Iowa; 1896.)

Where the loss, as found by the jury, was less than the proof of loss made by the insured to the insurer, it was proper to charge that if plaintiff, in the proofs of loss, placed the amount too high, through inadvertence or mistake, with no intent to defraud defendant, the statement would not necessarily defeat plaintiff's right to recover.—*Erb v. German-American Ins. Co.* (Iowa) 67 N. W. 583.

[b] (Iowa; 1896.)

It is no objection to the admission of proofs of loss that they contain untrue statements.—*Runkle v. Hartford Ins. Co.* (Iowa) 68 N. W. 712.

[c] (Iowa; 1896.)

A provision requiring the assured to submit to an examination under oath does not render misstatements of fact on such examination after a loss ground of forfeiture unless he knew their falsity, and made them with a fraudulent intent.—*Huston v. State Ins. Co.* (Iowa) 69 N. W. 674.

§ 75. — Fraud or false swearing.

[a] (Iowa; 1896.)

The fact that, in answering a question upon a printed blank for making proof of loss, plaintiff stated that "the building was owned in fee simple, and was the homestead" of himself and wife, did not constitute an "attempted fraud by false swearing," avoiding the policy.—*Carey v. Home Ins. Co.* (Iowa) 66 N. W. 920.

[b] (Iowa; 1896.)

False swearing in proofs of loss, in order to defeat insured's right of recovery, must have been done willfully, with intent to defraud.—*Runkle v. Hartford Ins. Co.* (Iowa) 68 N. W. 712.

[c] (Iowa; 1896.)

Where the policy covers musical instruments in a certain house, and contains no limitation as to ownership, a claim by the assured for the loss of a piano belonging to his wife is no fraud on the insurer, though there may have been a misstatement as to the ownership.—*Huston v. State Ins. Co.* (Iowa) 69 N. W. 674.

[d] (Mich.; 1894.)

False statements and misrepresentations made to insurance adjusters by the husband of the insured, who had exclusive control of his wife's business, and was her agent in adjusting the loss, with intent to deceive the insurance company into paying a sum greater than the actual loss, will not defeat a recovery on the policy, unless made with the knowledge and complicity of the insured. *Grant, J.*, dissenting.—*Metzger v. Manchester Fire Assur. Co.* (Mich.) 63 N. W. 650.

102 Mich. 334.

[e] (Mich.; 1894.)

An insurance policy provided that it should be void in case of any fraud or false swearing by the insured, either before or after the loss, touching any matter relating to the insurance, and that the word "insured," as used in the policy, should be held to include the legal representative of the insured. *Held*, that the term "legal representative" referred to one who succeeds to the legal rights of the insured by reason of his death, or the transfer of the policy, and not to a mere agent of the insured.—*Metzger v. Manchester Fire Assur. Co.* (Mich.) 63 N. W. 650.

102 Mich. 334.

[f] (Mich.; 1895.)

A fire policy providing for examination of the insured on oath regarding a loss, and

that a false oath by him on any matter affecting the insurance or the subject thereof before or after a loss should avoid it, is avoided by a false affidavit of the insured on such an examination that certain property was destroyed, though such affidavit may not have been intentionally false, but carelessly made.—*Knop v. National Fire Ins. Co. (Mich.)* 65 N. W. 228.

§ 76. Estoppel or waiver as to notice and proofs.

[a] (Iowa; 1895.)

All the books and papers of account, except a small daybook of plaintiff, had been destroyed in the fire which consumed the building and stock insured by defendant. Defendant's secretary requested plaintiff to procure duplicate bills of his purchases, after which an adjuster would be sent to adjust the loss. The procuring of these bills was not a duty owed by plaintiff under the terms of the policy. Plaintiff procured bills according to his understanding of the arrangement with the secretary, and notified the company that he would be ready for an adjustment any time after a certain date. The destruction of the books made it almost impossible to secure accurate proofs, and this fact had much to do with the agreement between plaintiff and defendant's secretary. *Held*, that a finding that there was a waiver of proofs of loss was justified.—*Sigers v. Hawkeye Ins. Co. (Iowa)* 63 N. W. 194.

[b] (Iowa; 1896.)

The assured does not waive a waiver of proofs of loss by afterwards furnishing the proofs.—*Warshawky v. Anchor Mut. Fire Ins. Co. (Iowa)* 67 N. W. 237.

[c] (Mich.; 1896.)

Where a mutual benefit association had expressly waived proof of death, it is an unnecessary and unreasonable requirement to demand that the beneficiary should supply such proof in the form prescribed by the by-laws of the association, with many of the provisions of which she could not comply.—*Fillmore v. Great Camp of the Maccabees (Mich.)* 66 N. W. 675.

[d] (Minn.; 1896.)

A policy provided that, within 60 days after loss, insured should furnish proof of loss, and, if required, information as to certain other matters and an official certificate of the same. An insufficient proof of loss was furnished, which was retained by the company until within two or three days prior to the expiration of the 60 days, when it objected thereto, and demanded that insured furnish the particulars which he was required by the policy to furnish unconditionally, and also the information and certificate which he was not required to furnish until demand. *Held* that, by confusing the demands and failing to warn insured that he had less time in which to furnish the particulars required by the policy than to furnish those not unconditionally required, the company waived the 60-day limit.—*McCarvel v. Phenix Ins. Co. of Brooklyn (Minn.)* 66 N. W. 367.

64 Minn. 193.

[e] (Minn.; 1896.)

By objecting to proofs of loss solely on the ground that the amount claimed is in excess of an award made under the policy, other grounds of objection are waived.—*Levine v. Lancashire Ins. Co. (Minn.)* 68 N. W. 855.

[f] (Neb.; 1896.)

A policy provided that "the insured, as often as required, shall * * * submit to examinations under oath by any person named by this company, and subscribe the same, and, as often as required, shall produce for examination all books of account," etc., "at such reasonable place as may be designated by this company or its representative." *Held* that, where the company failed to demand an examination within a reasonable time after loss, and failed to designate a time and place where, and an officer before whom, the examination should occur, it was no defense to an

action on the policy that insured did not comply with a letter of the adjuster stating that the company desired insured to submit to an examination under oath, and asking him to name a convenient date at which he would be prepared to do so.—*Aetna Ins. Co. v. Sammons (Neb.)* 69 N. W. 125.

[g] (Wis.; 1897.)

A fire insurance policy provided that loss "shall be payable 60 days after" proofs of loss were furnished, and that the insured should, within 60 days after the fire, "unless such time is extended in writing," furnish proofs of loss. The policy did not provide that it should be void for failure to furnish proofs within such time, and did provide that on numerous other contingencies it should be void. *Held*, that failure to furnish proofs of loss within the time prescribed did not work a forfeiture, but merely postponed the maturity of the claim.—*Flatley v. Phenix Ins. Co. (Wis.)* 70 N. W. 828.

§ 77. — Statements and acts of officers and agents.

[a] (Iowa; 1896.)

Evidence that, after loss, plaintiff called on the secretary of an insurance company for blank proofs of loss, and was told that they were unnecessary, and that there was nothing more for her to do, sufficiently shows a waiver of written proofs.—*Scott v. Security Fire Ins. Co. (Iowa)* 66 N. W. 1054.

[b] (Neb.; 1895.)

A provision in a policy requiring proofs of loss to be furnished within a specified time is waived if, with a knowledge of the fire, the company's agent goes on the ground, takes possession of the books of the insured, and makes an estimate of the loss.—*Home Fire Ins. Co. v. Hammang (Neb.)* 62 N. W. 883.

44 Neb. 566.

[c] (Neb.; 1896.)

An insurance company, which, after a loss of the property covered by its policy, with a knowledge of acts amounting to a breach of warranty by the insured, continues to recognize its liability on the policy by demanding repeated proofs of loss, and by insisting upon arbitration under a stipulation which applies to the measure of damages only, waives all defenses based upon the breach, notwithstanding the secretary of the company, in returning the proof of loss for correction, added, "This company neither admits nor denies its liability, nor waives any of its rights under said policy."—*Home Fire Ins. Co. v. Kennedy (Neb.)* 66 N. W. 278.

47 Neb. 138.

§ 78. — Authority of agent.

[a] (Iowa; 1896.)

An agent with authority to waive proofs of loss may also waive a provision requiring such waiver to be indorsed on the policy.—*O'Leary v. German American Ins. Co. of New York (Iowa)* 69 N. W. 686.

[b] (Minn.; 1895.)

An insurance agent who is authorized merely to fix rates and to countersign and deliver policies cannot, after a loss, waive a provision in the policy requiring proofs of loss to be made within sixty days. *Canty, J., dissenting.*—*Shapiro v. St. Paul F. & M. Ins. Co. (Minn.)* 63 N. W. 614.

61 Minn. 135.

[c] (Minn.; 1895.)

A local insurance agent who accepted applications for insurance, fixed and collected premiums, and filled up, countersigned, and issued policies, could not accept or waive notice of loss. *Canty, J., dissenting.*—*Ermentraut v. Girard Fire & Marine Ins. Co. of Philadelphia (Minn.)* 65 N. W. 635.

63 Minn. 305.

§ 79. — Declaration and acts of adjuster.

[a] (Mich.; 1895.)

An insurance adjuster, by telling assured that as to her household furniture everything was satisfactory, but that he wanted to get bills as far as possible of her store goods, and that as soon as she notified him about getting things ready he would meet her, did not waive conditions in the policy requiring assured to make and keep an inventory of her stock, and in case of fire to furnish certain proofs of loss, where, long before the expiration of the time for filing proofs, assured was notified that the company would insist on the performance of the terms of the policy, and she sued on the policy several months before the time for filing the proofs had expired.—*Allen v. Milwaukee Mechanics' Ins. Co.* (Mich.) 64 N. W. 15.

[b] (Neb.; 1896.)

A finding that the company waived proofs of loss was justified by evidence that, after being notified of the loss, the adjuster went to assured's place, and examined and inquired into the loss, cause of fire, etc.; that the assured submitted to him a memorandum of the items of property destroyed, with their value; and that negotiations took place between them which resulted in an offer of \$900 in full settlement.—*Aetna Ins. Co. v. Simmons* (Neb.) 69 N. W. 125.

[c] (Wis.; 1896.)

Where an insurance company has knowledge of facts which show that a condition of the policy has been broken, the act of its adjuster, sent to ascertain the amount of the loss, in requiring the assured, at some trouble and cost, to supplement his proofs of loss by furnishing a "carpenter's estimate" of the damage, estops the company from declaring such breach to be a forfeiture of the policy.—*Dick v. Equitable Fire & Marine Ins. Co.* (Wis.) 65 N. W. 742.

92 Wis. 46.

§ 80. — Denial of liability.

[a] (Iowa; 1895.)

The right of an insurance company to require proofs of loss, as stipulated in a policy, is waived where it denies all liability for the loss.—*Bloom v. State Ins. Co.* (Iowa) 62 N. W. 810.

[b] (Mich.; 1895.)

Where, in an action on a fire insurance policy, defendant denied all liability, the fact that proofs of loss did not comply with the terms of the policy will not defeat recovery.—*Lum v. United States Fire Ins. Co.* (Mich.) 62 N. W. 562.

104 Mich. 397.

[c] (Neb.; 1895.)

Where an insurance company denies all liability for the loss, and refuses to pay the same, and places such refusal on grounds other than the failure of the insured to give notice of the loss, such refusal waives the necessity of such notice.—*Omaha Fire Ins. Co. v. Dierks*, 61 N. W. 740, 43 Neb. 473; *Id.*, 61 N. W. 745, 43 Neb. 569.

[d] (Neb.; 1895.)

Proofs of loss required by an insurance policy are waived when the insurance company denies any liability for the loss on the ground that the policy was not in force at the date of the loss.—*Dwelling House Ins. Co. v. Brewster* 61 N. W. 746, 43 Neb. 528.

[e] (Neb.; 1895.)

Notice and proofs of loss are waived when an insurance company denies liability on the ground that its policy was not in force when the loss occurred.—*German Ins. & Sav. Inst. v. Kline* (Neb.) 62 N. W. 857.

44 Neb. 395.

[f] (Neb.; 1895.)

An insurance company, by refusing to pay a loss, and defending an action on the policy, on the ground that it was not in force at the

date of the loss, waives a requirement for proofs of loss.—*Rochester Loan & Banking Co. v. Liberty Ins. Co.* (Neb.) 62 N. W. 877.

44 Neb. 537.

[g] (Neb.; 1896.)

By defending an action on a policy on the ground that the policy had never been in force, the company waived objections to the failure of insured to furnish proofs of loss.—*Aetna Ins. Co. v. Simmons* (Neb.) 69 N. W. 125.

[h] (Wis.; 1895.)

Where insurer's adjuster, who was authorized to settle losses, receives from the insured's agent, within the time proofs of loss may be filed, a list of the property destroyed, and bases his refusal to pay on the ground of the insured's absence, the insurer is estopped to claim as a defense that proofs of loss were not made as required by the policy.—*Roberts v. Northwestern Nat. Ins. Co.* (Wis.) 62 N. W. 1018.

90 Wis. 210.

[i] (Wis.; 1895.)

After plaintiff's loss by fire, an adjuster of the company in which he was insured visited the premises, received from plaintiff a list of the property destroyed, and, discovering that benzine had been kept in the building, told plaintiff that that fact rendered the policy void. Thereafter the company refused to communicate with plaintiff in reference to his loss. *Held*, that this constituted a waiver of the provision of the policy requiring proofs of loss.—*Faust v. American Fire Ins. Co. of Philadelphia* (Wis.) 64 N. W. 883, 91 Wis. 158.

[j] (Wis.; 1896.)

A denial of liability by an insurer during the time for filing proofs of loss is a waiver of such proofs.—*Gross v. Milwaukee Mechanics Ins. Co.* (Wis.) 66 N. W. 712, 92 Wis. 656; *Same v. Western Assur. Co.*, *Id.*

§ 81. — Failure to object.

[a] (Minn.; 1895.)

The fact that the general managers of the company retained proofs sent them long after loss did not constitute a waiver of the provision requiring immediate notice of loss, where they notified insured that they denied any liability under the policy on the part of the company. *Canty, J.*, dissenting.—*Ermentraut v. Girard Fire & Marine Ins. Co. of Philadelphia* (Minn.) 65 N. W. 635.

63 Minn. 305.

[b] (Minn.; 1896.)

Where the company's chief adjuster retained proofs of loss not delivered until after the expiration of the time prescribed, without objecting that they were not made in time, it constituted a waiver.—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.* (Minn.) 66 N. W. 132.

64 Minn. 61.

§ 82. Adjustment of loss—Arbitration and appraisal.

[a] (Mich.; 1894.)

Where the appraiser appointed by an insurance company is not a resident of the place where the loss occurred, and refuses to accept as umpire any of the persons, residents of such place, proposed by the insured's appraiser, on the ground that he is not acquainted with them, and himself proposes only persons living some distance therefrom, his conduct amounts to a refusal to arbitrate, and entitles the insured to sue.—*Brock v. Dwelling-House Ins. Co.* (Mich.) 61 N. W. 67.

102 Mich. 583.

[b] (Mich.; 1894.)

An insurance policy required, in event of a disagreement as to the amount of loss, an appraisal. On demand of the insured, made without giving the insurer a reasonable time to accept the proofs of loss, appraisers were appointed. No steps were taken looking to an

adjustment. *Held*, that the insurer could not claim that the appointment was premature.—*Brock v. Dwelling-House Ins. Co.* (Mich.) 61 N. W. 67.
102 Mich. 583.

[c] (Minn.; 1896.)

The presumption is that the adjuster has authority to make arrangements for the sale of salvage, and consequently to ratify a sale thereof already made by the adjuster of another company.—*First Nat. Bank v. Lancashire Ins. Co.* (Minn.) 68 N. W. 1; *Same v. Home Ins. Co.*, *Id.*

§ 83. — Estoppel or waiver.

[a] (Mich.; 1896.)

A clause in an accident policy providing for arbitration before action is waived where the company, after receiving a demand for the money, and a threat of action therefor, made no request for arbitration, and expressed its willingness to test the matter in the courts.—*Gnau v. Masons' Fraternal Accident Ass'n of America* (Mich.) 67 N. W. 546.

[b] (Minn.; 1896.)

Where, after insured rejected an award made under the policy, the company never suggested a new appraisal, but expressly insisted on the award, and, in its answer to an action on the policy, took the same position, it waived its right to a new appraisal after the award was set aside.—*Levine v. Lancashire Ins. Co.* (Minn.) 68 N. W. 855.

[c] (Neb.; 1896.)

An insurance company, by denying its liability on the ground of a forfeiture of the policy by reason of a breach of warranty by the insured, waives whatever right it may have had to insist upon arbitration as a means of determining the amount of the plaintiff's damage.—*Home Fire Ins. Co. v. Kennedy* (Neb.) 66 N. W. 278.
47 Neb. 138.

[d] (Neb.; 1896.)

Where insured attacks for fraud an award made under the policy, the burden is on him to establish fraud.—*Connecticut Fire Ins. Co. v. O'Fallon* (Neb.) 69 N. W. 118.

[e] (Neb.; 1896.)

The right to insist on arbitration for determining the amount of the loss is waived by the company where it denies liability on the ground of a forfeiture of the policy because of an alleged breach of warranty.—*Aetna Ins. Co. v. Simmons* (Neb.) 69 N. W. 125.

[f] (Wis.; 1895.)

Where the failure of the appraisers to agree on the amount of loss is due to insurer's appraiser, in bad faith, demanding an abatement of a portion of the claim, and also arbitrarily refusing to accept as umpire any of the persons proposed by insured's appraiser, merely because they live in the place where the loss occurred, and only proposing persons living 200 miles distant, insurer waives the defense that the arbitration has not been concluded.—*Chapman v. Rockford Ins. Co.* (Wis.) 62 N. W. 422.
89 Wis. 572.

Submission to arbitration as condition precedent to action on policy, see post, §§ 108, 109.

§ 84. Extent of loss and liability of insurer.

[a] (Iowa; 1896.)

A provision limiting the insurer's liability to the proportion of the loss borne by the amount of the policy to the whole insurance does not avail the insurer where the value of the property destroyed is \$1,400, and the insurance covering all of it is \$1,050, though a part worth \$162 is, with other property, covered by a policy for \$2,050.—*Erb v. Fidelity Ins. Co.* (Iowa) 69 N. W. 261.

[b] (Iowa; 1897.)

A policy providing that the company should not be liable "for a greater proportion of any

loss on the described property than the amount hereby insured shall bear to the whole insurance," covered all the lumber in three yards, which was also covered by other insurance, and there was specific separate insurance in other companies on the lumber in each yard, and one of the yards was not injured. *Held*, that the provision meant that the company would not be liable for a greater proportion of the loss than the amount of the policy bore to the total insurance on the property actually injured or destroyed.—*Lesure Lumber Co. v. Mutual Fire Ins. Co.* (Iowa) 70 N. W. 761.

[c] (Wis.; 1897.)

The neglect of the insured to use all reasonable means to save the property at and after the fire, and his misconduct in dissuading others from attempting to save it, defeats a recovery only as to the property lost in consequence of such neglect and misconduct.—*Wolters v. Western Assur. Co.* (Wis.) 70 N. W. 62.

§ 85. — Value of property destroyed.

(Iowa; 1896.)

Acts 18th Gen. Assem. c. 211, § 3, providing that in an action on a fire policy the amount stated in it is prima facie evidence of the insurable value, at the date of the policy, of any building insured, does not apply to a policy on personal property.—*Warshawky v. Anchor Mut. Fire Ins. Co.* (Iowa) 67 N. W. 237.

§ 86. — Total loss.

[a] (Neb.; 1895.)

To sustain a finding of a "total loss" of a building, it is not necessary to show that all the material of the building was actually destroyed.—*Insurance Co. of North America v. Bachler* (Neb.) 62 N. W. 911.
44 Neb. 549.

[b] (Neb.; 1895.)

Where insured real property is wholly destroyed, any provision of the policy that limits the amount of the loss to less than the sum written is void.—*Insurance Co. of North America v. Bachler* (Neb.) 62 N. W. 911.
44 Neb. 549.

[c] (Wis.; 1896.)

Where the identity of a building, as such, has been destroyed by fire, it is a total loss, though some of its materials may not have been entirely destroyed, and the court may properly instruct that the loss is total where such facts are undisputed.—*Lindner v. St. Paul Fire & Marine Ins. Co.* (Wis.) 67 N. W. 1125.
93 Wis. 526.

§ 87. — Title insurance.

(Minn.; 1896.)

Where a title insurance company undertook to defend the interest of insured in the premises against a lien, it was bound to protect him through all stages of the proceeding to enforce the lien, as well after as before judgment therein, or notify him that it could not do so, and furnish him necessary information of the status of the proceeding in time to enable him to protect himself; and if, after giving such notice, the company defended the proceeding, but thereafter abandoned the defense, it was necessary for it to give insured another such notice.—*Quigley v. St. Paul Title Insurance & Trust Co.* (Minn.) 66 N. W. 361.
64 Minn. 149.

§ 88. — Indemnity insurance.

(Wis.; 1896.)

A policy issued to an employer recited that it was issued on application for "indemnity against claims for compensation for personal injuries," and stipulated that assurer should pay to the employer "all sums for which it shall become liable to its employes." The conditions of the policy prohibited the employer from settling with its employes without the consent of the

assurer, who was also to assume charge of actions against the employer; and also provided that the employees should not sue on the agreement after a certain time, unless an action against the employer was then pending. *Held*, that the agreement was one of indemnity against liability, and payment by the employer of a judgment recovered against him was not a condition precedent to the assurer's liability.—*Hoyen v. Employers' Liability Assur. Corp.* (Wis.) 67 N. W. 46.

93 Wis. 201.

§ 89. — Duties of insured after loss.

(Wis.; 1896.)

Evidence that the insured, after loss, separated the undamaged from the damaged personal property, and sold the same, without consent of the insurer, before its adjuster had seen it, shows a breach of a policy requiring the insured to separate the damaged and undamaged personal property, and make a complete inventory, and exhibit it, when required, to the company's adjuster.—*Oshkosh Match Works v. Manchester Fire Assur. Co.* (Wis.) 66 N. W. 525.

92 Wis. 510.

§ 90. — Right of insurer to rebuild.

(Iowa; 1897.)

Where an insurer, entitled to rebuild unless insured preferred to receive money, notified insured of its election to rebuild, and demanded that plans be furnished in accordance with the policy, and insured made no response, and indicated no preference for money, the policy was converted into a building contract, under which the insurer might proceed.—*Zalesky v. Iowa State Ins. Co.* (Iowa) 70 N. W. 187.

§ 91. Subrogation of insurer.

(Ia) (Iowa; 1896.)

Where insured property is destroyed by fire negligently set out by a railroad company, the owner is not entitled to compensation for his loss from both the insurance company and the railroad company.—*Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller* (Iowa) 68 N. W. 443.

(Ib) (Minn.; 1895.)

An insurance company, which by the express terms of its policy has been absolved from liability because of a stipulation contained in a bill of lading of the insured property, whereby the carrier liable for the loss is to have the benefit of the insurance, has the right to impose, as terms of payment of the loss, that it have the unqualified right to proceed against the carrier primarily liable to the insured.—*Southard v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.) 62 N. W. 442.

60 Minn. 382.

(1c) (Minn.; 1896.)

A mortgagor executed to the mortgagee a bond conditioned that he would discharge all claims for labor and material furnished for the building to be erected on the mortgaged premises, and all liens on account thereof, and save the mortgagee harmless therefrom, including expenses incurred in satisfying the same. A title insurance company issued a policy guaranteeing the mortgagee that the mortgage was a first lien on the premises, and agreed to indemnify him against prior liens. The mortgagor failed to pay certain claims which became liens on the premises superior to that of the mortgage, and the insurer paid off the same, and took an assignment of the bond of the mortgagee. *Held*, that the insurer had a cause of action on the bond to recover the amount paid to satisfy the lien.—*St. Paul Title Insurance & Trust Co. v. Johnson* (Minn.) 67 N. W. 543.

64 Minn. 492.

(Id) (Wis.; 1896.)

Where insured property is destroyed by fire, through the negligence of a third person, an insurer of the property, who has paid the as-

sured the insurance money, becomes subrogated pro tanto to the owner's claim against the wrong doer, and should join the owner as plaintiff in an action for such negligent burning.—*Wunderlich v. Chicago & N. W. Ry. Co.* (Wis.) 66 N. W. 1141.

93 Wis. 132.

(1c) (Wis.; 1896.)

The owner of property destroyed by fire, having been paid the loss by the insurer, cannot recover of the one whose negligence caused it; the insurer being subrogated to his rights.—*Allen v. Chicago & N. W. Ry. Co.* (Wis.) 68 N. W. 873.

IX. WHO ENTITLED TO PROCEEDS.

Exemptions of proceeds of life policy, see "Constitutional Law," 27; "Exemptions," §§ 9, 11.

§ 92. Assignee of policy before loss.

(Ia) (Minn.; 1895.)

No right accrued to the holder of an employer's liability insurance policy before an action was commenced by the injured employé against assured for damages; and hence where assured assigned for the benefit of his creditors before the commencement of such suit, though after the injury to the employé, the assignee obtained no right under the policy, so as to preclude assured, on the recovery against him of a judgment by the employé, from maintaining an action against the company for the amount of the judgment under the policy.—*Anoka Lumber Co. v. Fidelity & Casualty Co. of New York* (Minn.) 65 N. W. 353.

63 Minn. 286.

(Ib) (Minn.; 1896.)

A creditor, to whom a life insurance policy was transferred to collect as her interest might appear, was entitled to recover thereon, on insured's death, to the amount of the face value thereof, though a portion of her debt was not due at the time of trial.—*Hale v. Life Indemnity & Investment Co.* (Minn.) 68 N. W. 182.

§ 93. Policy payable to mortgagee.

(Ia) (Mich.; 1895.)

Where a fire insurance policy makes loss, if any, payable to J., as his chattel mortgage interest may appear, the company's liability is not affected because the chattel mortgage was made to another person, who indorsed the note secured thereby to J., who was recognized by all the parties to the mortgage as the owner thereof.—*Johnston v. Farmers' Fire Ins. Co. of York* (Mich.) 64 N. W. 5.

(Ib) (Minn.; 1897.)

A mortgagor who has failed to redeem cannot recover from the mortgage insurance money paid for the burning of the property after the foreclosure, but before expiration of the time to redeem, under a policy procured and paid for by the mortgagor for the mortgagee's benefit.—*Carlson v. Presbyterian Board of Relief for Disabled Ministers* (Minn.) 70 N. W. 3.

X. OFFICERS AND AGENTS.

Knowledge of officers or agents as to breach of condition, see ante, § 68.

Of mutual benefit company, see post, § 152.

Power of officers or agents to waive breach of condition, see ante, § 69.

Statements and warranties made by agent, see ante, § 41.

§ 94. Creation of agency.

(Ia) (S. D.; 1895.)

Where insurance agents not the authorized agents of defendant company procure the issuance of a policy for plaintiff on memoranda

furnished them by plaintiff, they will be considered agents of the plaintiff, and not of the company.—*Promherz v. Yankton Fire Ins. Co.* (S. D.) 63 N. W. 784.

[b] (Wis.: 1896.)

Where one on succeeding to the business of a general insurance agent applies to one of the companies for its agency, and the company requests him to make up the former agent's accounts, and collect any balance due from him, and to cancel any risks taken by the former agent which he deems insecure, promising to appoint him agent when such balance is collected, and he, without the knowledge of the company, secures all its insurance blanks and supplies from the former agent, such person does not, by holding out, become the company's agent to issue policies before his appointment.—*Rahr v. Manchester Fire Assur. Co.* (Wis.) 67 N. W. 725.

93 Wis. 355.

§ 95. Evidence of agency.

(Wis.: 1896.)

In an action on a fire policy, in which recovery depends on plaintiff's establishing either that the person that issued the policy was an agent of defendant by appointment or by holding out, the issue as to appointment is properly withdrawn where the evidence shows that such person issued the policy depending on its probable ratification by defendant, or on his probable early appointment, and that the risk was never reported to defendant by him.—*Rahr v. Manchester Fire Assur. Co.* (Wis.) 67 N. W. 725.

93 Wis. 355.

§ 96. Extent and exercise of powers.

[a] (Iowa: 1895.)

Defendant executed his note to D. personally, in payment of a premium for insurance in a company of which D. was state manager, receiving from the latter a contract giving him a right to renew the note for three years, and D. receipted for the note in his official capacity, on a blank furnished by the company. The first note was taken up, and a second note given at the instance of B., who signed himself "Supt. of Agents," and subsequently, at the request of S., who appeared on the letter heads bearing the company's name as "cashier," and so signed the letters to defendant, the latter sent a third note, with a check for interest due, the receipt whereof was acknowledged by S. as "cashier," and S. forwarded a new policy, and promised to return the second note. It appeared that D. acted for the company in selecting its medical examiners, and had authorized defendant to recommend suitable persons therefor; that he also had authority to solicit applications for insurance, and that S. was in the employ of both D. and the company. The policies were issued from the company's home office in another state. *Held*, that the taking of the premium note, and the renewals thereof, were within the apparent scope of D.'s employment, and that the company was bound to return to defendant the second note, which he had renewed.—*First Nat. Bank v. Getz* (Iowa) 64 N. W. 799; *Getz v. Equitable Life Assur. Soc. of the United States, Id.*

[b] (Iowa: 1896.)

An insurance agent authorized to make contracts of insurance may during continuance of his agency, at any time, even after loss, correct a policy issued by him by inserting property included in the original contract, but omitted by mistake from the policy.—*Taylor v. State Ins. Co.* (Iowa) 67 N. W. 577.

[c] (Iowa: 1896.)

Where a foreign life assurance society maintains a branch office in a state, with a manager whose agency is general in that state, and to whom the people look for information or adjustments of the society's business in the state, the

acts and knowledge of the manager are the acts and knowledge of the society.—*Van Werden v. Equitable Life Assur. Soc. of United States* (Iowa) 68 N. W. 892.

[d] (Neb.: 1896.)

A life insurance policy provided that there should be no contract until the admission fee and advance premium were paid thereon, and that no agent had authority to alter the contract or extend credit, and that no alteration of the contract should be valid unless in writing. *Held*, that a general agent appointed by the association in writing, who was to receive, by the terms of his appointment, in payment for his services, the entire amount of admission fees and advance premiums, had authority, on delivering a policy, to extend credit for the payment of such fee and premium.—*Pythian Life Ass'n v. Preston* (Neb.) 66 N. W. 445.

47 Neb. 374.

[e] (Neb.: 1896.)

Authority conferred on an insurance agent to waive a condition in the policy that the policy shall be inoperative during the time the premium note remains unpaid after its maturity cannot be delegated, without the principal's consent, to a subagent.—*Home Fire Ins. Co. v. Garbacz* (Neb.) 67 N. W. 864.

48 Neb. 827.

[f] (Neb.: 1897.)

A fire insurance agent issued policies on behalf of his principal, but, learning that his agency was about to be revoked, he canceled them, and issued in lieu thereof others on behalf of companies of which he was also agent. He did not cancel said policies at the request of his principal nor of the insured, nor because the cancellation was for his principal's interest. *Held*, that the cancellation of the policies was not a defense to an action by his principal against him for the premiums.—*Northern Assur. Co. of London v. Hamilton* (Neb.) 69 N. W. 781.

[g] (Wis.: 1897.)

An insured who knows that insurance companies generally refuse to take a second line of policies on the same property is bound by a contract made by his broker with the company's agent that a second line of policies would not be procured from other agencies of the same company, though the insured did not know of the contract until after the fire.—*John R. Davis Lumber Co. v. Hartford Fire Ins. Co.* (Wis.) 70 N. W. 84.

[h] (Wis.: 1897.)

An unauthorized contract by the insured's agent not to procure other policies through different agencies of the same company is ratified if the insured, after a loss, and with knowledge of the existence of the contract, demands payment on the first line of policies.—*John R. Davis Lumber Co. v. Hartford Fire Ins. Co.* (Wis.) 70 N. W. 84.

§ 97. — Of soliciting agent.

[a] (Iowa: 1895.)

An insured is chargeable with knowledge of the limitations upon the authority of a soliciting agent, and that he cannot bind the company, contrary to the provisions of the policy, by stating that it will make no difference where the insured property is situated.—*Dryer v. Security Fire Ins. Co.* (Iowa) 62 N. W. 798.

[b] (Iowa: 1896.)

A fire insurance company is bound by an agreement by its soliciting agent, who has no authority to issue policies, as to the concurrent insurance permitted, where by mistake it is not correctly stated in an application filled out by him, it being one he is authorized to make.—*Fitchner v. Fidelity Mut. Fire Ass'n* (Iowa) 68 N. W. 710.

[c] (Wis.: 1896.)

An agent of a credit insurance company, for the purpose of soliciting insurance, trans-

mitting applications, and collecting premiums, has power to alter a provision in the policy that the customer of insured must be rated in Dun's, and rated at not less than a sum specified, by an agreement that, if the customer is not rated in Dun's and is rated in Bradstreet's, the latter rating shall be binding.—*Shakman v. United States Credit System Co.* (Wis.) 66 N. W. 528.

92 Wis. 366.

[d], (Wis.; 1897.)

Rev. St. § 1977, providing that whoever solicits insurance for any insurance company or property owner, or transmits an application for insurance or a policy, is an agent of the company, does not preclude such solicitor from acting as agent of the insured in some particulars.—*John R. Davis Lumber Co. v. Hartford Fire Ins. Co.* (Wis.) 70 N. W. 81.

§ 98. — To surrender or discharge policy.

[a], (Minn.; 1897.)

Evidence that the surrender of the policies was induced by fraudulent representations of defendant's agent as to the value of the policies in case of the insured's death is properly excluded where the agent's authority is expressly limited to procuring and forwarding applications for approval, and collecting premiums, and plaintiff does not offer to show that the agent has been directed by defendant to represent it in procuring the surrender of the policies.—*Gardner v. Fidelity Mut. Life Ass'n* (Minn.) 69 N. W. 895; *Warner v. Same, Id.*

[b], (Wis.; 1897.)

There is no presumption that a special agent of the insured to place and manage insurance has authority, after procuring and delivering policy, to surrender or discharge it.—*John R. Davis Lumber Co. v. Home Ins. Co.* (Wis.) 70 N. W. 59.

§ 99. — Effect of instruction to agents.

(Wis.; 1896.)

Where the agent of a minor applied for insurance on her property, in ignorance of a rule of the company that no risks should be taken on property belonging to infants, the right of the insured to recover on the policy is not affected by private instructions from the company to the general agents who issued it.—*Johnson v. Scottish Union & N. Ins. Co.* (Wis.) 67 N. W. 416.

93 Wis. 223.

§ 100. Notice to agent.

[a], (Iowa; 1896.)

Notice of a change in the address of the assured, given to a bank authorized to collect premiums and deliver receipts for a foreign insurance company, is notice to the company.—*Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 66 N. W. 157.

[b], (Neb.; 1895.)

Knowledge on the part of an agent of an insurance company, authorized to issue its policies, of facts that render the policy voidable at the company's option, is knowledge of the company.—*Eagle Fire Co. v. Globe Loan & Trust Co.* (Neb.) 62 N. W. 895.

44 Neb. 380.

§ 101. Estoppel to deny authority.

[a], (Neb.; 1895.)

After an insurance company has held out its agent as authorized to insert certain provisions in policies, by a circular stating, without qualification, that it issued policies containing such provisions, it cannot deny his authority to do so.—*Frank v. Pacific Mut. Life Ins. Co.* of California (Neb.) 62 N. W. 454.

44 Neb. 320.

[b], (Neb.; 1895.)

Circulars issued by an insurance company, and brought to the notice of the insured

before the policy was written, stating, without restriction, that the company wrote policies paying one-third for the loss of one foot, are admissible to show that the insurer had held its agent out as authorized to write such policies to all persons.—*Frank v. Pacific Mut. Life Ins. Co.* of California, 62 N. W. 454, 41 Neb. 320.

§ 102. Liability of surety on bond.

(Minn.; 1895.)

The surety on the bond of an insurance agent, reciting that the agent was bound to conduct the business according to the general and specific instructions of the company, was liable for a loss which the company was compelled to pay on a policy on premises, the insurance on which it had ordered the agent to cancel, by reason of the agent's failure to cancel.—*Royal Ins. Co. v. Clark* (Minn.) 63 N. W. 1029.

61 Minn. 476.

§ 103. Compensation.

(Minn.; 1895.)

The fact that a contract for agency for an insurance company, whereby the agent was to receive commissions on renewal premiums payable during the agency, was modified as to the amount of such commissions without referring in terms to the continuance of the agency, did not entitle the agent to renewal commissions payable after his discharge.—*Jacobson v. Connecticut Mut. Life Ins. Co.* (Minn.) 63 N. W. 740.

61 Minn. 330.

XI. ACTIONS AGAINST INSURANCE COMPANIES.

On certificate in mutual companies, see post, §§ 180-183.

On marine policy, see "Marine Insurance."

§ 104. Rights of action and defenses.

[a], (Iowa; 1896.)

On the expiration of a policy of insurance on the homestead payable to the husband, a renewal was written by the agent of the company on the oral application of the wife in which the ownership of the property was stated to be in the husband, as in the former policy, when in fact it was then in the wife, as the agent knew. *Held*, that in an action by the husband on the policy, he having an insurable interest in the property, it was not necessary to ask a reformation of the policy so as to show the true ownership.—*Carey v. Home Ins. Co.* (Iowa) 66 N. W. 920.

[b], (Iowa; 1896.)

Where a life assurance society violates its contract of insurance the assured may elect whether to enforce the contract, or to treat it as rescinded, and recover for the breach.—*Van Wenden v. Equitable Life Assur. Soc. of United States* (Iowa) 68 N. W. 892.

[c], (Mich.; 1896.)

Where an applicant for accident insurance has truthfully described his calling, and all the facts concerning his business are known by the insurance company, the fact that the assured was improperly classified is no bar to his recovery on the policy.—*Emlaw v. Travelers' Ins. Co.* (Mich.) 66 N. W. 469.

[d], (Wis.; 1897.)

Where an action on an insurance policy was pending and at issue, an inadvertent notice of an assessment to plaintiff was not a waiver of defenses set up in the answer.—*Agnew v. Farmers' Mutual Protective Fire Ins. Co.* (Wis.) 70 N. W. 554.

§ 105. — Negligence or wrongful act of insured.

[a], (Iowa; 1895.)

The burning of an insured building by the insured, in pursuance of a conspiracy to ob-

tain the insurance which he has on personal property therein, will also prevent the recovery of the insurance on the building.—*Names v. Dwelling-House Ins. Co. of Boston (Iowa)* 64 N. W. 628.

[b] (Iowa; 1896.)

The fact that the owner of an insured building started a fire for the purpose of burning rubbish, which escaped, and consumed the building, does not constitute a defense to an action to recover the insurance, in the absence of any design to burn the building.—*Des Moines Ice Co. v. Niagara Fire Ins. Co. (Iowa)* 68 N. W. 600.

[c] (Wis.; 1895.)

An insurance company is not relieved from liability on its policy for loss by fire merely because insured was negligent.—*Pool v. Milwaukee Mechanics' Ins. Co. (Wis.)* 65 N. W. 54, 91 Wis. 530.

§ 106. Limitations by provision of policy.

[a] (Iowa; 1896.)

McCain's Code, § 1734, providing that no action shall be begun on an insurance policy within 90 days after notice of loss has been given, prevents the insured from suing within that time, though the insurer, on receipt of proof of loss, absolutely denied liability.—*Finsterv Merchants' & Bankers' Ins. Co. (Iowa)* 65 N. W. 1004.

[b] (Iowa; 1897.)

Acts 18th Gen. Assem. c. 211, § 3, provides that, to maintain an action on an insurance policy, the assured need only prove the loss and notice in writing to the company within 60 days, accompanied by an affidavit as to how the loss occurred and its extent, but that no action shall be begun within 90 days after giving such notice. *Held*, that the latter requirement cannot be waived, and an action begun in less than 90 days after a notice of loss not accompanied by an affidavit, or after a waiver of such notice and affidavit, was premature.—*Blood v. Hawkeye Ins. Co. (Iowa)* 69 N. W. 1141.

[c] (Mich.; 1897.)

The provision of an accident policy that suits for recovery thereunder shall be brought within one year from the time of the accident is waived where, after the accident, the insurance company writes to the insured, asking him to allow the matter to rest until adjuster sees him, and the adjuster does not call, and no suit is brought until after one year.—*Turner v. Fidelity & Casualty Co. (Mich.)* 70 N. W. 898.

[d] (Minn.; 1897.)

By denying, in an answer, any liability for loss under the policy, the insurer does not waive its right to plead in abatement that under the terms of the policy as to payment the action has been prematurely brought.—*La Plant v. Fireman's Ins. Co. (Minn.)* 70 N. W. 856.

[e] (Neb.; 1895.)

Where an insurance company denies that the policy was in force when the loss occurred, it cannot avail itself of the provision in the policy that no action should be brought until 60 days after receipt of proofs of loss and adjustment.—*Home Fire Ins. Co. v. Fallon (Neb.)* 63 N. W. 860.

45 Neb. 554.

[f] (Neb.; 1896.)

A policy providing that no action thereon should be maintainable after a year from the date of insured's death also provided that the death loss should be payable within 90 days after the first periodical mortuary premium paying day next ensuing the date of acceptance by the company of satisfactory proof of death. *Held*, that the period of limitation did not begin to run until 90 days after death.—*Kettenbach v. Omaha Life Ass'n (Neb.)* 69 N. W. 135.

§ 107. Process and service.

[a] (Iowa; 1895.)

One who, after accepting an application for insurance on property in Wisconsin, procured, through a general agent residing out of the state, a policy for defendant insurance company, and received a commission on the premium, is an agent of defendant on whom service of process may be made, within Rev. St. Wis. § 1977, providing that whoever solicits insurance, and receives compensation therefor, shall be deemed an agent of the insurance company, though defendant, being a foreign corporation, without having complied with the laws, was not entitled to do business in that state.—*Fred Miller Brewing Co. v. Council Bluffs Ins. Co. (Iowa)* 63 N. W. 565.

[b] (Iowa; 1895.)

Under the laws of Wisconsin, making one who solicits insurance, and receives compensation therefor, the agent of the insurance company, and providing that service of process may be made on such agent, service of summons in an action on a policy may be made on a person who solicited it, one year and a half after it issued, though the policy provides that such person is the agent of insured only.—*Fred Miller Brewing Co. v. Council Bluffs Ins. Co. (Iowa)* 63 N. W. 565.

[c] (Iowa; 1897.)

Jurisdiction over a foreign insurance company not authorized to do business in the state is not acquired by service on a nonresident adjusting agent, not employed in the general management of the business, or in any office or agency in the state, made while he was temporarily within the state.—*Lesure Lumber Co. v. Mutual Fire Ins. Co. (Iowa)* 70 N. W. 761.

[d] (Iowa; 1897.)

Where there was no proper service of an original notice in an action against a foreign insurance company, the appearance of defendant will be considered as the commencement of the action, for the purpose of determining whether it was premature.—*Lesure Lumber Co. v. Mutual Fire Ins. Co. (Iowa)* 70 N. W. 761.

[e] (Mich.; 1895.)

How. Ann. St. § 4368, provides that the word "process," as used in the act regulating service thereof on foreign insurance companies by substituted service on the insurance commissioner, shall include any writ, declaration, summons, order, or subpoena whereby any action shall be commenced against such insurance company. *Held*, that summons in garnishment is thereby included.—*German-American Ins. Co. v. Chippewa Circuit Judge (Mich.)* 63 N. W. 531. 105 Mich. 566.

[f] (S. D.; 1895.)

An insurance company incorporated under the laws of South Dakota, which issued a policy to parties in another state covering property in that state, is subject, in an action on the policy, to the laws of the latter state relating to service of process.—*Gude v. Dakota Fire & Marine Ins. Co. (S. D.)* 65 N. W. 27.

§ 108. Submission to arbitration as condition precedent.

[a] (Iowa; 1895.)

Where a policy provided that differences as to the amount of loss should, at the "written request of either party," be submitted to arbitration, and that no action should be brought until after the award, arbitration, in the absence of a request therefor, was not a condition precedent to an action.—*Davis v. Anchor Mut. Fire Ins. Co. (Iowa)* 64 N. W. 687.

[b] (Iowa; 1897.)

Provisions in a policy that an appraisal by arbitrators shall be made if there is a disagreement as to the loss; that the loss shall not be payable until 60 days after notice and satisfactory proofs of loss have been given, "including an award by appraisers when the appraisal shall be required"; and that no action on the policy can be maintained without "a full com-

pliance by the insured with all the foregoing requirements,"—do not make an appraisal a condition precedent to the right to sue, where the company makes no demand therefor.—*Leasure Lumber Co. v. Mutual Fire Ins. Co.* (Iowa) 70 N. W. 761.

[c] (Mich.; 1895.)

Under a fire policy providing that in case of disagreement as to amount of loss it shall be ascertained by appraisers, and their award shall be prima facie evidence of the amount; that loss shall be payable 60 days after notice and proof of loss, including an award by appraisers "when appraisal has been required"; that no action on the policy can be sustained till full compliance by insured with all the foregoing requirements, nor unless commenced within 12 months after loss,—an appraisal is a condition precedent to suit only where it has been demanded, and not having been demanded for eight months, though proofs of loss have been duly made, action may be brought.—*National Home Building & Loan Ass'n v. Dwelling House Ins. Co.* (Mich.) 64 N. W. 21.

[d] (Neb.; 1895.)

Though a policy of insurance provides that in case of a dispute between the parties the matter should be submitted to arbitration, the fact that no arbitration was had does not prevent an action on the policy.—*Insurance Co. of North America v. Bachler* (Neb.) 62 N. W. 911.

44 Neb. 549.

[e] (Wis.; 1895.)

An arbitration clause in a policy providing that the policy shall not be payable until a certain time after an award by appraisers, when appraisal has been required, is valid, and, when appraisal is demanded, it is a condition precedent to the insured's right to sue on the policy, unless the condition is afterwards waived by the insurer.—*Chapman v. Rockford Ins. Co.* (Wis.) 62 N. W. 422, 89 Wis. 572.

§ 109. — Validity of condition.

(Neb.; 1895.)

A provision in a policy that no suit or action against the insurer shall be sustained until after an award has been obtained by arbitration, fixing the amount due in case of loss, is void as an attempt to oust the courts of jurisdiction.—*National Masonic Acc. Ass'n v. Burr* (Neb.) 62 N. W. 466.

44 Neb. 256.

§ 110. Parties—Policy payable to assignee of mortgagee.

(Minn.; 1895.)

Where a policy was payable to the assignee of the mortgagee as his interest may appear, and after the loss such assignee transferred his interest to a third person, such person and the owner of the property are proper parties to an action on the policy.—*Ermentrout v. American Fire Ins. Co. of Philadelphia* (Minn.) 62 N. W. 543.

60 Minn. 418.

§ 111. Complaint or petition.

[a] (Iowa; 1895.)

The petition, in an action against an endowment association, alleged that defendant issued to plaintiff a certificate of membership, and that subsequently, at defendant's request, plaintiff surrendered this certificate, and was induced to accept a second certificate in lieu of it. There was no allegation of fraud on the part of the defendant, nor attempt to reform either certificate on the ground that it was based on an oral contract. *Held*, that the action was brought upon the second certificate.—*Gonsow v. Equitable Mut. Life & Endowment Ass'n* (Iowa) 63 N. W. 192.

[b] (Mich.; 1897.)

In an action for the use of R. on a fire policy for \$1,500, it appeared that \$500 was on a building, and that the loss on the build-

ing was payable to R., mortgagee, as his interest might appear. The declaration alleged that by the policy defendant insured plaintiffs and R., mortgagee, as the interest of the mortgagee should appear; that the building was burned, whereby plaintiffs and R. as mortgagee were damaged to the amount of \$1,500; and that plaintiffs were damaged. *Held*, that the declaration, in the absence of a demurrer, was not insufficient, as averring that plaintiffs and R. were jointly entitled to recover \$1,500.—*Cronin v. Fire Ass'n of Philadelphia* (Mich.) 70 N. W. 448.

[c] (S. D.; 1891.)

In an action on an insurance policy which provides that a loss is not payable until 60 days after proofs of loss are made, a complaint that states that such proofs were made immediately after the fire, but neither states nor shows on its face that 60 days thereafter had elapsed before the commencement of the suit, fails to state a cause of action.—*First Nat. Bank v. Dakota Fire & Marine Ins. Co.* (S. D.) 61 N. W. 439.

6 S. D. 424.

[d] (Wis.; 1891.)

A complaint alleging that plaintiffs, as copartners, insured their goods in defendant's company, and that the policy had expired, but that defendant had agreed to renew it, and had accepted a premium therefor, but had failed to make the renewal, and that the goods were destroyed by fire within the period which the agreed renewal would have covered, and alleging, further, a statement made both before and after the loss by defendant's agent that the renewal had in fact been made, is good on demurrer without alleging the performance of conditions precedent.—*Schwahn v. Michigan Fire & Marine Ins. Co.*, 61 N. W. 78, 89 Wis. 84.

[e] (Wis.; 1896.)

As against a demurrer *ore tenus*, a complaint on an insurance policy, alleging that more than 90 days have elapsed since notice and proofs of loss were furnished, but not showing whether defendant was entitled to any or to so much respite, will not be *held* bad, as not showing that the respite allowed defendant has elapsed.—*Johnston v. Northwestern Live-Stock Ins. Co.* (Wis.) 68 N. W. 868.

[f] (Wis.; 1896.)

One suing on a policy need not plead an estoppel of insurer to claim that a statement in the application was a warranty; the defense of breach of the warranty not amounting to a counterclaim, and therefore not admitting of a reply.—*Johnston v. Northwestern Live-Stock Ins. Co.* (Wis.) 68 N. W. 868.

§ 112. — Alleging insurable interest.

(Mich.; 1895.)

The complaint in an action by R. on a fire policy alleged that it was issued to M. and R. as partners, and that it was assigned to R., and thereafter alleged that at the time of the execution of the policy as aforesaid, and from the time of said assignment till the loss, plaintiff had an interest in the property, being the sole owner thereof in fee simple. *Held* that, the point not being raised by demurrer, the complaint would not be considered to state that at the issuing of the policy plaintiff was the sole owner of the property, but that at that time he owned only an undivided interest, and that from the time of the assignment he had a sole interest therein.—*Rediker v. Queen Ins. Co. of America* (Mich.) 65 N. W. 105.

§ 113. — Policy payable to assignee of mortgagee.

(Minn.; 1895.)

In an action on an insurance policy, the complaint alleged the contract of insurance, and that the loss was payable to the assignee of the mortgagee, as interest might appear, and alleged a loss within the terms of the policy, due notice and proof of loss, and the assignment of the in-

terest of the assignee of the mortgagee to plaintiff. *Held*, that the complaint stated a cause of action, though it did not specifically allege a mortgage, or the extent of the interest of the assignee of the mortgagee.—*Ermentrout v. American Fire Ins. Co. of Philadelphia* (Minn.) 62 N. W. 543.

60 Minn. 418.

§ 114. — Alleging loss and cause thereof.

[a] (Minn.: 1895.)

Where a bond by a fidelity insurance company to indemnify an employer against loss by reason of a shortage of grain caused by the actual fraud or dishonesty of the employé provided how the existence and amount of the shortage should be ascertained, and that, when so ascertained, it should be evidence that it was caused by the fraud or dishonesty of the employé, and not by any of the various other causes mentioned for which the company was not to be liable, it was not necessary, in an action by the company against the employé to recover the amount paid under the bond for loss on account of a shortage, to allege that the shortage was caused by defendant's fraud or dishonesty.—*Fidelity & Casualty Co. of New York v. Bickhoff* (Minn.) 65 N. W. 351.

63 Minn. 170.

[b] (Minn.: 1896.)

The complaint, in an action by a common carrier on a policy insuring it to the extent of its liability for loss by fire on grain in its elevator at its terminal station, set out the contract, and a common-law contract of carriage of grain of certain shippers, with the obligation to safely deliver it at such station to a connecting carrier, and that while it was in the elevator, awaiting such delivery, in the usual course of carriage, it was lost by fire, and that plaintiff paid the shippers therefor. *Held*, that it stated a cause of action, though it did not allege expressly that the fire was caused by the carrier's negligence.—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.* (Minn.) 66 N. W. 132.

64 Minn. 61.

§ 115. — Anticipating defenses.

[a] (Iowa: 1894.)

In an action on an accident insurance policy conditioned that the policy shall not cover injuries received while the insured is under the influence of liquor, etc., it is not necessary to negative in the complaint a breach of the conditions, though the policy provides that a compliance with the conditions are "conditions precedent" to its enforcement.—*Jones v. United States Mut. Acc. Ass'n of City of New York* (Iowa) 61 N. W. 485.

92 Iowa, 652.

[b] (Mich.: 1896.)

The complaint, in an action on a life policy for its cash value at the end of the third year after it was issued,—under the provision therein that on its surrender, within three months after expiration of the third or any subsequent year for which premiums had been paid, the cash value specified therein would be paid,—will not be held fatally defective by reason of failure to aver surrender within the time limited, objection being first made on appeal.—*Loekwood v. Michigan Mut. Life Ins. Co.* (Mich.) 66 N. W. 229.

[c] (Wis.: 1896.)

Pleading or proving compliance by insured with his agreement in a live-stock insurance policy to use diligence and care in the use and for the preservation of the stock, and in case of sickness to immediately summon a veterinary, is not necessary; it being a condition subsequent, and matter of defense.—*Johnston v. Northwestern Live-Stock Ins. Co.* (Wis.) 68 N. W. 868.

§ 116. Answer.

[a] (Iowa: 1895.)

Code, § 2715, making, in an action on contract, a general allegation of performance of

all conditions precedent to the action sufficient, and section 2717, requiring an answer controverting such allegation to specifically state the facts showing nonperformance, do not apply where the complaint on a fire policy attempts to set out the facts constituting the performance of the conditions of the policy, and they are denied generally.—*Brock v. Des Moines Ins. Co.* (Iowa) 64 N. W. 685.

[b] (Iowa: 1896.)

An answer which in one count alleges other insurance as a ground for avoiding the policy, and in another count asks to prorate other insurance, if any be found, does not allege the existence of other insurance as a basis for prorating the loss.—*O'Leary v. German American Ins. Co. of New York* (Iowa) 69 N. W. 686.

[c] (Mich.: 1897.)

The defenses that plaintiffs failed to have indorsed the fact that proceedings to foreclose a mortgage on the property had been commenced, that plaintiff had ceased to use the property, and that the building was unoccupied, must be specially pleaded.—*Cronin v. Fire Ass'n of Philadelphia* (Mich.) 70 N. W. 448.

§ 117. Reply.

(Neb.: 1896.)

The answer in an action on an insurance policy set up an application made by the insured, reciting that the property was unincumbered, a condition of the policy against alienation of the property, and a breach thereof by plaintiff. The reply, after setting out a general denial, admitted that plaintiff signed "an" application, but alleged that he signed the same in reliance on the representations of the insurance agent that the application was a matter of form merely, and that the fine printed matter in the policy did not affect the insurance; that plaintiff was unable to read; and that the agent read neither the application nor the policy to him. *Held*, that the reply admitted the existence of the condition against alienation, but not the signing of the application alleged in the answer, nor a breach of said condition.—*Farmers' & Merchants' Ins. Co. v. Peterson* (Neb.) 66 N. W. 847.

47 Neb. 747.

§ 118. Pleading and proof—Variance.

[a] (Iowa: 1895.)

In an action on an insurance policy, evidence showing a waiver of a stipulation requiring proofs of loss within a certain time is inadmissible in support of an allegation of performance of the stipulation.—*Hensinkveld v. Capital Ins. Co. of Des Moines* (Iowa) 64 N. W. 591.

[b] (Iowa: 1895.)

A waiver of proofs of loss cannot be relied on, unless pleaded.—*Brock v. Des Moines Ins. Co.* (Iowa) 64 N. W. 685.

[c] (Iowa: 1895.)

In an action on an insurance policy, the fact that plaintiff could have saved goods from loss was a matter of defense, to be pleaded and proved.—*Davis v. Anchor Mut. Fire Ins. Co.* (Iowa) 64 N. W. 687.

[d] (Iowa: 1895.)

Where the complaint in an action on an insurance policy merely alleges that notice and proofs of loss were given, a waiver of proofs of loss cannot be shown.—*Hensinkveld v. St. Paul Fire & Marine Ins. Co.* (Iowa) 64 N. W. 769.

[e] (Iowa: 1896.)

In an action on a fire policy, where the petition averred notice and proof of loss, accompanied by the affidavit required, copies of which were attached as exhibits, and the answer admitted that the papers thus set out were received, their delivery was established without putting them formally in evidence.—*Taylor v. State Ins. Co.* (Iowa) 67 N. W. 577.

[f] (Iowa; 1896.)

Defendant's denial of an allegation that the fire was without fault or negligence on plaintiff's part does not raise an issue as to the cause of the fire, so as to admit of testimony concerning the amount of plaintiff's indebtedness at the time of the loss, for the purpose of proving that the fire was purposely set.—*Corkery v. Security Fire Ins. Co. (Iowa) 68 N. W. 792.*

[g] (Mich.; 1895.)

In an action on a fire insurance policy, a variance between the declaration and the evidence as to the date of the policy is not fatal, proofs of loss having been made within the time required.—*Linn v. United States Fire Ins. Co. (Mich.) 62 N. W. 562.*

104 Mich. 397.

[h] (Mich.; 1895.)

The complaint in an action by R. on a fire policy issued to M. and R., and assigned to plaintiff, having shown that, at the execution of the policy, R. was not the sole owner of the property, but that, at the time of the loss, he was such owner, he may show an assignment to him of M.'s interest in the property, though it was not alleged, it not being necessary to allege, how he became the owner.—*Rediker v. Queen Ins. Co. of America (Mich.) 65 N. W. 105.*

[i] (Minn.; 1895.)

That the plaintiff insurance company had no license from the state to do an insurance business in the state is a matter of defense to be pleaded.—*Fidelity & Casualty Co. of New York v. Bickhoff (Minn.) 65 N. W. 351.*

63 Minn. 170.

[j] (Minn.; 1896.)

A life insurance company, seeking to avoid its policy on the ground that answers in the application for the policy were untrue, must specifically allege which of the answers it claims to be false, and, on the trial, will be limited in its proof to those specified.—*Chambers v. Northwestern Mutual Life Ins. Co. (Minn.) 67 N. W. 367.*

64 Minn. 495.

[k] (Minn.; 1896.)

In an action on a life policy, where the defense was that insured had committed suicide, an instruction that the presumption was that the policy was valid, until the contrary was made to appear, and that "this is only one form of saying that the burden of proof rests upon defendant, and not upon the plaintiff, to show that the policy is not a legal and binding contract, as it purports to be," was not erroneous as a whole.—*Hale v. Life Indemnity & Investment Co. (Minn.) 68 N. W. 182.*

[l] (Neb.; 1896.)

In an action on a life policy, defendant, having alleged that the misrepresentations upon which it acted to its own disadvantage were contained in the written application of the assured, was not entitled on the trial to show what oral representations insured made to a physician at the time the examination was made.—*Bankers' Life Ass'n v. Lisco (Neb.) 66 N. W. 412.*

47 Neb. 340.

§ 119. Evidence.**[a] (Iowa; 1896.)**

The fact that one making an oral application for a policy payable to her and her husband stated that the property, though formerly in her husband's name, had been conveyed to her, may be shown, to charge the company with notice of the fact.—*Carey v. Home Ins. Co. (Iowa) 66 N. W. 920.*

[b] (Iowa; 1896.)

Evidence that plaintiff told defendant's agent to make the policy payable to the mortgagee as his claim might appear, as in a former policy, of which the one in suit was a renewal, was admissible to show that the agent had actual knowledge of the mortgage when he delivered

the policy.—*Corkery v. Security Fire Ins. Co. (Iowa) 68 N. W. 792.*

[c] (Iowa; 1896.)

Evidence that the plaintiff told defendant's agent to go to the office of another company, in which plaintiff's goods were insured, and make the policy correspond with the one there recorded, and that said agent examined the record of the existing policy, which recited: "Mortgage Clause. Loss, if any, payable to M.," renders the entry competent on the issue as to the agent's knowledge that the property insured was mortgaged to M., though such entry referred to a former mortgage which had been satisfied.—*Corkery v. Security Fire Ins. Co. (Iowa) 68 N. W. 792.*

[d] (Neb.; 1896.)

Where a recovery on a policy is for the payment of a mortgage on the insured premises greater in amount than the policy, in accordance with a union mortgage slip attached to the policy, it is proper to exclude evidence that a transfer of the title by the mortgagor without the mortgagee's consent operated to lessen the mortgagor's interest in the preservation of the property.—*North British & M. Ins. Co. v. Bohn (Neb.) 68 N. W. 942.*

[e] (Wis.; 1897.)

Where, in an action on a fire policy, defendant claims that the fire was set by plaintiff, evidence as to the conduct of plaintiff, and his appearance and statement in respect to the tracks running from the fire to his house, and his motive for burning the property, is admissible.—*Agnew v. Farmers' Mutual Protective Fire Ins. Co. of Town of Medina (Wis.) 70 N. W. 554.*

§ 120. — Burden of proof and presumptions.**[a] (Iowa; 1891.)**

Where, in an action on an accident policy, it appears that the insured was killed by a pistol shot, the burden is on the insurer to show that the shot was not accidental.—*Jones v. United States Mut. Acc. Ass'n of City of New York (Iowa) 61 N. W. 485.*

92 Iowa, 652.

[b] (Iowa; 1895.)

When the policy does not cover death caused "directly or indirectly, wholly or in part, by voluntary exposure to necessary danger," the burden of proof is on the company to show such exposure.—*Follis v. United States Mut. Acc. Ass'n (Iowa) 62 N. W. 807.*

[c] (Iowa; 1895.)

In an action by the original beneficiary to recover on an assigned policy of life insurance, which provided that upon proof of death the insurance should be paid the representatives of the insured or his assignee, the complaint alleged that the company and assignee "conspired to defeat the plaintiff out of the proceeds of the policy." Plaintiff introduced evidence that the policy was in force at the time of the death of the insured, and that payment was made to the assignee in accordance therewith, but did not attack the validity of the assignment. *Held*, that the direction of a verdict for defendant was proper.—*Mellerup v. Travelers' Ins. Co. (Iowa) 63 N. W. 665.*

[d] (Iowa; 1896.)

The burden is on a life insurance company, which claims a forfeiture for nonpayment of a premium, to show what the correct amount of such premium is, where the amount is variable, and knowledge thereof rests solely with the company.—*Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 66 N. W. 157.*

[e] (Iowa; 1896.)

McClain's Code, § 1734, providing that the amount stated in the policy shall be prima facie evidence of the insurable value of the property at the date of the policy, and that, to maintain an action on the policy, it shall only be necessary to prove the loss of the building, and

show proper notice of loss, applies where proofs of loss have been waived.—*Scott v. Security Fire Ins. Co. (Iowa)* 66 N. W. 1054.

[f] (Iowa; 1896.)

In an action on a fire policy issued on a stock of goods, a charge that the amount stated in the policy is *prima facie* evidence of the insurable value of the property at the date of the policy is erroneous, as placing on defendant the burden of showing that its value was less.—*Warshawky v. Anchor Mut. Fire Ins. Co. (Iowa)* 67 N. W. 237.

[g] (Iowa; 1896.)

Under the provisions of McClain's Code, § 1734, making the amount stated in an insurance policy *prima facie* evidence of the insurable value of the property insured, it is not necessary for the insured, in an action to recover for a loss, to introduce evidence of value beyond the policy itself; and, if the actual value at the time of loss is less than the amount named in the policy, though caused by the removal of a part of the building by the plaintiff, the burden of proving such fact rests on the defendant.—*Des Moines Ice Co. v. Niagara Fire Ins. Co. (Iowa)* 68 N. W. 600.

[h] (Mich.; 1897.)

Insured having shown injury as the result of accident, the insurer has the burden of showing as a defense that the accident was within the exceptions of the policy.—*Hess v. Preferred Masonic Mut. Acc. Ass'n of America (Mich.)* 70 N. W. 460.

[i] (Minn.; 1895.)

If the defense in an action on a standard policy be concealment or misrepresentation by the insured, it must be set out in the answer, and proved, and the materiality of the facts constituting such defense must be shown.—*Caplis v. American Fire Ins. Co. of New York (Minn.)* 62 N. W. 440.
60 Minn. 376.

[j] (Minn.; 1896.)

In an action on a mutual fire insurance policy providing that losses caused by steam-threshing machines should be paid, provided due caution should be exercised to prevent fire from their use, the burden was on defendant to show that plaintiff did not exercise care in using the machine which set the fire.—*Morris v. Farmers' Mut. Fire Ins. Co. of Harmony (Minn.)* 65 N. W. 655.
63 Minn. 420.

[k] (Minn.; 1896.)

If an insurance company asserts a condition against incumbering the property in defense of the action, the burden is upon it to show that the condition was in the policy, and that it was broken.—*Mistilski v. German Ins. Co. (Minn.)* 67 N. W. 80.
64 Minn. 366.

[l] (Minn.; 1896.)

Though answers to questions in the application for a life insurance policy as to the use of spirituous liquors be considered as warranties, it does not devolve on plaintiff in an action on the policy to allege and prove that they were true.—*Chambers v. Northwestern Mutual Life Ins. Co. (Minn.)* 67 N. W. 367.
64 Minn. 495.

[m] (Neb.; 1896.)

The fact that plaintiff in an action on a policy alleged that he had performed all and singular the conditions of the policy on his part to be performed, and that the company denied that allegation, did not cast the burden on plaintiff to negative a breach of the condition in the policy against alienation of the property insured.—*Farmers' & Merchants' Ins. Co. v. Peterson (Neb.)* 66 N. W. 847.
47 Neb. 747.

[n] (Neb.; 1896.)

A policy of insurance is *prima facie* an admission by the insurers of the title of the insured to the property embraced in the policy.
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—*Farmers' & Merchants' Ins. Co. v. Peterson (Neb.)* 66 N. W. 847.
47 Neb. 747.

[o] (Wis.; 1897.)

An insurer who sets up the negligent omission of the insured to save the property has the burden of proving that loss resulted from such negligence.—*Wolters v. Western Assur. Co. (Wis.)* 70 N. W. 62.

§ 121. — Fraud or misrepresentation.

[a] (Mich.; 1895.)

On the issue as to whether insured was treated by a physician for a certain disease, a prescription, claimed to have been prepared for insured by the physician, is inadmissible in evidence in the absence of proof that such prescription was taken by insured to the druggist to be filled.—*Plumb v. Penn Mut. Life Ins. Co. (Mich.)* 65 N. W. 611.

[b] (Minn.; 1896.)

In an action on a life insurance policy, evidence as to the business habits, pursuits, and associations of the insured at and before the time of issuing the policy is admissible, as bearing on the question whether he was temperate, as stated in his answers in the application for the policy.—*Chambers v. Northwestern Mutual Life Ins. Co. (Minn.)* 67 N. W. 367.
64 Minn. 495.

§ 122. — Increase of risk.

(Iowa; 1896.)

In an action on a policy providing that any false representations as to the condition or occupancy of the property insured, or omission to make known every fact material to the risk, should avoid the policy, it appeared that the application described the building as a "general sales room," and warranted that the application was a full statement of all the facts in regard to the risk. *Held*, that it was error to exclude evidence that the building was used as a residence, increasing the risk.—*Warshawky v. Anchor Mut. Fire Ins. Co. (Iowa)* 67 N. W. 237.

§ 123. — Amount of loss.

[a] (Iowa; 1896.)

In an action on a fire policy, the insured testified as to the values of the different items. *Held*, that the value was presumably the cash value at the time of the loss, and within the measure of damages in the policy, which provided that the insurer should "not be liable beyond the actual cash value of the property at the time any damage or loss occurs."—*Erb v. German-American Ins. Co. (Iowa)* 67 N. W. 583.

[b] (Mich.; 1894.)

On an issue as to the value of a stock of goods destroyed by fire, a witness testified that he had been in the store a number of times within a year, but could not say that he was there within a month before the fire; that he thought he had noticed a stock which would amount to anywhere from \$9,000 to \$12,000; and that, in this estimate, he was not confining himself to the year alluded to. *Held*, that such testimony was incompetent.—*Metzger v. Manchester Fire Assur. Co. (Mich.)* 63 N. W. 650.
102 Mich. 334.

[c] (Minn.; 1896.)

In an action against an insurance company for the value of a stock of merchandise destroyed by fire, daybooks, ledgers, and other books of account, kept in the usual course of business, showing the amount and value of the goods, are competent evidence, when properly verified or authenticated.—*Levine v. Lancashire Ins. Co. (Minn.)* 68 N. W. 855.

§ 124. — Notice and proof of loss.

[a] (Mich.; 1895.)

In an action on a life insurance policy, in pursuance of plaintiff's notice, defendant produced on the trial the proofs submitted by plain-

tiff. A witness testified that, when plaintiff notified defendant of decedent's death, she received blanks which, as filled up and returned to defendant, were the proofs offered, and, when defendant objected to testimony of the execution of the proofs, plaintiff stated that it might be stricken out, if defendant would admit that the proofs were regular, which defendant declined to do. *Held*, that the proofs were properly admitted.—*Maier v. Massachusetts Ben. Ass'n*, (Mich.) 65 N. W. 552.

[b] (Mich.; 1895.)

In an action on an insurance policy, affidavits taken by insurer concerning matters occurring before the death of the insured, without plaintiff's knowledge, are inadmissible in evidence against plaintiff, in connection with the proofs of death furnished by plaintiff.—*Plumb v. Penn Mut. Life Ins. Co.* (Mich.) 65 N. W. 611.

[c] (Wis.; 1896.)

Copy of the proofs of loss sent insurer, together with a postal from insurer acknowledging the receipt thereof, is admissible in evidence, after notice to insured to produce the originals, to prove that proofs of loss were made.—*Dowling v. Lancashire Ins. Co.* (Wis.) 65 N. W. 738.

92 Wis. 63.

§ 125. — Declarations.

(Minn.; 1896.)

The defense in an action on a life policy being that insured committed suicide, declarations made by him, two years before the alleged act, to the effect that he intended to commit suicide, were not admissible as original evidence, since they were too remote.—*Hale v. Life Indemnity & Investment Co.* (Minn.) 68 N. W. 182.

§ 126. — Sufficiency.

[a] (Iowa; 1895.)

In an action on an accident policy, evidence that insured, who was free from disease so far as his family or physician could discover, directly before the fall which caused his death, was seen to stagger, does not conclusively prove that the fall was caused by "fits or vertigo," so as to avoid the policy, under a condition avoiding the same in such event; physicians testifying that insured's conduct might have been due to other causes.—*Meyer v. Fidelity & Casualty Co. of New York* (Iowa) 65 N. W. 328.

[b] (Iowa; 1896.)

In an action at law on a verbal contract of insurance the issue whether the contract was in fact made is to be determined by a preponderance of the evidence.—*Farmers' Co-operative Soc. of Geneva v. German Ins. Co.* (Iowa) 66 N. W. 878.

[c] (Mich.; 1895.)

Where decedent's family doctor testified that pneumonia caused decedent's death, and two doctors for defendant testified as experts, on hypothetical questions tending to show the symptoms as testified to by the family doctor, that decedent's death was due to liquor, there was such a conflict in the testimony as warranted the submission to the jury of the question of the cause of decedent's death.—*Maier v. Massachusetts Ben. Ass'n* (Mich.) 65 N. W. 552.

[d] (Wis.; 1895.)

On the issue as to whether plaintiff, at the time of his application for accident insurance, was a carpenter, he merely testified that at the time he was "cutting cordwood"; that afterwards he was "framing timbers,—framing sets and caps." Several witnesses, without being contradicted, testified that plaintiff was not a carpenter. *Held*, that a finding by the jury that plaintiff was a carpenter should be set aside as against the evidence.—*Murphy v.*

American Mut. Acc. Ass'n (Wis.) 62 N. W. 1027.

90 Wis. 206.

[e] (Wis.; 1895.)

Evidence that a person went to bed as usual, and in the morning was found drowned in a cistern, the opening to which was 15 by 20 inches, raises a presumption of suicide, so as to defeat recovery on a policy of life insurance excepting risks arising from suicide.—*Johns v. Northwestern Mutual Relief Ass'n* (Wis.) 63 N. W. 276.

90 Wis. 332.

[f] (Wis.; 1896.)

Where a policy describes the property insured as being owned by the insured, and he is shown to have been in possession at the time of its destruction, such facts constitute sufficient proof of ownership, prima facie, to authorize a recovery.—*Lindner v. St. Paul Fire & Marine Ins. Co.* (Wis.) 67 N. W. 1125.

93 Wis. 526.

§ 127. Question for jury.

[a] (Iowa; 1895.)

Whether the execution of a mortgage on insured property increases the risk is a question for the jury.—*Collins v. Merchants' & Bankers' Mut. Ins. Co.* (Iowa) 64 N. W. 602.

[b] (Iowa; 1895.)

When intoxication is a defense, and there is a conflict in the testimony, the question is for the jury.—*Follis v. United States Mut. Acc. Ass'n* (Iowa) 62 N. W. 807.

[c] (Minn.; 1895.)

In an action on an insurance policy, where the defense was suicide, and there was evidence bearing on the business in which deceased was engaged and his financial condition, and on alleged reasons for taking his life, and evidence that he died suddenly in the prime of life, the question of suicide was for the jury.—*Hale v. Life Indemnity & Investment Co.* (Minn.) 63 N. W. 1108.

[d] (Neb.; 1896.)

In an action upon an insurance policy, one defense being that the insurer had parted with all interest in the insured "property before the policy was issued," the question whether the insured was, at the time the policy issued, the owner of the property, was, on conflicting evidence, properly submitted to the jury.—*Oakland Home Fire Ins. Co. v. Bank of Commerce* (Neb.) 66 N. W. 646.

47 Neb. 717.

§ 128. Instructions.

[a] (Iowa; 1895.)

Where, in suit for insurance on a building, defendant avers in defense a conspiracy between plaintiff and others unknown to burn the building to procure insurance on personal property therein, evidence that the house was fired by an unknown incendiary, but not the plaintiff; that the plaintiff planned to realize on the insurance obtained on the personal property, which could only be done by burning the building,—warrants an instruction on the theory of the existence of a conspiracy, though the other conspirators are not identified.—*Names v. Dwelling-House Ins. Co. of Boston* (Iowa) 64 N. W. 628.

[b] (Iowa; 1895.)

Where, on suit for insurance on a building, the defense of a conspiracy between plaintiff and others to burn the building to procure other insurance is set up, an instruction authorizing the jury, if they find that the plaintiff and others each performed acts for the carrying out of the common purpose to burn the building to procure such insurance, to find that they were engaged in a conspiracy, is proper.—*Names v. Dwelling-House Ins. Co. of Boston* (Iowa) 64 N. W. 628.

[c] (Iowa: 1896.)

An instruction which, in briefly summing up the facts plaintiff must establish in order to recover, fails to require that the fire must have been "without his fault," is not erroneous where this requirement has been stated in a preceding instruction, and there is no request to have the instruction made clearer.—*Huston v. State Ins. Co. (Iowa)* 69 N. W. 674.

[d] (Mich.: 1897.)

An instruction in an action on a credit guaranty policy that "the amount of yearly sales which plaintiffs were authorized to make, so far as this contract bears on the losses in this case, was \$70,000," and "there is to be deducted from these losses three-fourths of one per cent.," will not be held erroneous, because open to the interpretation that such percentage is on the losses, instead of on the \$70,000, where the manner of calculating the deduction and its amount were not disputed on the trial.—*Sloan v. Mercantile Credit Guarantee Co. (Mich.)* 70 N. W. 886.

[e] (Mich.: 1897.)

Error in refusing to instruct that proofs of loss are not evidence of the matters stated therein is not prejudicial, where the testimony of the insured as to such matters is not contradicted.—*Sloan v. Mercantile Credit Guarantee Co. (Mich.)* 70 N. W. 886.

[f] (Minn.: 1897.)

Where the defense was that the policy had been canceled by mutual agreement, an instruction that the plaintiffs had secured other insurance, valid in law, on the same property on the day of the alleged cancellation, which was an incorrect statement as to the effect of the evidence, was prejudicial error.—*C. A. Smith Lumber Co. v. Central Manufacturers' Mut. Ins. Co. (Minn.)* 70 N. W. 866.

[g] (Neb.: 1895.)

In an action on a policy of insurance, wherein there was evidence of a mortgage on the property to the knowledge of the company when the policy issued, there was error by the court, after stating what facts would be deemed a waiver of such existing mortgage, in stating that, if these facts were established, the provision of the policy as to incumbrance is eliminated from the case, where there was also evidence of a mortgage made after the policy issued.—*Agricultural Ins. Co. of Watertown v. Morrow (Neb.)* 62 N. W. 212, 43 Neb. 788.

[h] (Wis.: 1897.)

Where, in an action on a policy, the only issue was whether plaintiff set fire to the buildings destroyed, an instruction that all other matters claimed in the complaint stood as admitted as true is not prejudicial to plaintiff.—*Agnew v. Farmers' Mutual Protective Fire Ins. Co. (Wis.)* 70 N. W. 554.

§ 129. Special interrogatories and verdict.**[a] (Iowa: 1896.)**

In an action on a fire policy it appeared that the insured stated in their proofs of loss that they could not set out specifically the items and character of the goods destroyed by fire. Defendant claimed that the statement was untrue, because they had recently taken an inventory. Held that, if it was necessary for the insured to make such itemized list, it was not error to refuse to submit an interrogatory requested by defendant, asking the jury to state whether the insured had such inventory.—*Runkle v. Hartford Ins. Co. (Iowa)* 68 N. W. 712.

[b] (Iowa: 1896.)

In an action on a fire policy, where defendant claims that the proofs of loss contained false statements, it is not error to refuse to submit to the jury an interrogatory which relates to statements made to defendant's agent, and not to such proofs of loss.—*Runkle v. Hartford Ins. Co. (Iowa)* 68 N. W. 712.

[c] (Mich.: 1897.)

Plaintiff testified that he made application for a policy in writing to C., and that he did not make the application to the agent who signed the policy. On being shown such application, which was directed to defendant company, he admitted the signature to be his. The mortgagee, to whom part of the loss was payable, testified that he made an oral application to such agent, that he replied that he would submit the question to defendant, and that a few days later he received the policy, and paid the premium. There had been a previous talk between such witness and plaintiffs about applying for some insurance in defendant company. The written application was dated December 5th, and had the stamp of defendant's manager, bearing date December 6th, and the policy was issued December 7th. Held, that it was error not to submit the question to the jury whether the policy was issued on the written or the oral application.—*Cronin v. Fire Ass'n of Philadelphia (Mich.)* 70 N. W. 448.

[d] (Wis.: 1895.)

Where there is evidence, pro and con, on the issue whether the insurer waived a provision avoiding the policy in suit, the special verdict should state whether the provision was waived.—*McFetridge v. American Fire Ins. Co. (Wis.)* 62 N. W. 938.
90 Wis. 138.

§ 130. Amount of recovery.**[a] (Iowa: 1896.)**

Where property was insured by a soliciting agent for \$1,700, after examination, and the evidence as to value was conflicting, a verdict for plaintiff for \$1,700, with interest, will not be disturbed as excessive.—*Scott v. Security Fire Ins. Co. (Iowa)* 66 N. W. 1054.

[b] (Iowa: 1896.)

Where an insurance company refuses to pay on the basis of the amount of loss stated by the insured in his proofs, the latter is not concluded by such statement, but may recover on the basis of the actual value of the property destroyed.—*Corkery v. Security Fire Ins. Co. (Iowa)* 68 N. W. 792.

[c] (Wis.: 1895.)

Where, in an action on a policy providing that, in case of additional insurance, defendant shall be liable only for the proportion of the loss his insurance bears to the total insurance, the proofs of loss furnished by insured, and put in evidence by him, show that there was additional insurance, it is error to render judgment against defendant for the total loss, though he failed to plead such provision.—*McFetridge v. American Fire Ins. Co. (Wis.)* 62 N. W. 938.
90 Wis. 138.

§ 131. — Attorney's fee.**[a] (Neb.: 1897.)**

Comp. St. c. 43, § 45, providing that one recovering on an insurance policy shall be allowed an attorney's fee, applies to a policy covering both real and personal property.—*Omaha Fire Ins. Co. v. Thompson (Neb.)* 70 N. W. 39.

[b] (Neb.: 1897.)

Under Comp. St. c. 43, § 45, providing that the court on rendering judgment on a policy shall allow plaintiff a reasonable sum as an attorney's fee, does not authorize the allowance of an attorney's fee for services rendered on error.—*Eddy v. German Ins. Co. (Neb.)* 70 N. W. 947.

§ 132. — Right to interest.**(Neb.: 1896.)**

Interest on a verdict for plaintiff is properly included from its date to the rendition of judgment, where judgment is delayed by defendant's motion for new trial.—*Fremont, E. & M. V. R. Co. v. Root (Neb.)* 69 N. W. 337.

§ 133. Judgment and arrest thereof.

(Iowa; 1896.)

Under Mc'lain's Code, § 1734, prohibiting the bringing of an action to recover on an insurance policy within 90 days after notice of loss is given, where an action is brought before the expiration of such time the objection may be raised by motion in arrest of judgment, and is not waived because not sooner made.—Woodcock v. Hawkeye Ins. Co. (Iowa) 66 N. W. 761.

XII. ACCIDENT INSURANCE.

Burden of proof in action on accident policy, see "Evidence," § 8.

§ 134. Risks and liabilities covered.

[a] (Iowa; 1894.)

Where one insured in an accident policy was killed by a shot from a pistol in the hands of another, and deceased did nothing to provoke the shooting, the killing was accidental, within the meaning of the policy, though the person shooting intended to kill deceased.—Jones v. United States Mut. Acc. Ass'n of City of New York (Iowa) 61 N. W. 485.

92 Iowa, 652.

[b] (Iowa; 1895.)

Injuries caused by a fall due to a temporary and unexpected physical disorder are "violent," "external," and "accidental," within the meaning of such words in an insurance policy.—Meyer v. Fidelity & Casualty Co. of New York (Iowa) 65 N. W. 328.

[c] (Mich.; 1897.)

Where an accident policy provides for indemnity for injuries which shall, independently of other causes, wholly disable the insured "from prosecuting any and every kind of business pertaining to his occupation," an insured can recover on direct proof of the injury and evidence that he was in the real-estate business, and that he went to his office every day for a short time, but was unable to do any kind of work.—Turner v. Fidelity & Casualty Co. (Mich.) 70 N. W. 898.

[d] (Wis.; 1895.)

A company is not liable on its accident policy insuring against loss of time for injuries through external and accidental means which shall, independently of all other causes, "immediately" and wholly disable the insured from transacting any business in his occupation, where the insured, injured by a fall, was able for two months to attend partially to his business, but at the end of that time became totally incapacitated by a stroke of paralysis which was the direct result of the accident.—Merrill v. Travelers' Ins. Co. of Hartford, Conn. (Wis.) 64 N. W. 1039, 91 Wis. 229.

§ 135. — Question for jury.

(Wis.; 1894.)

It is for the jury to determine whether a total loss of three fingers and a part of another on the same hand, destruction of the joint of the thumb, and a cutting of the hand is a loss of the hand, "causing immediate, continuous, and total disability," within the meaning of that clause in a policy of accident insurance.—Lord v. American Mut. Acc. Ass'n, 61 N. W. 293, 89 Wis. 19.

§ 136. Excepted risks.

[a] (Iowa; 1895.)

The words "disease" or "bodily infirmity," as used in a provision in an accident policy exempting insured from liability for injuries caused thereby, mean practically the same thing, and only include an ailment or disorder of a somewhat established or settled character, and not merely a temporary disorder, arising from some sudden and unexpected derangement of the system, though it produces unconsciousness.

—Meyer v. Fidelity & Casualty Co. of New York (Iowa) 65 N. W. 328.

[b] (Neb.; 1897.)

A banker who, while in a sawmill to get some boards sawed for a cabinet to be used in the bank, operates a saw to cut off some pieces for handles, is not within the provision of an accident policy declaring it void as to accidents occurring when engaged in any profession, employment, or exposure not ruled in the policy as a preferred occupation; he not being engaged in sawing as a business.—Hess v. Preferred Masonic Mut. Acc. Ass'n of America (Mich.) 70 N. W. 460.

[c] (Neb.; 1895.)

A contract between an accident insurance company and the insured that the policy shall not extend to injuries received while entering a moving conveyance using steam as a motive power, or while riding on a conveyance not intended for passengers, is valid.—Travelers' Ins. Co. v. Snowden (Neb.) 63 N. W. 392, 45 Neb. 249.

[d] (Wis.; 1896.)

A policy insuring against injuries through "external, violent, and accidental means," except when resulting from "intentional injuries" and other specified causes, does not exempt the insurer from liability for injuries inflicted independently by third persons, where the other causes specified all involve acts in which the insured must participate by intent or consent.—Button v. American Mut. Acc. Ass'n (Wis.) 65 N. W. 861.

92 Wis. 83.

§ 137. — Violation of law.

[a] (Iowa; 1894.)

Under a policy providing that the insurance shall not extend to injuries received in consequence of violating the law, the fact that insured was killed in a difficulty soon after leaving a bawdyhouse, and while he was carrying concealed weapons, does not prevent a recovery, it not appearing that his death was the natural result of either his visit to the house or the act of carrying the weapon.—Jones v. United States Mut. Acc. Ass'n of City of New York (Iowa) 61 N. W. 485.

92 Iowa, 652.

[b] (Iowa; 1895.)

A provision, in an accident insurance policy, that it shall not cover an accident occurring while the insured was violating law, does not apply where the insured was injured on Sunday, while at a friend's, after hunting, though hunting on Sunday is prohibited by Code, § 4072.—Praeder v. National Masonic Accident Ass'n (Iowa) 63 N. W. 601.

[c] (N. D.; 1896.)

One who starts to hunt prairie chickens with a loaded gun in close season does not thereby attempt to kill prairie chickens in violation of laws 1891, c. 69.—Cornwell v. Fraternal Acc. Ass'n of America (N. D.) 69 N. W. 191.

§ 138. Voluntary or unnecessary exposure to danger.

[a] (Iowa; 1894.)

The fact that insured was shot immediately after leaving a bawdyhouse does not prevent a recovery under a policy providing that the insurance shall not extend to injuries due to an "unnecessary exposure to danger."—Jones v. United States Mut. Acc. Ass'n of City of New York (Iowa) 61 N. W. 485.

92 Iowa, 652.

[b] (Iowa; 1895.)

Where, on a dark night, deceased, in his right mind, attempted to walk across a railroad trestle where there was no railing, and nothing to walk on but ties 10 inches apart, he voluntarily exposed himself to unnecessary danger.—Folles v. United States Mut. Acc. Ass'n (Iowa) 62 N. W. 807.

[c] (Iowa; 1895.)

Where the deceased, in going home, crossed a railroad trestle bridge, having a plank walk and fence railing on one side, much used by the public, it cannot be said, as a matter of law, that he exposed himself to danger in so doing.—*Follis v. United States Mut. Acc. Ass'n* (Iowa) 62 N. W. 807.

[d] (Iowa; 1895.)

Going out on water in a boat to fish on a dark night, without knowledge that snags are there, is not an exposure to "unnecessary danger," within a provision in an accident policy exempting the insurer from liability for injuries from "voluntary exposure to unnecessary danger."—*Collins v. Bankers' Acc. Ins. Co.* (Iowa) 64 N. W. 778.

[e] (Mich.; 1895.)

Under an insurance policy, providing that it should be void if the accident occurred from voluntary or unnecessary exposure to danger, no recovery can be had for the death of the assured caused by jumping from a moving train after it had passed a station.—*Smith v. Preferred Mut. Acc. Ass'n (Mich.)* 62 N. W. 990. 104 Mich. 634.

[f] (N. D.; 1896.)

One who hunts for game with a loaded gun does not expose himself to unnecessary danger, so as to render void an accident insurance policy.—*Cornwell v. Fraternal Acc. Ass'n of America* (N. D.) 69 N. W. 191.

[g] (N. D.; 1896.)

It is not exposure to unnecessary danger, within the meaning of an accident insurance policy, for insured to attempt to scale a bank with a loaded gun in hand.—*Cornwell v. Fraternal Acc. Ass'n of America* (N. D.) 69 N. W. 191.

[h] (Wis.; 1896.)

A policy of accident insurance providing that the insurance does not cover death or injury resulting wholly or in part, directly or indirectly, from exposure to unnecessary danger, must be construed as including all cases arising from exposure to unnecessary danger where such exposure is attributable to the failure on the part of assured to exercise ordinary care.—*Shevlin v. American Mut. Acc. Ass'n (Wis.)* 68 N. W. 866.

[i] (Wis.; 1896.)

Where a policy of accident insurance does not cover death or injury resulting from exposure to unnecessary danger, the act of the assured in jumping from a rapidly moving freight car without any reasonable cause therefor, on a dark night, is an act of gross negligence precluding recovery under the policy for the injuries received.—*Shevlin v. American Mut. Acc. Ass'n (Wis.)* 68 N. W. 866.

§ 139. Proximate cause of death.**(Iowa; 1895.)**

Evidence that deceased broke his limb; that it turned black, and that the discoloration extended to the body; and that he was in great pain,—is sufficient to sustain a finding that the injury was the proximate cause of death, though there was evidence that deceased was at times intemperate.—*Prader v. National Masonic Accident Ass'n (Iowa)* 63 N. W. 601.

§ 140. Sufficiency of evidence as to cause of death.**(Iowa; 1895.)**

Evidence that deceased was sober when he left home with two others; that each drank from a quart bottle of whisky, of which some was left when they returned; that deceased then drank two glasses of wine; and that he was then injured by stepping into a hole,—does not show that deceased was injured while under the influence of intoxicating drink, it appearing that he was considered sober by those in company with him.—*Prader v. National Masonic Accident Ass'n (Iowa)* 63 N. W. 601.

XIII. MUTUAL FIRE COMPANIES.**§ 141. Incorporations and by-laws.****[a] (Iowa; 1895.)**

The articles of a corporation provided that the general nature of the business should be "the insurance of the property of its members"; that the fund for payment of losses, etc., "shall consist exclusively of money raised by assessment on mutual pledges given by the members for their insurance." They also provided for a guaranty fund, and a board of directors "chosen by the guarantors or shareholders from among their numbers"; that the guaranty fund should not exceed \$50,000, and should consist of shares of \$100 each; that the guaranty fund should be secured by the obligations of the holders, in such form as the directors approved, and be subject to assessment by the board, not exceeding 10 per cent. in any six months, to meet losses and expenses, when there is not sufficient raised by assessments on pledges of members; that the property of members and the subscribers to the guaranty fund should be exempt from corporate debts, except, etc. *Held*, that the corporation was not a stock company, but a mutual company, as authorized by Code, tit. 9, c. 4, § 1160, providing that nothing in the chapter shall prevent persons from making mutual pledges and giving valid obligations to each other for their own insurance, but such associations shall in no case insure property not owned by one of their own members, except schoolhouses and churches.—*Corey v. Sherman (Iowa)* 64 N. W. 828.

[b] (Iowa; 1895.)

The by-laws of a mutual insurance company provided that each applicant should deposit his application and his mutual pledge, "on which he shall pay — per cent., which shall be indorsed thereon at date of the policy." Appended to each application for mutual policies issued was an obligation by which the applicant promised to pay a specified sum at such time and in such installments, not exceeding one-sixth in any year, as the directors should order. The by-laws and mutual policies also provided for the cancellation of the policy and surrender of assured's obligation on payment of all sums for which he was liable. The company also issued for cash premiums, and, without requiring applications or other undertakings, policies which provided for their cancellation and a refund of the premium after deducting the short rates, and that after being in force one year, or in case of cancellation by the company, the assured should share in the dividends during the time the policy was to run. *Held*, that such cash policies were issued on the stock plan, and without authority, and that the holders of mutual policies could not be assessed on their obligations to pay losses under such cash policies.—*Corey v. Sherman (Iowa)* 64 N. W. 828.

[c] (Minn.; 1896.)

Where the secretary of a mutual fire insurance company testified, from his belief only, that notice of amendment of a by-law was served by mail on all members, and the plaintiff member testified positively that he received no notice, whether notice was given was for the jury.—*Morris v. Farmers' Mut. Fire Ins. Co. of Harmony (Minn.)* 65 N. W. 655. 63 Minn. 420.

§ 142. Right to membership.**(Iowa; 1895.)**

Only the policy holders in a mutual fire insurance company are members thereof; and contributors to a guaranty fund, to be used for payment of loss in case the funds for which the statutes provide are insufficient, cannot be made members and directors.—*Berry v. Anchor Mut. Fire Ins. Co. (Iowa)* 62 N. W. 681.

§ 143. Payments for insurance.

(Neb.; 1896.)

Under Act March 30, 1891 (Laws 1891, c. 35) § 8, which declares each policy holder in a mutual insurance company formed under the act shall, "at the time of effecting the insurance, pay such percentage in cash and such other charges as may be required by the rules and by-laws of the company," the amount to be paid, and the question whether any advance payment shall be made by the insured, depend alone upon the rules and by-laws of the company; but payments must be made in current money, and payment by note is hence insufficient.—State v. Moore (Neb.) 67 N. W. 876.

48 Neb. 870.

§ 144. Guaranty obligations.

[a] (Iowa; 1895.)

Code, tit. 9, c. 4, § 1146, requiring all notes taken for insurance to state on their face that they were so taken, does not apply to deposit notes of members and holders of policies of a mutual company organized under section 1160, which authorizes the organization of mutual insurance companies which shall not be subject to other provisions of the chapter.—Corey v. Sherman (Iowa) 64 N. W. 828.

[b] (Iowa; 1895.)

The organizers of a mutual insurance company published notices that it would have a guaranty fund not to exceed \$50,000, "which shall be paid as ordered by the directors and as required in said articles and by-laws." The company issued advertisements stating that the guaranty fund was pledged to prompt payment of losses should other funds be inadequate; and that it was to protect policy holders against an assessment of more than one-sixth the amount of their notes in any year; while it was not an asset, and afforded no such protection. *Held*, that such false representations did not constitute such fraud as entitled subsequent members and policy holders to be relieved from liability on their premium notes. Kinne and Demer, J.J., dissenting.—Corey v. Sherman (Iowa) 64 N. W. 828.

§ 145. Assessments.

[a] (Mich.; 1896.)

A member of a mutual fire insurance company, who contracts to pay for losses and expenses, cannot be assessed for unearned premiums. Insurance Co. v. Merrill (1891) 59 N. W. 661, 101 Mich. 393, followed.—Warner v. Delbridge & Cameron Co., 68 N. W. 283.

[b] (Mich.; 1896.)

The charter of a mutual fire insurance company provided that all assessments should be made by the directors, who should ascertain the amount of loss, determine the sum to be raised as surplus fund, and make an assessment embracing the loss, the expenses incident thereto, and the sum to be raised as surplus, which assessment should be handed to the secretary, who should notify the members. *Held*, that an assessment made by the secretary, in accordance with the resolution of the directors that such assessment was necessary, without the formal approval of the directors, was invalid, and the failure of a member to pay the same would not forfeit his policy.—Johnson v. Farmers' Mut. Fire Ins. Co. of Kent County (Mich.) 68 N. W. 290.

[c] (Mich.; 1896.)

Such assessment was not rendered valid by the signature of the directors individually to the assessment roll, in the absence of any action by the board as a body.—Johnson v. Farmers' Mut. Fire Ins. Co. of Kent County (Mich.) 68 N. W. 290.

[d] (Wis.; 1895.)

An assessment on members of a millers' mutual insurance company, in winding up its affairs, may be made to include the expenses of the receivership, and may be made large enough

in amount to cover shrinkage and loss by uncollectible assessments.—Seamans v. Millers' Mut. Ins. Co. (Wis.) 63 N. W. 1059.
90 Wis. 490.

§ 146. Withdrawal of members and release from liability.

[a] (Wis.; 1895.)

Sanb. & B. Ann. St. § 1911c, provides that all persons insured in a millers' mutual insurance company shall give their obligation to pay such company their pro rata of the necessary expenses and losses. *Held*, that the directors, in winding up the affairs of said company, could not release members from further liability by surrendering the premium notes on the payment of an assessment which was insufficient to meet existing claims, and the court had power, at the instance of the creditors, to order another assessment.—Seamans v. Millers' Mut. Ins. Co. (Wis.) 63 N. W. 1059.
90 Wis. 490.

[b] (Wis.; 1895.)

Sanb. & B. Ann. St. § 1911f, relating to millers' and manufacturers' mutual insurance companies, provides that a member may withdraw by giving notice in writing, and paying all dues and his ratable share of all losses up to the date of his withdrawal. *Held*, that the payment of an assessment levied by the directors, in winding up the affairs of the company, which was insufficient to meet all claims, and the surrender of the premium note, did not relieve a member from further liability.—Seamans v. Millers' Mut. Ins. Co. (Wis.) 63 N. W. 1059.
90 Wis. 490.

§ 147. Annulning policy.

(Wis.; 1895.)

The act of the directors of a millers' mutual insurance company, in deciding to cease business, and levying an assessment on members to meet outstanding claims, does not annul the policy, within the meaning of Sanb. & B. Ann. St. § 1911f, providing that they shall have power to annul the policy by giving notice to the holder thereof, and paying any sum which may be due from the company to such member.—Seamans v. Millers' Mut. Ins. Co. (Wis.) 63 N. W. 1059.
90 Wis. 490.

§ 148. Insolvency.

[a] (Iowa; 1895.)

The insolvency of a mutual insurance company and its assignment for benefit of creditors do not terminate the obligation of members and policy holders to contribute to payment of losses which occurred prior to the assignment.—Corey v. Sherman (Iowa) 64 N. W. 828.

[b] (Wis.; 1895.)

Where a mutual insurance company becomes insolvent, the order of the court appointing a receiver cancels all existing policies, and no assessment can be made for premiums unearned at the time of insolvency.—Davis v. Shearer (Wis.) 62 N. W. 1050.
90 Wis. 250.

[c] (Wis.; 1895.)

An assessment on premium notes given to a mutual insurance company may include shrinkage, interest on loss claims and expenses of receivership where the company has become insolvent.—Davis v. Shearer (Wis.) 62 N. W. 1050.
90 Wis. 250.

XIV. MUTUAL BENEFIT INSURANCE.**1. IN GENERAL.****§ 149. The contract.**

(Iowa; 1897.)

A certificate of membership in an organization, which promises to pay to the member,

in the event of his total disability, the sum of \$1,500, or, in the event of his death, a like sum to his wife, is an ordinary contract of insurance against death and total disability from whatever cause.—*Murdy v. Skyles* (Iowa) 70 N. W. 714.

§ 150. Corporations and associations.

[a] (Iowa; 1895.)

A fraternal and benefit association that requires, for membership, no medical examination, unless a benefit certificate is desired and such members are required to pay assessments based on their age, with additional assessments, from time to time, on death losses, is, as regards its beneficial object, an insurance company, subject to the provisions of McClain's Code, § 1733, that "all insurance companies or associations" shall attach to the policy a copy of any application which, by the terms of the policy, is made a part thereof, or affects the validity of the policy, an omission to do which shall preclude the insurer from relying on the application as a defense to the policy.—*Grimes v. Northwestern Legion of Honor* (Iowa) 64 N. W. 806.

[b] (Iowa; 1895.)

Acts 21st Gen. Assem. c. 65, relating to the incorporation and regulation of mutual benefit societies, and providing (section 20) that corporations doing business for the payment of death losses by an assessment on its members shall not be subject to the general insurance laws, and (section 21) that secret fraternal societies complying with the provisions of the act shall be entitled to the privileges thereof, does not exempt a fraternal society which also does an insurance business, but fails to comply with the act, from the provisions of McClain's Code, § 1733, requiring any application which affects the validity of the policy to be attached to or indorsed on the policy.—*Grimes v. Northwestern Legion of Honor* (Iowa) 64 N. W. 806.

§ 151. — Franchises and powers.

[a] (Mich.; 1897.)

Under Gen. Laws 1887, Act No. 187 (as amended by Gen. Laws 1895), § 3, subd. 3, requiring the articles of incorporation of a mutual life insurance company to state definitely and correctly the object of the incorporation, the number of classes of members therein, and the object or purpose of such classification, where the articles do not provide for the payment of policies except on the death of the insured, the issuance of a policy payable on the occurrence of total disability is unauthorized.—*Preferred Masonic Mut. Life Ins. Co. v. Giddings* (Mich.) 70 N. W. 1026.

[b] (Mich.; 1897.)

Under Act June 17, 1887, authorizing associations to incorporate for the purpose of carrying on the business of insuring the lives of their members; and Pub. Acts 1895, No. 58, § 11, declaring that any such corporation may provide in its policy for payment, at stated periods, of premiums or assessments for the purpose of accumulating and maintaining a mortuary, an emergency, and a reserve fund, provided nothing in the act shall be construed to permit a contract promising any fixed amount to a certificate or policy holder, except in case of death or total permanent disability,—policies may be issued payable only in case of death, on which premiums shall be paid at stated periods during life, or for a number of years only, and insuring a member for life, or for a stated number of years; and a policy may be issued on the joint lives of members.—*Home Life Assur. Co. v. The Attorney General* (Mich.) 70 N. W. 1031.

[c] (Wis.; 1897.)

A benefit society organized under Sanb. & B. Ann. St. § 1771, authorizing the formation of corporations for the mutual benefit of members, their families or kindred, has no power to issue a certificate for the benefit of one not of

the family or kindred of the member.—*Groth v. Central Verein Der Gegenseitigen Unterstuetzungs Gesellschaft Germania* (Wis.) 70 N. W. 80.

Foreign companies, see post, § 185.

§ 152. — Officers.

(Iowa; 1895.)

Where the by-laws of a mutual benefit insurance society provide that assessments for death losses shall be levied by the board of directors, the board cannot delegate such power to the president.—*Garretson v. Equitable Mut. Life & Endowment Ass'n* (Iowa) 61 N. W. 952. 93 Iowa, 402.

§ 153. — Reorganization.

(Minn.; 1895.)

The incorporation of an endowment association having been declared invalid, officers of the association, with others, organized a corporation to carry on the same business; and, for the protection of stockholders in the old association, the new company accepted a transfer of an endowment fund collected by the former, which it agreed to credit to the former's members, and agreed to accept all such members who desired to join it, and to give them credit on its books for their share of said fund, and to pay them, if they did not join it, on surrender of their certificates, their share of said fund, and passed a resolution offering certificates to members of the old association for one-half the amount of their old certificates, without charging them an admission fee. *Held*, that a member of the old association who did not accept the proposition for transfer, or call for his share of the fund, who was never recognized as a member by the new company, and against whom the new company made no assessments, could not recover on his old certificate against the new association.—*Adams v. Northwestern Endowment & Legacy Ass'n* (Minn.) 65 N. W. 360.

63 Minn. 184.

§ 154. By-laws or rules as part of contract.

[a] (Mich.; 1896.)

By-laws of a mutual benefit society, giving it 90 days after maturity of benefit certificates in which to pay losses, and forbidding transfers of membership certificates, do not affect the rights of holders of certificates issued before such by-laws were passed.—*Wheeler v. Supreme Sitting of Order of Iron Hall* (Mich.) 68 N. W. 229.

[b] (Wis.; 1896.)

Where, under the application and certificate of membership, a mutual benefit association was not to be liable for the death of the assured by suicide, the association cannot be held liable for such death, even though neither the by-laws nor other rules of the association authorize such limitation.—*McCoy v. Northwestern Mutual Relief Ass'n* (Wis.) 66 N. W. 697.

92 Wis. 577.

§ 155. Change in laws—Effect on existing members.

(Mich.; 1895.)

The articles of association of defendant order provided that the association could change its constitution and laws, and that members could receive a benefit, to be paid in such sums and at such times as may be provided by the laws governing such payment, or in the certificate of membership. A certificate provided that if the member should pay his assessments punctually, and maintain himself in good standing, he should be entitled to receive, etc., but with no time set for payment. Afterwards defendant order adopted a by-law providing that final benefits should be adjusted within 90 days, and that claims should be filed within 30 days from the expiration of the certificate. *Held*, that the by-law did not affect the time for bringing a suit on such certificate.—

Cohen v. Supreme Sitting of Order of Iron Hall (Mich.) 63 N. W. 304.
105 Mich. 283.

§ 156. What constitutes endowment insurance.

(Mich.; 1894.)

The constitution of a fraternal association provided that it might issue endowment or life certificates, not exceeding \$250 each, payable in 100 months or on total disability or death; and that, when there was a sufficient sum in the maturity fund, the lowest serial number of the endowment certificates might be retired. *Held*, that the sum provided by such certificates to be paid was an endowment fund. —Walker v. Giddings (Mich.) 61 N. W. 512.
103 Mich. 344.

§ 157. Power to issue endowment insurance.

[n] (Mich.; 1894.)

Laws 1869, Act 101 (How. St. c. 118) § 1, authorized not less than live persons to incorporate to secure to the family or heirs of a member on his death a certain sum of money by assessment on the members, or to secure in the same manner a certain sum, weekly or monthly, to a member disabled by sickness or otherwise. *Held*, that a fraternal beneficiary association organized under such act was not authorized to conduct an "endowment insurance" business. —Walker v. Giddings (Mich.) 61 N. W. 512.
103 Mich. 344.

[b] (Mich.; 1894.)

Pub. Acts 1863, No. 119, defines fraternal beneficiary associations, and provides who may be beneficiaries, and how such association may be organized. Section 3 provides that all such associations, organized under the laws of and now doing business in the state, shall be considered duly organized, and "may continue such business," provided they comply with the requirements of the act as to annual reports, etc. *Held*, that such act does not authorize a fraternal beneficiary association organized under Laws 1869, Act 104, which has been unlawfully conducting the business of "endowment insurance," to continue to do business by complying with the requirements as to reports, etc. —Walker v. Giddings (Mich.) 61 N. W. 512.
103 Mich. 344.

§ 158. Amount of benefit or endowment.

[a] (Iowa; 1895.)

An agreement by an endowment association that, upon surrender of a policy after it has been in force for 10 years, the association would pay to the holder "his full share of the endowment fund of said association, not exceeding \$1,000, it being thereby declared to be the design and purpose of this association to provide the full sum of \$1,000 for each insurance certificate," is not an absolute promise to pay \$1,000, but merely a promise to pay the holder his share of the endowment fund of the association, not exceeding \$1,000. —Gongower v. Equitable Mut. Life & Endowment Ass'n (Iowa) 63 N. W. 192.

[b] (Minn.; 1895.)

The articles of a mutual benefit insurance association provided that the funds to pay the beneficiary of a deceased member should be raised by contributions by the members of such dues as the by-laws provided; "said sum in no case to exceed the total sum of such dues remaining (received) in the treasury of said society." The by-laws (made a part of the certificate of membership) expressly provided that the amount to be paid should be one dollar for each member, not exceeding the limit of the benefit. *Held*, that the articles of association contingently reduced the sum to be paid to the amount realized from an assessment on the members, the beneficiary being prima facie entitled to recover a sum equal to one dollar for

each member. Lake v. Minnesota Masonic Relief Ass'n (Minn.) 63 N. W. 261.
61 Minn. 96.

§ 159. Guaranty fund—Rights and liabilities of contributors.

[a] (Iowa; 1895.)

A mutual benefit insurance company may provide for a guaranty fund, the contributors to which shall be liable for losses only when the funds of the company for which the statutes provide are insufficient to pay the losses, provision being made for repayment of the money advanced by such contributors when it can be raised by assessment on the pledges of the members of the company. —Berry v. Anchor Mut. Fire Ins. Co. (Iowa) 62 N. W. 681.

[b] (Iowa; 1895.)

Since contributors to the guaranty fund are presumed to know that a provision in the articles that they shall be members of the association, and that its directors shall be chosen from them, is invalid, such a provision does not invalidate guaranty fund notes given by them. —Berry v. Anchor Mut. Fire Ins. Co. (Iowa) 62 N. W. 681.

§ 160. Beneficiaries—Designation and rights.

[a] (Mich.; 1895.)

Under the by-laws of a firemen's benefit association, providing that any member retired after 25 years' service continues to be an active member on paying the dues and assessments for active membership, and that on the death of any active or retired member an assessment shall be levied on each surviving member, and paid to the beneficiary named by the deceased member, the beneficiary of one injured while an active member, in the performance of his duty, and then placed by the fire department on the retired and pension list, without having performed 25 years' service, but who paid up the dues and assessments of an active member until his death, which resulted from such injury, is entitled to the assessment on the surviving members. —Neville v. Detroit Firemen's Fund Ass'n (Mich.) 62 N. W. 169.
104 Mich. 149.

[b] (Mich.; 1897.)

A person insured in a benefit association can charge his beneficiary with payment of a debt out of the insurance money. —Woodruff v. Tihman (Mich.) 70 N. W. 420.

[c] (Minn.; 1894.)

A policy of mutual life insurance for the benefit of "legal representatives" held payable to the widow and children as heirs or next of kin, rather than to the executor or administrator. —Schultz v. Citizens' Mut. Life Ins. Co. (Minn.) 61 N. W. 331.
59 Minn. 308.

[d] (Minn.; 1896.)

Where a beneficial association, by its certificate, agreed to pay within 60 days after notice and proof of death, to the member's wife, if living, if not living then to the member's heirs or assigns, a sum ascertainable, the words "if living" and "if not living" referred to the date of the member's death; hence the widow's right as beneficiary became vested on the husband's death, and on her death, six days thereafter, her heirs were entitled to the fund. —Kottman v. Minnesota Odd Fellows Mut. Ben. Soc. (Minn.) 68 N. W. 732.

[e] (Neb.; 1897.)

Where the holder of a certificate in a mutual benefit association should have submitted it to the supreme secretary of the association as a condition to the right to designate his parents as beneficiaries, such presentation will be presumed where the designation was made on the certificate, and the insured subsequently, for a number of years, paid assessments for their benefit. —Shryock v. Shryock (Neb.) 70 N. W. 515.

[C] (Wis., 1895.)

Where the charter of a benevolent corporation provides that its purpose is to assist and give pecuniary aid to the widows and "orphans" of deceased members, and its constitution provides that a member may designate to whom benefits shall be paid in case of his death, a member may designate as his beneficiary a daughter of his wife by a former husband.—*Renner v. Supreme Lodge of Bohemian Slavonian Ben. Soc. of United States (Wis.)* 62 N. W. 80, 89 Wis. 401.

§ 161. Designation of subordinate lodge as beneficiary.**(Minn., 1895.)**

Where a by-law of a mutual benefit association provides therefor, a subordinate association, though unincorporated, may be designated as a beneficiary under a certificate of membership.—*Finch v. Grand Grove, etc., Ancient Order of Druids (Minn.)* 62 N. W. 384, 60 Minn. 308.

§ 162. Change of beneficiary.**[a] (Iowa, 1897.)**

Assured in a benefit society may change the beneficiary; there being no inhibition in the endowment certificate, articles of incorporation or by-laws of the society, or the statutes.—*Carpenter v. Knapp (Iowa)* 70 N. W. 764.

[b] (Iowa, 1897.)

A provision on the back of the certificate in a benefit society that "in case of assignment of the within certificate the beneficiary must consent thereto, and said assignments must be approved by the secretary; * * * otherwise the assignment shall be void,"—does not limit the power of assured to change his beneficiary.—*Carpenter v. Knapp (Iowa)* 70 N. W. 764.

[c] (Mich., 1895.)

The rules of a benefit association provided that a change of beneficiary could be made only by indorsing the desire for change on the back of the certificate, and paying a recording fee. Deceased took out a policy in favor of his wife, and, after divorce from her, made a sworn statement to the company that he desired a change of beneficiary, and could not obtain possession of the certificate from his former wife. On the company's disapproval of the application, he disposed by will of the proceeds to become due on the policy. *Held*, that such disposition created a valid change of beneficiary.—*Grand Lodge of Ancient Order of United Workmen v. Kohler (Mich.)* 63 N. W. 897.

[d] (Minn., 1895.)

The by-laws of a benefit insurance company provided that no change of beneficiaries should be made except on application by the member, when the old certificate should be canceled, and a new one issued. A member took out a certificate payable to his daughter, and delivered it to another for safe-keeping, and thereafter, without surrendering it, took out another certificate, payable to his wife, and kept the latter until his death. *Held*, that the facts that the member made no written application for a change of beneficiaries, and that it did not appear that he ever requested a change of beneficiaries, did not warrant a conclusion that no application was ever made, so as to preclude a recovery on the later certificate, as against the beneficiary named in the former.—*Becker v. Minnesota Odd Fellows' Mut. Ben. Soc. (Minn.)* 64 N. W. 895.

[e] (Neb., 1897.)

A mutual benefit association provided for payment of a certain sum "at the death of a member, to whomsoever he shall designate, or, if a legatee be not mentioned, then to the heirs at law of the deceased." A clause in a certificate provided: "It is my will that the benefit fund named in this certificate be paid to —, legal heirs, subject to revocation or assignment at pleasure, on presentation of this certificate to the supreme secretary," etc. The insured,

intending to make provision for his parents, indorsed said certificate as follows: "Two thousand dollars of this policy to be paid to my father and mother, if living at the time of my death. [Signed] W. B. S." *Held*, that the act of the insured in directing payment to his father and mother was an original designation, and not a change of beneficiaries, within the meaning of the certificate and laws of the association.—*Shryock v. Shryock (Neb.)* 70 N. W. 515.

§ 163. — Vested rights.**[a] (Iowa, 1897.)**

Where assured in a benefit society has the power to change the beneficiary, a beneficiary named in the certificate has no vested interest therein, enabling him to assign it during assured's life.—*Carpenter v. Knapp (Iowa)* 70 N. W. 764.

[b] (Minn., 1895.)

A by-law of a mutual benefit association provided that on the death of a member the benefit should go (1) to the widow, (2) to his children, etc.; that a member could change the order of payment, and that the benefit would be paid to the party as designated by the member. *Held*, that the widow had no vested right in the benefit, so as to prevent the member from changing the beneficiary.—*Finch v. Grand Grove, etc., Ancient Order of Druids (Minn.)* 62 N. W. 384, 60 Minn. 308.

§ 164. Assignment of certificate.**(Wis., 1897.)**

Laws 1887, c. 1, relating to mutual life insurance companies, provides (section 14) that any member may direct the amount to be paid to a person named, other than the beneficiary named in the certificate. *Held*, that one who effects insurance on his own life in a company organized under such chapter may assign the certificate to any person, whether he have an insurable interest or not, without any reference to the beneficiaries named in it.—*Strike v. Wisconsin Odd Fellows Mut. Life Ins. Co. (Wis.)* 70 N. W. 819.

§ 165. Remedies of beneficiaries—Necessity of compelling assessments.**(Iowa, 1895.)**

Where an accident policy provided for payment of a certain sum in case of death, and that such payment should be conditioned "upon the same being realized from assessments" under the laws of New York, and the by-laws of the company provided for assessments to pay losses where there were no funds on hand, the beneficiary can sue at law to recover the amount, and need not file a bill to compel the levy of the assessment.—*Pollis v. United States Mut. Acc. Ass'n (Iowa)* 62 N. W. 807.

§ 166. Surrender of certificate—Consideration.**(Wis., 1897.)**

Where a benefit society, under Sanb. & B. Ann. St. § 1771, could not issue a certificate for the benefit of one not of the family or kindred of the member, a surrender of the certificate for the benefit of the parents of the member was without consideration, when made in order to substitute strangers as beneficiaries.—*Groth v. Central Verein Der Gegenseitigen Unterstuetzungs Gesellschaft Germania (Wis.)* 70 N. W. 80.

§ 167. Misrepresentation or fraud.**(Iowa, 1895.)**

A certificate for reinstatement reciting that insured is in good health is not such a misrepresentation as will avoid the policy, though insured at the time had a cold, and died a few weeks later of cancer, the exact nature of the latter disease not being discovered until just before death.—*Seiverts v. National Ben. Ass'n of Minneapolis (Iowa)* 64 N. W. 671.

§ 168. — **Waiver.**

[a] (S. D.: 1895.)

Laws 1890, c. 51, § 21, providing that, where an insurance company defends on the ground of the intemperate habits of the insured, it shall be a sufficient reply for the plaintiff to show that such habits were generally known in the community where the insurance company's agent resided, if thereafter the company continued to receive premiums, does not apply to mutual benefit associations. — *Knudson v. Grand Council of Northwestern Legion of Honor* (S. D.) 63 N. W. 911.

[b] (Wis.: 1896.)

A company which had issued a certificate payable to a woman described in the application as the wife of insured was afterwards notified by him that she was not his wife, and requested to correct the certificate. Ten days later, the company wrote him to return the certificate for correction, at the same time sending him notice of an assessment, which assessment was paid by the beneficiary after the death of the assured, and retained by the company. *Held*, that there was a waiver of the misrepresentation as to the relationship of the beneficiary to the assured. — *Seibel v. Northwestern Mut. Relief Ass'n* (Wis.) 68 N. W. 1009.

§ 169. **Modification of contract.**

[a] (Iowa: 1895.)

Where a policy provided that insured may, within 15 days after his assessment becomes due and unpaid, be reinstated by the payment of the assessment and a fine, the insurer cannot alter the contract by the subsequent adoption of a by-law providing for such reinstatement on condition that insured was then in good health. — *Seiverts v. National Ben. Ass'n of Minneapolis* (Iowa) 64 N. W. 671.

[b] (Mich.: 1896.)

A mutual benefit society which issues to a member a certificate of insurance, conditioned, among other things, on "paralysis so extensive as to produce absolute disability," cannot modify the certificate, by excluding this cause of disability, without the express consent of the member. — *Starling v. Supreme Council Royal Templars of Temperance* (Mich.) 66 N. W. 340.

§ 170. **Proof of loss.**

(Mich.: 1894.)

Where the laws of a benefit society provide that "further proof may be required if deemed necessary by the supreme commander," the society cannot demand further proof of loss, after the usual proof has been made, unless the supreme commander personally "deems" it necessary. — *Tosserum v. Supreme Commandery of the United Friends of Michigan* (Mich.) 61 N. W. 261.

103 Mich. 185.

2. **PAYMENT OF DUES. FORFEITURE OF MEMBERSHIP.**§ 171. **In general.**

[a] (Neb.: 1897.)

The parties may stipulate that the certificate shall not become operative until all charges and assessments are paid. — *Modern Woodmen Acc. Ass'n v. Kline* (Neb.) 69 N. W. 943.

[b] (Neb.: 1897.)

Receipt by the association, subsequent to the injury sued for, of the sum necessary to constitute plaintiff a member from that date, he being then informed that the certificate does not cover the injury, is not a waiver of payment in full as a condition to the taking effect of the certificate. — *Modern Woodmen Acc. Ass'n v. Kline* (Neb.) 69 N. W. 943.

§ 172. **Assessments.**

[a] (Iowa: 1895.)

An assessment to meet liability on a policy in an accident assessment insurance company must be made on the basis of the membership at the date of the accident. — *Collins v. Bankers' Acc. Ins. Co.* (Iowa) 61 N. W. 778.

[b] (Mich.: 1896.)

Where the board of trustees of a mutual benefit association, when less than a quorum was present, after official notice of the death of members, ordered assessments, the irregularity, if any, was cured by the approval of the minutes of such meeting at a subsequent meeting, when a quorum was present. — *Wolf v. Michigan Masonic Mut. Ben. Ass'n* (Mich.) 66 N. W. 576.

[c] (Mich.: 1896.)

A member of an order which is social as well as beneficiary, whose lodge is disbanded for lack of members, and whose transfer card is refused by the other local lodge, is not bound to transfer his membership to a foreign lodge, but may send his assessments to the supreme council. — *Starling v. Supreme Council Royal Templars of Temperance* (Mich.) 66 N. W. 340.

[d] (Minn.: 1895.)

Where a member of a mutual insurance company is assessed on his premium note for losses incurred at a time when he was not a member, or other members liable to assessment are knowingly omitted therefrom, thereby rendering the assessment as to the former member of larger amount, the assessment is voidable as to him. — *Swing v. H. C. Akcley Lumber Co.* (Minn.) 64 N. W. 97.

62 Minn. 169.

§§ 173, 174. — **Notice of assessment.**

[a] (Iowa: 1895.)

Where the constitution of a mutual benefit association requires notice of assessment to be given its members by "mailing them a notice to their last address as shown by the branch books," and a notice is mailed to a member at a different address from that shown in such books, a failure by the assured to pay the assessments will not forfeit his rights under his certificate of membership. — *Molloy v. Supreme Council of Catholic Mut. Ben. Ass'n* (Iowa) 61 N. W. 928.

93 Iowa, 504.

[b] (Iowa: 1895.)

Where a contract of insurance required a notice of assessments to be mailed to the beneficiary, placing a notice, properly addressed and stamped, upon a desk from which the mail carrier, whenever he delivered mail, took letters so left to deposit them in the mail, was not a mailing of the notice within the contemplation of the contract. — *Molloy v. Supreme Council of Catholic Mut. Ben. Ass'n* (Iowa) 61 N. W. 928.

93 Iowa, 504.

[c] (Iowa: 1895.)

The certificate of membership of a benefit association provided that the policy should be avoided by failure to pay the annual dues when due. The by-laws provided that a notice of the amount of annual dues should be given the members 30 days before they became due. *Held* that, in the absence of such notice, the failure to pay the annual dues when due did not avoid the policy. — *Garretson v. Equitable Mnt. Life & Endowment Ass'n* (Iowa) 61 N. W. 952.

93 Iowa, 402.

[d] (Mich.: 1896.)

Articles of a mutual benefit association provided that, when official notice was received of the death of a member, it was the duty of the secretary to notify each member; that each member should, within 15 days after date of such notification, pay to the secretary \$1.10; and, in case he should neglect to pay within 15 days, he should be again notified by the secretary; and, if such sum was not then paid within 15 days after the second notification, his

name should be erased from the roll of members. *Held*, that the legality of notices was not affected by the fact that the second notice was given a day or two earlier than provided by such articles.—*Wolf v. Michigan Masonic Mut. Ben. Ass'n* (Mich.) 66 N. W. 576.

§ 175. — Time for payment.

[a] (Iowa; 1896.)

The by-laws of a mutual benefit association provided that "each member shall pay the amount due on the notice of the collector, within 30 days from the date of such notice," and, on failure to pay, shall stand suspended. A member failed to pay such assessment within 30 days from its date; but, after the expiration of that time, notices of other assessments were sent to said member, requesting him to pay the therein-mentioned assessments due from him, to maintain his standing in the order, and reciting that, "to avoid suspension, this notice must be paid on or before" a certain date, and that "the sending of this notice shall not be held to waive forfeiture or lapse of membership by the nonpayment of previous assessments." Within 30 days after the date of the last notice, said member died, and tender of the amount due on such assessments was made within that time. *Held*, in an action on the certificate of membership, that the sending of said notices extended the time of payment of the overdue assessments.—*McGowan v. Northwestern Legion of Honor* (Iowa) 67 N. W. 89.

[b] (Minn.; 1894.)

Where the articles of an insurance association provide for the assessment of policy holders only "upon every death loss," a by-law which provides that mortuary premiums "shall be due and payable 90 days from date of policy, and every 90 days thereafter," is void, and a failure to pay such premium within such time does not forfeit the policy.—*Schultz v. Citizens' Mut. Life Ins. Co.* (Minn.) 61 N. W. 331.

59 Minn. 308.

[c] (Neb.; 1895.)

A member of a mutual benefit company, whose certificate provided that "all assessments and dues must be paid within thirty days of the date of the notice" calling therefor, does not, by failing to pay within that time, lose his membership, but is precluded from claiming benefits for an injury received after the assessment became due, until its payment.—*National Masonic Acc. Ass'n v. Burr* (Neb.) 62 N. W. 466.

44 Neb. 256.

[d] (Wis.; 1897.)

A by-law of a beneficial order, providing that any member failing to pay an assessment within 30 days after notice "shall stand suspended," is self-executing; and one so in arrears at his decease was not "a member in good standing," within the requirements of a beneficial certificate.—*Freckmann v. Supreme Council of Royal Arcanum* (Wis.) 70 N. W. 1113.

§ 176. — Question for jury.

(Neb.; 1895.)

In an action for benefits under an accident policy, on an issue as to whether plaintiff had sent to the company an assessment before he received the injury, there was evidence that he had mailed a check to the company, which, in due course of mail, would have reached it before that time, and evidence tending to show that it did not reach the company until afterwards. *Held*, that the question was for the jury.—*National Masonic Acc. Ass'n v. Burr* (Neb.) 62 N. W. 466.

44 Neb. 256.

§ 177. Estoppel to claim forfeiture.

(Wis.; 1896.)

The secretary of a mutual benefit association, without authority, entered into a contract of insurance with assured, providing against the liability of the association in case of suicide.

Afterwards a by-law was adopted, providing against such liability, and a new form of certificate issued in accordance therewith. The assured was urged to exchange his old certificate for one of the new form, and, it also appeared, had paid at least two assessments for death by suicide. *Held*, that on the death of the assured by suicide the company was not estopped from pleading the violation as a forfeiture of the contract.—*McCoy v. Northwestern Mutual Relief Ass'n* (Wis.) 66 N. W. 697.

92 Wis. 577.

§ 178. Reinstatement after forfeiture.

(Iowa; 1895.)

A mutual benefit society agreed with a member, who had forfeited her membership, to accept her note for a certain amount and \$5 in cash, in payment of past dues, and to reinstate her, on receipt of a satisfactory health certificate. The society refused to accept the certificate sent, and demanded a re-examination. After the negotiations for a re-examination had fallen through, the member made a proposition for a settlement, which was declined by the society, it claiming that the member was wholly in fault, but the note and postal order for \$5 were retained. The order was cashed by an employé of the society through mistake, but no attempt was ever made to collect the note. No assessments were afterwards paid by the member prior to her death, which occurred four years afterwards, nor were notices sent to her. *Held*, that the society did not waive its rights to demand a satisfactory health certificate as a prerequisite to the member's reinstatement.—*Garretson v. Equitable Mut. Life & Endowment Ass'n* (Iowa) 61 N. W. 952.

93 Iowa, 402.

3. SETTLING DISPUTES IN COURTS—ACTIONS BY BENEFICIARIES.

§ 179. Right to settle disputes in courts.

[a] (Iowa; 1895.)

Provisions in a certificate of insurance that all disputed claims shall be arbitrated before suit and the award be final and conclusive will not be enforced. 54 N. W. 184 (1893) followed.—*Prader v. National Masonic Accident Ass'n*, 63 N. W. 601.

[b] (Mich.; 1895.)

A rule of a benefit society, to which members subscribe on being admitted, providing that the executive committee shall have power to pass on all death claims, and that its decision after a hearing shall be binding on the claimant unless an appeal is taken to the highest council of the order, and that the decision on appeal shall be final, and that no suit in law or in equity shall be commenced by any member or beneficiary against such council, is not invalid as against public policy.—*Fillmore v. Great Camp of Knights of Maccabees* (Mich.) 61 N. W. 785.

103 Mich. 437.

[c] (Mich.; 1896.)

The beneficiary of a mutual benefit association must enforce her claim under the rules of the association, and, in the absence of fraud, must exhaust her remedy under the charter and by-laws before she has any remedy in the courts.—*Fillmore v. Great Camp of the Maccabees* (Mich.) 66 N. W. 675.

§ 180. Action for endowment—Pleading.

(Iowa; 1895.)

In an action for an endowment under an agreement in a certificate that, on surrender of the certificate, after having been kept in force for 10 full years, the association will pay the holder his full share of the endowment fund of the association, not exceeding \$1,000, plaintiff must allege the amount of her share in the endowment fund of the defendant association.—*Gongower v. Equitable Mut. Life & Endowment Ass'n* (Iowa) 63 N. W. 192.

§ 181. Action on certificate.

(Mich.; 1895.)

The holder of a certificate of membership in a mutual benefit society, which provides that suit thereon must be brought within the "nine months next after the death of said person herein assured shall have occurred," cannot bring suit 9 days after the expiration of that time, where defendant had refused to pay the claim in its last letter to plaintiff 15 days after the member's decease.—*Shackett v. People's Mut. Ben. Soc.* (Mich.) 64 N. W. 875.

§ 182. — Defenses.

[a] (Mich.; 1896.)

In an action on matured mutual benefit certificates, the defense that the suit was prematurely brought, on the ground that, under the by-laws, the treasurer could not pay them until certain proceedings were had, and that, if there was no money in the treasury to pay the certificates, an assessment would have to be made, was not available, where it did not appear that the failure to pay was for want of funds in the treasury.—*Wheeler v. Supreme Sitting of Order of Iron Hall* (Mich.) 68 N. W. 229.

[b] (Minn.; 1896.)

A benefit certificate, providing for the payment of a weekly indemnity in case of disability, required that the medical examiner should see the member personally at least once a week during the disability, and certify to the same in the proof. *Held* that, where the failure of the examiner to see the applicant was caused either by his own neglect, or by the neglect of the secretary of the council to which the applicant belonged to notify him of the applicant's disability, the absence of his certificate was no defense to an action for the indemnity.—*Young v. Grand Council of Ancient Order of Aztecs* (Minn.) 65 N. W. 933.
63 Minn. 506.

§ 183. — Evidence.

[a] (Mich.; 1894.)

In an action on a benefit certificate which was made payable to plaintiff when issued, and the beneficiary of which could not be changed by the assured by will or otherwise, the declarations of the assured, after the certificate was issued, that she had misrepresented her age, are not admissible.—*Tessmann v. Supreme Commandery of the United Friends of Michigan* (Mich.) 61 N. W. 261.
103 Mich. 185.

[b] (Mich.; 1896.)

In an action on a fraternal accident policy providing that the company should not be liable in an amount greater than that realized from the assessment of the members, the burden of proof is on the company to show that the amount realized by the assessment was less than the amount claimed; the matter being peculiarly within its knowledge.—*Gnau v. Masons' Fraternal Accident Ass'n of America* (Mich.) 67 N. W. 546.

§ 184. — Question for jury.

(Mich.; 1896.)

Whether a person is totally disabled from following any avocation, within a benefit insurance certificate, is for the jury.—*Starling v. Supreme Council Royal Templars of Temperance* (Mich.) 66 N. W. 340.

XV. INSURANCE COMPANIES.

Mutual benefit companies, see ante, §§ 149-153.
— fire companies, see ante, §§ 141-147.

§ 185. Rights of policy holders on insolvency.

[a] (Minn.; 1896.)

The defendant insurance company was engaged in the business of insuring or indem-

nifying mercantile concerns against "excess losses" caused by the failure or insolvency of customers to whom such concerns had made sales on credit, such losses being ascertained by deducting from the actual losses 15 per cent. thereof, and also 1 per cent. of the total year's sales, to be not less than a stipulated amount. A. took out a policy, to run one year, in which it was stipulated that the year's sales on which the 1 per cent. was to be computed should not be less than \$90,000. When the policy had run 10 months and 7 days the insurer, being insolvent, made an assignment for the benefit of its creditors. During the time the policy ran, the total amount of sales of the insured was \$75,000. For the purpose of determining the excess loss, *held*, the 1 per cent. should be computed on this amount, and not on the \$90,000 aforesaid.—*Smith v. National Credit Ins. Co.* (Minn.) 68 N. W. 28.

[b] (Minn.; 1896.)

The policy of the A. Co. ran the full year for which it was issued, and 9 days thereafter the insured assigned as aforesaid. By the terms of the policy the insured was barred from recovering on the policy unless it made final proof of its year's losses within 30 days after the expiration of the year, which it failed to do. *Held*, the assignment was a breach of the contract, and the insured was entitled to recover on a quantum meruit without furnishing such proof of loss.—*Smith v. National Credit Ins. Co.* (Minn.) 68 N. W. 28.

[c] (Minn.; 1896.)

B. took out a similar policy, which had run but a part of the year for which it was taken out when the insurer assigned as aforesaid. During this time, B. did not suffer a sufficient amount of loss to enable him to recover for the same under the policy; but, during the whole year for which the policy was issued, he did. *Held*, he is not entitled, as against the funds in the hands of the insurance commissioner, deposited under Gen. St. 1894, § 3332, to treat the insurer as a going concern for the balance of the year, so as to recover for losses occurring subsequent to the assignment.—*Smith v. National Credit Ins. Co.* (Minn.) 68 N. W. 28.

[d] (Minn.; 1896.)

The D. corporation took out a similar policy, which ran also but a part of the year, when the insurer assigned as aforesaid. During this time the insured suffered no loss. *Held*, it was not entitled to rescind the contract and recover back the whole premium paid, and was only entitled to recover back the unearned premium for the balance of the year subsequent to the assignment.—*Smith v. National Credit Ins. Co.* (Minn.) 68 N. W. 28.

[e] (Minn.; 1896.)

Policy holders having claims for unearned premiums are entitled to participate in the funds in the hands of the insurance commissioner.—*Smith v. National Credit Ins. Co.* (Minn.) 68 N. W. 28.

[f] (Minn.; 1896.)

The insured was also entitled to recover back the unearned premium for the balance of the year after the assignment.—*Smith v. National Credit Ins. Co.* (Minn.) 68 N. W. 28.

[g] (Minn.; 1896.)

The assignment of a credit insurance company terminates policies as to losses thereafter occurring to the holders by reason of credit given.—*Smith v. National Credit Ins. Co.* (Minn.) 68 N. W. 28.

§ 186. Foreign insurance companies.

[a] (Iowa; 1896.)

McClain's Code, § 1144, providing that no insurance company incorporated under the laws of another state shall, directly or indirectly, take risks or transact any business of insurance in Iowa unless possessed of \$200,000 actual paid-up capital, and that any such company desiring to transact business in Iowa shall file with

the auditor of state a copy of its charter, and a statement showing certain facts regarding its condition, is not unconstitutional.—*Barker v. Lamb & Sons (Iowa)* 68 N. W. 686.

[d] (Wis.: 1896.)

Rev. St. 1878, § 1219, provides that all foreign fire and inland navigation insurance companies doing business in Wisconsin shall pay to the state each year, as a license fee, 2 per cent. on the gross income of the preceding year on business transacted within the state. Section 1220 requires every foreign company doing a life or accident insurance business to pay an annual license fee of \$300 "for the transaction of such business," while domestic companies are subjected to an additional tax of 2 per cent. on their cash receipts for the preceding year. By the subsequent statute, Laws 1880, c. 105, as amended (Sanb. & B. Ann. St. § 1953a), it is provided that foreign accident insurance companies shall be subject to the same fees and taxes as are paid by fire insurance companies doing business in the state. *Held*, that a foreign company doing both a life and an accident insurance business in the state, which has paid the fee of \$300, is subject also to the payment of 2 per cent. on the premiums received from its accident business for the preceding year.—*Travellers' Ins. Co. v. Fricke (Wis.)* 68 N. W. 958.

§ 187. — Mutual companies.

[a] (Iowa: 1896.)

A compliance with a statute requiring foreign insurance companies desiring to do business in the state to first file with the superintendent of insurance authority to accept service of process in their behalf is conclusively presumed from the transaction of business by such a company in the state.—*Sparks v. National Masonic Acc. Ass'n (Iowa)* 69 N. W. 678.

[b] (Iowa: 1896.)

Under Rev. St. Mo. § 5915, providing that any person who receipts for money on account of any insurance company not authorized to do business in the state for a policy in such company, though the same may not be required of him as agent, or who makes any contract for such company, shall be deemed its agent, evidence that the general agent of a foreign insurance company solicited applications in Missouri which were forwarded by him to the home office, where they were entered on the company's register, the applicants paying such agent a membership fee, and that another person in the company's pay afterwards collected assessments in Missouri from the applicants, sufficiently shows that the company was transacting business in that state, though it was provided in the applications that they should not be binding until approved by the secretary in Iowa.—*Sparks v. National Masonic Acc. Ass'n (Iowa)* 69 N. W. 678.

[c] (Minn.: 1896.)

The statute imposing conditions precedent on the doing of business in the state by insurers applies to foreign mutual insurance associations which are unincorporated.—*Seamans v. Christian Bros. Mill Co. (Minn.)* 68 N. W. 1065.

[d] (Wis.: 1896.)

Laws 1893, c. 293, which provided that all foreign mutual fire insurance companies that had been declared insolvent should collect "all claims due" from policy holders within the state for premiums or assessments within six months after the passage of said act, was not restricted to claims actually payable at that time, so as to become the proper subject of an action, but included claims on then existing premium notes for assessments made and notified after such enactment.—*Wyman v. Kimberly-Clark Co. (Wis.)* 67 N. W. 932.

93 Wis. 554.

[e] (Wis.: 1896.)

Laws 1893, c. 293, prescribing a six-months limitation for actions by a "receiver" of a for-

foreign mutual fire insurance company for claims due from policy holders within the state, applies to an action by a "trustee" of such an Ohio company, the same functions being exercised under the laws and practice of Ohio by a trustee that are exercised by a receiver under the laws of Wisconsin.—*Mausfield v. William Becker Leather Co. (Wis.)* 68 N. W. 411.

93 Wis. 656.

§ 188. — Effect of noncompliance with law.

[a] (Iowa: 1896.)

Under McClain's Code, § 1144, prohibiting foreign insurance companies from transacting business in Iowa unless possessed of a certain capital, and complying with other conditions named therein, the receiver of a foreign insurance company which has not complied with such provisions cannot maintain in Iowa an action upon premium notes given for insurance written upon property situated within Iowa.—*Barker v. Lamb & Sons (Iowa)* 68 N. W. 686.

[b] (Mich.: 1895.)

A foreign mutual benefit society which has failed to comply with the laws of the state, and is therefore forbidden, under penalty (1 How. Ann. St. § 4225), to do business in the state, cannot sue under 2 How. Ann. St. § 8136, to recover money assessed against its members in the state, and which was voluntarily paid by such members to defendant, its agent, for the use of the company, as the claim "arose out of" forbidden acts, within the statute.—*People's Mut. Ben. Soc. v. Lester (Mich.)* 63 N. W. 977.

105 Mich. 716.

[c] (Mich.: 1895.)

Sess. Laws 1893, Act No. 74, making it a penal offense to solicit insurance for a non-resident person or corporation without procuring from the insurance commissioner a certificate of authority showing, among other things, that the nonresident has complied with the insurance laws of the state, and has appointed an attorney on whom process may be served, is not in conflict with the section of the United States constitution prohibiting a state from discriminating against the citizens of other states.—*People v. Gay (Mich.)* 65 N. W. 292.

[d] (Minn.: 1896.)

An insurance company which has not complied with the prerequisites to doing business in the state (Gen. St. 1894, §§ 3157, 3161, 3167, 3199) cannot recover premiums on a contract insuring property located in the state, whether the contract was made within or without the state.—*Seamans v. Christian Bros. Mill Co. (Minn.)* 68 N. W. 1065.

[e] (Wis.: 1895.)

A contract by a foreign insurance company insuring property in Wisconsin necessarily involves the doing of business in that state, within the meaning of Sanb. & B. Ann. St. §§ 1915-1919, providing that, except on certain conditions, no foreign fire insurance company shall "directly or indirectly take risks or transact any business of insurance in this state," and assessments on the policy holder cannot be recovered, though the contract was executed outside the state.—*Rose v. Kimberly & Clark Co. (Wis.)* 62 N. W. 526, 89 Wis. 545.

INTENT.

Fraudulent intent of grantee, see "Fraudulent Conveyances," §§ 17-22.

Of testator, construction of will, see "Wills," § 34.

Opinion evidence of, see "Evidence," § 50.

INTEREST.

- I. RIGHT TO INTEREST, §§ 1-6.
 II. RATE OF INTEREST, §§ 7-9.
 III. RUNNING OF INTEREST, §§ 10-14.

See, also, "Usury."

Allowance in action on policy, see "Insurance," § 132.

As damages for trespass in cutting timber, see "Trespass," § 8.

As element of damages, see "Damages," § 33.

As penalty for non-payment of tax, see "Taxation," § 81.

Compound interest, see "Usury," § 3.

Computation, construction of mandate, see "Appointed," § 297.

Default in payment, right to foreclose mortgage, see "Mortgages," § 53.

Including interest in judgment for forfeiture of bail, see "Bail," § 5.

Increasing rate after maturity, see "Usury," § 6.

Liability of garnishee, see "Garnishment," § 34.

Personal liability of executor or administrator, see "Executors and Administrators," § 34.

Provision in note, see "Negotiable Instruments," § 5.

Special laws regulating, see "Constitutional Law," § 18.

I. RIGHT TO INTEREST.

On claim against decedent's estate, see "Executors and Administrators," § 26.

On damages allowed in condemnation proceedings, see "Eminent Domain," § 38.

Right of partner to interest on advances, see "Partnership," § 30.

§ 1. In general.

[a] (Neb.; 1895.)

In an action by one surety against co-sureties for contribution, plaintiff is entitled to interest on the amount paid by him from the date of such payment.—*Smith v. Mason* (Neb.) 63 N. W. 41.

44 Neb. 610.

[b] (Wis.; 1896.)

A grantor conveyed timber land, with special warranty without reference to a previous conveyance by him to another of part of the timber standing on the land. After the second conveyance the grantee of the timber entered, and cut the same, and paid the grantor the agreed price therefor. *Held* that, in allowing the grantee of the land the amount so paid the grantor as an offset against the unpaid balance of the price of the land, interest at the legal rate should be allowed on said amount from the time it was paid the grantor, since it was the grantor's duty, on receiving the money, to turn it over to the grantee of the land.—*Gates v. Parnly* (Wis.) 67 N. W. 739.

93 Wis. 291.

§ 2. On money received for another's use. (Neb.; 1896.)

Where a fund is paid a bank for the purpose of having it paid to the person entitled thereto, and the bank, in violation of the trust, transfers the fund, with its assets, to a receiver appointed for it, the cestui que trust is entitled, on recovering the fund of the receiver, to 7 per cent. interest thereon, under Comp. St. c. 41, providing that interest shall be allowed "on money received to the use of another, and retained without the owner's consent, express or implied." *Capital Nat. Bank v. Coldwater Nat. Bank* (Neb.) 69 N. W. 115.

§ 3. On rent installments.

(Mich.; 1894.)

In trespass against one who has held possession of plaintiff's premises after termina-

tion of the lease and due notice to surrender, interest on the several installments of rent from the dates at which they became due is properly recovered.—*Lane v. Ruhl* (Mich.) 61 N. W. 347.

103 Mich. 38.

§ 4. On default for nonpayment of interest coupons.

(Wis.; 1894.)

On foreclosure it is not error to allow interest on deferred payments of interest, as agreed in writing signed by the mortgagor.—*Gibson v. Southwestern Land Co.* (Wis.) 61 N. W. 282, 89 Wis. 49.

§ 5. On claim for work under sewer contract.

(Minn.; 1896.)

A contract with a city provided that plaintiff should be paid a stated gross sum for building certain sewers on the completion and acceptance of the work. It also provided for the granting of estimates during the progress of the work, and for paying the same when there was money in the treasury applicable to the payment of such work; but no interest was to be allowed on them. During the progress of the work, estimates were allowed, but no warrants were issued therefor, or anything paid thereon until after the work was completed and accepted, and the amount due therefor allowed, when warrants were issued from time to time, and paid to the amount of the respective estimates. *Held*, that the sums paid on such warrants were payments pro tanto on the debt then due as an entirety, and not on estimates, and that plaintiff is entitled to interest on his debt, including the amount of the estimates from the date of the completion and acceptance of the work.—*J. D. Moran Mfg. Co. v. City of St. Paul* (Minn.) 67 N. W. 1000.

§ 6. Necessity of demand.

(Wis.; 1897.)

Where a note duly dated provides that interest shall be payable semiannually thereafter, the interest becomes due on a day certain, rendering demand therefor unnecessary.—*Zautcke v. North Milwaukee Town-Site Co.* No. 3 (Wis.) 69 N. W. 978.

II. RATE OF INTEREST.

Rate payable on redemption from mortgage sale, see "Mortgages," § 99.

§ 7. In general.

[a] (Mich.; 1896.)

Where a mortgage note provided 7 per cent. interest for the first two years and 10 per cent. thereafter, and the mortgagee, on default in interest within the first two years, elected, under the mortgage, to declare the whole amount due, and sue therefor, the decree should allow interest at 7 per cent.—*Shelden v. Barlow* (Mich.) 66 N. W. 338.

[b] (Neb.; 1895.)

Comp. St. c. 77, § 181, expressly provides that, on foreclosure of a valid tax-sale certificate, the holder is entitled to recover interest on the amount bid at the sale, and on the several sums paid for subsequent taxes at the rate of 20 per cent. per annum from the date of the sale and said payments, respectively, until the expiration of two years from the date of the purchase, and 10 per cent. interest thereon after that period.—*Osgood v. Grant* (Neb.) 62 N. W. 894.

44 Neb. 350.

§ 8. On foreclosure decree.

(Neb.; 1895.)

The mortgagor could not object to a decree in foreclosure based on a mortgage bond

bearing interest at 6 per cent. until maturity, and 10 per cent. thereafter, which drew interest at 7 per cent. from the date of its rendition.—*Havemeyer v. Paul* (Neb.) 63 N. W. 932.
45 Neb. 373.

§ 9. Legal rate.

[a] (Mich.; 1895.)

Where a dowress purchases the mortgage on land in which dower is assigned her, the rate of interest, as between herself and the remainder-man, is the legal rate of interest, and not that stipulated in the mortgage.—*Hodges v. Phinney* (Mich.) 64 N. W. 477.

[b] (Mich.; 1896.)

How. Ann. St. §§ 5360, 5361, providing for the payment of interest on the university fund, but without specifying the rate, impliedly fixed the same at 7 per cent., that being then the legal rate; and the rate so established for such fund was not affected by a subsequent modification of the usury law, changing the legal rate of interest on money to 6 per cent.—*Regents of University of Michigan v. Auditor General* (Mich.) 66 N. W. 956.

III. RUNNING OF INTEREST.

§ 10. In general.

[a] (Iowa; 1896.)

Where a note, payable to testator with interest, provides that, instead of the maker paying the same in testator's lifetime, the amount of the note may be deducted from the share of testator's estate to be left the maker, the interest on the note ceases to run on the death of testator, the rights of testator's creditors not being involved.—*In re Newcomb's Will* (Iowa) 67 N. W. 587.

[b] (Neb.; 1897.)

A daughter who has made no demand during her father's lifetime for repayment of a gratuitous loan to him is entitled to interest thereon only from the date of filing her claim against his estate.—*Bell v. Rice* (Neb.) 70 N. W. 25.

§ 11. From demand of payment.

(Wis.; 1896.)

Where a vendor sold goods on an open account for a series of years, and, from time to time, sent statements in which no interest was claimed, and no demand was made for payment except the drawing of drafts on the vendee, which were paid, it was error to allow the vendor interest on the monthly balances.—*Ryan Drug Co. v. Hvambasbl* (Wis.) 65 N. W. 873.
92 Wis. 62.

§ 12. From beginning of suit.

[a] (Mich.; 1895.)

Where a certificate of deposit provides for interest if the deposit remains for one year, on suit by the holder within one year, interest runs only from the time the suit was brought.—*Beardsley v. Wehber* (Mich.) 62 N. W. 173.
104 Mich. 88.

[b] (Wis.; 1895.)

Interest on the sum found due to one partner on settlement of partnership transactions in a suit brought for that purpose, the existence of the partnership being disputed, should be allowed from the beginning of the suit, and should not exceed the sum agreed on in the contract.—*Green v. Stacy* (Wis.) 62 N. W. 627.
90 Wis. 46.

§ 13. Suspension during litigation.

(Mich.; 1895.)

The failure of defendant to tender the amount due on a contract, with interest, prevents the suspension of interest on the amount due pending litigation by plaintiff for relief thereon to which he was not entitled.—*Anderson v. Smith* (Mich.) 65 N. W. 615.

§ 14. Method of computation.

(Minn.; 1895.)

Where partial payments are made, interest is to be computed by applying the payment first to interest due, and then to the principal, but, if the payment be less than the interest, the surplus of interest is not to be taken to augment the principal.—*Betcher v. Hodgman* (Minn.) 65 N. W. 96.
63 Minn. 30.

INTERLOCUTORY ORDERS.

When appealable, see "Appeal," § 21.

INTERNATIONAL LAW.

See "Aliens"; "Conflict of Laws"; "Extradition."

INTERPLEADER.

Jurisdiction of proceedings begun in another court, see "Courts," § 25.

[a] (Mich.; 1895.)

In interpleader, the fact that one of the defendants threatens to appeal does not warrant complainant in refusing to pay the money into court, as required by the decree, under a penalty of a dismissal with costs to defendants.—*Look v. McCabill* (Mich.) 63 N. W. 898.

[b] (Neb.; 1897.)

A Nebraska bank sued the beneficiary of a life insurance policy in Connecticut, the home of the insurance company, and, having recovered judgment, instituted *seire facias* against the company. In the meanwhile, one claiming to be the assignee of the policy sued the company thereon in Nebraska, he not having appeared in the Connecticut proceedings, nor become subject to the jurisdiction of that court. *Held* that, under Code Civ. Proc. § 48, the company was entitled to an order requiring the plaintiff in the *seire facias* proceeding to interplead in the latter action, to an order permitting it to pay the funds in its hands into court, and to be thereupon dismissed and discharged from liability for the fund, and to an injunction against the prosecution of the *seire facias* proceeding till said action was finally determined.—*Hartford Life Annuity Ins. Co. v. Cummings* (Neb.) 69 N. W. 782.

INTERPRETATION.

Of contracts, see "Contracts," §§ 26-36.
Of foreign writings, see "Evidence," § 85.

INTERPRETERS.

Allowing accomplice to translate defendant's written instructions for committing the crime, see "Criminal Law," § 63.

INTERROGATORIES.

See "Deposition," § 5; "Discovery," § 4.

INTERRUPTION.

Of adverse possession, see "Adverse Possession," §§ 23, 24.

INTERSTATE COMMERCE.

See "Constitutional Law," §§ 46-52.

INTERVENING CAUSES.

See "Negligence," § 12.

INTERVENTION.

See "Parties," §§ 11-13.

INTESTACY.

See "Descent and Distribution"; "Executors and Administrators."

INTOXICATING LIQUORS.

- I. CONSTITUTIONALITY AND REPEAL OF ACTS, §§ 1, 2.
- II. LOCAL OPTION, §§ 3-7.
- III. LICENSES, TAXES, AND REGULATIONS, §§ 8-23.
- IV. ILLEGAL SALES, AND MAINTENANCE OF SALOONS, §§ 24-27.
- V. KEEPING FOR SALE—LIQUOR NUISANCE, §§ 28, 29.
- VI. CRIMINAL PROSECUTION, §§ 30-42.
- VII. SEARCH AND SEIZURE, §§ 43, 44.
- VIII. ABATEMENT AND INJUNCTION OF LIQUOR NUISANCE, §§ 45-53.
- IX. CIVIL DAMAGE LAWS, §§ 54-63.
- X. RIGHTS OF PROPERTY, AND CONTRACTS, §§ 64-67.

Intoxication as affecting capacity to commit crime, see "Criminal Law," § 6.
 — as contributory negligence, see "Negligence," § 24.
 Providing treatment for habitual drunkards, police power, see "Constitutional Law," § 44.
 Use by jurors, see "Criminal Law," § 176;
 "New Trial," § 20.

I. CONSTITUTIONALITY AND REPEAL OF ACTS.

Expression of subjects in titles, see "Statutes," § 11.

§ 1. Iowa "Muley Law."

[a] (Iowa; 1895.)
 Acts 25th Gen. Assem. c. 62 ("Muley Law"), entitled "An act to tax the traffic in intoxicating liquors and to regulate and control the same," being general in its application to all localities in the state coming within its terms, operates as a repeal of any inconsistent prohibitory law, and is not unconstitutional in delegating to the people in certain cities legislative powers to repeal or abrogate by popular vote the provisions of the prohibitory liquor law, as the act does not depend on such vote to give it validity, but merely to determine the limit of its operations, and whether its provisions shall be adopted by cities coming within its terms. Kinne, J., dissenting.—State v. Forkner (Iowa) 62 N. W. 772.

[b] (Iowa; 1895.)
 The consent of the majority of the electors provided for by the act is merely a condition precedent to action on the part of the city council, to which is then left the determination of the whole matter, not only as to whether the power shall be created, but also as to the con-

ditions of its creation; and the requirement of such preliminary consent of the voters does not invalidate the act on the ground that the whole matter is left to a vote of the people, who are to determine whether the law is to be enforced or not. Kinne, J., dissenting.—State v. Forkner (Iowa) 62 N. W. 772.

[c] (Iowa; 1895.)

Such act is not a local or special law, and does not furnish a diversity of laws in different parts of the state, nor does it violate the constitutional requirements that all laws of a general nature shall have a uniform operation throughout the state.—State v. Forkner (Iowa) 62 N. W. 772.

[d] (Iowa; 1895.)

The provision in such act that its adoption in a city by popular vote shall be a bar to proceedings under the existing prohibitory liquor law is not unconstitutional as granting to the people of a particular locality, or to the city council of cities or incorporated towns, the pardoning power, which, by Const. art. 4, § 1, is lodged in the governor.—State v. Forkner (Iowa) 62 N. W. 772.

Adopting provisions of "Muley Law," see post, §§ 22, 23.

§ 2. Repeal.

(Iowa; 1894.)
 The "Muley Law" (Laws 25th Gen. Assem. c. 62), empowering municipalities to authorize the sale of liquor under certain conditions, does not impliedly repeal the general law prohibiting the sale of liquor.—State v. Van Vleet (Iowa) 61 N. W. 241.
 92 Iowa, 476.

II. LOCAL OPTION.

§ 3. Election to adopt—Order for election.

[a] (Mich.; 1895.)
 Under the local option law of 1889, providing that the order of the board of supervisors for an election "shall be entered in full on the journal of the proceedings for that day, and the same shall be signed by the acting chairman and clerk of the board, before final adjournment," it is sufficient if the journal for the day be signed, and the signatures need not directly follow the order.—Thomas v. Abbott (Mich.) 63 N. W. 984.
 105 Mich. 687.

[b] (Mich.; 1895.)

The requirement that there shall "issue an order" of the board of supervisors directing an election is satisfied by the record of such order in the journal of the board, and the service of copies of the order on the officials named in the act, and the publication thereof.—Thomas v. Abbott (Mich.) 63 N. W. 984.
 105 Mich. 687.

§ 4. — Notice.

(Mich.; 1895.)
 Where, in the journal of the board of supervisors, there are irrelevant orders between the order directing the holding of a special local option election and the signatures of the acting chairman and clerk to the journal of the day, it is proper, in the notices to be posted, to append the signatures at the close of the order directing the election, and to omit the irrelevant orders.—Thomas v. Abbott (Mich.) 63 N. W. 984.
 105 Mich. 687.

§ 5. — Time for holding.

(Mich.; 1896.)
 The local option law (Laws 1889. Act No. 207), § 9, provides that a proposition for prohibition, having been once submitted and decided by the voters in any county, shall not be again submitted within two years next there-

after, but may be again submitted, etc., at the expiration of not less than two years after each such election. Section 13 provides that a resolution of prohibition shall take effect on May 1st, next following its adoption, and shall not be subject to repeal by the board of supervisors within two years next thereafter, after the expiration of which period the board may again, by a majority vote, act as in the first instance, and repeat such resolution, but not unless a majority of the voters shall have declared against prohibition, etc. *Held*, that action by the voters in preparing petitions, and presenting them to the board, or the order of the board in calling an election, need not be delayed until the lapse of two years after a previous election.—*Keefer v. Board of Supervisors of Hillsdale County* (Mich.) 67 N. W. 981.

§ 6. — Conclusiveness of determination of board.

[a] (Mich.; 1895.)

Under the local option law (Acts 1889, No. 207, § 6), the determination of the board of supervisors as to the sufficiency of the petition for a special election, and the requisite number of electors signing the same, is conclusive.—*Thomas v. Abbott* (Mich.) 63 N. W. 984.
105 Mich. 687.

[b] (Mich.; 1895.)

The determination of the board of supervisors as to the result of a local option election is final.—*Thomas v. Abbott* (Mich.) 63 N. W. 984.
105 Mich. 687.

§ 7. Proof of adoption.

(Mich.; 1895.)

Pub. Acts 1889, No. 207 (Local Option Law) § 17, makes the record or a certified copy of the proceedings by the county board evidence that the provisions of the act are in force in the county. Section 14 provides that the regularity of the proceedings prior to the adoption of the prohibitory resolution by the county board shall not be open to question on a prosecution for a violation of the act. *Held* that, on a trial for an unlawful sale of liquor, a certified copy of the preamble and resolution by the county board is sufficient evidence of the existence of prohibition in the county, without proof of the regularity of the proceeding had prior to the adoption of the resolution.—*People v. Whitney* (Mich.) 63 N. W. 765.
105 Mich. 622.

III. LICENSES, TAXES, AND REGULATIONS.

§ 8. Police power.

(Wis.; 1895.)

The licensing of intoxicating liquors is an exercise of the police power, and not of the taxing power of the state to raise revenue.—*Rock County v. City of Edgerton* (Wis.) 63 N. W. 291.
90 Wis. 288.

§ 9. Application for license.

(Neb.; 1896.)

The fact that the description of the premises where an applicant for license desired to sell liquor was erroneously stated in the application was immaterial where it was correctly stated in the published notice of application, and none of the adjacent property owners were misled by the error.—*Waugh v. Graham* (Neb.) 66 N. W. 301.
47 Neb. 153.

§ 10. Injunction against issuance of license.

(Wis.; 1895.)

Equity will not enjoin municipal officers from granting licenses for the sale of intoxicating liquors, at the suit of a private individual, who will suffer no special damage by reason
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of such licenses being granted.—*Nast v. Town of Eden*, 62 N. W. 409, 89 Wis. 610.

§ 11. Mandamus to compel issuance.

(Minn.; 1895.)

The exercise of discretion of a county board in refusing a liquor license will not be controlled by mandamus.—*State v. Board of Com'rs of Carver County* (Minn.) 62 N. W. 1135.
60 Minn. 510.

§ 12. Amount of license.

[a] (Wis.; 1895.)

Laws 1885, c. 296, § 3, requires the city clerk to give notice of a special election to be held for the purpose of determining the amount to be paid for a liquor license "in the manner provided for giving notices of general elections" by Laws 1893, c. 288. *Held*, that a notice published as provided by chapter 288, §§ 9-11, is sufficient, and publication in a newspaper in the city, as required in case of nominations by sections 26, 27, is unnecessary.—*State v. City of Janesville* (Wis.) 62 N. W. 933.
90 Wis. 157.

[b] (Wis.; 1897.)

At the time a liquor license was taken out in the city of Superior, and prior to the constitutional amendment prohibiting the amendment of city charters by special act, the charter of such city provided that the license fee therein should be "not less than \$500, any general law of the state to the contrary notwithstanding." Rev. St. § 1548, as amended by Laws 1885, c. 296, provided that the license fee should be \$200, and (section 6) that section 1548, as amended, should not be construed to diminish the sum required by any city charter to be paid for a license to sell liquor in such city; and Laws 1893, c. 286, § 1, amended said section 1548, as amended by the act of 1885, merely as to the limits of the license year, and re-enacted it as amended. *Held* that, as to the amount of the license, the effect of the act of 1893 was merely to continue section 1548 in force as amended by Laws 1885, so that the amount of the license involved was governed by the charter.—*State v. Howe* (Wis.) 70 N. W. 670.

§ 13. Granting license—Appeal from decision.

[a] (Neb.; 1896.)

The fact that the applicant for liquor license did not state that the 30 signers of his petition were residents as well as freeholders of the ward in which his premises were located could not be first urged on appeal by the remonstrants.—*Waugh v. Graham* (Neb.) 66 N. W. 301.
47 Neb. 153.

[b] (Neb.; 1896.)

In an appeal from the action of a body authorized to hear and decide applications for license to sell intoxicating liquors, in order to properly present any evidence which may have been introduced at the original hearing to the appellate court, it must be reduced to writing, filed in the office of application, and transmitted to the appellate court.—*Waugh v. Graham* (Neb.) 66 N. W. 301.
47 Neb. 153.

§ 14. Revocation of license.

[a] (Wis.; 1897.)

One of three members of a town board of supervisors, who hires a minor to purchase liquor, so as to obtain evidence against the dealer of selling to minors, is incompetent to sit as a member on a hearing to revoke the dealer's license for selling to minors; so that, he sitting, the action of the board revoking his license is void. *Marshall and Newman, JJ., dissenting.*—*State v. Bradish* (Wis.) 70 N. W. 172.

[b] (Wis.; 1897.)

1 Sanb. & B. Ann. St. § 1559, provides that if, upon the hearing of charges of violations of

law by a saloon keeper, "the board shall find the complaint to be true, the license shall be revoked"; and where it is admitted that on such a hearing before a mayor and council the testimony of illegal sales was uncontradicted, and such sales were admitted by the licensee, a refusal to find the charges true is an abuse of discretion on the part of the council, and accordingly mandamus will lie to compel a revocation of the license, where no other adequate remedy is provided. *State v. City of Oshkosh* (Wis.) 70 N. W. 300.

§ 15. — Recovery of fee paid.

(Neb.; 1895.)

Where a liquor license has been issued, and on appeal such license is canceled, the licensee is entitled to a repayment pro tanto of the sum paid for the same, for the unexpired time.—*Chamberlain v. City of Tecumseh* (Neb.) 61 N. W. 632, 43 Neb. 221.

§ 16. Fees and taxes.

[a] (Iowa; 1896.)

Under the "Mule Law" (Acts 25th Gen. Assem. c. 62, § 1), providing that the "tax" for the privilege of selling liquors shall be a lien upon all property, both real and personal used in carrying on the liquor business, such lien is not superior to a mortgage existing at the time the lien attaches.—*Smith v. Skow* (Iowa) 66 N. W. 893.

[b] (Iowa; 1897.)

The tax imposed by the mule law (Laws 1894, c. 62, § 1) on liquor dealers, which it provides "shall be assessed against every person, partnership or corporation" engaged in the business, creates a personal liability on the part of the dealer, which may be enforced by an ordinary action, notwithstanding the lien also given therefor on the real estate wherein the liquors are sold and on all personal property used in connection with the business.—*Marshall County v. Knoll* (Iowa) 69 N. W. 1146.

[c] (Mich.; 1895.)

The payment in advance of the annual tax required by law is a condition precedent to engaging in the business of selling liquors, under 3 How. St. § 2283d, requiring payment of such tax on or before the 1st day of May; and the fact that a dealer may have been engaged in the business during the preceding year will not render lawful sales made by him on the 1st day of May, before payment of such tax, on the ground that he is privileged, under section 8, to furnish the bond therein required on that day, and may lawfully continue the business until he has an opportunity to file it.—*People v. Gault* (Mich.) 62 N. W. 724.

104 Mich. 575.

[d] (Neb.; 1896.)

A license issued without payment in full of the fee prescribed by law is invalid.—*Fry v. Kaessner* (Neb.) 66 N. W. 1126.

48 Neb. 133.

§ 17. Disposition of license moneys.

[a] (Iowa; 1897.)

A school-district township is not a "municipality," within Laws 1894, c. 62, § 14, which provides that one-half the tax levied and collected on saloons under the act shall be paid over by the county treasurer to the municipality in which the business is conducted.—*District Tp. of Sheridan v. Frahm* (Iowa) 70 N. W. 721.

[b] (Wis.; 1895.)

The fund created by licensing the sale of intoxicating liquors is under the absolute control of the legislature.—*Rock County v. City of Edgerton* (Wis.) 63 N. W. 291.

90 Wis. 288.

§ 18. Conduct of business.

(Iowa; 1896.)

A room with one entrance opening into the street, and another opening into an office

which has an exit upon another street, is not "a single room having but one entrance or exit and that opening upon a public business street," within Acts 25th Gen. Assem. c. 62, § 17, subd. 3, authorizing liquors to be sold or kept for sale in such room under certain conditions.—*Ritchie v. Zalesky* (Iowa) 67 N. W. 399.

§ 19. Prohibition of sales near church or school.

(Iowa; 1894.)

Under Acts 25th Gen. Assem. c. 62, providing that the business of selling intoxicating liquors shall not be conducted within 300 feet of any church or school building, the distance must be measured on a direct line, and not by the traveled route.—*State v. Greenway* (Iowa) 61 N. W. 239.

92 Iowa, 472.

§ 20. View of interior of saloon.

(Iowa; 1896.)

Acts 25th Gen. Assem. c. 62, § 17, subd. 3, declaring that the bar where liquors are furnished shall be in plain view from the street, unobstructed by screens, blinds, etc., applies not only to retailers, but to wholesale dealers who give away liquors by the glass to be drunk on the premises.—*Ritchie v. Zalesky* (Iowa) 67 N. W. 399.

§ 21. Bonds of dealers.

[a] (Iowa; 1897.)

The bond prescribed by Laws 1894, c. 62, § 17, to be given by an applicant for a license to sell liquors, and which is required to be "conditioned upon the faithful observance of all the provisions" of the act, binds the obligors for the payment of the tax assessed against the principal under the act, and which it is made the duty of such principal to pay.—*Marshall County v. Knoll* (Iowa) 69 N. W. 1146.

[b] (Mich.; 1895.)

Under Pub. Acts 1887, No. 313, providing for the approval of liquor bonds by the common council, a majority of the council may approve such bond, and a two-thirds vote is not required, as in the passage of an ordinance.—*O'Halloran v. City of Jackson* (Mich.) 64 N. W. 1046.

[c] (Mich.; 1895.)

A charter provision requiring every ordinance or resolution of the council to be approved by the mayor has no application to the approval of a liquor bond.—*O'Halloran v. City of Jackson* (Mich.) 64 N. W. 1046.

[d] (Mich.; 1897.)

Under 3 How. Ann. St. § 2283d, which provides that, if a person required to pay a tax as a liquor dealer shall engage in the business "without having made, executed, and delivered the bond required by this act, * * * such person * * * shall be deemed guilty of a misdemeanor," where the bond is insufficient by reason of one of the sureties being disqualified, though it was given in good faith, is sufficient in form and has been approved by the municipal authorities, he is subject to criminal prosecution.—*Wolcott v. Burlingame* (Mich.) 70 N. W. 831.

[e] (Neb.; 1895.)

The reference, in a retail liquor dealer's bond, to "the provisions of chapter 61 of the General Statutes of the State of Nebraska, passed at the 16th legislative assembly, and approved February 28, 1887," was a sufficient reference to chapter 61 of the "Laws of Nebraska, 1881," as arranged and published by the secretary of state.—*Plucknett v. Tippey* (Neb.) 63 N. W. 845.

45 Neb. 342.

§ 22. Adopting provisions of "Mule Law."

(Iowa; 1897.)

Laws 1894, c. 62 (Mule Law), authorizing all cities of over 5,000 inhabitants to grant or withhold their consent to the sale of liquors within their limits, which consent is made a bar to prosecution under the prohibitory liquor law of the state, and to regulate the business of liquor selling, does not apply to cities acting under special charters, it being provided by McClain's Code, § 941, that no general law as to cities organized under the general incorporation act shall affect cities organized under special charters, unless it has special reference to such cities; hence the city council of a city under a special charter cannot, by its consent to the sale of liquor, suspend the penalties of the prohibitory law of the state. Granger, J., dissenting. — Clark v. Riddle (Iowa) 70 N. W. 207.

§ 23. — Written statement of consent.

[a] (Iowa; 1894.)

The term "resident freeholders," as used in Acts 25th Gen. Assem. c. 62, § 17, providing that a person appearing to pay the tax for selling intoxicating liquors shall file with the county auditor a written statement of consent from all the resident freeholders owning property within 50 feet of his place of business, includes only freeholders residing in the city by which the license is granted. — State v. Greenway (Iowa) 61 N. W. 239.

92 Iowa, 472.

[b] (Iowa; 1895.)

Under chapter 62, § 17, Acts 25th Gen. Assem., providing that before the payment of the tax mentioned in said chapter shall be a bar to proceedings under the prohibitory liquor laws, "a written statement of consent from all resident freeholders owning property within 50 feet of the premises where said business is carried on" shall be filed, the freeholders need not live on the premises, to be within the protection of the statute. — State v. Mateer (Iowa) 62 N. W. 684.

[c] (Iowa; 1895.)

Such provision does not refer to freeholders whose property, although within the prescribed distance from the house occupied as a saloon, is more than 50 feet from the room in which the business is conducted. — State v. Mateer (Iowa) 62 N. W. 684.

[d] (Iowa; 1895.)

A statement filed under Acts 25th Gen. Assem. c. 62, was as follows: "Petition and consent under section 17, known as the 'Mule Law.' * * * The undersigned residents and voters of Oskaloosa, Iowa, respectfully petition and consent that said city of Oskaloosa shall be put under the operation of the provision of said law. * * * Held, that this was a compliance with the requirement that "a written statement of consent signed by a majority of the voters" be filed with the auditor. — State v. Mateer (Iowa) 62 N. W. 684.

[e] (Iowa; 1895.)

Under Acts 25th Gen. Assem. c. 62, § 17, providing that after a written statement of the consent to the sale of liquor in towns having over 5,000 inhabitants, signed by a majority of the voters residing in the city, shall have been filed with the county auditor, the payment of a certain tax shall, on certain conditions, be a bar to a prosecution for selling liquor, the filing of such a statement by the auditor is not a judicial determination of its sufficiency, but is a mere ministerial act, and therefore is not conclusive or prima facie evidence, on a collateral attack, of the sufficiency of the statement. — State v. Ashert (Iowa) 63 N. W. 557; Same v. Savery House Hotel Co., Id.

IV. ILLEGAL SALES, AND MAINTENANCE OF SALOONS.

Prohibition of sale near church or school, see ante, § 19.

Recovery of price of liquor sold, see post, § 65. What law governs sales, see "Conflict of Laws," § 9.

§ 24. Criminal intent — Ignorance of fact.

(Iowa; 1895.)

In a prosecution for selling intoxicating liquor without a permit, it is no defense that the seller did not know that the liquor was intoxicating. — State v. Valure (Iowa) 64 N. W. 280.

§ 25. Keeping open at prohibited times.

[a] (Mich.; 1896.)

Where saloon keepers have a room in the same building, but disconnected with the saloon, in which liquors are sometimes sold and served, the keeping open of such room, and selling liquor therein, on the 4th of July, is a keeping open of such saloon, in violation of the law prohibiting saloons from being kept open on such day. People v. Cox (1888) 38 N. W. 235, 70 Mich. 247, and People v. Ringsted (1892) 51 N. W. 519, 90 Mich. 371, followed. — People v. Whipple, 66 N. W. 490.

[b] (Mich.; 1896.)

On trial for keeping a saloon open on Sunday, where it appeared that liquor had been served in a room adjoining the saloon, occupied by defendant as a sitting room for his family, it was not error to charge that if a man occupying an entire building, having a saloon in one room opening into another room back of it, admits to that room on Sunday persons who called to get beer and persons who called ostensibly for other purposes, and deals out beer to them in that room, it is immaterial where he gets the beer or what he calls the room, but that it is to all intents a part of the saloon. — People v. Bowkus (Mich.) 67 N. W. 319.

[c] (Mich.; 1896.)

Defendant kept a restaurant and saloon, connected with double doors; the eating room being in the front portion of the building, and the bar in the rear. Liquors were, however, served in both rooms, and on the front door of the front room were the signs, "Lager Beer," "Wines and Liquors." Held, that the front room was a part of the saloon, within the meaning of the statute forbidding saloons to be kept open on Sunday. — People v. Koob (Mich.) 67 N. W. 320.

[d] (Mich.; 1896.)

Pub. Acts 1887, No. 313, § 17, provides that saloons shall be closed on Sunday, and that any person violating this section shall be deemed guilty of a breach of the peace, and punished accordingly, "and this punishment shall be taken to be in excess of all other manner of punishment in this act provided for a violation" of this section. Section 7 provides that a person violating the act, upon conviction, "if there is no specific penalty provided therefor by this act, shall be punished by a fine of not more than \$200," etc. Section 18 provides that "any person who shall violate any of the provisions of the five preceding sections * * * shall be punished as provided in section 7 of this act." The penal clause of section 17 was declared unconstitutional. Held, that a conviction for keeping a saloon open on Sunday, in violation of section 17, could be sustained and punished under sections 7 and 18. — People v. Rohrer (Mich.) 69 N. W. 90.

§ 26. Sale by agent.

[a] (Mich.; 1894.)

Under the local option law, which makes it unlawful for any person to sell, etc., or "to keep a saloon or place where," etc., a mere

clerk or bartender employed to sell, both in the presence and absence of the proprietor, is guilty of keeping the place. —McGrath, C. J., dissenting.—*People v. Rice* (Mich.) 61 N. W. 510.

103 Mich. 350.

[1b] (Mich.; 1896.)

Where neither principal nor agent has complied with the law by paying the tax or filing a bond in a county where the agent has sold beer, the agent may be informed against as principal. —*People v. De Groot* (Mich.) 69 N. W. 248.

§ 27. Place of sale.

(Mich.; 1896.)

Where an agent, working on a monthly salary, at A., takes individual orders for beer, and sends them to his principal at B., and the orders are shipped in gross to the agent at A., and he delivers the individual orders, collects the money for them, and forwards it to his principal, the sales are made at A.—*People v. De Groot* (Mich.) 69 N. W. 248.

See, also, post, § 66.

V. KEEPING FOR SALE—LIQUOR NUISANCE.

§ 28. Keeping for sale.

[a] (Iowa; 1894.)

On a trial for keeping liquor for sale, it was shown that a restaurant was carried on in the front room of a building, and that in a back room intoxicating liquors were found. The defendant had been seen in the front room, but it was not shown that he had any interest in the liquor, nor in the business carried on in the front room, or that he was ever in the back room. *Held*, that a conviction should be set aside.—*State v. Johnson* (Iowa) 61 N. W. 195.

92 Iowa, 768.

[1b] (Mich.; 1896.)

A druggist who has complied with the statutory provision to entitle him to sell liquor for medicinal purposes cannot, on proof of one illegal sale of liquor as a beverage, be convicted of keeping a place for the illegal sale of liquors. The prosecution should be for the unlawful sale.—*Maynard v. Eaton* Circuit Judge (Mich.) 65 N. W. 769.

[1c] (Neb.; 1897.)

Under Comp. Stat. c. 50, § 20, making it a misdemeanor to keep malt, spirituous, or vinous liquors for sale without license, each such act of keeping constitutes a separate misdemeanor.—*Hans v. State* (Neb.) 69 N. W. 838.

§ 29. Liquor nuisance.

[a] (Iowa; 1891.)

On a trial for nuisance in the sale of intoxicating liquors, it appeared that defendant was a registered pharmacist, and that his store was resorted to nightly for drinking purposes; that there was much drunkenness and noise about his place; and that people came there as late as 1 o'clock, sometimes in hacks, and drank in his back room. The evidence as to whether applications for purchases were signed was conflicting, but tended to show that applications signed at other places were used. It did not appear that defendant was generally at his store when the drinking was done, but there was evidence that he knew of the illegal sales. *Held*, that a verdict of guilty would not be disturbed.—*State v. Oeder* (Iowa) 61 N. W. 190.

92 Iowa, 767.

[1b] (Iowa; 1895.)

On an appeal from a conviction of keeping a liquor nuisance, the abstract of record showed that defendant kept a place in which intoxicating liquors were sold; that his place was frequently searched by police officers; that several times kegs of beer were found there; and that a regular bar was kept. The instructions

fully and fairly presented the case to the jury. *Held*, that the record sustained the conviction.—*State v. Forkner* (Iowa) 62 N. W. 683.

[1c] (Iowa; 1896.)

A conviction for maintaining a liquor nuisance was sustained by evidence that defendant, before commencing business, in conversing with others, gave them cause to believe that he intended to sell liquor in a box car placed on a certain lot; that, while defendant was engaged in business in said car, men bought and drank beer there; that the odor of beer came from the car; and that empty beer kegs were piled behind the car.—*State v. Cleary* (Iowa) 66 N. W. 724.

[1d] (Iowa; 1896.)

In a prosecution for maintaining a liquor nuisance, evidence that in the cellar of the hotel kept by one of the defendants were found several barrels of bottled beer, and half a barrel of brandy, and a tub of ice containing also bottled beer; that there were a table, cards, and chairs in the cellar, and empty beer bottles; that in the cellar there was an electric bell, connected with a push on the first floor; and that the other defendant was in the cellar, in his shirt sleeves, apparently in charge,—warrants a conviction of both defendants.—*State v. Wright* (Iowa) 68 N. W. 440.

Abatement and injunction of nuisance, see post, §§ 45–53.

Evidence in prosecution for maintaining liquor nuisance, see post, § 38.

VI. CRIMINAL PROSECUTION.

§ 30. Defenses.

[a] (Mich.; 1896.)

The fact that a defendant charged with having kept his saloon open on Sunday opened it to receive a relative suddenly taken ill on the street does not show an overruling necessity which constitutes a defense, where there were other places equally as convenient, and other persons were also indiscriminately admitted.—*People v. Taylor* (Mich.) 68 N. W. 303.

[1b] (Mich.; 1897.)

The fact that the witnesses to whom an unlawful sale of liquor was made purchased with a view to prosecute and obtain a reward for defendant's conviction is not a defense.—*People v. Everts* (Mich.) 70 N. W. 430.

§ 31. Preliminary proceedings.

[a] (Mich.; 1895.)

Evidence on a preliminary hearing, making a prima facie case, that persons selling liquors prohibited by a local option law are not within the exceptions of the statute, warrants an information charging them with selling them in violation of the law.—*People v. Berry* (Mich.) 65 N. W. 98.

[1b] (Mich.; 1895.)

Where a warrant by a justice for the arrest of a person for a violation of the local option law recites that the justice examined two persons as to whether the local option law was in force, it will be presumed that the evidence was sufficient to show that it was, so as to confer jurisdiction.—*People v. Berry* (Mich.) 65 N. W. 98.

[1c] (Mich.; 1895.)

A warrant for a violation of the local option law (Laws 1889, Act No. 207), issued by a justice of the peace, need not recite the evidence showing that said law was in force in the county.—*People v. Bennett* (Mich.) 65 N. W. 280.

[1d] (Mich.; 1895.)

A warrant for a violation of the local option law (Laws 1889, Act No. 207) need not set out the evidence showing that defendant was not a druggist, and therefore within the exception of the statute.—*People v. Bennett* (Mich.) 65 N. W. 280.

[c] (S. D.: 1896.)

A complaint made to a police magistrate, under an ordinance of the city of Yankton, which declares "that any person who, within the limits of this city, shall keep and maintain a tippling shop, * * * shall upon conviction be fined," etc., in which it is charged that the defendant, "at the city and county of Yankton, on the 17th day of September, A. D. 1893, with force and arms, did keep and maintain a tippling shop, * * * within the limits of the city of Yankton, state of South Dakota, against the peace and dignity of said city of Yankton, and contrary to the form of the ordinance in such case made and provided," states facts sufficient to constitute a public offense under such ordinance. Haney, J., dissenting.—City of Yankton v. Douglass (S. D.) 66 N. W. 923.

§ 32. Indictment, information, and complaint.

[a] (Mich.: 1894.)

Where an information charges the offense of keeping a place where liquors were sold, and also that of selling on a specified day, and the people are required to elect just before submission to the jury, when objection is first made, an objection of multifariousness is without force.—People v. Rice (Mich.) 61 N. W. 540. 103 Mich. 350.

[b] (Mich.: 1895.)

A complaint charging the illegal sale of intoxicating liquors by one "not being then and there a druggist," and alleging that such liquors were not "sold for chemical, scientific, mechanical, medicinal, or sacramental purposes," and were "not proprietary patent medicines," is broad enough to show that the accused was not selling lawfully, as a druggist.—People v. Aldrich (Mich.) 62 N. W. 570. 104 Mich. 455.

[c] (Mich.: 1895.)

The pleadings in a prosecution for illegal sale of liquors need not describe the building in which the liquors were sold.—People v. Aldrich (Mich.) 62 N. W. 570. 104 Mich. 455.

[d] (Mich.: 1895.)

An information for illegally selling liquor, which alleges, substantially in the language of the statute, that defendant engaged in the business, "not being then and there a druggist who sells," etc., is sufficient, although omitting after such clause the words, "in strict compliance with law."—People v. Gault (Mich.) 62 N. W. 724. 104 Mich. 575.

[e] (Mich.: 1895.)

The preliminary proceedings upon which an information for keeping a saloon open on Sunday were formally correct, but in the charge of the information the word "liquors" was omitted. *Held*, that since it was in the power of the court, under 2 How. Ann. St. § 9535, to amend a formally defective indictment, it must be held, after verdict, that defendant was not prejudiced by the omission.—People v. Case (Mich.) 62 N. W. 1017. 105 Mich. 92.

[f] (Mich.: 1895.)

Under 3 How. Ann. St. § 2283f4, providing that on days when saloons are prohibited from selling liquor all curtains, screens, partitions, etc., that obstruct the view from the sidewalk, street, or alley "of the bar" must be removed, an information charging that defendant "obstructed the view from the street, sidewalk, and alley by not removing said curtains * * * that * * * obstructed the view from the street, sidewalk, and alley," is good. The words "said curtains" referring to a previous part of the information in which it was alleged that curtains obstructed a view "of the bar."—People v. Kennedy (Mich.) 62 N. W. 1020. 105 Mich. 75.

[g] (Mich.: 1896.)

In How. Ann. St. § 2283e, providing that "all saloons, restaurants, bars, in taverns or elsewhere, and all other places except drug stores," where liquors are sold, shall be closed on Sunday, the words "except drug stores" are used only in connection with "other places," and in an indictment charging the keeping open of a saloon on Sunday it is not necessary to aver that such saloon was not a drug store.—People v. Taylor (Mich.) 68 N. W. 303.

[h] (Minn.: 1896.)

An indictment under Gen. St. 1894, § 2012, requiring all persons licensed to sell intoxicating liquors "to close their places of business (hotels excepted) at 11 o'clock at night," must negative the exception.—State v. Jarvis (Minn.) 69 N. W. 474.

[i] (Neb.: 1896.)

An information under Comp. St. c. 50, § 20, for keeping intoxicating liquors for sale without a license, need not set out the names of the persons to whom the liquors were alleged to have been sold by defendant.—Hornberger v. State (Neb.) 66 N. W. 23. 47 Neb. 40.

[j] (Wis.: 1895.)

A complaint charging a person with selling intoxicating liquors without license in a certain county, without naming any city or village in which the alleged offense was committed, sufficiently complies with Rev. St. §§ 4657-4659, reciting the requirements of a criminal complaint.—State v. Hickok (Wis.) 62 N. W. 934. 90 Wis. 161.

§ 33. — Duplicity.

[a] (Iowa: 1895.)

Since Code, § 1543, defines the offense of liquor nuisance as consisting in using for the prohibited purposes "any building, erection or place," an indictment for liquor nuisance charging the use of "a building, erection, place, and railroad car" charges two offenses.—State v. Chapman (Iowa) 62 N. W. 659.

[b] (Mich.: 1895.)

An information charging a violation of Act No. 313, Pub. Acts 1887, in retailing liquors as a beverage without payment of the required tax, and without posting the county treasurer's notice and receipt therefor, is not bad for duplicity.—People v. Aldrich (Mich.) 62 N. W. 570. 104 Mich. 455.

§ 34. Election by state between sales.

(S. D.: 1895.)

In a prosecution for illegal sale of liquor, where the state introduces evidence of two distinct sales, the court should require the state to elect on which sale it will rely for conviction.—State v. Valentine (S. D.) 63 N. W. 541.

§ 35. Evidence.

[a] (Mich.: 1895.)

On prosecution for violation of a local option law by keeping a place where prohibited liquors were sold, evidence as to the condition of persons going in and out of the place is admissible.—People v. Berry (Mich.) 65 N. W. 98.

[b] (Neb.: 1896.)

The fact that a liquor license was not granted to a particular person may be shown by the testimony of the officer whose duty it would be to issue a license, were one granted.—Hornberger v. State (Neb.) 66 N. W. 23. 47 Neb. 40.

[c] (Wis.: 1895.)

Evidence that "whisky" was delivered is admissible, as it tends to show possession of the article charged to have been unlawfully sold.—Fosdahl v. State, 62 N. W. 185, 89 Wis. 482.

[d] (Wis.: 1895.)

In a prosecution for selling "whisky" without a license, evidence that "beer" was de-

covered at defendant's place shortly before the commission of the alleged offense is inadmissible.—*Fosslahl v. State*, 62 N. W. 185, 89 Wis. 482.

§ 36. — Presumption and burden of proof.

[a] (Neb.: 1896.)

When, under an information for keeping intoxicating liquors for sale, a sale is proved, the burden is upon the accused to show that he held a license or permit from the proper authorities.—*Hornberger v. State* (Neb.) 66 N. W. 23, 47 Neb. 40.

[b] (Neb.: 1897.)

Unlawful intent in keeping liquors may be presumed from recent prior illegal sales by defendant.—*Hans v. State* (Neb.) 69 N. W. 838.

§ 37. — Obstructing view from alley.

(Mich.: 1895.)

On a prosecution for failure to comply with 3 How. Ann. St. § 2283f4, providing that on days when saloons are required by law to be closed, all screens which obstruct a view of the bar from the street or alley must be removed, it is sufficient to show that the alley was at the time open to use of the general public, and a dedication need not be proved.—*People v. Kennedy* (Mich.) 62 N. W. 1020, 105 Mich. 75.

§ 38. — Nuisance.

[a] (Iowa: 1896.)

The fact that an indictment for keeping a liquor nuisance specifies the time the nuisance was maintained does not preclude evidence of illegal sales prior to the time specified, but within three years, the period of limitations for the finding of an indictment.—*State v. Arnold* (Iowa) 67 N. W. 252.

[b] (Iowa: 1896.)

On a trial for maintaining an hotel as a liquor nuisance after proof of illegal sales in the hotel, evidence of similar sales in barns and buildings appurtenant to the hotel is admissible.—*State v. Arnold* (Iowa) 67 N. W. 252.

[c] (Iowa: 1896.)

On a trial for maintaining an hotel as a liquor nuisance, a witness testifying as to sales in barns appurtenant to the hotel was properly allowed to state that he supposed from the facts that defendant kept his horses in the barn, and had control of the hotel, that he also had control of the barns.—*State v. Arnold* (Iowa) 67 N. W. 252.

[d] (Mich.: 1895.)

In a prosecution for keeping a place where intoxicating liquors were sold, evidence of sales prior to the date alleged in the information is admissible to show the character of the place kept by defendant.—*People v. Caldwell* (Mich.) 65 N. W. 213.

§ 39. — Sufficiency.

[a] (Iowa: 1895.)

On a trial for keeping a liquor nuisance, a deed of the premises from defendant to his wife would not raise the presumption that she was the proprietor of the business, where it appeared that defendant and his family lived on the premises, and that defendant conducted the business.—*State v. Neeson* (Iowa) 64 N. W. 409.

[b] (Iowa: 1895.)

The finding of liquor in a place, not a private house, is presumptive evidence that the person in possession of the premises kept it for the purpose of illegal sale.—*State v. Arie* (Iowa) 64 N. W. 268.

[c] (Mich.: 1896.)

In a prosecution for violation of the local option law, there was evidence that defendants sold intoxicating liquors as a beverage, and kept a saloon and place where lager beer and whisky

were kept for sale, as alleged in the information, to such persons as applied for them; that there was a pool, billiard, and card table in the room, and that soft drinks were sold there. *Held*, that the evidence was sufficient to support a conviction, though there was no evidence that defendants were not registered pharmacists. *People v. Berry* (1895) 65 N. W. 98, followed. — *People v. Knopf*, 66 N. W. 951.

§ 40. Instructions.

[a] (Neb.: 1894.)

On a trial for violating the local option law by selling lager beer, witnesses testified that, at the place and time charged, they obtained lager beer. Others testified that they obtained hop pop, and that they did not know it was intoxicating. *Held*, that it was error to refuse to charge that, if the defendants only sold hop pop, the jury should acquit, though the court charged that, if the people had not proved beyond a reasonable doubt that defendants sold lager beer, they must acquit. *Grant and Hooker, JJs.*, dissenting.—*People v. Rice* (Mich.) 61 N. W. 510, 103 Mich. 350.

[b] (Neb.: 1896.)

Error in failing to instruct that the liquor must have been sold by defendant within the limits of the town charged in the indictment was harmless, where the evidence was directed to proving that defendant had the liquors in that town, and no testimony was offered to show that he had them at any other place.—*Hornberger v. State* (Neb.) 66 N. W. 23, 47 Neb. 40.

§ 41. Judgment and sentence.

[a] (Neb.: 1896.)

Since each act of selling or giving away intoxicating liquors without a license, in violation of Comp. Laws 1895, c. 50, § 11, is a misdemeanor, and since several of such offenses may be charged in one information in different counts, it is proper, on a conviction under several such counts in one information, to impose a separate sentence for each conviction.—*Nichols v. State* (Neb.) 69 N. W. 99.

[b] (Neb.: 1897.)

Upon a conviction, on two separate counts, for keeping two different kinds of liquor, in violation of the statute, separate sentences should be imposed for each conviction.—*Hans v. State* (Neb.) 69 N. W. 838.

§ 42. Review.

(Mich.: 1895.)

Defendant having waived the reading of the record of the board of supervisors on a trial for violating the local option law (Laws 1889, Act No. 207), he cannot complain on appeal of an instruction that said law was in force in that county.—*People v. Bennett* (Mich.) 65 N. W. 280.

VII. SEARCH AND SEIZURE.

§ 43. Liability for illegal seizure.

(Iowa: 1895.)

Though the statute authorizing seizure, condemnation, and destruction of liquor be void, the proceedings thereunder being regular, neither the marshal who filed the information therefor, and had reason to believe that the statements thereof were true, nor the constable who executed the search warrant under which it is seized, and the writ for its destruction, nor the person who, at his request, aided him in the destruction, is liable to the owner, there having been no malice on the part of either.—*Anheuser-Busch Brewing Ass'n v. Hammond* (Iowa) 61 N. W. 1052, 93 Iowa, 520.

§ 44. Liability of county for costs.

(Iowa: 1894.)

In proceedings for the seizure and destruction of forfeited liquor, the expenses incurred by hiring persons to guard the liquor are not taxable against the county as part of the constable's fees.—*Hegele v. Polk County* (Iowa) 61 N. W. 393.

92 Iowa, 701.

VIII. ABATEMENT AND INJUNCTION OF LIQUOR NUISANCE.

§ 45. Abatement.

(Iowa: 1897.)

Where a resolution was passed by a city council, and signed by the mayor, consenting to the sale of liquor by an applicant under the mulet law, the fact that the clerk by mistake omitted the signature of the mayor from the copy filed with the county auditor is not ground for the abatement of the licensed business as a nuisance, when the mistake is corrected before the trial of an action for that purpose.—*Clark v. Riddle* (Iowa) 70 N. W. 207.

§ 46. Injunction.

[a] (Iowa: 1894.)

Acts 25th Gen. Assem. c. 62, § 19, provides that any one engaged in the sale of intoxicating liquors who shall violate any of the provisions of the act shall be liable to all the penalties provided for by Code, c. 6, tit. 11 (Prohibitory Act), and acts amendatory thereto. Miller's Code, § 1543, provides that one unlawfully carrying on the liquor business may, at the action of any citizen in the county, be enjoined in equity. *Held*, that a decree for an injunction is a "penalty," within the meaning of the former act.—*State v. Greenway* (Iowa) 61 N. W. 239.

92 Iowa, 472.

[b] (Iowa: 1894.)

The "Mulet Law" (Laws 25th Gen. Assem. c. 62, § 17) provides, under certain conditions, for the suspension by municipalities of the law prohibiting the sale of liquor. Section 19 provides, on the happening of certain other conditions, the bar to "proceedings" as provided in section 17 shall cease to operate, and that persons selling liquor shall then be liable to all the "penalties" provided for under Code, tit. 11, c. 6. *Held*, that the word "penalties" includes the remedy by injunction against keeping a liquor nuisance.—*State v. Van Vliet* (Iowa) 61 N. W. 241.

92 Iowa, 476.

[c] (Iowa: 1895.)

Acts 22d Gen. Assem. c. 73, § 4, making injunctions to restrain the illegal keeping of intoxicating liquors for sale binding throughout the judicial district in which the action was brought, does not render a perpetual injunction restraining defendant from unlawfully keeping such liquor for sale on certain premises a bar to a suit to enjoin the maintenance by him of a similar nuisance in the same district, but on other premises, owned by his codefendant, against whom no injunction is in force.—*Carter v. Steyer* (Iowa) 61 N. W. 956.

93 Iowa, 533.

[d] (Iowa: 1897.)

The fact that a bond given by a firm as liquor dealers is signed by one of the members as surety renders it defective, but does not constitute a ground for enjoining their business as a nuisance, the bond being amendable under McClain's Code, § 326.—*Clark v. Riddle* (Iowa) 70 N. W. 207.

[e] (Iowa: 1897.)

In an action to abate a liquor nuisance, an injunction cannot be granted against the proprietors of the business because of their illegal sale of liquor elsewhere than in the building described, the illegal sale of liquor

itself not being a ground for injunction.—*Clark v. Riddle* (Iowa) 70 N. W. 207.

§ 47. — Against landlord.

(Iowa: 1895.)

Evidence that buildings owned by defendant had the general reputation of being used for the illegal sale of intoxicating liquor, and that defendant occupied a room therein, and was frequently seen about the place, will sustain a finding that she knew the character of the business done on the premises.—*Carter v. Steyer* (Iowa) 61 N. W. 956.

§ 48. Pleading.

(Iowa: 1894.)

In a suit to enjoin a liquor nuisance, no reply is necessary to an answer which alleges that the suit is brought in bad faith, and for the purpose of annoying defendant, the purpose being immaterial.—*McQuade v. Collins* (Iowa) 61 N. W. 213.

93 Iowa, 22.

§ 49. Evidence.

(Iowa: 1896.)

Since the general law prohibiting the sale of intoxicating liquors is still in force, a defendant who, in an action to enjoin such sales, relies on Acts 25th Gen. Assem. c. 62, authorizing liquors to be sold under certain conditions, must show compliance therewith.—*Ritchie v. Zalesky* (Iowa) 67 N. W. 399.

§ 50. Vacation of judgment.

(Iowa: 1896.)

Code, § 1551, requiring peace officers to execute the liquor law, and to make complaint for violations, does not render a sheriff a representative of the state in actions under such law unless he is complainant; and in a civil action for an injunction, commenced by the county attorney, statements made by the sheriff to a defendant, which induced him to make default, do not constitute fraud authorizing a vacation of the judgment.—*Seddon v. State* (Iowa) 69 N. W. 671.

§ 51. Costs.

(Iowa: 1897.)

In an action under the statute to abate a liquor nuisance, the court cannot tax the costs to the plaintiff, unless it is found that the action was brought maliciously, and without probable cause.—*Clark v. Riddle* (Iowa) 70 N. W. 207.

§ 52. Review.

(N. D.: 1895.)

A judgment imposing a fine and imprisonment for contempt of court under Laws 1890, c. 110, § 13, relating to liquor nuisances, and to the punishment of contempts in violating injunctive orders issued in suits to abate the same, may be reviewed by writ of error.—*State v. Markuson* (N. D.) 64 N. W. 934.

5 N. D. 147.

§ 53. Contempt in violating injunction.

[a] (Iowa: 1896.)

In contempt proceedings for violation of an injunction against the sale of liquors, an affidavit showed that on Sunday defendant was in his saloon, and passed beer out of a broken window, to men who drank it; that affiant went to such window, and saw defendant secreting himself; that when seen he went into the front part of the saloon; and that affiant went to the front end of the saloon, and, looking in, saw defendant was the only person there. *Held*, that the evidence showed a violation of the injunction; Acts 25th Gen. Assem. c. 62, providing that the place for sales "shall not be open at all nor shall sales be made on" Sunday.—*Cotant v. Hobson* (Iowa) 67 N. W. 255.

[14] (N. D.: 1895.)

An affidavit made as the basis of an order for attachment for contempt in violating an injunctive order granted in a suit to abate a liquor nuisance under Laws 1890, c. 110, § 13, is not defective for failing to allege in terms that the action was pending at the time the affidavit was made, where it alleges that the injunctive order has not been dissolved or modified. *State v. Markuson* (N. D.) 61 N. W. 931.

5 N. D. 147.

IX. CIVIL DAMAGE LAWS.

§ 54. Persons entitled to sue.

[a] (Neb.: 1896.)

A poor person dependent for support upon a relative, according to the provisions of chapter 67, Comp. St. 1895, may, in his own name and for his own benefit, maintain an action against a vendor of intoxicating drinks, for the loss of such support, caused by the death of such relative, when such death occurs in consequence of the traffic of such vendor in intoxicating drinks, without any action of the county commissioners in that behalf.—*Fitzgerald v. Donohoe* (Neb.) 67 N. W. 880.

48 Neb. 852.

[14] (Neb.: 1896.)

The action which arises in favor of a parent, against a retail liquor dealer and his businessmen, to recover for the loss of services of a minor child, occasioned by the death of the child as a result of the use of intoxicating liquors furnished by the defendant saloon keeper, is governed by Comp. St. c. 50, providing that a person licensed to sell liquors shall pay all damages that the community or individuals may sustain in consequence of the traffic, and not by chapter 21, known as the "Civil Damage Act." Hence the action may be prosecuted in the name of the party entitled to the damages, without the intervention of an administrator of the decedent.—*Fitzgerald v. Donohoe* (Neb.) 67 N. W. 880.

48 Neb. 852.

§ 55. Persons liable.

[a] (Mich.: 1895.)

Laws 1887, Act No. 313, § 20, provides that every wife who shall be injured by any intoxicated person, or by reason of the intoxication of any person, or by the selling or furnishing any liquors to any person, shall have a right of action against any person who contributed to such intoxication by furnishing liquor, etc. Held that, where a husband is convicted of breaking and entering a store in the nighttime, with intent, etc., the wife has no cause of action against persons who just previously sold him liquor, on the ground that the liquor intoxicated him, and that while intoxicated he committed such crime.—*Dennison v. Van Wornor* (Mich.) 65 N. W. 274.

[14] (Neb.: 1895.)

The liability of the sureties on a bond given by a liquor dealer under Comp. St. 1895, p. 683, c. 50, is coextensive with that of the principal.—*Gran v. Houston* (Neb.) 64 N. W. 245, 45 Neb. 813.

§ 56. Defenses.

[a] (Neb.: 1895.)

The fact that the wife consented to or acquiesced in the sale or gift of intoxicants to the husband constituted no defense to an action for damages by the wife in her own behalf and for her minor children for loss of support, occasioned by the death of the husband through drinking the liquor.—*Gran v. Houston* 64 N. W. 245, 45 Neb. 813.

[14] (Neb.: 1897.)

An action by a widow for furnishing liquors to her deceased husband cannot be defeat-

ed by proof that they were furnished by the defendant, a licensed saloon keeper, with the knowledge and consent of the plaintiff.—*Kliment v. Corcoran* (Neb.) 70 N. W. 910.

§ 57. Joinder of parties.

(Mich.: 1895.)

Under 3 How. Ann. St. § 2283e2, making "any person or persons," and, if licensed liquor dealers, the sureties on their bonds, who have furnished liquors to a person, liable, "jointly and severally," for injuries suffered by others by such person's intoxication by said liquors, the principals and sureties on different bonds may be joined in a single action.—*Franklin v. Frey* (Mich.) 63 N. W. 970.

§ 58. Issues and proofs—Variance.

(Neb.: 1895.)

The fact that a wife consented to the sale of liquors to her husband, in order to constitute a defense to an action by her for damages for loss of support, resulting from the husband's drinking the liquor, should be specially pleaded.—*Gran v. Houston* (Neb.) 64 N. W. 245, 45 Neb. 813.

§ 59. Evidence.

[a] (Mich.: 1897.)

The claim that conviction of plaintiff's husband for drunkenness caused by liquor sold him by defendant might have been collusive does not prevent its admission.—*Lucker v. Liske* (Mich.) 70 N. W. 421.

[14] (Mich.: 1897.)

Where a mother sues for damages suffered because intoxicating liquors were furnished to her minor son, she may show her dependence on him; the amount he used to earn, and what he had in the bank, before he began to use intoxicating liquors; his failure to get employment, if traceable to his drinking habit, and that he had been seen on the street in a state of intoxication during the time it was claimed that defendant furnished him liquor.—*Weiser v. Welch* (Mich.) 70 N. W. 438.

[14] (Neb.: 1895.)

In an action by a wife under Comp. St. 1895, c. 50, p. 683, to recover damages of a liquor dealer for loss of support occasioned by her husband having received his death from drinking liquor sold him by defendant, evidence that the money earned by the husband while living was devoted to the wife's support was admissible.—*Gran v. Houston* (Neb.) 64 N. W. 245, 45 Neb. 813.

[14] (Neb.: 1897.)

In an action for selling liquor to plaintiff's deceased husband, where plaintiff alleges that she was injured in her means of support thereby, evidence of the value of the family homestead and the amount of incumbrance thereon at the time of her husband's death is admissible.—*Kliment v. Corcoran* (Neb.) 70 N. W. 910.

§ 60. Instructions.

[a] (Iowa: 1895.)

A charge that one who sold or "furnished" to decedent intoxicating liquor, producing intoxication which was the immediate cause of his death, is liable for such death, is not error, where the evidence shows conclusively that the liquor was sold to decedent.—*Miller v. Hammers* (Iowa) 61 N. W. 1087.

93 Iowa, 746.

[14] (Neb.: 1895.)

Where it appeared, in an action against two liquor dealers for the death of plaintiff's intestate, that when intestate died his mind was deranged, and that he was in a stupid condition, superinduced by periods of intoxication at intervals extending over a period of five months, the last of which occurred two weeks after any liquor was sold; that some of the fits of intoxication were contributed to by sales of liquor by defendants; and that intestate had

drank heavily for several years past, and been subject to attacks of delirium tremens.—it was inapplicable to charge that, where several dealers furnish liquors the use of which results in intoxication and damage, each dealer is equally liable, and that if one furnishes the first draft while the user is sober, and the liquor which intensifies and completes the intoxication is furnished by others, the former is equally liable with the latter for the damage resulting from such intoxication.—*Dolan v. McLaughlin* 64 N. W. 1076, 46 Neb. 449.

[c] (Neb.: 1895.)

Where it appeared, in an action against liquor dealers for the death of plaintiff's intestate, that at least one sale was of liquor not intoxicating, it was erroneous to instruct that the presumption is that liquor sold at a saloon is intoxicating.—*Dolan v. McLaughlin* (Neb.) 64 N. W. 1076, 46 Neb. 449.

§ 61. Question for jury.

(Neb.: 1895.)

In an action for the death of one killed while intoxicated, by a collision between a passenger train and a hand car on which he was riding, the evidence showed that the liquor was procured from defendant's saloon, and tended to show that deceased was in such a condition that he did not see the approaching train. *Held*, that the question whether the liquor furnished by defendant contributed to the death was for the jury.—*Cornelius v. Hultman* (Neb.) 62 N. W. 591.

44 Neb. 441.

§ 62. Damages.

[a] (Mich.: 1895.)

In an action against a saloon keeper for selling liquor to plaintiff's husband, thereby injuring her means of support, and her feelings, defendant will be liable for whatever damages plaintiff has sustained from his acts, though the husband was an habitual drunkard before such sales began.—*Ford v. Cheever* (Mich.) 63 N. W. 975.

105 Mich. 679.

[b] (Mich.: 1895.)

That the prosecution on which plaintiff's husband was convicted for drunkenness caused by the liquor sold him by defendant was not commenced till after her action for damages for sale of liquor was brought does not render evidence of the conviction inadmissible, as she may recover for damages resulting subsequent to bringing the action.—*Lucker v. Liske* (Mich.) 70 N. W. 421.

[c] (Mich.: 1897.)

Evidence of publication in a newspaper of an account of the participation of plaintiff's husband in a row while drunk from liquor sold him by defendant is admissible on the question of damages.—*Lucker v. Liske* (Mich.) 70 N. W. 421.

[d] (Mich.: 1897.)

In an action by a wife for damages for sale of liquor to her husband, evidence of his conviction of drunkenness caused by the liquor is admissible, not to prove the drunkenness, but to show damages.—*Lucker v. Liske* (Mich.) 70 N. W. 421.

[e] (Neb.: 1895.)

The damages recoverable from a liquor dealer under Comp. St. 1895, p. 683, c. 50, include damages from the loss of support to a widow, occasioned by the death of her husband through drinking intoxicating liquors.—*Gran v. Houston*, 64 N. W. 245, 45 Neb. 813.

§ 63. — Exemplary damages.

[a] (Iowa: 1895.)

Code, § 1557, providing that, in an action for damages for selling intoxicating liquors, plaintiff shall recover exemplary damages, gives plaintiff a right thereto if actual damages are

shown.—*Miller v. Hammers* (Iowa) 61 N. W. 1087.

93 Iowa, 746.

[b] (Mich.: 1897.)

Under 3 How. Ann. St. § 2283c3, providing for exemplary damages for willfully furnishing a minor with intoxicating liquors, exemplary damages may be recovered where the person furnishing the liquor knows or has reason to believe that the person to whom it is furnished is under 21 years of age.—*Weiser v. Welch* (Mich.) 70 N. W. 438.

X. RIGHTS OF PROPERTY, AND CONTRACTS.

§ 64. Lawfulness of ownership.

(Iowa: 1896.)

On the issue whether liquors named in a policy of insurance were owned by the insured for the purpose of sale in violation of law, it was not error to charge that, if the insured did not intend to sell them in the state, or if he kept them with intent to sell them outside the state, his ownership was not unlawful, though there was no evidence of an intent to sell them outside the state.—*Erb v. German-American Ins. Co.* (Iowa) 67 N. W. 583.

§ 65. Recovery of price of liquor sold.

[a] (Iowa: 1895.)

The fact that a nonresident making sales of liquor in another state to a resident of Iowa does so to enable the purchaser to violate the liquor laws of that state, or participates in an unlawful disposal of said liquor therein, does not enable the purchaser to recover the price paid therefor under Code, § 1550, giving a right to recover payments made for intoxicating liquor sold in violation of the Iowa liquor law.—*Wind v. Iler* (Iowa) 61 N. W. 1001.

93 Iowa, 316.

[b] (Iowa: 1896.)

In an action to recover money paid for intoxicating liquors, under Code, § 1550, providing that all such payments shall be deemed to have been received upon a valid promise and agreement to repay on demand, the defendant cannot escape liability on the ground that he sold the liquors, and received the money therefor, merely as agent for another.—*Sellers v. Arie* (Iowa) 68 N. W. 814.

[c] (Neb.: 1895.)

An action could not be maintained for the price of beer sold a citizen of Nebraska, to be resold in that state in violation of law.—*Storz v. Finkelstein*, 65 N. W. 195, 46 Neb. 577.

[d] (Neb.: 1896.)

Where intoxicating liquors are sold in Nebraska for the purpose of enabling the person to resell them, contrary to, or in violation of, the laws of that state, and the vendor has knowledge of the illegal purpose of the buyer, and participates with him in the illegal traffic, the sale is void, and no recovery can be had for the price of the liquors.—*Storz v. Finkelstein* (Neb.) 66 N. W. 1020.

48 Neb. 27.

Assignability of claim, see "Assignment," § 4.

§ 66. Place of sale.

[a] (Iowa: 1895.)

A nonresident has a right to sell intoxicating liquors to a resident of Iowa for importation into that state, without reference to the police regulations thereof.—*Wind v. Iler* (Iowa) 61 N. W. 1001.

93 Iowa, 316.

[b] (Iowa: 1895.)

Where intoxicating liquors were shipped from another state to a purchaser in Iowa, the fact that upon receipt thereof the purchaser drew the bungs of the barrels, for the sole pur-

pose of testing the liquors, did not make such liquors a part of the general mass of property in Iowa, and so subject to its police regulations.—*Wind v. Her* (Iowa) 61 N. W. 1001, 93 Iowa, 316.

§ 67. Contracts.

(a) (Iowa; 1897.)
The lease of a building for a saloon to one who has complied with the malt law (Acts 25th Gen. Assen. c. 62), and which provides that, as part of the rent, the lessee shall pay the tax levied on the property under the law, is not invalid as founded on an illegal consideration.—*McKeever v. Beacom* (Iowa) 70 N. W. 112.

(b) (Mich.; 1897.)
The provision of 3 How. Ann. St. § 2283d1, which precludes a person from becoming a surety on more than two liquor bonds, is constitutional.—*Wolcott v. Burlingame* (Mich.) 70 N. W. 831.

INTOXICATION.

As a defense to crime, see "Criminal Law," § 6.

INVENTORY.

By executor, see "Executors and Administrators," § 11.
By insured, see "Insurance," § 59.
Of property attached, see "Attachment," § 27.

INVESTMENT.

By trustee, see "Trusts," § 20.

IRRIGATION.

§ 1. Establishment of district.

(Neb.; 1895.)
Act March 26, 1895, providing for the creation of irrigation districts by county boards, does not violate Const. art. 1, § 3, relating to the creation of municipal corporations, since irrigation districts are public rather than municipal.—*Board of Directors of Alfalfa Irrigation Dist. v. Collins*, 64 N. W. 1086, 46 Neb. 411.

§ 2. Franchises and privileges of irrigation companies.

(a) (Neb.; 1895.)
Act March 27, 1889, art. 1, § 3, relating to irrigation, and providing that no tract of land shall be crossed by more than one ditch without the owner's consent, includes land owned by corporations.—*Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.* (Neb.) 64 N. W. 343, 45 Neb. 884.

(b) (Neb.; 1895.)
Since Act March 27, 1889, relating to irrigation, does not confer on an irrigation company any right to connect with the ditches of another such company, or take water therefrom, the facts that one irrigation company concedes that another company has a right to connect with the former's ditch, and offers to supply the latter with water at reasonable rates, do not entitle it to an injunction restraining the latter from appropriating a right of way for a ditch over the former's lands.—*Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.* (Neb.) 64 N. W. 343, 45 Neb. 884.

§ 3. Assessments and taxes.

(a) (Neb.; 1895.)
Act March 26, 1895, relating to irrigation districts, is not unconstitutional on the ground that the power thereby conferred on such districts to levy taxes is without limitation.—*Board of Directors of Alfalfa Irrigation Dist. v. Collins*, 64 N. W. 1086, 46 Neb. 411.

(b) (Neb.; 1895.)
Act March 26, 1895, relating to irrigation districts, does not conflict with Const. art. 9, § 1, requiring uniform taxation, since that provision relates only to revenue required for the general purpose of state and municipal government.—*Board of Directors of Alfalfa Irrigation Dist. v. Collins*, 64 N. W. 1086, 46 Neb. 411.

ISLAND.

Jurisdiction of crime committed on island in river forming boundary of states, see "Criminal Law," § 10.

ISSUES.

See "Pleading"; "Trial."

J.

JAIL AND JAILER.

See, also, "Penitentiary."

Liability of city for defects in jail, see "Municipal Corporations," § 75.

[a] (Iowa; 1897.)

Under McClain's Code, § 5041, providing: "The sheriff is entitled to receive the following fees" (section 5056): "For boarding a prisoner, a compensation fixed by the board of supervisors, not less than fifty cents a day"; (section 5057) "for waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors;" and section 5062, providing that the sheriff is also entitled for attending courts, and for other service for which no compensation is allowed by law, to such annual salary as may be fixed by the board of supervisors,—he is entitled, for washing for and for waiting on prisoners, to a reasonable compensation outside of his salary.—Hamill v. Carroll County (Iowa) 69 N. W. 1122.

[b] (Wis.; 1896.)

Under Rev. St. § 4917, requiring a county to pay the sheriff his "expenses for maintaining" persons confined in the county jail, on "the accounts of the keeper of such jail having been first allowed by the county board," the sheriff is entitled only to the actual expenses which he incurs in maintaining prisoners, including the cost of the materials used for food and for preparing and serving the same, but without any allowance for his personal services, or for profits.—Doty v. Sauk County (Wis.) 67 N. W. 10.
93 Wis. 102.

[c] (Wis.; 1896.)

An action by a sheriff against the county to recover for the maintenance of prisoners confined in the county jail is properly dismissed where the complaint fails to set out the actual expenses incurred by plaintiff.—Doty v. Sauk County (Wis.) 67 N. W. 10.
93 Wis. 102.

[d] (Wis.; 1897.)

Under Rev. St. §§ 4947, 4950, providing that the sheriff shall be paid actual expenses in maintaining prisoners in county jails, he must keep accurate accounts of expenses, and present them to the county board for audit; and, if he fails so to do, he can recover by action only such reasonable expenses as he can show he incurred, by clear testimony.—Deissner v. Waukesha County (Wis.) 70 N. W. 668.

JOINDER.

Of causes of action, see "Action," §§ 5-7; "Pleading," § 14.

Of counts, see "Indictment and Information," §§ 27, 28.

Of parties and offenses, see "Indictment and Information," §§ 27, 28.

JOINT LIABILITY.

Of parties to contract, see "Contracts," § 25.

JOINT TORT FEASOR.

See "Torts."

JUDGE.

I. APPOINTMENT, QUALIFICATIONS, AND TENURE, §§ 1-3.

II. POWERS, DUTIES, AND LIABILITIES, §§ 4-7.

See, also, "Courts"; "Justices of the Peace."

Absence from trial, see "Trial," § 6.

Conduct and remarks during trial, see "Criminal Law," § 59.

Criticism of court or judge, see "Contempt," § 1.

Delegation of legislative power to, see "Constitutional Law," § 15.

Power at chambers to hear motion to vacate judgment, see "Judgment," § 95.

— of court commissioner to act as judge, see "Court Commissioners."

Prejudice of judge as ground for change of venue, see "Criminal Law," § 42.

Signature to judgment, see "Judgment," § 32.

When judge acts as court, see "Courts," § 3.

I. APPOINTMENT, QUALIFICATIONS, AND TENURE.

§ 1. Relationship to parties.

(Mich.; 1895.)

The prosecuting attorney is not a party to a criminal case, within How. St. §§ 6822, 7245, prohibiting a judge or justice of the peace from hearing any case when they are related to either party.—People v. Whitney (Mich.) 63 N. W. 765.

105 Mich. 622.

§ 2. Reviewing own decision.

(S. D.; 1896.)

Where an application to the county court for an order directing that the personal representative of a decedent should convey to plaintiff certain lands was denied without prejudice, on the ground that the applicant's right to a deed was doubtful, such determination did not disqualify the judge (who afterwards became judge of the circuit court) from hearing and determining the action brought by such applicant to establish a resulting trust in the lands in controversy.—Graham v. Selbie (S. D.) 67 N. W. 831.

§ 3. Vacancy in office—Method of filling.

(Neb.; 1895.)

Under the constitution and the statute, when a vacancy occurs in the office of county judge, and the unexpired term exceeds one year, the office should be filled by election.—State v. Lansing, 64 N. W. 1104, 46 Neb. 514.

II. POWERS, DUTIES, AND LIABILITIES.

§ 4. Authority.

[a] (Neb.; 1897.)

A judge of the district court, within his own judicial district, may hear and determine a motion for a new trial in a case wherein the judge of another district presided during the trial, but, before the hearing of the motion for new trial, had ceased to preside.—Lauder v. State (Neb.) 69 N. W. 776.

[b] (S. D.; 1894.)

A circuit judge holding court in another circuit on the request of the judge of the same may continue the term, and conclude the trial

of causes he has been requested to try at an adjourned term. *Williams v. Williams* (S. D.) 61 N. W. 38.

6 S. D. 284.

§ 5. — In chambers.

[a] (Mich.; 1897.)

Pub. Acts 1895, No. 181, conferring on the judge at chambers and the circuit court commissioners, before whom a party must be examined in proceedings in the nature of proceedings for discovery authorized by the act, the power to determine what is relevant to the issue, and giving testimony so taken the force of evidence, without providing for a review by the court of the rulings made on the examination, is unconstitutional, as conferring judicial power on said officers.—*Mulhern v. Grove* (Mich.) 70 N. W. 15.

[b] (Neb.; 1895.)

Comp. St. 1893, c. 19, authorizing the district judge at chambers "to grant, dissolve or modify temporary injunctions," does not include a final disposition of an action for an injunction, either by dismissal or otherwise.—*Browne v. Edwards & McCulloch Lumber Co.* (Neb.) 62 N. W. 1070.

44 Neb. 361.

§ 6. — In vacation.

(Neb.; 1896.)

Act February 25, 1875, authorizing judges of the district court to confirm, in vacation, sales of real estate made on execution, is not unconstitutional.—*Beatrice Paper Co. v. Beloit Iron Works*, 65 N. W. 1059, 46 Neb. 900.

§ 7. Liability for judicial acts.

(Neb.; 1895.)

A police justice, acting within his jurisdiction, is not liable in a civil action for false imprisonment because the proceedings under which the person was imprisoned were void for irregularities.—*Atwood v. Atwater* (Neb.) 61 N. W. 574, 43 Neb. 147.

JUDGMENT.

I. IN GENERAL—VALIDITY, §§ 1-9.

II. BY CONFESSION, §§ 10, 11.

III. BY DEFAULT, §§ 12-21.

1. In General, §§ 12, 13.

2. Setting Aside, §§ 14-21.

IV. RENDITION AND ENTRY—DOCKETING, §§ 22-35.

V. OPERATION AND EFFECT, §§ 36-67.

1. In General, §§ 36-38.

2. Res Judicata, §§ 39-61.

3. Lien, §§ 62-67.

VI. COLLATERAL ATTACK, §§ 68-75.

VII. FOREIGN JUDGMENTS, §§ 76-80.

VIII. PAYMENT, SATISFACTION, AND DISCHARGE, §§ 81-88.

IX. AMENDMENT, CORRECTION, AND ARREST, §§ 89-93.

X. REVIVAL, § 94.

XI. OPENING AND VACATING, §§ 95-105.

XII. EQUITABLE RELIEF, §§ 106-112.

XIII. ASSIGNMENT, §§ 113, 114.

XIV. ACTIONS ON JUDGMENTS, §§ 115-117.

Accepting benefits of judgment, estoppel to appeal, see "Appeal," § 14.

Against claimant in attachment, see "Attachment," § 48.

— corporation, condition precedent to enforcing liability of stockholders, see "Corporations," § 81.

— stockholders for corporate debts, see "Corporations," § 85.

Against surety on replevin bond, see "Replevin," § 35.

Amending pleading after judgment, see "Pleading," § 48.

Appealable judgments and orders, see "Appeal," §§ 15-38.

As condition precedent to attacking fraudulent conveyance, see "Fraudulent Conveyances," § 31.

As evidence, see "Evidence," §§ 73, 74.

By justice, see "Justices of the Peace," §§ 24-26.

Decision from justice, see "Appeal," §§ 175, 176.

— in criminal cases, see "Criminal Law," §§ 231-240.

— on appeal, see "Appeal," §§ 273-301.

Decree in equity, see "Equity," §§ 43, 48, 61.

— of specific performance, see "Specific Performance," §§ 12, 13.

Effect of appearance entered after judgment, see "Appearance," § 4.

Finality of judgment appealed from, see "Appeal," § 22.

For alimony, see "Divorce," §§ 29-31.

For divorce, see "Divorce," § 15.

For forfeiture of bail, see "Bail," § 5.

For partition, see "Partition," § 5.

For sale of land for taxes, see "Taxation," § 91.

Garnishment of judgment debtor, see "Garnishment," § 2.

In action for partnership accounting, see "Partnership," § 26.

— on bond, see "Bonds," § 9.

— on policy, see "Insurance," § 133.

— to enforce mechanics' liens, see "Mechanics' Liens," § 58.

— to enforce taxes, see "Taxation," § 77.

— to quiet title, see "Quieting Title—Removal of Cloud," § 9.

— to set aside fraudulent conveyance, see "Fraudulent Conveyances," § 38.

In attachment, see "Attachment," § 41.

In condemnation proceedings, see "Eminent Domain," § 19.

In criminal cases, see "Criminal Law," §§ 183-191.

In ejectment, see "Ejectment," §§ 10, 11.

In forcible entry, see "Forcible Entry and Detainer," § 7.

In proceedings for contempt, see "Contempt," § 16.

— to enforce assessment for public improvements, see "Municipal Corporations," § 159.

In replevin, see "Replevin," §§ 24-26.

Interest on, see "Interest," § 8.

Judgments or orders reviewable on writ of error, see "Error, Writ of," § 1.

Law of the case on appeal, see "Appeal," §§ 190, 191.

Liability of justice for entering void judgment, see "Justices of the Peace," § 13.

Modification of decree for alimony, see "Divorce," § 31.

— on appeal, see "Appeal," §§ 289, 290.

Necessity of filing judgment roll, requisites of appeal, see "Appeal," § 46.

Objections first raised on appeal, see "Appeal," § 201.

Of foreclosure, see "Mortgages," §§ 62-66.

On pleadings, see "Pleading," § 47.

Order for judgment non obstante, when appealable, see "Appeal," § 29.

Parol evidence to contradict, see "Evidence," § 102.

Perfecting judgment as condition precedent to right to costs, see "Costs," § 10.

Sheriff's fee for collecting, see "Sheriffs and Constables," § 3.

I. IN GENERAL—VALIDITY.

§ 1. What constitutes.

(Iowa; 1895.)

The record entry, after adjudging the conveyance to defendant void, as prayed by

plaintiff; that it is further ordered, adjudged, and decreed that plaintiff pay defendant, within 30 days, \$1,700, in satisfaction of all sums expended by defendant on the premises and of his services to plaintiff; that said sum be a lien on the premises; and, if not paid, that the premises be sold to satisfy the judgment,—is a "judgment," within Code, § 2489, declaring that "every final adjudication of the rights of the parties in an action is a judgment."—Walker v. Walker (Iowa) 61 N. W. 930.
93 Iowa, 643.

§ 2. — Personal judgment.

(Iowa; 1894.)

A judgment reciting that plaintiff have and recover against the defendant a specific sum named therein, and that the property attached (describing it) be sold to satisfy the judgment and costs, and awarding a special execution for the sale thereof, is not a personal judgment, but a judgment against the land.—Griffith v. Milwaukee Harvester Co. (Iowa) 61 N. W. 243.

92 Iowa, 634.

§ 3. Jurisdiction to sustain.

[a] (Iowa; 1895.)

Where motions and demurrers are submitted for decision during the term or in vacation, the court, by failure to determine the questions until the next term, does not lose jurisdiction, so as to require a resubmission.—Reed v. Lane (Iowa) 65 N. W. 380.

[b] (Iowa; 1895.)

The fact that one judge presided when the cause was heard, and another when judgment was rendered, does not invalidate the judgment.—Reed v. Lane (Iowa) 65 N. W. 380.

[c] (Neb.; 1896.)

Where a resident of New York brought an action in the United States circuit court in Nebraska to foreclose a mortgage against residents of the latter state, though the mortgagee, who was plaintiff's assignor, was also a resident of Nebraska, the court had jurisdiction of the subject-matter, and its decree of foreclosure was hence not a nullity.—Tzschuck v. Mead (Neb.) 66 N. W. 428.

47 Neb. 260.

[d] (S. D.; 1896.)

It is not essential that the jurisdiction of a superior court should affirmatively appear in the judgment roll. If it does not, and the contrary does not therein affirmatively appear, jurisdiction will be presumed.—Scaman v. Galligan (S. D.) 66 N. W. 458.

§ 4. Mistake in name of party.

[a] (Iowa; 1894.)

A mistake in the name of the plaintiff in the petition does not vitiate the judgment, where the name appears correctly in the judgment itself, in the notice to defendant, and in the writ of attachment issued in the case.—Griffith v. Milwaukee Harvester Co. (Iowa) 61 N. W. 243.

92 Iowa, 634.

[b] (Minn.; 1896.)

A judgment by default against defendant is valid, notwithstanding a mistake in the summons in the Christian name of one of the plaintiffs.—Bradley v. Sandilands (Minn.) 68 N. W. 321.

§ 5. Variance from summons.

(Neb.; 1895.)

The fact that the judgment exceeds the sum indorsed on the summons is unimportant where defendant appeared and answered to the merits.—Erck v. Omaha Nat. Bank (Neb.) 62 N. W. 67, 43 Neb. 613.

§ 6. On issue at law—Notice of assessment of damages.

(Minn.; 1895.)

Under Gen. St. 1894, § 5387 (Gen. St. 1878, c. 66, § 243), providing that on a judgment for plaintiff on an issue of law the plaintiff may proceed as if there were no answer, when the summons was personally served, the plaintiff in an action of tort was not entitled to assess his damages, on obtaining a judgment on an issue of law, without notice to a defendant who had appeared.—Davis v. Red River Lumber Co. (Minn.) 63 N. W. 1111.

61 Minn. 534.

§ 7. Conditional judgment.

(Minn.; 1895.)

Where it was decreed that plaintiff was entitled to judgment on the performance of certain conditions, mere technical failure to comply will not deprive plaintiff of the right to the judgment, where defendant can be fully compensated for such failure.—Carlton v. Carey (Minn.) 63 N. W. 611.

61 Minn. 318.

§ 8. Void as to one joint defendant.

(Neb.; 1897.)

Where all the parties to a joint and several obligation are made defendants to an action thereon, the fact that the judgment is void as to one of them because the voluntary appearance in his name was unauthorized does not render it void as to all.—Council Bluffs Sav. Bank v. Griswold (Neb.) 70 N. W. 376.

§ 9. Validating void judgment.

(Minn.; 1896.)

A void judgment cannot be validated by citing the party against whom it is entered to show cause why it should not be declared valid.—Jewett v. Iowa Land Co. (Minn.) 67 N. W. 639.

64 Minn. 531.

II. BY CONFESSION.

Collateral attack, see post, § 74.

Equitable relief, see post, § 108.

Foreign judgment, see post, § 80.

Authority of corporate officer to enter, see "Corporations," § 19.

§ 10. Statement of indebtedness.

(Iowa; 1895.)

A statement of indebtedness, for judgment by confession, filed and entered of record, is not rendered void by failure of the clerk to enter judgment thereon.—Trenery v. Swan (Iowa) 61 N. W. 947.

93 Iowa, 619.

§ 11. Warrant authorizing judgment.

[a] (Mich.; 1896.)

In a note executed in Ohio, a warrant of attorney authorizing an appearance, without process, to confess judgment against the makers, in any court of record, is sufficient to confer jurisdiction on a court of record in that state to enter judgment upon confession of an attorney of that court.—First Nat. Bank v. Garland (Mich.) 67 N. W. 559.

[b] (Mich.; 1896.)

Rev. St. Ohio, § 5321 et seq., authorizes judgment by confession; and where a duly verified petition has been filed, the court has jurisdiction to render judgment upon confession under warrant of attorney.—First Nat. Bank v. Garland (Mich.) 67 N. W. 559.

III. BY DEFAULT.

Amendment, see post, § 89.

Effect as estoppel, see post, § 40.

Effect of mistake as to defendant's name, see ante, § 4.

Equitable relief, see post, §§ 108, 109.

Allowing entry of judgment, effect as fraudulent conveyance, see "Fraudulent Conveyances," § 3.

— effect as preference, see "Insolvency," § 6.

1. IN GENERAL.

§ 12. Application for judgment—Notice. (S. D.: 1895.)

The fact that a defendant who failed to answer appeared in the action did not entitle him to notice of plaintiff's application for judgment by default, under Comp. Laws, § 5025, subd. 1. —Searles v. Lawrence (S. D.) 65 N. W. 34.

§ 13. Process to sustain.

[a] (Iowa; 1896.)

Where the copy of the notice delivered to defendant fails to show that the original notice was signed by plaintiff or his attorney, as required by statute, the service is insufficient to give the court jurisdiction to enter a default judgment.—Hoitt v. Skinner (Iowa) 68 N. W. 788.

[b] (Iowa; 1897.)

A judgment for plaintiff, in a suit against husband and wife on their joint note, is valid as to the wife, who, after appearing and filing an answer, withdrew the same, and made no further defense, though invalid as to the husband, who was not served.—Kellogg v. Window (Iowa) 69 N. W. 875.

[c] (Iowa; 1897.)

A court has jurisdiction to enter default on the second term after service, where defendant had only nine clear days intervening between the service of the notice and the first day of the next term of the court, under Code, § 2602, which provides that defendant, if served within the county where the suit is brought 10 days before the first day of the next term, shall be held to appear at such term, and, if not so served, he shall be held to appear at the second term after service.—Walters v. Blake (Iowa) 69 N. W. 879.

[d] (Mich.; 1896.)

In an action against several defendants on a joint demand, where one defendant, not served, appears and files and serves his plea, he is entitled to notice of trial; and until such notice is given the court cannot legally enter judgment by default against the remaining defendants.—Penfold v. Slyfield (Mich.) 68 N. W. 226.

[e] (Mich.; 1896.)

Proof of service must show that a copy of the declaration and rule to plead was served on defendant before a judgment by default can be taken.—Campbell v. Donovan (Mich.) 69 N. W. 514.

[f] (Mich.; 1897.)

In attachment under the log lien law, a justice of the peace had no jurisdiction to give judgment against the log owner, who did not appear, and who was not served until the day before judgment was rendered; there being no showing that the officer made any attempt to find said owner in reasonable time, though he was named in the writ.—Newbauer v. Newbauer (Mich.) 70 N. W. 1104.

See, also, post, § 16.

2. SETTING ASIDE.

Judgment of justice, see "Justices of the Peace," § 26.

§ 14. In general.

[a] (Neb.; 1897.)

Where a defendant is in default, if the petition states a cause of action, the plaintiff is

entitled to judgment, without proof except as to the quantity of damages.—Skater v. Skirving (Neb.) 70 N. W. 493.

[b] (S. D.; 1896.)

Comp. Laws, § 4939, relating to opening default judgments, should be liberally construed in order that cases may be disposed of on their merits.—Turner v. Coughran (S. D.) 66 N. W. 810.

[c] (S. D.; 1897.)

A party relieved from default by a general order may plead limitations.—Garvie v. Greene (S. D.) 70 N. W. 847.

[d] (Wis.; 1897.)

On the setting aside of a judgment rendered in the absence of a party, on the ground of mistake or excusable neglect, as authorized by Rev. St. § 2832, it is proper that the court should impose as terms the payment of the reasonable expenses incurred by the adverse party, without reference to the amount shown to have been actually paid out.—Bohl v. Schuett (Wis.) 70 N. W. 559.

§ 15. Grounds for setting aside.

[a] (Neb.; 1896.)

A default judgment entered on defendant's failure to appear at the trial will not be set aside because defendant was absent through anticipation that the case would not be reached for trial on that day, on account of its being the eighteenth case assigned to the same judge, though the case was reached only through the unexpected continuance of some of the preceding cases.—Andres v. Kridler (Neb.) 68 N. W. 938.

[b] (Neb.; 1896.)

Neither plaintiff nor his counsel appearing on the day of trial, defendant amended his answer by leave, thereby introducing new matter of defense. A trial was immediately had, and judgment rendered for defendant, based on the finding of the truth of the new defense. Held, that it was error to overrule the motion, made by plaintiff a few days later, to vacate the default, on the ground that his counsel failed to notice the day on which the cause was set for trial from oversight, and that on that day he was actively engaged in the trial of another case.—Hernance v. Cunningham (Neb.) 69 N. W. 311.

[c] (N. D.; 1895.)

To warrant the setting aside of a judgment by default on the ground of mistake, under Comp. Laws, § 4939, such mistake must consist of something done in the case, either by the court or the party, that was not intended to be done.—Sargent v. Kindred (N. D.) 63 N. W. 151.

5 N. D. 8.

[d] (N. D.; 1895.)

It was error to refuse to set aside a default judgment, as against a defendant who was not served with process, though the application was made by all defendants jointly, as to the rest of whom the default was properly permitted to stand.—Stewart v. Parsons (N. D.) 65 N. W. 672.

5 N. D. 273.

[e] (S. D.; 1895.)

Where a complaint was found insufficient to constitute a cause of action, and the jury were discharged, and the trial postponed to permit plaintiff to prepare an amended complaint, without a time being fixed within which such complaint should be answered, a judgment entered without notice, for want of an answer, before the expiration of 30 days from service of the amended complaint, should be vacated, where defendant, within the statutory time, served a meritorious answer.—Bell v. Thomas (S. D.) 63 N. W. 907.

[f] (S. D.; 1896.)

It is not a sufficient ground for opening a default judgment that defendant "was informed * * * that there was no need of going to expense to employ an attorney, for they could not get judgment against him."—State v. Casey (S. D.) 69 N. W. 585.

[g] (Wis.: 1896.)

A judgment against a defendant who did not appear, being supported neither by the complaint nor anything in the record, should be set aside.—*Stahl v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 68 N. W. 95-1.

§ 16. — Defective service of process.**(Iowa: 1896.)**

Where the service on defendant is insufficient to give the court jurisdiction to enter a default judgment, defendant is entitled to have a default judgment set aside, without complying with McClain's Code, § 4078, which requires that an affidavit of merits be filed, and a reasonable excuse for default shown, to authorize the court to set it aside.—*Hoitt v. Skinner* (Iowa) 68 N. W. 788.

§ 17. Discretion of trial court.**[a] (Iowa: 1895.)**

A refusal to set aside a judgment by default will not be disturbed where the evidence that an attorney had been employed by defendant was conflicting.—*Mogelberg v. Clevinger* (Iowa) 61 N. W. 1092.

93 Iowa, 736.

[b] (Iowa: 1896.)

The setting aside of a default against husband and wife on the ground of unavoidable casualty preventing defendants from defending, in that the husband, who assumed to look after the case, being ill, was led to believe that no judgment would be taken, was not an abuse of discretion.—*Liggett v. Worrall* (Iowa) 67 N. W. 406.

[c] (Iowa: 1897.)

It is not an abuse of discretion to open a default judgment against S. on a note intended to be that of a corporation of which he was secretary, but which, on its face, through the omission of the word "by" before his name, was the joint note of himself and the corporation, though notice of the action was served on him as well as the corporation; he having turned it over to the president, not noticing that a personal claim was made on him, and supposing that it related only to the corporation.—*Capital Savings Bank & Trust Co. v. Swan* (Iowa) 69 N. W. 1065.

[d] (Mich.: 1897.)

In an action against a city for personal injuries, where defendant has defaulted, and the court has determined that it has the right to defend, it is not within its discretion to limit the defense by striking from the plea notice that defendant would give evidence that no written notice of the injury was given the head of its law department as required by statute.—*City of Detroit v. Donovan* (Mich.) 70 N. W. 894.

[e] (Minn.: 1895.)

An application to vacate a judgment rendered on default is one addressed to the discretion of the trial court.—*St. Mary's Hospital v. National Ben. Co.* (Minn.) 61 N. W. 824.

60 Minn. 61.

[f] (Minn.: 1896.)

Defendant failed to appear at the trial on June 4th, because he was informed by his attorney that the case was set for June 5th, and a default was entered. Defendant's attorney made affidavit that he was not present when the case was set, but was informed by the trial judge that it was set for the 5th. The counter affidavits, which were not rebutted, showed that it was stipulated that the case should be set for the 4th, and that on that day, immediately after the case was set, defendant's attorney was so notified. Held not an abuse of discretion to refuse to set the default aside.—*Stewart v. Cannon* (Minn.) 68 N. W. 604.

§ 18. Delay in making motion.**(Minn.: 1897.)**

A default judgment of foreclosure against a cemetery association was entered May 31,

1890, and the sale made thereunder was confirmed November 12, 1892. The assignee of the purchaser, in July, 1895, brought ejectment against the mortgagor, in which action the mortgagor, in September, 1895, moved to vacate the decree in the foreclosure proceedings, and for leave to answer, giving, as reasons for its delay, that, when the foreclosure proceedings were brought, it was advised that it had no defense, and that after the decision, in August, 1893, of an appeal in another similar case against it, declaring such mortgages invalid, it believed, until the ejectment suit was brought, that the assignee had abandoned all claim to the land. In February, 1892, the mortgagor had been advised by counsel that it had no power to make such a mortgage, and could defeat suit thereon. Held, that the facts did not excuse the delay in making the motion.—*Northern Trust Co. v. Crystal Lake Cemetery Ass'n* (Minn.) 69 N. W. 708; *Ménage v. Same, Id.*

§ 19. When set aside as of course.**[a] (N. D.: 1895.)**

Where the attorney for defendant in an action for divorce withdrew his appearance and the answer, and the written grounds for such withdrawal, filed in the action before default was declared therein, showed that his reason for withdrawing arose from hostility to his client for alleged nonpayment of fees, a judgment against defendant for want of an answer should be set aside on defendant's motion as a matter of right.—*Nichells v. Nichells* (N. D.) 64 N. W. 73.

5 N. D. 125.

[b] (N. D.: 1896.)

When application is made under Comp. Laws, § 4900, subd. 5 (Rev. Codes, § 5260), by one served by publication, after he is in default, for leave to serve an answer, and the court holds that sufficient cause is shown, the right to defend is absolute.—*Smith v. Nicholson* (N. D.) 67 N. W. 296.

5 N. D. 426.

§ 20. Showing meritorious defense.**[a] (Iowa: 1897.)**

Under Code, § 2871, requiring an affidavit of merits to authorize the setting aside of a default, an affidavit which merely states that the question to be put in issue is "as to the liability of the defendant * * * such as grew out of the alleged alteration of the note sued upon," is insufficient, as it does not state that the note was in fact altered, or that defendant has any defense thereto.—*Polk County Sav. Bank v. Geneser* (Iowa) 70 N. W. 89.

[b] (Minn.: 1896.)

An order opening a default will not be reversed solely because of the insufficiency of the affidavit of merits or of the answer, unless the answer is such that it could be struck out on motion. *Sheldon v. Risedorph* (1877) 23 Minn. 518, followed.—*Forin v. City of Duluth*, 68 N. W. 515.

[c] (Minn.: 1897.)

It was not error to relieve a city from a judgment by default, and allow it to answer to the merits, where its affidavit showed that by reason of the failure of the mayor or those in his office to deliver the papers to the corporation counsel, the latter did not know of the suit until after judgment, and that, in counsel's opinion, the city had a good defense, and it also appeared that allowing the answer would not delay the trial beyond the time when the case could have been tried had an answer been seasonably filed.—*Glaeser v. City of St. Paul* (Minn.) 69 N. W. 1101.

[d] (Neb.: 1896.)

Under Code Civ. Proc. § 606, providing that a judgment shall not be vacated until it is adjudged that there is a valid defense to the action in which it was rendered, although the

district court may find that grounds exist for the vacation of a judgment, it should not set it aside, unless, after a hearing of the applicant's evidence, it shall find and decide that the applicant has made out a *prima facie* defense to the action in which the judgment was rendered.—*Western Assur. Co. v. Klein* (Neb.) 67 N. W. 873.

48 Neb. 904.

[c] (N. D.; 1895.)

On a motion by defendant to vacate a default judgment, an affidavit of merit, as well as a verified answer, must be presented.—*Sargent v. Kindred* (N. D.) 63 N. W. 151.

5 N. D. 8.

[f] (Wis.; 1897.)

A motion to vacate a judgment by default for money loaned a foreign firm, based on the affidavit of defendants' attorney that he was directed to enter an appearance, but neglected to do so because he did not know that they had been personally served, and the affidavit of one of the partners that the loan was to his co-partner personally, was properly denied, where defendants failed to furnish their attorney with the facts relied on as a defense till a month after rendition of judgment, and plaintiff's counter affidavit showed that the money was used by the firm.—*Pfister v. Smith* (Wis.) 69 N. W. 984.

§ 21. Default based on constructive service.

(Minn.; 1894.)

A default judgment on constructive service will not be opened when the presumption that the party in default has been diligent after receiving actual notice of the pendency of the action is conclusively rebutted.—*Mueller v. McCulloch* (Minn.) 61 N. W. 455.

59 Minn. 409.

IV. RENDITION AND ENTRY—DOCKETING.

By justice, see "Justices of the Peace," § 25. Entry on special verdict notwithstanding general verdict, see "Trial," § 118. Injunction against entry, see "Injunction," § 10. Liability of justice for failure to enter, see "Justices of the Peace," § 12. Necessity of formal entry before appeal can be taken, see "Appeal," § 17. Showing in record as to rendition, see "Appeal," § 118. Time of entering judgment for mandamus, see "Mandamus," § 28.

§ 22. Rendition and entry in general.

[a] (Iowa; 1897.)

An entry that plaintiff have judgment "for the sum of \$—," is insufficient to create a lien.—*Roane v. Hamilton* (Iowa) 70 N. W. 181.

[b] (Neb.; 1896.)

A judgment purporting to have been rendered by the court, and not by the judge thereof in vacation, cannot be presumed to have been entered out of term.—*Minnick v. Minnick* (Neb.) 68 N. W. 374.

[c] (Neb.; 1897.)

On rendering judgment, it is proper to dismiss the suit without prejudice as to an item, set out in a separate paragraph of the petition, which was not due when the suit was brought.—*Grotte v. Nagle* (Neb.) 69 N. W. 973.

§ 23. Necessity of entry in judgment book.

(S. D.; 1896.)

Under Comp. Laws, § 5102, providing that a judgment "shall be entered in the judgment book," a judgment so entered is the original judgment, and a form of judgment signed by the judge is only an order for judgment, and

not the judgment of the court.—*Locke v. Hubbard* (S. D.) 69 N. W. 583.

§ 24. Designation of parties.

[a] (Mich.; 1896.)

A judgment entry which fails to include the names of the several defendants against whom the judgment was rendered may be explained by reference to the title of the cause.—*First Nat. Bank v. Garland* (Mich.) 67 N. W. 559.

[b] (Neb.; 1895.)

An action was entitled "B. v. N. and H." In the bill of particulars it was alleged that "said defendants N. O. N. and J. H. are indebted to plaintiff." Judgment was entered by default against defendants without naming them. Service was made under Code, § 25, authorizing service against companies or firms not incorporated, the return being: "I served this writ on the within-named J. H., at his usual place of business; * * * the within N. O. N. not found in the county." Held a judgment against the firm of N. & H., and not the individual members thereof.—*Broatch v. Moore* (Neb.) 63 N. W. 30.

44 Neb. 640.

§ 25. Pleading and proof to sustain.

[a] (Iowa; 1896.)

In an action by a nonresident to cancel certain paving assessments, plaintiff stated in his petition "that he is willing and hereby offers to pay any and all legal assessments of taxes, for city or other purposes, upon said land, or for which said land may be legally assessed." Held, that such tender justified a personal judgment against plaintiff for the amount found to be legally due, regardless of any statute providing for a personal liability.—*Farwell v. Des Moines Brick Manuf'g Co.* (Iowa) 66 N. W. 176.

[b] (Mich.; 1896.)

Under a complaint alleging that plaintiff loaned to defendant money with which to pay off a mortgage on defendant's property, and that defendant promised to execute another mortgage to plaintiff for the amount of such loan, and praying that defendant be compelled to execute such mortgage, and that she be enjoined from disposing of the property, and also seeking general relief, a judgment giving plaintiff a lien on the property for the amount of the loan, and subrogating him to the rights of the holder of the prior mortgage, was warranted.—*Van Voorhis v. Boud* (Mich.) 67 N. W. 974.

[c] (Minn.; 1894.)

In an action on a note by an indorsee against the makers, several of defendants denied the genuineness of their signatures, and others alleged, and introduced evidence tending to show, fraud by the payee, in that he obtained their signatures by presenting a blank book for their subscription for shares in the purchase of a stallion, and that the note was, at the time of signing, concealed from view by a false cover on the book. Held error to render judgment for such defendants as failed to appear and testify to their having been deceived in signing the note. Cnty. J., dissenting, on the ground that the evidence of fraud was sufficient to justify the jury in finding the note void as to all of defendants, even in the hands of an innocent purchaser.—*Yellow Medicine County Bank v. Wiger* (Minn.) 61 N. W. 452.

59 Minn. 384.

[d] (Neb.; 1896.)

A judgment foreign to the issues joined, and for which there was no prayer by the party in whose favor it was rendered, must, upon appeal, be reversed in the supreme court.—*Carter v. Gibson* (Neb.) 66 N. W. 631.

47 Neb. 655.

[e] (Neb.; 1896.)

It is error to render a judgment for the plaintiff upon the pleadings, without evidence, for a larger sum than is by the answer admitted

to be due him.—*Van Etten v. Kusters* (Neb.) 66 N. W. 1106.

48 Neb. 152.

[f] (S. D.; 1895.)

Under a complaint stating an equitable cause of action, and praying an accounting with numerous persons charged in a fiduciary capacity, a judgment at law established by the evidence against one defendant only for damages for breach of contract to pay money cannot be rendered.—*Anderson v. Chilson* (S. D.) 65 N. W. 435.

[g] (Wis.; 1895.)

Rev. St. § 2886, provides that the relief granted to plaintiff, if there be no answer, cannot exceed that demanded in the complaint. *Held*, that where defendant appeared and demurred, and the judgment was entered on notice without objection, defendant cannot complain that the judgment as entered was not prayed for.—*Viles v. Green* (Wis.) 64 N. W. 856. 91 Wis. 217.

§ 26. Verdict and findings to sustain.

[a] (Iowa; 1895.)

In an action for breach of warranty, it is error for the court to enter judgment for general damages, in the absence of a finding by the jury of the amount of such damages.—*National Horse-Importing Co. v. Novak* (Iowa) 64 N. W. 616.

[b] (Wis.; 1896.)

Under Rev. St. § 2844, providing that where, in any action, there shall arise issues triable by a jury and by the court, the court shall, in its discretion, order the trial of either to be first had, and, "when both" shall be found, render judgment, it is error in an action on an insurance policy, where a claim is made by the contractor of the building insured against the owner, and the policy is sought by such contractor to be reformed so as to include his interest in the building as builder, to order the reformation of the contract on the trial of such equitable issue, before the other issues have been tried.—*Trustees of St. Clara Female Academy v. Delaware Ins. Co.* (Wis.) 66 N. W. 1140; *Same v. Milwaukee Mechanics' Ins. Co., Id.*; *Same v. Northwestern Nat. Ins. Co., Id.*; *Same v. Rockford Ins. Co., Id.* 93 Wis. 57.

§ 27. Non obstante veredicto.

[a] (Minn.; 1896.)

Where, immediately on recording the verdict in plaintiff's favor, the trial court set it aside of its own motion, without objection, it could not thereafter vacate said order, and grant defendant's motion for judgment, notwithstanding the verdict, under Laws 1895, c. 320.—*Hemstad v. Hall* (Minn.) 66 N. W. 366. 64 Minn. 136.

[b] (Minn.; 1896.)

It is error to grant a motion under Laws 1895, c. 320, for judgment, notwithstanding the verdict, unless movant makes a motion to direct a verdict in his favor at the close of the testimony.—*Hemstad v. Hall* (Minn.) 66 N. W. 366. 64 Minn. 136.

[c] (Minn.; 1896.)

A party is not entitled to an order for judgment notwithstanding the verdict, under Laws 1895, c. 320, on a motion for a new trial, unless he asks that relief in his moving papers.—*Crane v. Knauf* (Minn.) 68 N. W. 79.

[d] (Minn.; 1896.)

To entitle a party to judgment notwithstanding a verdict (Laws 1895, c. 320), he must not only have moved to direct a verdict at the close of the testimony, but, after judgment, he must specifically move for judgment in his favor; a mere motion for new trial not being sufficient to authorize the judgment.—*Netzer v. City of Crookston* (Minn.) 68 N. W. 1099.

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[e] (Neb.; 1894.)

A judgment non obstante veredicto can be entered only when the pleadings of the party in whose favor a verdict was rendered entitled the other party to judgment. *Manning v. City of Orleans* (1894) 60 N. W. 953, 42 Neb. 712, followed.—*Gibbon v. American Bldg. & Loan Ass'n*, 61 N. W. 126, 43 Neb. 132.

[f] (Wis.; 1894.)

A judgment non obstante veredicto will not be rendered for defendant.—*Sheehy v. Duffy* 61 N. W. 295, 89 Wis. 6.

[g] (Wis.; 1896.)

A judgment in favor of defendant, notwithstanding a verdict for plaintiff, will not be rendered where the pleadings and evidence raise questions of fact proper for the jury.—*Slivitzki v. Town of Wien* (Wis.) 67 N. W. 730. 93 Wis. 460.

§ 28. Joint or several judgment—Joint defendants.

[a] (Mich.; 1895.)

In an action against a husband and wife on their joint bond, personal judgment may be rendered against the husband alone, without an amendment of the pleadings, in case the wife is not liable.—*People's Bldg. & Loan Ass'n of Saginaw County v. Billing* (Mich.) 62 N. W. 373.

104 Mich. 186.

[b] (Mich.; 1896.)

Where plaintiff's action is against three joint defendants, two of whom show a valid discharge, and no discontinuance is taken as to them, a judgment in favor of plaintiff cannot be sustained against the third defendant.—*Beekman v. Sylvester* (Mich.) 66 N. W. 1093.

[c] (Wis.; 1896.)

The fact that a joint judgment is invalid as to one of the defendants, because jurisdiction over him was never acquired in the action, will not avoid the judgment as to his co-defendants.—*Keith Bros. & Co. v. Stiles* (Wis.) 65 N. W. 860.

92 Wis. 15.

[d] (Wis.; 1896.)

Rev. St. § 2884, authorizing a court, in an action against defendants jointly liable on a contract, but some of whom are not served, to enter judgment, in form, against all the defendants, so far as that it may be enforced against joint property, though permissive in form, becomes mandatory when required by the rights of a defendant; and, in an action against partners, one who is served has the right to insist on the entry of such judgment, so that it may be enforced against the property of the firm.—*Brawley v. Mitchell* (Wis.) 66 N. W. 799.

92 Wis. 671.

§ 29. Recitals in judgment against joint defendants.

(Neb.; 1895.)

Code Civ. Proc. § 511, providing that, in the entry of judgment on an instrument whereon two or more persons are jointly and severally liable, the entry shall so state if any of such persons are in fact sureties, does not apply to the entry of judgment on an appeal bond.—*Flanagan v. Cleveland* (Neb.) 62 N. W. 297. 44 Neb. 58.

§ 30. Date of judgment.

(Iowa; 1895.)

A judgment is not void merely because it is not dated.—*Reed v. Lane* (Iowa) 65 N. W. 380.

§ 31. Pending motion for new trial or to set aside verdict.

[a] (Wis.; 1896.)

A judgment entered after a motion has been made to set aside a verdict and for a new trial, but before such motion has been heard

and determined, though irregular, is not void.—*Davison v. Brown* (Wis.) 67 N. W. 42.
93 Wis. 85.

[b] (Wis.; 1896.)

Where defendant, after verdict has been rendered against him, applies for a new trial, but neglects to obtain an order staying entry of judgment until the motion should be determined, a judgment entered on the verdict after the usual three days' notice is valid, and should not thereafter be set aside on motion on the ground that it was entered pending motion for a new trial.—*Wheeler v. Russell* (Wis.) 67 N. W. 43.

93 Wis. 135.

§ 32. Signing by judge.

(Neb.; 1895.)

Where the judgment actually rendered by the county court is spread on the court records under the supervision of the judge, it is sufficient without his signature.—*Scott v. Rohman*, 62 N. W. 46, 43 Neb. 618.

§ 33. Entry nunc pro tunc.

[a] (Mich.; 1896.)

The court may cause its judgment in disbarment proceedings to be entered nunc pro tunc on discovering the omission of the clerk to record it.—*In re Shepard* (Mich.) 67 N. W. 971.

[b] (Neb.; 1896.)

Where a judgment is in fact rendered, but not recorded, the court may, at any time after, independent of statute, render the judgment nunc pro tunc.—*Van Etten v. Test* (Neb.) 68 N. W. 1023.

[c] (S. D.; 1895.)

Where a motion to vacate a judgment by default is taken under advisement, and later the action is dismissed, a subsequent order nunc pro tunc granting the motion to vacate, to take effect at a date prior to the dismissal, is valid, and the order of dismissal, inoperative when made, becomes effective upon the entry of such order.—*Todd v. Todd* (S. D.) 63 N. W. 777.

[d] (Wis.; 1896.)

Where a corporation is dissolved after an action against it is tried and the case has been taken under advisement by the court, it is proper to order the findings to be dated as of a day before the corporation was dissolved, and render judgment nunc pro tunc as of such day.—*Shakman v. United States Credit System Co.* (Wis.) 66 N. W. 528.

92 Wis. 366.

§ 34. Provision as to costs.

(Neb.; 1895.)

A judgment of a justice of the peace that: "It is therefore considered by me that plaintiff recover from defendant the sum of \$7.48 and his costs herein expended, taxed at \$37.55, as follows: See margin,"—held a sufficient compliance with Comp. St. 1893, c. 28, § 30, providing that in all actions, motions, and proceedings, the costs of the parties shall be taxed and entered on the record separately.—*Kissinger v. Staley* (Neb.) 63 N. W. 55.

44 Neb. 783.

§ 35. Effect of docketing—Notice.

(Wis.; 1896.)

One holding land in trust for another is not charged with notice of a judgment against the latter by the mere docketing thereof, so as to be liable to the judgment creditor in case he pays the proceeds of sale of the land to the cestui que trust.—*Bartz v. Paff* (Wis.) 69 N. W. 297.

V. OPERATION AND EFFECT.

Of foreign judgment, see post, § 77.

Validating void judgment, see ante, § 9.

Contempt in refusing to obey, see "Contempt," § 6.

1. IN GENERAL.

§ 36. Construction.

(Neb.; 1895.)

Where one defendant files only a demurrer to the petition, on the ground that it does not state a cause of action, and other defendants answer, presenting issues, a decree reciting that the case was heard on the pleadings and evidence, finding the facts as alleged in the petition, and granting plaintiff the relief prayed, will be treated as an order overruling the demurrer, and entering judgment thereon.—*Moore v. Kime*, 61 N. W. 736, 43 Neb. 517.

§ 37. Merger of causes of action.

[a] (Iowa; 1897.)

A confessedly void judgment does not abate a suit founded on the same subject-matter.—*Zalesky v. Iowa State Ins. Co.* (Iowa) 70 N. W. 187.

[b] (Minn.; 1896.)

Where the plaintiff in an action brought upon a joint contract obligation against the joint debtors elects, upon default of one of them to answer, to enter judgment against such defendant, the judgment is a bar to a subsequent action against the others, the debt being merged in the judgment.—*Davison v. Harmon* (Minn.) 67 N. W. 1015.

[c] (Wis.; 1895.)

A judgment in one state against one partner for a firm debt is a bar to an action in another state against another member not served in the former action.—*Keith Bros. & Co. v. Stiles* (Wis.) 64 N. W. 860.

92 Wis. 15.

§ 38. Effect of appeal.

(Neb.; 1897.)

A decree rescinding a sale of unpaid stock is a bar to a suit by a creditor of the corporation against the purchaser as a stockholder for the amount due on the stock, though an appeal therefrom is pending.—*Creighton v. Keith* (Neb.) 70 N. W. 406.

2. RES JUDICATA.

Decree for guardianship accounting, see "Guardian and Ward," § 10.

§ 39. In general.

[a] (Mich.; 1896.)

A bill in equity to obtain a new trial and for relief against a judgment will not be entertained after motion for new trial has been denied by the court which rendered the judgment, and its denial affirmed by the court of last resort. *Gray v. Barton* (1886) 28 N. W. 813, 62 Mich. 186, followed.—*Codde v. Mahiat*, 66 N. W. 1093.

[b] (Minn.; 1895.)

After the levy of an attachment, that writ was dissolved, but the creditor had a judgment for less than he claimed, but more than the debtor admitted to be due. Held, in an action for malicious prosecution in suing out and levying the attachment, such judgment did not estop plaintiff from proving the amount due, for the purpose of showing malice or bad faith by defendant.—*Tykeson v. Bowman* (Minn.) 61 N. W. 909.

60 Minn. 108.

[c] (Neb.; 1895.)

Overruling a demurrer to a petition on the ground that it did not state a cause of action does not preclude another judge of the same court from subsequently directing a verdict for defendant on the pleadings and evidence.—*Kleekner v. Turk* (Neb.) 63 N. W. 469.

45 Neb. 176.

§ 40. Conclusive nature of adjudication.

[a] (Iowa; 1896.)

A judgment reciting, "On condition of the acceptance by plaintiff of \$600 in full for all damages herein, and on the further condition that the defendant also accept same, and agrees not to appeal to the supreme court herein, judgment is hereby entered on verdict for said \$600 and costs against defendant, and motion for new trial is withdrawn," constitutes a final settlement of the controversy between the parties.—Lundon v. Waddick (Iowa) 67 N. W. 388.

[b] (Iowa; 1896.)

A decree of a circuit court of Illinois directing the receiver of a mutual life insurance company to assess upon each of the members thereof 65 per centum of their premium notes is not such an adjudication as will be conclusive upon the courts of Iowa in an action brought to enforce the payment of the premium notes given by defendant upon a policy of insurance.—Barker v. Lamb & Sons (Iowa) 68 N. W. 686.

[c] (Mich.; 1896.)

Where a bill is filed, alleging a mistake in the description of a deed, and asking for reformation thereof, and prosecuted to final decree, complainant cannot thereafter file a bill setting up the same transaction in amplified form, requiring the same facts to support it as in the former bill.—Detroit, L. & N. R. Co. v. McCammon (Mich.) 66 N. W. 471.

[d] (Mich.; 1896.)

In an action for partition and for an accounting of rents and profits of land, where a decree determining the parties to be co-tenants, and directing partition, is made, and no appeal taken, on appeal from a subsequent decree, entered on report of the commissioners, determining the rights of the co-tenants to the rents and profits, the question whether the parties are co-tenants cannot be reviewed.—Hunt v. Hunt (Mich.) 67 N. W. 510.

[e] (Minn.; 1895.)

A finding on an issue involved, on which judgment was rendered, is conclusive in a subsequent action between the same parties wherein the issue is the same.—Thompson v. Crosby (Minn.) 64 N. W. 823.
62 Minn. 324.

[f] (Minn.; 1897.)

A judgment by default constitutes an estoppel to the same extent as judgment on a verdict for plaintiff.—Northern Trust Co. v. Crystal Lake Cemetery Ass'n (Minn.) 69 N. W. 708; Menage v. Same, Id.

[g] (Minn.; 1897.)

Judgment by default in a foreclosure suit estops the purchaser from afterwards questioning the validity of the mortgage.—Northern Trust Co. v. Crystal Lake Cemetery Ass'n (Minn.) 69 N. W. 708; Menage v. Same, Id.

[h] (Neb.; 1895.)

A judgment by a court having jurisdiction of the parties and subject-matter, as between such parties, conclusively settles all questions litigated.—Chase v. Miles (Neb.) 62 N. W. 35, 43 Neb. 686.

[i] (Neb.; 1895.)

Where a decree determines the issues between the parties, and reserves the cause for an accounting, the issues cannot be retried in the subsequent proceedings for the accounting.—Younkin v. Younkin (Neb.) 63 N. W. 31.
44 Neb. 729.

[j] (Neb.; 1896.)

A judgment of amercement against an officer is, in a subsequent suit upon the official bond, conclusive evidence of the facts necessary to sustain the judgment against the officer, and prima facie evidence against the sureties.—Fire Ass'n of Philadelphia v. Ruby (Neb.) 68 N. W. 939.

[k] (Wis.; 1896.)

In an action to reform a contract to give it a certain meaning, plaintiff claiming that, through fraud or mistake, a material part was

not inserted in the writing, judgment was rendered for defendant, the court remarking at the time that the meaning of the contract would not be changed by granting the prayer. *Held* that such remark, not being part of the judgment, would not be res judicata in an action on the contract as written.—Braun v. Wisconsin Rendering Co. (Wis.) 66 N. W. 196.
92 Wis. 245.

§ 41. — Dismissal, nonsuit, or discontinuance.

[a] (Mich.; 1896.)

In an action for an injunction, a plea of former adjudication which sets up that complainant's former bill was dismissed must allege that it was dismissed on the merits.—Detroit, L. & N. R. Co. v. McCammon (Mich.) 66 N. W. 471.

[b] (Mich.; 1897.)

A discontinuance by plaintiff is not a bar to another suit.—Shank v. Woodworth (Mich.) 70 N. W. 140.

[c] (Neb.; 1896.)

The mere dismissal of an action, and publication by plaintiff of a notice that he believed he had done wrong in commencing such suit, cannot be successfully shown in bar of another suit commenced upon the same causes of action.—Oliver v. Lansing (Neb.) 67 N. W. 195, 48 Neb. 338.

[d] (Wis.; 1896.)

A judgment of peremptory nonsuit against a plaintiff is not a bar to another action for the same cause.—Gates v. Parnly (Wis.) 66 N. W. 253.
93 Wis. 294.

§ 42. Matters properly determinable or cognizable in former action.

[a] (Iowa; 1895.)

The foreclosure of a mortgage given by a guardian to secure his wards for money belonging to them in his hands—judgment being asked for only the amount of the mortgage—is not a bar to an action on the guardian's bond for the balance due though the petition alleged the removal of the guardian, and the full amount of his indebtedness.—Reed v. Lane (Iowa) 65 N. W. 380.

[b] (Iowa; 1896.)

Where the validity of a previous settlement was in issue in an action for damages, and was determined by the jury, it became res judicata, and cannot be relitigated in an action to subject lands to the payment of the judgment for damages.—Carbiener v. Montgomery (Iowa) 66 N. W. 900.

[c] (Iowa; 1896.)

Where a judgment for plaintiff is reversed because his action was prematurely brought, he must be presumed to have presented all existing facts that would show him entitled to maintain the action when commenced, and he cannot relitigate the question in a new action commenced after the case has been remanded.—Wilhelmi v. Des Moines Ins. Co. (Iowa) 68 N. W. 782.

[d] (Mich.; 1895.)

Where, pending divorce proceedings, an order for the payment of temporary alimony is made on petition accompanied by the affidavit of a physician setting out in a bill of particulars the value of his services rendered the wife and infant child of defendant, the presumption is that, in the allowance based on such petition, the physician's bill was included, and the allowance is a bar to a subsequent action against the husband by the physician for such services.—Hyde v. Leisenring (Mich.) 65 N. W. 536.

[e] (Mich.; 1896.)

After a pretended settlement between heirs, one of them petitioned the probate court for the appointment of an administrator, and, after a

hearing, in which one witness was sworn, and the papers alleged by petitioner's co-heirs to constitute the settlement were offered in evidence, the judge denied the petition for want of jurisdiction, and because the estate had been settled, but it did not appear that he was called upon to construe said papers. *Held*, that the judgment was not a bar to a suit in equity by petitioner to avoid the alleged settlement.—*Shurte v. Fletcher* (Mich.) 69 N. W. 233.

[f] (Mich.; 1897.)

In assumpsit for the keep of a horse, the bill of particulars limited the claim for keeping to the time suit was commenced, but plaintiff kept the horse until after the trial. *Held*, that extrinsic evidence that the court submitted the case on a theory which would have permitted a recovery for keeping to the time of trial was not competent, in a subsequent action, to show that the verdict was conclusive of the amount plaintiff was entitled to when the horse was taken from his possession.—*Rosema v. Porter* (Mich.) 70 N. W. 316.

[g] (Minn.; 1896.)

A judgment in replevin by a vendee against his vendor for recovery of the goods described in the contract of sale, that plaintiff have the property, or the value thereof, was a bar to a subsequent action by the vendee against the vendor for damages for failure to deliver part of such property in accordance with the contract.—*Veline v. Dahlquist* (Minn.) 66 N. W. 141.

64 Minn. 119.

[h] (Minn.; 1896.)

The plaintiff, at the commencement of the first action to determine adverse claims under the statute, held a lien on the land in question, which he claimed had at that time ripened into a title, but which in fact had not. The court so found, and ordered his complaint to be dismissed. Thereupon he moved for additional findings, setting out the facts out of which his lien arose, and declaring the same a valid lien on the premises, which findings were allowed, and judgment ordered accordingly. In the judgment entered, it was adjudged that he had a valid lien on the land, but no other interest in it. Between the time of trial and the time of the application for additional findings, his lien ripened into a title, which cut off the inferior valid lien of defendant; but this lien was by the judgment adjudged to be valid, and subsequent to plaintiff's lien. In a subsequent action brought by plaintiff to determine defendant's adverse claims, *held*, that the judgment was an adjudication that plaintiff had no title to the land, and estops him from claiming that he had such title, or that defendant's lien is cut off by the same.—*Eide v. Clarke* (Minn.) 68 N. W. 98.

[i] (Neb.; 1897.)

Judgment by default was rendered against A. and others. At a subsequent term, they filed a petition, under Code, § 602, to vacate the judgment, on the ground that it had been irregularly obtained, that the petition stated no cause of action, and that it had been procured through a fraud upon the jurisdiction of the court. This petition was dismissed, on a general finding against petitioners. They then brought an original action to enjoin the enforcement of the judgment, on the ground that it was void, alleging the same matters. *Held*, that, each of the matters pleaded in the former proceeding being pertinent to such a proceeding, the judgment in that case made them res judicata.—*Slater v. Skirving* (Neb.) 70 N. W. 493.

[j] (Neb.; 1897.)

Where a plaintiff alleges several facts, the proof of any one of which entitles him to judgment, and there is a general finding against him, it will be conclusively presumed that each fact so averred was determined against him.—*Slater v. Skirving* (Neb.) 70 N. W. 493.

§ 43. — Defenses and counterclaims.

[a] (Iowa; 1897.)

Under a lease for three years at an annual rental, payable November 1st and March 1st, the lessor, in December of the first year, 1894, sued to recover the year's rent, to March 1, 1895. Defendants pleaded a compromise, by which plaintiff accepted 1,100 bushels of oats for the year's rent, the lease to terminate March 1, 1895. Plaintiff filed an amended petition for the first installment of rent, since as to the second the action was premature, and the parties agreed that the original answer should stand. The court entered judgment, by agreement, of [first installment], upon pleadings, against defendants, and said defendants quit possession of said land March 1, 1895. *Held*, that the answer, being denied by operation of law, presented an issue involving the existence of the lease, which was conclusively settled by the agreed judgment, and hence the lessor could not recover the second installment of rent.—*Mowry v. Wareham* (Iowa) 69 N. W. 1128.

[b] (Mich.; 1895.)

In an action for fraud in procuring a logging contract, defendant claimed a reduction of damages for overpayments made by him under the contract, and it appeared that, pending the action, defendant brought a separate action to recover such overpayments, and the court ruled that for that reason the jury should not deduct the amount of such overpayments. *Held*, in a subsequent action on a supersedeas bond given on appeal by defendant, where the sum claimed was set up as a counterclaim, that defendant, after having accepted the benefit of such ruling, could not assert that the damages recovered by him were excessive, and should have been reduced to the extent of defendant's claim, and that, no reduction having been made, such claim was barred by the judgment in the previous action.—*Busch v. Wilcox* (Mich.) 64 N. W. 455.

[c] (Mich.; 1896.)

A. brought an action sounding in tort, to recover damages of defendant B. Defendant pleaded the general issue, and the only question was whether or not plaintiff had himself violated the contract between the parties, and thus justified defendant in summarily ending it. On this sole issue many items of indebtedness of A. to B. were the subject of evidence, but they were not introduced as a basis for set-off or recoupment, because not pleaded, and were not submitted to the jury. *Held*, that by that action the question of A's indebtedness to B. was not res judicata.—*Perkins v. Oliver* (Mich.) 68 N. W. 245.

[d] (Minn.; 1896.)

A judgment by default against a county auditor, granting a peremptory writ of mandamus requiring him to pay certain moneys to relator as treasurer of an alleged school district, does not estop the auditor from denying the existence of the school district on a subsequent application by the same relator for mandamus to compel the auditor to pay other moneys to him as treasurer of said alleged district.—*State v. Cooley* (Minn.) 68 N. W. 66.

[e] (Neb.; 1897.)

Failure to interpose limitations as a defense in a suit against a firm concludes the individual partner.—*Winters v. Means* (Neb.) 69 N. W. 753.

[f] (Neb.; 1897.)

A partner cannot attack a judgment against the firm on grounds which might have been set up in the action against the firm.—*Winters v. Means* (Neb.) 69 N. W. 753.

[g] (Neb.; 1897.)

Where, on an action upon the first of a series of notes given for the same consideration, defendant alleges fraud and breach of warranty, a judgment for plaintiff may be pleaded as a bar to the same defense, when interposed to

an action upon a second note of the series.—*Gilmore v. Whiteman* (Neb.) 70 N. W. 364.

[h] (N. D.: 1896.)

The complaint on a note alleged that the note was given for the value of property obtained by the maker from the payee by false pretenses, and a judgment by default adjudged that the note was so founded. *Held* that, since defendant was under no obligation to litigate the extraneous question of false pretenses, the judgment was no evidence as to their existence.—*Sobolisk v. Jacobson* (N. D.) 69 N. W. 46.

[i] (S. D.: 1896.)

Where, in an action to foreclose a mechanic's lien, one claiming an interest in the property was made a party defendant, and it was alleged in the complaint that such defendant, naming her, "has or claims to have some interest in the land, * * * but she has no claim prior or superior to that of plaintiffs," and such defendant admits such allegation in her answer, and fails to set up or claim any superior title to the property involved in the action, she is concluded by a verdict of a jury in such action finding all issues in favor of the plaintiff, and a judgment rendered thereon, and she cannot dispute the title to such property, as against one who claims the same under a sale of the property made under the judgment.—*Southard v. Smith* (S. D.) 66 N. W. 316.

[j] (Wis.: 1896.)

The denial of the reformation of a deed, prayed for in a counterclaim, is not an adjudication that the deed is in accordance with the contract of the parties.—*Gates v. Parmly* (Wis.) 66 N. W. 253.

93 Wis. 294.

§ 44. Matters determined in former suit.

[a] (Iowa: 1896.)

Judgment in replevin for plaintiff for the recovery of certain hotel furniture, claimed by him as head of a family, is not a bar to an action for the value of the use of similar furniture in the hotel, as to which defendant had wrongfully deprived plaintiff of the use.—*Mathews v. Herron* (Iowa) 67 N. W. 226.

[b] (Mich.: 1895.)

A judgment for defendant, rendered by the federal circuit court of appeals, in an action by a city to enjoin the operation of a street-railway company, because the company was operating the road without the consent of the local authorities, is conclusive of the sufficiency of the consent of the local authorities on an application by the city and certain of its citizens for an order to show cause why the attorney general of the state should not file an application in the nature of a quo warranto to inquire by what right the company maintained its railway in the streets of the city.—*City of Detroit v. Ellis* (Mich.) 61 N. W. 886.

103 Mich. 612.

[c] (Minn.: 1895.)

Where a deed contains a reservation that the grantor shall pay to the grantees annually a certain sum for the rest of their lives, a judgment in an action for one installment, creating a lien on the premises, is not a bar to an action for subsequent installments against one who redeemed the premises from sale under the judgment.—*Doescher v. Doescher* (Minn.) 63 N. W. 736.

61 Minn. 326.

[d] (Minn.: 1895.)

A personal judgment on a note made by a husband does not prevent a personal judgment against the wife on her collateral mortgage executed jointly with her husband.—*Macomb Sewer-Pipe Co. v. Hanley* (Minn.) 63 N. W. 744.

61 Minn. 350.

[e] (Minn.: 1896.)

In an action by a corporation to enforce a subscription, defendant answered, setting up, among other defenses, that the corporation was organized for an illegal purpose in furtherance

of which the subscription was procured, and a judgment was rendered for defendant. *Held* that, there being no showing that the judgment was based on the defense of illegality, the judgment was not a bar to an action to recover subsequent calls on the same subscription.—*Augir v. Ryan* (Minn.) 65 N. W. 640.

63 Minn. 373.

[f] (Minn.: 1897.)

In an action to compel a railroad company to remove its tracks from a street, on the ground that the necessity for there maintaining them has been extinguished by the company's removal of its depot and boat landings to points outside the village, a plea of *res judicata* is not sustained where the former judgment determined only that the statute gave defendant's predecessor the right to use the street if necessary; that such use was necessary to enable the company to make connections with the lake navigation; and that such necessity "has ever since existed and still exists."—*Village of Wayzata v. Great Northern Ry. Co.* (Minn.) 69 N. W. 1073.

[g] (Minn.: 1897.)

On foreclosure of a trust deed of railway property, a trustee named in another deed (a prior lien) was made a defendant. Upon a petition made by its counsel, the court, when rendering its final decree, made an allowance out of the trust funds for the services rendered by counsel after a full hearing upon the merits. Later, counsel procured an order directing the receiver to pay over the amount so allowed. The money was then paid to the plaintiff in this action, one of the counsel. The court then set apart out of the trust funds money to pay certain interest due upon bond coupons held by the parties whose interests counsel had represented, and also directed that this money be placed in the custody of defendant trust company. The plaintiff then sued to recover judgment for a balance alleged to be due for legal services, and for money expended, and to impress a lien upon the money in the custody of the trust company. *Held*, that this money was part of the trust funds out of which the former allowance was made, and the matter was *res judicata*.—*Truesdale v. Farmers' Loan & Trust Co.* (Minn.) 70 N. W. 568.

[h] (Minn.: 1897.)

The action does not come within the exception in the order directing the receiver to pay over the amount of the allowance, to the effect that such payment shall not preclude the petitioner or its counsel from recovering compensation for services from "the parties or persons represented by them."—*Truesdale v. Farmers' Loan & Trust Co.* (Minn.) 70 N. W. 568.

[i] (Neb.: 1895.)

The payment of an award of arbitrators for damage by trespassing animals under Comp. St. c. 2, art. 3, does not bar an action by the owner for damages to the animals resulting from the landowner's negligence in caring for the animals while held to secure his lien.—*Richardson v. Halstead* (Neb.) 62 N. W. 1077.

44 Neb. 606.

[j] (Neb.: 1896.)

A judgment recovered against a constable and another person for a wrongful seizure of plaintiff's property under a judgment against a third person is conclusive against the constable and his sureties as to plaintiff's ownership of the property so seized, and the amount of damage sustained thereby, unless the judgment was outside the court's jurisdiction, or was procured by fraud or collusion.—*Lewis v. Mills* (Neb.) 66 N. W. 817.

47 Neb. 910.

[k] (Neb.: 1896.)

A judgment on the merits against an overseer of highways, for the removal, under color of his office, of a fence from plaintiff's land,—the sole defense being the existence of an alleged public road at the locus in quo,—is, in

the absence of fraud, a bar to a subsequent proceeding instituted by the overseer's successor in office, in behalf of the public, to restrain a threatened obstruction of such alleged highway, where the rights of the parties depend upon the facts put in issue in the former action.—*Holsworth v. O'Chander* (Neb.) 68 N. W. 334.

§ 45. Identity of points at issue and of parties.

[a] (Minn.; 1894.)

A judgment in a former action for the same relief is not *res judicata* that plaintiff is not now entitled to it except on the conditions then imposed, where, during the intervening time, the situation has been materially changed.—*Guilford v. Western Union Tel. Co.* (Minn.) 61 N. W. 324.
59 Minn. 332.

[b] (Minn.; 1895.)

A judgment in an action against the lessee for a breach of the covenant to pay rent is not a bar to an action for damages for negligence in the care of the premises.—*Wright v. Tileston* (Minn.) 61 N. W. 823.
60 Minn. 34.

[c] (Minn.; 1896.)

Where one had possession of property of another, on a part of which he held a lien, a judgment in replevin against him for the part free from the lien was not a bar to a subsequent action of replevin for the other part, brought after tender of the amount of the lien.—*Wheelock v. Svensgaard* (Minn.) 65 N. W. 937.
63 Minn. 486.

[d] (Neb.; 1897.)

Where a second action between the same parties is upon a different demand, a judgment in a prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding or verdict was rendered.—*Slater v. Skirving* (Neb.) 70 N. W. 493.

[e] (S. D.; 1895.)

Where a second action between the same parties is on a different claim, the judgment in the prior action operates as an estoppel only as to those issues common to both actions.—*Noyes v. Belding* (S. D.) 62 N. W. 953.
6 S. D. 629.

[f] (S. D.; 1897.)

A judgment against one sued in his individual capacity, and who as such answers, disclaiming any interest in the property sued for, does not estop him to claim the property in the capacity of a trustee of others, for whom he held it when the suit was commenced.—*Sonnenberg v. Steinbach* (S. D.) 70 N. W. 655.

[g] (S. D.; 1897.)

Claim for property by one in his capacity as trustee may be made by motion in the action in which, being sued therefor in his individual capacity, and answering in such capacity with disclaimer of interest, judgment is rendered against him.—*Sonnenberg v. Steinbach* (S. D.) 70 N. W. 655.

§ 46. Grounds of former decision.

[a] (Iowa; 1894.)

Under Code, § 2851, requiring the judgment, in case matter in abatement and in bar are both pleaded, and it is based on the matter in abatement, to state such fact, the presumption in a subsequent action on the same claim is that a judgment which fails to state on which it was based was in fact based on the matter in bar.—*Garretson v. Ferrall* (Iowa) 61 N. W. 251.
92 Iowa, 728.

[b] (Minn.; 1895.)

In attachment proceedings against an assignee for the benefit of creditors, a ruling on a motion to dissolve the attachment, on the hearing of which the only question considered was whether the assignment was under the insolvent

law, or was a mere common-law assignment, is not *res adjudicata*, so as to prevent the parties from again raising the question of the validity of the attachment.—*Heidel v. Benedict* (Minn.) 63 N. W. 490.

61 Minn. 170.

§ 47. Effect on parties and privies.

[a] (Iowa; 1895.)

A judgment in an action by a third person against plaintiff and defendants for an accounting in relation to the purchase and sale of lands for the joint benefit of all the parties, wherein plaintiff answered separately, is not conclusive of plaintiff's rights to an accounting by defendants, where the rights of each party were independent, and plaintiff withdrew his answer in the former action before a final hearing, though he might have so pleaded in that action as to have presented his claim fully.—*Purslow v. Jackson* (Iowa) 62 N. W. 12.
93 Iowa, 694.

[b] (Neb.; 1896.)

A judgment is binding upon the parties thereto and their privies as to the issues adjudicated.—*Fuller v. Brownell* (Neb.) 67 N. W. 6.
48 Neb. 145.

§ 48. — Parties claiming in different rights.

(Minn.; 1895.)

A judgment in an action by a parent for the benefit of a minor child, brought under Gen. St. 1894, § 5164, to recover for injuries sustained by the child through defendant's negligence, is not a bar to an action by the parent in his individual right to recover for loss of services, expenses incurred, and compensation for care and trouble sustained by him, as a result of such injuries to the child.—*Bamka v. Chicago, St. P., M. & O. R. Co.* (Minn.) 63 N. W. 1116.
61 Minn. 549.

§ 49. — Judgment in rem.

(Minn.; 1895.)

A judgment on a special assessment to pay for grading, rendered in a proceeding wherein the lot owner did not appear, does not estop him from suing the city for grading the street below the established grade.—*Farrell v. City of St. Paul* (Minn.) 64 N. W. 809.
62 Minn. 271.

§ 50. Effect on persons not parties.

[a] (Iowa; 1894.)

In an action on a bond, on the issue as to whether a prior suit by one G. was for the benefit of plaintiff, plaintiff testified that on account of his being a nonresident he assigned to G. "the right to prosecute the bond, being the same claim for which this action is brought." *Held*, that such prior action was binding on plaintiff.—*Garretson v. Ferrall* (Iowa) 61 N. W. 251.
92 Iowa, 728.

[b] (Iowa; 1895.)

Where an assignee defended a suit to foreclose a mortgage on the ground that it was withheld from record to defraud creditors, a creditor cannot afterwards, in a suit against the mortgagor, raise the same issue.—*Mehlhop v. Ellsworth* (Iowa) 64 N. W. 638.

[c] (Mich.; 1894.)

A mortgagee of chattels is not bound by a judgment in an action between the mortgagor and another to determine the title to the property mortgaged, to which he was not a party, and which was begun after the execution of the mortgage.—*Damm v. Mason* (Mich.) 61 N. W. 3.
102 Mich. 545.

[d] (Mich.; 1896.)

Where a mortgage is made to a husband and wife jointly, on the death of the wife testate title to her half vests in the executor, and an action by him against the husband to re-

cover one-half the sum collected by the latter on the mortgage is not barred by a foreclosure suit against the mortgagor and deceased's heirs and devisees, to which the executor was not a party, and in which the husband claimed sole ownership of the mortgage, and the court so decreed.—*Luttermoser v. Zeuner* (Mich.) 68 N. W. 117.

[c] (Mich.; 1896.)

The judgment in mandamus to compel the judge of the trial court to order the production of the books of a corporation is not *res judicata* as to the stockholders who were not made parties, barring them from pleading, in a subsequent action against them, a defense which might have been pleaded in the mandamus proceedings.—*Rouse, Hazard & Co. v. Detroit Cycle Co.* (Mich.) 69 N. W. 511.

[f] (Minn.; 1896.)

A judgment *inter alios* is not evidence against a third party of any of the facts upon which it was based.—*Kurtz v. St. Paul & D. Ry. Co.* (Minn.) 67 N. W. 508.

[g] (N. D.; 1895.)

Where, in an action on a policy, defendant has shown a divestiture of plaintiff's interest in the property by a mortgage foreclosure prior to the loss, the record of a judgment annulling the foreclosure proceedings, in an action brought subsequent to the loss, to which defendant was not a party, is inadmissible.—*Tierney v. Phoenix Ins. Co. of Brooklyn* (N. D.) 62 N. W. 642.

4 N. D. 565.

[h] (Wis.; 1897.)

A judgment is no evidence against a stranger that plaintiff therein owned the cause of action upon which he recovered it.—*Landauer v. Espenhain* (Wis.) 70 N. W. 287.

§ 51. — Persons notified to defend.

[a] (Mich.; 1895.)

A grantor, who is notified by a grantee to appear in an action against the grantee involving the title to the land, cannot, in assumption for the value of timber on the land, claim that the question of title had not been adjudicated, where judgment was rendered against the grantee.—*Fitzpatrick v. Hoffman* (Mich.) 62 N. W. 349.

104 Mich. 228.

[b] (Minn.; 1896.)

An ejectment having been brought against the vendee for the recovery of the land, the vendor was notified thereof, and undertook to defend the same. *Held* that, in a subsequent action against him by the vendee because of the eviction by plaintiff in the ejectment suit, the vendor was bound by the judgment in ejectment.—*Fleckton v. Spicer* (Minn.) 65 N. W. 926.

63 Minn. 454.

§ 52. — Effect of participating in litigation.

[a] (Mich.; 1895.)

Where a new township is created from a portion of an old township, after the issuance of bonds by the old township, the new township cannot defend an action by the old to enforce its liability for its proportion of a judgment recovered by a bondholder against the old township, on the ground that it has not had its day in court, the new township having assisted in the defense of the action by the bondholder against the old township.—*Township of Grant v. Township of Reno* (Mich.) 65 N. W. 376.

[b] (Minn.; 1895.)

Where lien claimants sued the vendor and his purchaser to enforce their liens against the property, and a surety on a bond given by the vendor to indemnify the purchaser against mechanics' liens appeared for the vendee, and conducted the defense of the suit for him and the vendor, a judgment in that suit was conclusive against the surety in an action on the

bond.—*Reed v. McGregor* (Minn.) 64 N. W. 88. 62 Minn. 94.

§ 53. — Heirs.

(Minn.; 1895.)

A decree of the probate court assigning the residue of an estate is conclusive on all persons interested in the estate, though not then in being.—*Ladd v. Weiskopf* (Minn.) 64 N. W. 99.

62 Minn. 29.

§ 54. — Enforcement of logging lien.

(Minn.; 1895.)

A judgment for one claiming a lien for labor on logs, under Gen. St. 1894, §§ 2451–2465, in an action wherein the owner of the logs was not a party, does not prevent such owner from denying and contesting the lien in a subsequent action to recover the logs.—*Brown v. Markham* (Minn.) 62 N. W. 123.

60 Minn. 233.

§ 55. Judgment against principal—Effect on sureties.

[a] (Minn.; 1895.)

A judgment against a sheriff for acts constituting a breach of condition of his bond is only *prima facie* evidence of the breach as against the sureties.—*Hursey v. Marty* (Minn.) 63 N. W. 1090.

61 Minn. 430.

[b] (Neb.; 1895.)

A judgment in an action of replevin against an officer for the value of property illegally seized by him is conclusive against the officer and his sureties in an action on the officer's official bond as to plaintiff's ownership of the property when seized, and the amount of damages suffered.—*Thomas v. Markmann* (Neb.) 62 N. W. 206, 43 Neb. 823.

§ 56. Suit on behalf of infant—Effect on infant.

(Minn.; 1895.)

The judgment in an action by a father under Gen. St. 1894, § 5164, authorizing him to maintain an action for injury to his minor child, is a bar to a subsequent action by the minor or his guardian, or by the minor after reaching majority.—*Lathrop v. Schutte* (Minn.) 63 N. W. 493.

61 Minn. 196.

§ 57. Pleading.

[a] (Mich.; 1896.)

In an action for an injunction, a plea of former adjudication, which sets up a public record of the same court in which the action is pending, need not be verified.—*Detroit, L. & N. R. Co. v. McCammon* (Mich.) 66 N. W. 471.

[b] (Mich.; 1896.)

A plea of former adjudication to a bill for an injunction need not confess or acknowledge any of all the matters set forth in the bill.—*Detroit, L. & N. R. Co. v. McCammon* (Mich.) 66 N. W. 471.

[c] (Minn.; 1895.)

Estoppel by former verdict, being conclusive evidence only of the facts actually litigated in the former action, need not be pleaded in a subsequent action between the same parties on a different cause.—*Swank v. St. Paul City Ry. Co.* (Minn.) 63 N. W. 1088.

61 Minn. 423.

[d] (Neb.; 1897.)

A party may not present issues for determination, and avoid the effect of an estoppel by withholding proof thereof.—*Slater v. Skirving* (Neb.) 70 N. W. 493.

§ 58. Parol evidence.

(Neb.; 1897.)

Where the record leaves it uncertain as to what issues were adjudicated in a former action, extrinsic evidence is admissible in another

action for a different object to show on what issues the first case was determined.—*Slater v. Skirving* (Neb.) 70 N. W. 493.

§ 59. Judgment in replevin.

(Minn.; 1890.)

Where plaintiff in replevin obtained possession, and on the trial dismissed the suit, whereupon judgment was entered for defendant for a return of the property or \$115, that judgment was not—under Gen. St. 1878 c. 65, § 272 (Gen. St. 1894, § 5420), providing that if the property is delivered to plaintiff in replevin, and the action dismissed before answer, defendant shall have judgment for a return and damages, but that such judgment shall not be a bar to another action—inconclusive as to the value of the property.—*Johnson v. Vaule* (Minn.) 63 N. W. 1039.

61 Minn. 401.

§ 60. Action for divorce.

(Mich.; 1895.)

The fact that defendant's wife procured a divorce from him on the ground of extreme cruelty will not conclude him from denying that he was guilty of cruelty, on an issue as to her justification in leaving him, raised in an action against him by a third person for necessities furnished the wife after she had left her husband, and before getting her divorce.—*Corry v. Lackey* (Mich.) 63 N. W. 418.

105 Mich. 363.

§ 61. Decision in habeas corpus proceeding.

(Mich.; 1895.)

The determination of a court on habeas corpus for the custody of a child is conclusive on a subsequent application for the writ based on the same state of facts.—*In re Sneed* (Mich.) 62 N. W. 1009.

105 Mich. 61.

3. LIEN.

Action on judgment after lien has lapsed, see post, § 116.

Preserving lien on setting aside judgment, see post, § 105.

On homestead, see "Homestead," § 20.

Priority of lien of mortgage, see "Mortgages," § 22.

§ 62. In general.

[a] (Neb.; 1895.)

A judgment recovered against the vendor of land, who has not conveyed the same, or received all the purchase money, is a lien on the interest of the vendor in the land, consisting of the unpaid purchase money.—*Olander v. Tighe*, 61 N. W. 633, 43 Neb. 344.

[b] (Neb.; 1896.)

Where a judgment debtor and his wife conveyed their homestead to a co-judgment debtor for the purpose of having it reconveyed to the wife, which was done, the lien of the judgment did not attach.—*Roberts v. Robinson* (Neb.) 68 N. W. 1035.

[c] (S. D.; 1895.)

The lien of a judgment against a corporation whose assets consist partly in real estate is an innumbrance on such real estate.—*Willis v. Rapid Valley Horse-Ranch Co.* (S. D.) 63 N. W. 546.

[d] (Wis.; 1897.)

Land purchased and paid for by a married woman was, without her knowledge or consent, deeded to her husband, but, two days later, on discovering that fact, she demanded a deed in her own name, whereupon the husband conveyed the property to her. *Held*, that such conveyance executed the implied trust in favor of the wife as of the date of the deed to the husband, so that the lien of a prior judgment

against him did not attach. *Davenport v. Stephens* (Wis.) 70 N. W. 661.

§ 63. Date of lien.

(Wis.; 1896.)

Saml. & B. Ann. St. § 2905a, providing that a decree affecting real estate shall be a lien only from the time it is docketed, does not apply to a judgment foreclosing a mortgage, since it does not create a lien, but enforces the lien created by the mortgage.—*Huntington v. Meyer* (Wis.) 66 N. W. 500.

92 Wis. 557.

§ 64. Title to property.

[a] (Iowa; 1896.)

Where a wife paid the entire consideration for lands, and the grantor thereupon delivered to her a deed, expressly saying that he intended to make the conveyance to her, the fact that by a mistake of the scrivener her husband's name was inserted in the deed as grantee, who quitclaimed the premises to his wife as soon as the mistake was discovered, vested no interest in the husband to which the lien of a judgment against him could attach during his nominal ownership.—*Bucknell v. Deering* (Iowa) 68 N. W. 825.

[b] (Neb.; 1897.)

The lien of a judgment of the district court attaches to all the lands of the debtor within the county where the judgment was rendered, whether then owned by him or subsequently acquired.—*Duell v. Potter* (Neb.) 70 N. W. 922.

[c] (Wis.; 1895.)

Where property is paid for by one person, and the title taken by another, under Rev. St. §§ 2077, 2078, which provides that such conveyance shall be presumed fraudulent as against the creditors of the former, and, where not disproved, a trust shall result in favor of such creditors, the person paying the consideration acquires no title to which a judgment lien can attach.—*Blackburn v. Lake Shore Traffic Co.* (Wis.) 63 N. W. 289.

90 Wis. 362.

§ 65. After-acquired property.

[a] (Iowa; 1895.)

Where judgments are obtained at different times against the same defendant, and the latter thereafter acquires property to which judgment liens may attach, both of such judgments become liens on the after-acquired property at the same instant, and neither has priority. *Ware v. Purdy* (1894) 60 N. W. 526, followed.—*Kesterson v. Tate*, 63 N. W. 350.

[b] (Iowa; 1895.)

Under Code, § 2882, declaring judgments liens on lands owned by defendant or thereafter acquired, the liens of judgments attach to after-acquired property *pari passu*.—*Ware v. Delahay* (Iowa) 64 N. W. 640.

§ 66. Priorities.

[a] (Iowa; 1894.)

The lien established on a defendant's other real property by the decree in a foreclosure judgment has no priority over the equitable one existing in favor of one to whom defendant had previously contracted in writing to convey a certain parcel.—*Kraner v. Chambers* (Iowa) 61 N. W. 373.

92 Iowa, 681.

[b] (Iowa; 1895.)

Where judgments in favor of different persons are recovered on the same day against the same defendant, the judgment creditor first issuing execution and levying on the debtor's property acquires a prior lien thereon.—*Kesterson v. Tate* (Iowa) 63 N. W. 350.

[c] (Iowa; 1895.)

Where judgments held by different persons are not a lien on the property of defendant, the judgment creditor who first issues execution and

levies on the property secures a prior lien.—Kesterson v. Tate (Iowa) 63 N. W. 350.

[d] (Neb.; 1895.)

The docketing in the district court, pursuant to Code Civ. Proc. § 561, of a judgment rendered by a county court or a justice of the peace, does not make such judgment one of the district court, so as to entitle the judgment creditor to a pro rata distribution of funds with a creditor under a contemporaneous district court judgment.—Moores v. Peycke (Neb.) 62 N. W. 1072.

44 Neb. 405.

§ 67. — Mortgages.

(Neb.; 1895.)

Where land is omitted from a mortgage by mistake, the lien of a judgment subsequently filed against the mortgagor is subject to the equity of the mortgage.—Chadron Loan & Building Ass'n v. Hamilton (Neb.) 63 N. W. 808.

45 Neb. 369.

VI. COLLATERAL ATTACK.

On foreign judgment, see post, § 79.

§ 68. In general.

(Iowa; 1896.)

A judgment obtained against a school district after trial and determination of the right to recover cannot, on mandamus proceedings to compel levy of tax to pay it, be attacked on the ground that the creation of the indebtedness for which the judgment was obtained was in violation of Const. art. 11, § 3, fixing the limit of indebtedness of the district; at least where the abandonment of appeal from the judgment by the officers of the district was not collusive for the purpose of avoiding consideration of the question.—Edmundson v. Independent School Dist. of Jackson (Iowa) 67 N. W. 671.

§ 69. What constitutes.

(Iowa; 1896.)

An action to cancel and enjoin the enforcement of a judgment against a garnishee, on the ground that it has been satisfied according to its conditions, is not a collateral attack.—Brakke v. Hoskins (Iowa) 67 N. W. 235.

§ 70. Showing errors and irregularities.

[a] (Mich.; 1896.)

Erroneous action of the circuit court in an attachment suit in allowing costs to the plaintiff, the amount recovered being less than \$100, cannot be collaterally attacked in an action on the bond of an intervener, conditioned on the payment of the judgment recovered, which should be adjudged a lien on the property.—Gill v. Backus (Mich.) 66 N. W. 347.

[b] (Minn.; 1896.)

Irregularities, though apparent on the face of the record, do not render the judgment void, and subject to collateral attack.—Vaule v. Miller (Minn.) 67 N. W. 540.

64 Minn. 485.

[c] (Neb.; 1895.)

Since the county court has jurisdiction to set aside the homestead of a surviving husband, the fact that in doing so it proceeded under Laws 1889, c. 57, which was since declared unconstitutional, did not render the decree open to collateral attack.—Brandhoefer v. Bain, 64 N. W. 213, 45 Neb. 781.

[d] (Neb.; 1895.)

It was no ground for collateral attack of a judgment rendered in an action against a partnership that the judgment was rendered against one partner only.—Hough v. Stover 65 N. W. 189, 46 Neb. 588.

[e] (Neb.; 1897.)

A judgment, erroneous because not based on any findings, is voidable, but not void.—Maryott v. Gardner (Neb.) 69 N. W. 837.

[f] (Wis.; 1896.)

In an action upon a note given as collateral security, an order, entered in an action on the principal debt, allowing the sheriff to amend his return to an execution issued therein, and vacating the judgment, execution, and sale in such action, cannot be collaterally impeached for irregularity.—Ashland Nat. Bank v. Gregory (Wis.) 69 N. W. 168.

§ 71. — Defective process or service thereof.

[a] (Mich.; 1897.)

A judgment cannot be impeached in a collateral action by extrinsic evidence to show, in contradiction of the record, that service was not in fact made on the defendant.—Allured v. Volter (Mich.) 70 N. W. 1037.

[b] (Neb.; 1896.)

In a collateral proceeding, by which is attacked a deficiency judgment, as having been entered without notice of the motion therefor, evidence cannot be considered which is merely contradictory of satisfactory proof of service submitted to the court by which the judgment was entered.—Gillilan v. Murphy (Neb.) 69 N. W. 98.

[c] (Neb.; 1897.)

Where there is an attempt at service reaching the defendant, a defect in the manner of service or form of the return is a mere irregularity, and is not ground for collateral attack on the judgment. But where the attempted service does not reach the defendant at all, a judgment founded thereon is absolutely void.—Campbell Printing Press & Manuf'g Co. v. Marder, Luse & Co. (Neb.) 69 N. W. 774.

[d] (S. D.; 1896.)

Though no separate affidavit appears in the record of an attachment suit against a nonresident defendant showing that copies of the summons and complaint were mailed to him, such fact is sufficiently shown in a collateral proceeding by the affidavit made by the attachment plaintiff on his application for judgment, and by a recital in the judgment.—Davis v. Cook (S. D.) 69 N. W. 18.

§ 72. For want of jurisdiction.

[a] (Minn.; 1896.)

When the record of a judgment shows that the court was without jurisdiction to proceed in the action in which the judgment was rendered, the judgment may be impeached collaterally.—Jewett v. Iowa Land Co. (Minn.) 67 N. W. 639.

64 Minn. 531.

[b] (Neb.; 1895.)

A decree entered by the supreme court on a proceeding in error taken from an order not appealable is void, and subject to collateral attack, though the proceeding in error was taken and the decree entered pursuant to a stipulation of the parties.—Johnson v. Parrotte 64 N. W. 363, 46 Neb. 51.

[c] (S. D.; 1896.)

A judgment authorizing the arrest of a defendant, which was rendered in an action the complaint in which did not state a cause of action based upon the fraud of the defendant, could be collaterally attacked by defendant on habeas corpus.—Griffith v. Hubbard (S. D.) 67 N. W. 850.

§ 73. For fraud.

[a] (Iowa; 1896.)

That the affirmance of a judgment against a school district was bad by reason of collusion of the parties does not justify a collateral attack of the judgment, the remedy being by timely proceeding to set aside the order

of affirmance.—*Edmundson v. Independent School Dist. of Jackson (Iowa)* 67 N. W. 671.

[b] (Mich.; 1896.)

While a judgment fraudulently obtained may be collaterally attacked by a third person who had no notice of the fraud at the time he acquired interests in property sold under the same, parties and their privies can obtain relief therefrom only in a direct proceeding instituted for that purpose in the court where the original proceeding was held.—*Dunlap v. Byers (Mich.)* 67 N. W. 1067.

§ 74. On judgment by confession.

(Wis.; 1895.)

A judgment by confession is not subject to collateral attack, though the affidavit to the complaint on which it was confessed is defective.—*F. Mayer Boot & Shoe Co. v. Falk (Wis.)* 61 N. W. 562, 89 Wis. 216.

§ 75. Attack on sales made by order of probate court.

(Minn.; 1895.)

Under Gen. St. 1894, § 4612, relating to the contest of sales made by an executor, administrator, or guardian, the record of the probate court in the sale of land by a guardian imports absolute verity, and, when regular on its face, cannot be questioned in a collateral proceeding by any evidence dehors the record.—*Kurtz v. St. Paul & D. R. Co. (Minn.)* 63 N. W. 1.

61 Minn. 18.

VII. FOREIGN JUDGMENTS.

Actions on, see post, § 117

§ 76. Giving full faith and credit to judicial proceedings of sister state.

[a] (Mich.; 1895.)

Under Const. U. S. art. 4, § 1, declaring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," a decree of a court of Illinois, ascertaining the assets and liabilities of a corporation, and decreeing the assessments against the members, who were not parties to the suit, required to pay its liabilities, the decree being, in Illinois, conclusive against the members, is also conclusive against the members in an action in Michigan to recover such assessment from a member.—*McGrath, C. J., and Long, J., dissenting.—Mutual Fire Ins. Co. v. Phoenix Furniture Co. (Mich.)* 66 N. W. 1095.

[b] (Wis.; 1895.)

Under Const. U. S. art. 4, § 1, requiring full faith and credit to be given in each state to the "public acts, records, and judicial proceedings of every other state," a decree of an Illinois court, ordering an assessment upon premium notes of a mutual insurance company, being conclusive in Illinois on all members, unless attacked by direct proceedings, is not open to collateral attack in the courts of Wisconsin.—*Parker v. Stoughton Mill Co. (Wis.)* 64 N. W. 751, 91 Wis. 174.

§ 77. Conclusiveness and effect.

[a] (Iowa; 1896.)

A judgment in an action brought in a foreign state to set aside a deed to lands in Iowa did not settle the title to said lands as to defendants living in Iowa who did not appear in said action, where said judgment did not purport to act upon the land, though it ordered a defendant who did appear to execute a deed to said lands to the plaintiff in that action, and enjoined the other defendants from prosecuting an action in Iowa affecting the title to said land, or from conveying or incumbering the same, and it appeared that prior to said action plaintiff therein had conveyed the lands to his wife.—*Blackman v. Wright (Iowa)* 65 N. W. 843.

[b] (Iowa; 1896.)

A judgment entered in an action brought in a foreign state to set aside a deed to lands in Iowa is not binding on defendants living in Iowa who did not appear in said action, though their grantor did.—*Blackman v. Wright (Iowa)* 65 N. W. 843.

[c] (Neb.; 1895.)

A judgment of a court of a sister state, properly authenticated, is conclusive on the subject-matter of the suit; and an action thereon can only be defeated on the ground that the court had no jurisdiction, that there was fraud in procuring the judgment, or by defenses based on matters arising after the judgment was rendered.—*Snyder v. Critchfield (Neb.)* 62 N. W. 306.

44 Neb. 66.

[d] (Neb.; 1895.)

In an action on a foreign judgment, payment of the debt before judgment, that the foreign action was barred by the statute of limitations, or any other defense which applied to the original cause of action, cannot be availed of.—*Snyder v. Critchfield (Neb.)* 62 N. W. 306.

44 Neb. 66.

§ 78. Showing want of jurisdiction.

(Wis.; 1896.)

In an action on a foreign judgment, the objection that the judgment defendant was a nonresident of the foreign state when the action was commenced, and jurisdiction of him could not therefore be obtained, cannot be urged where the record shows that he was, shortly before the time, engaged in business there, and that the return of summons reported him "not found" only in one county.—*Keith Bros. & Co. v. Stiles (Wis.)* 65 N. W. 860.

92 Wis. 15.

§ 79. Showing fraud.

(Neb.; 1895.)

A foreign judgment cannot be attacked for fraud because it was procured in plaintiff's favor by the aid of an attorney who was a member of a firm hired to conduct the defense, where no objection was made at the time.—*Cox v. Barnes (Neb.)* 63 N. W. 394.

45 Neb. 172.

§ 80. Judgment by confession.

(Neb.; 1895.)

A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on in Nebraska, as a judgment on adversary proceedings.—*Snyder v. Critchfield (Neb.)* 62 N. W. 306.

44 Neb. 66.

VIII. PAYMENT, SATISFACTION, AND DISCHARGE.

Compelling payment, see "Mandamus," § 20.

Satisfaction of judgment in replevin, see "Replevin," § 26.

§ 81. Payment.

(Mich.; 1897.)

Where an agent authorized to collect a judgment accepts a check in payment, knowing that there is money in the bank to pay it, and notifies his principal, who is the real party in interest, though another is the nominal creditor, and, before presenting the check, by collusion permits the deposit to be exhausted by a check previously given to the principal for another debt, but dishonored for lack of funds, the judgment will be considered paid, so that it may not be enforced against sureties for the debt for which it was obtained.—*Kallander v. Neidhold (Mich.)* 70 N. W. 892.

§ 82. Set-off of judgments.

(S. D.; 1895.)

Proceedings for setting off judgments cannot be defeated by subsequent notice by the attorney of one of the judgment creditors of his claim of lien.—*Sweeney v. Bailey* (S. D.) 64 N. W. 188.

(S. D.; 1895.)

A judgment for plaintiff in replevin, for the property or the value thereof, against one claiming the property and the officer who seized the same under the claim, was subject to have set off against it a joint judgment obtained by the individual defendant in replevin, in an action on a joint and several note wherein he was plaintiff, against the plaintiff in replevin and another as makers of the note.—*Sweeney v. Bailey* (S. D.) 64 N. W. 188.

§ 83. Filing release in court.

(Mich.; 1896.)

Under statutory provisions for the discharge of one of the joint debtors without releasing the others from their ratable proportions of the debt, 2 How. Ann. St. § 7784, permits the clerk of the court to discharge a judgment, as to the released debtor, upon filing the proper evidence. *Held*, that such filing and discharge are not a prerequisite to a release, and that a release may be shown on the trial of an action brought to enforce the judgment.—*Beekman v. Sylvester* (Mich.) 66 N. W. 1093.

§ 84. Entry on record.

(Neb.; 1896.)

The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.—*Manker v. Sine* (Neb.) 66 N. W. 840.
47 Neb. 736.

§ 85. Payment into court.

(Mich.; 1894.)

Where a decree requires the payment of a certain amount to "complainant" within a certain time under pain of forfeiture, a deposit of such amount with the register of the court is not a compliance therewith.—*Lewis v. Kean* (Mich.) 61 N. W. 63.
102 Mich. 605.

§ 86. Consideration for release.

(Iowa; 1895.)

Where a judgment creditor has levied on the property of the wife of one of the judgment debtors as belonging to such debtor, and litigation in regard thereto is pending, the payment of a part of the judgment, and the settlement of the levy proceedings, constitute a sufficient consideration to support a release of the judgment.—*Stoutenberg v. Innisman* (Iowa) 61 N. W. 917.
93 Iowa, 213.

§ 87. Release of one judgment defendant.

(Neb.; 1897.)

The release by a judgment creditor of specific property belonging to one of the several judgment debtors from the lien of the judgment will not, of itself, discharge the other defendants.—*Council Bluffs Sav. Bank v. Griswold* (Neb.) 70 N. W. 376.

§ 88. Effect of tender.

(Minn.; 1895.)

Where a judgment debtor tenders the amount of the judgment, which the creditor refuses to accept, in order to redeem the land of the sale on a prior lien, the court will set aside such redemption, and compel the satisfaction of the judgment.—*Rother v. Monahan* (Minn.) 62 N. W. 263.
60 Minn. 186.

IX. AMENDMENT, CORRECTION, AND ARREST.**§ 89. Amendment.**

(N. D.; 1894.)

A court of equity, in furtherance of justice, may modify a judgment in a particular not affecting the merits of the case, but merely relating to the mode of execution.—*Tyler v. Shea* (N. D.) 61 N. W. 468.
4 N. D. 377.

(S. D.; 1895.)

Where the summons and complaint served on defendant clearly stated that, in case no answer was made, plaintiff would apply for judgment on the notes in suit, and for an adjudication that the debt was incurred for property obtained under false pretenses, defendant is not entitled to a modification of a judgment by default on the ground that he made no defense because he did not know that by Comp. Laws, § 5139, no "additional exemptions" can be claimed, as against a debt incurred for property obtained under false pretenses.—*Sundback v. Griffith* (S. D.) 63 N. W. 544.

§ 90. Time of making amendment.

(Minn.; 1896.)

Over 23 years after the confirmation of a guardian sale, and after the execution of the guardian's deed, the probate court assumed to amend all the files and records, from the petition for license to sell to the guardian's deed, so as to exclude from the description a part of the land described in the petition for license, license to sell, report of sale, order of confirmation, and guardian's deed. *Held*, that the action of the probate court was without jurisdiction, and void.—*Kurtz v. St. Paul & D. Ry. Co.* (Minn.) 67 N. W. 808.

(Neb.; 1895.)

Under Code Civ. Proc. § 602, a decree cannot be modified after the term at which it was rendered so as to permit deeds filed to stand as a compliance with the decree, nor so as to render a money judgment against defendant.—*Barnes v. Hale* (Neb.) 62 N. W. 1063.
44 Neb. 355.

(N. D.; 1894.)

Where a time is specified within which money must be paid to entitle a party to the benefit of the judgment, the court may, even after such time has expired, extend it by modifying the judgment directing that the payment to the party be made to the clerk of the court for the benefit of such party.—*Tyler v. Shea* (N. D.) 61 N. W. 468.
4 N. D. 377.

§ 91. Correction of clerical mistakes.

(Iowa; 1895.)

A judgment will not be corrected on the ground of a mistake in computation, after the time provided by Code, §§ 2837, 3154, for a new trial to correct such mistakes, no excuse for the failure to discover such mistake being given.—*Reed v. Lane* (Iowa) 65 N. W. 380.

(Minn.; 1895.)

Where, through inadvertence of the court, the judgment declared the mortgage in suit void, as well as set aside the foreclosure sale thereunder, the court could correct the same by striking out the provision as to the mortgage.—*Chase v. Whitten* (Minn.) 65 N. W. 84.
62 Minn. 498.

(Neb.; 1897.)

An affidavit on a motion under Code Civ. Proc. § 602, subd. 3, to correct the record entry of a judgment for mistake of the clerk, or irregularity in obtaining it, is insufficient if it only alleges that defendant did not consent to have any judgment rendered against him by stipulation or otherwise, and had no knowledge of such stipulation, where the record shows

that on the parties submitting the case to the court, on a stipulation in open court, the court found the issues in favor of plaintiff.—*Hogue v. Ogle* (Neb.) 70 N. W. 940.

§ 92. Reduction of excessive judgment.

(Iowa; 1896.)

The rule that the amount of the recovery fixed by the verdict of a jury cannot be reduced by the court without giving the successful party the option of a new trial does not apply where a case is tried by the court. Having power to correct its judgments during the term, it may reduce the amount of a judgment if satisfied that it is too large.—*Flickinger v. Omaha Bridge & Terminal Ry. Co.* (Iowa) 67 N. W. 372.

§ 93. Motion in arrest.

(Iowa; 1896.)

Inconsistency between a special finding and the general verdict cannot be taken advantage of by motion in arrest.—*Moffitt v. Albert* (Iowa) 66 N. W. 162.

X. REVIVAL.

§ 94. Necessity of revival.

(N. D.; 1897.)

Under Comp. Laws, § 5110, authorizing the personal representatives of a judgment creditor, within five years after the entry of judgment, to proceed to enforce the same by writ of execution, formal proceedings reviving the judgment in the name of the representatives are unnecessary.—*Daisy Roller Mills v. Ward* (N. D.) 70 N. W. 271.

XI. OPENING AND VACATING.

Judgment by default, see ante, §§ 14-21.
Compelling vacation, see "Mandamus," § 13.
Vacation, appealable order, see "Appeal," § 30.
— of decree for divorce, see "Divorce," §§ 17, 18.
— of foreclosure decree, see "Mortgages," §§ 79-81.
— of order granting new trial, see "New Trial," § 6.

§ 95. Jurisdiction to vacate.

[a] (Neb.; 1895.)

Where a judgment is rendered in a court having two judges, an application at the same term to vacate it as obtained on a forged waiver of service of summons may be considered by whichever judge is presiding at the time the application is presented.—*Dolen v. Buchanan*, 62 N. W. 233, 43 Neb. 551.

[b] (Neb.; 1897.)

A judge of the district court has no jurisdiction at chambers to hear and decide a motion to vacate a judgment made after the term at which the judgment was rendered.—*Fisk v. Thorp* (Neb.) 70 N. W. 498.

[c] (Wis.; 1895.)

The county court has power, upon petition, to set aside a judgment of distribution which has been procured by fraud, if it does not disturb rights which have become confirmed by limitations, though an appeal may be prosecuted therefrom.—*In re O'Neill's Estate* (Wis.) 63 N. W. 1042.

90 Wis. 480.

[d] (Wis.; 1895.)

Where a legatee, by fraudulent representations to the heirs, secures a judgment vesting the entire residuary estate in her, the heirs, immediately after discovering the fraud, may petition to set aside the judgment without bringing suit directly against said legatee.—*In re O'Neill's Estate* (Wis.) 63 N. W. 1042.

90 Wis. 480.

§ 96. Notice.

(Neb.; 1897.)

On the hearing of a motion to vacate the judgment of a district court after a term at which it was rendered, there must be reasonable notice to the adverse party or his attorney in the action.—*Fisk v. Thorp* (Neb.) 70 N. W. 498.

§ 97. Against innocent purchaser.

(Mich.; 1895.)

A decree by default may be opened on showing of an adequate excuse, where the case has not been enrolled, though third parties have purchased in reliance on the judgment.—*Benedict v. Auditor General* (Mich.) 62 N. W. 364.

104 Mich. 269.

§ 98. Grounds.

[a] (Minn.; 1895.)

It is no ground for vacating a judgment in a proceeding to collect a city tax, where the motion was made 15 months after the rendition of the judgment, that defendant was a non-resident, and did not know of the assessment till 3 months before moving to vacate; that his agents in the city, through whom he paid taxes, did not inform him of it; that he was advised that all assessments were payable at the county treasurer's office; and that he made inquiries there, and was not aware of the change in the law making assessments payable at the city comptroller's office.—*City of Duluth v. Diblee*, 63 N. W. 1117, 62 Minn. 18.

[b] (Minn.; 1896.)

If a judgment entered in strict accordance with the order of the court for judgment departs from or exceeds the relief demanded in the complaint, the proper remedy is by appeal from the judgment, not by a motion to wholly vacate and set it aside.—*Palmer v. Bank of Zumbrota* (Minn.) 67 N. W. 893; *Same v. George, Id.*; *Thacher v. Woodbury, Id.*

[c] (Minn.; 1896.)

Counsel for defendant in an action for malicious prosecution on March 4th, notified his client, who resided in Ohio, that the case would be tried at the term commencing on that day. On March 9th, not having received an answer, he consented that the case be tried March 17th, of which he wrote the client. Defendant not appearing at the trial, and not having answered counsel's letters, counsel stipulated for a judgment for plaintiff for \$1,500. Held, that it was proper to refuse to vacate the judgment on a showing that on March 8th defendant was called to New York and other places of business, and did not return home until the day of trial, and that while he was away his movements were so rapid that letters and telegrams did not reach him.—*Bates v. Bates* (Minn.) 68 N. W. 845.

[d] (Neb.; 1895.)

The failure of the clerk to journalize a judgment immediately upon its rendition was not ground for vacating the judgment, where it appeared that the failure of the movant to move to vacate the judgment during the term at which it was rendered was not caused by the clerk's omission.—*Slater v. Skirring* (Neb.) 63 N. W. 848.

45 Neb. 594.

[e] (S. D.; 1895.)

A judgment against an insolvent corporation, entered on an offer by an attorney at the suggestions of the president, after an assignment for the benefit of creditors, and while the corporation was enjoined from encumbering its property, was properly vacated.—*Willie v. Rapid Valley Horse-Ranch Co.* (S. D.) 63 N. W. 546.

§ 99. — Unavoidable casualty or misfortune.

[a] (Iowa; 1896.)

Where a defendant failed to appear and defend an action by the state in reliance on

statements made by the sheriff, who had no authority to bind the state as plaintiff, such facts do not constitute unavoidable misfortune, preventing a defense, which will support an action to vacate the judgment.—*Seddon v. State* (Iowa) 69 N. W. 671.

[b] (Neb.; 1897.)

After judgment in ejectment against a wife and her husband, the wife, at a subsequent term, filed a petition to vacate it, alleging that she depended entirely upon her husband to conduct the defense; that, at the time of the rendition of the judgment, he was sick and unable to attend court; that he willfully deceived her, and deprived her of an opportunity to appear and make defense. The character and duration of the husband's sickness were not stated, nor were the facts of the alleged deception given. *Held*, that the petition did not show that the wife had been prevented from defending by an unavoidable casualty or misfortune, within Code, § 602.—*Scott v. Wright* (Neb.) 70 N. W. 396.

§ 100. — Want of service and defective service of process.

[a] (Iowa; 1894.)

The failure to serve notice of the action on a nonresident defendant, so as to leave 20 days between the day of service and the first day of the next term of court, as required by Code, § 2602, subd. 3, does not render the judgment in the action void; and if defendant fails to take advantage of the irregularity by the second day of the next term, as provided by Code, §§ 3154, 3156, or to give an excuse for such failure, or to show a valid defense to the action, as required in such cases by Code, § 3159, the judgment will not be set aside because of the defective service.—*Griffith v. Milwaukee Harvester Co.* (Iowa) 61 N. W. 243.
92 Iowa, 634.

[b] (Iowa; 1896.)

A judgment and sale of land in attachment will not be set aside, after the lapse of three years, because no service was had on defendant, where he had knowledge of the action; having appeared in a suit in equity commenced at the same time to set aside a conveyance of the land by him as fraudulent, in which he acknowledged the commencement of the action at law, and failed to object to the judgment for want of notice.—*Corn Exch. Bank v. Applegate* (Iowa) 65 N. W. 1007.

[c] (Neb.; 1896.)

To entitle a party, under Code Civ. Proc. § 82, to open a judgment rendered against him upon service by publication, it must appear that he had no actual notice of the pendency of the action in time to appear therein and make his defense, by a preponderance of the evidence.—*Stover v. Hough* (Neb.) 66 N. W. 825.
47 Neb. 789.

[d] (Neb.; 1896.)

A decree rendered against a defendant upon service by publication alone, he having made no appearance in the cause, and the published notice requiring him to answer on or before a date anterior to the filing of the petition, may be set aside on motion, as having been irregularly entered, under Code Civ. Proc. § 602 et seq.—*Scarborough v. Myrick* (Neb.) 66 N. W. 867.
47 Neb. 794.

§ 101. — Fraud.

(Wis.; 1895.)

A petition by heirs to set aside a judgment of distribution procured by fraud alleged that the petitioners were advanced in age, and were residents of a foreign state; that the defendant falsely represented that the estate was small, and that all but a few legacies were given by the will to defendant; and that relying upon such representations, and believing that they were aiding in carrying out the provisions

of the will, petitioners executed papers which they afterwards discovered were releases of their interest in the residuary estate to defendant. *Held*, that the petition sufficiently alleged fraud on the part of defendant, though it appeared that the falsity of such representations could have been discovered by searching the records.—*In re O'Neill's Estate* (Wis.) 63 N. W. 1042.

90 Wis. 480.

§ 102. Time of proceeding.

[a] (Minn.; 1896.)

The district court, on findings of fact, made an order determining to whom money deposited for land condemned by the park board of Minneapolis should be paid, and the award was accordingly distributed. More than five years afterwards one of the distributees moved the court to amend certain of the findings, to strike out others, and to set aside the order. *Held* that, the order being a final order in a special proceeding, the court was without power to grant the motion, because of the delay.—*In re Condemnation of Lots in Remington Park* (Minn.) 68 N. W. 846; *Brame v. Towne*, *Id.*

[b] (N. D.; 1896.)

It is not sufficient that the notice of application to vacate a judgment under Comp. Laws, § 4939, be made within the year prescribed, but the application must be submitted and decided within that time, though the court may, to prevent injury to the suitor because of its own delay in deciding the application, direct that the order granting the relief be entered *nunc pro tunc* as of the time when the motion was finally submitted.—*Sargent v. Kindred* (N. D.) 67 N. W. 826.
5 N. D. 472.

[c] (N. D.; 1896.)

Notice to the attorney for defendant of the entry of judgment against such defendant is notice to the defendant, within Comp. Laws, § 4939, which confers upon the district court power to relieve a party from a judgment entered against him through his mistake, inadvertence, surprise, or excusable neglect within one year after notice thereof.—*Sargent v. Kindred* (N. D.) 67 N. W. 826.
5 N. D. 472.

[d] (Wis.; 1896.)

Motion to set aside a judgment as void for errors which do not go to the jurisdiction of the court must be made before the expiration of the term in which the judgment was rendered, as provided by Rev. St. § 2832.—*Gilbert-Arnold Land Co. v. City of Superior* (Wis.) 67 N. W. 38.
93 Wis. 194.

[e] (Wis.; 1896.)

It was proper to vacate an order of a court commissioner setting aside a judgment, on application under Rev. St. § 2832, on the ground that the judgment was entered against defendant through his inadvertence or excusable neglect, where, after the action had been commenced, and after his attorneys advised him that they did not think that there was any defense thereto, defendant left the state on account of ill health, and during a prolonged absence wrote once to his attorneys, directing them to attend to the case, and, after his return, failed to inquire the status of the action, and delayed moving for a vacation of the judgment for several months after he learned of the entry thereof.—*Superior Consol. Land Co. v. Dunphy* (Wis.) 67 N. W. 428.
93 Wis. 188.

§ 103. Showing valid cause of action or defense.

[a] (Wis.; 1896.)

There is no difference between legal and equitable actions, in respect to the requirements of a proposed answer in an application under Rev. St. § 2832, to open a judgment on the

ground of inadvertence or excusable neglect.—*Superior Consol. Land Co. v. Dunphy* (Wis.) 67 N. W. 428.

93 Wis. 188.

[b] (Wis.: 1896.)

A proposed answer in an application under Rev. St. § 2832, to open a judgment on the ground of inadvertence and excusable neglect, setting up defenses on information and belief only, and without an affidavit of any one having personal knowledge of the facts, is insufficient.—*Superior Consol. Land Co. v. Dunphy* (Wis.) 67 N. W. 428.

93 Wis. 188.

§ 104. Proofs and affidavits.

(Neb.: 1896.)

On the hearing of an application to open a judgment under Code Civ. Proc. § 82, the adverse party may present counter affidavits, to establish that the applicant had actual notice of pendency of the action a sufficient time before judgment to appear in court and make his defense.—*Stover v. Hough* (Neb.) 66 N. W. 825.

47 Neb. 789.

§ 105. Preserving lien on setting aside judgment.

(Neb.: 1896.)

A court is without power, on setting aside a mere money judgment, to continue in existence the statutory judgment lien so that it may attach to such judgment as may be subsequently rendered in the same cause.—*Farmers' Loan & Trust Co. v. Killinger*, 65 N. W. 790, 46 Neb. 677.

XII. EQUITABLE RELIEF.

§ 106. When granted, in general.

(Iowa: 1896.)

In an action to cancel a judgment and a levy on and sale of land, it appeared that such judgment had been satisfied by a previous sale of land, under an execution issued on it, and the second sale was void. The answer alleged that the first sale was abandoned, and no transfer of the land was made. It asked that the judgment be renewed, and made a lien on the land, and that the sheriff be ordered to resell the land, if the court found the second sale void. *Held*, that defendant was not entitled to the relief asked, even if the allegation of the answer was true, without proceedings to set the first sale aside.—*Harpam v. Worthington* (Iowa) 69 N. W. 535.

§ 107. Jurisdiction to grant.

[a] (Iowa: 1897.)

Under Code, § 3396, providing that a suit to enjoin a judgment must be brought in the county and court in which it was obtained, the district court cannot restrain proceedings on the judgment of the supreme court.—*Oberholtzer v. Hazen* (Iowa) 70 N. W. 207.

[b] (Iowa: 1897.)

Chancery has jurisdiction to cancel, and enjoin the enforcement of, a void judgment rendered by a justice of the peace.—*Leonard v. Capital Ins. Co.* (Iowa) 70 N. W. 629.

[c] (Iowa: 1897.)

Code, § 2522, providing that a judgment obtained in ordinary proceedings shall not be annulled in equity except for a defense which has arisen or been discovered since it was rendered, does not apply to void judgment.—*Leonard v. Capital Ins. Co.* (Iowa) 70 N. W. 629.

§ 108. Grounds.

[a] (Iowa: 1894.)

In an action to enjoin the collection of default judgments upon certain school orders issued beyond the constitutional limit of indebtedness, collusion in obtaining such judgments is not shown where it is not in evi-

dence that any member of the board issuing the orders knew that the suits were contemplated, or that the plaintiffs therein were otherwise informed than that defendants would appear, but it is shown that the president of a succeeding "reform" board did appear for the district, and afterwards permitted judgment by default, in accordance with a decision of the whole board.—*Independent Dist. of Rock Rapids v. Miller* (Iowa) 61 N. W. 376; *Same v. Bank of Rock Rapids*, *Id.*

92 Iowa, 676.

[b] (Iowa: 1895.)

A personal judgment, taken by default against a wife in an action to enforce a mechanic's lien, is properly set aside where her husband contracted the debt while unmarried, and the petition did not show a personal liability on her part, and she was assured by plaintiffs that there was no necessity for her appearance, though the notice addressed to her recited that a default would be entered against her.—*Larson v. Williams* (Iowa) 63 N. W. 461.

[c] (Iowa: 1896.)

Code, § 2522, provides that a judgment obtained in an action by ordinary proceedings shall not be annulled or modified by an order in an action by equitable proceedings, except for a defense which has arisen or been discovered since judgment was entered. *Held*, that where a judgment against a garnishee provided it should be satisfied by the garnishee's turning over to the constable all the property in his hands after satisfying the liens of the garnishee, and it afterwards appeared that there was nothing left to turn over after satisfying such liens, an action to cancel and enjoin the judgment could be maintained by such garnishee.—*Brakke v. Hoskins* (Iowa) 67 N. W. 235.

[d] (Neb.: 1895.)

The fact that a judgment was rendered, though without jurisdiction, by an inferior court, does not justify a perpetual injunction against the prosecution of any suit in regard to the same cause of action.—*Paul v. Davidson*, 61 N. W. 736, 43 Neb. 505.

[e] (Neb.: 1896.)

A petition by a plaintiff for a new trial, under Code, § 602, after the term at which judgment was rendered, is properly denied where the petition in the original suit fails to state sufficient facts to have supported a judgment in his favor, and it does not appear that his alleged cause of action is meritorious.—*Gilcrest v. Nantker* (Neb.) 66 N. W. 16.

47 Neb. 58.

[f] (Neb.: 1896.)

When the fraud urged as a ground for the issuance of an injunction against the enforcement of a judgment might have been set up in defense to the action, and no excuse is given for not setting it up therein, an injunction will not issue.—*Norwegian Plow Co. v. Bollman* (Neb.) 66 N. W. 292.

47 Neb. 186.

[g] (Neb.: 1896.)

Equity will not interfere to prevent the enforcement of a judgment on account of mere error of law.—*Fox v. McClay* (Neb.) 67 N. W. 588.

48 Neb. 820.

[h] (Wis.: 1895.)

The enforcement of a judgment entered by confession under Rev. St. § 2596, providing that, on entering such a judgment, plaintiff shall file an answer signed by defendant's attorney, will not be enjoined at the suit of an attachment creditor of defendant merely because plaintiff's attorney signed the name of defendant's attorney to the answer, during the absence of the latter and at his request, where the debt on which the judgment was founded was a valid one.—*John V. Farwell Co. v. Hilbert* (Wis.) 65 N. W. 172, 91 Wis. 437.

[1] (Wis.; 1896.)

That the defendant who had in charge the defense to an action was unable to attend the trial, on account of his having missed the train, and afterwards forgot about the action until the time for appeal had elapsed, on account of his mind's being occupied with the protection of property from forest fires which were raging with great violence at the time, is not ground for restraining the enforcement of the default judgment.—*Nye v. Sochor* (Wis.) 65 N. W. 854.

92 Wis. 40.

[1] (Wis.; 1896.)

Though the president of a corporation had no authority to bind it by the execution of a power of attorney to confess judgment, still equity will not intervene to set aside a judgment taken pursuant to it; the claim under the judgment, if not a legal one, being just and equitable.—*Ford v. Hill* (Wis.) 66 N. W. 115.

92 Wis. 188.

§ 109. — Perjury, fraud, or mistake.

[a] (Iowa; 1895.)

A court of equity has jurisdiction to set aside a judgment obtained by fraud where the ground of relief was not discovered until after the expiration of the statutory time for setting it aside.—*Larson v. Williams* (Iowa) 63 N. W. 464.

[b] (Iowa; 1895.)

Though Code, § 3154, provides that a judgment may be vacated after the term at which the same was rendered, for mistake, fraud, or unavoidable casualty, a mortgagor is not entitled to have a decree of foreclosure set aside for the mistake in computing the amount due, and the negligence of her own attorney in failing to see that the proper computation was made.—*Jackson v. Gould* (Iowa) 65 N. W. 406.

[c] (Iowa; 1896.)

Where the petition, in an action to enforce a lien, alleges nothing warranting a personal judgment, such a judgment, rendered by default and embodied in a decree drawn by plaintiff's attorney, is one against which a court of equity may grant relief, under Code, § 3154, as irregularly or fraudulently obtained.—*Larson v. Williams* (Iowa) 63 N. W. 441.

[d] (Iowa; 1896.)

A personal judgment by default, not warranted by the allegations of the petition, and procured by fraud of plaintiffs and their attorney, will be set aside in equity, though the original notice claimed a personal judgment.—*Larson v. Williams* (Iowa) 63 N. W. 441.

[e] (Iowa; 1896.)

A court of equity will vacate a personal judgment by default, obtained by fraud of plaintiffs and their attorney, after the time for applying for relief, under Code, § 3157, has elapsed.—*Larson v. Williams* (Iowa) 63 N. W. 441.

[f] (Minn.; 1894.)

A complaint alleged that defendant and plaintiff were husband and wife; that he sent her to a foreign land, and there left her; that he then commenced an action against her for a divorce, and, with the summons and complaint there served on her, he caused to be delivered an agreement to pay her alimony, and wrote her a letter stating that the ground of divorce was barrenness; that the ground in fact was impotency; that she was not impotent; that all of these and other artifices alleged were practiced for the fraudulent purpose of preventing her from defending the suit; and that they did thus induce her not to defend it; and that he procured judgment thereon, which made no provision for alimony. *Held*, that the complaint showed sufficient fraud to set aside the judgment, under Gen. St. 1878, c. 66, § 285.—*Colby v. Colby* (Minn.) 61 N. W. 460.

59 Minn. 432.

[g] (Minn.; 1897.)

Gen. St. 1894, § 5424, authorizing a suit to set aside a judgment obtained by the fraud or perjury of the prevailing party, does not apply to a judgment alleged to have been obtained by procuring a person to forge W.'s name to an assignment of certain rights, and to testify falsely that such assignment was executed by W.; it appearing that the making of the assignment by W. was distinctly alleged and denied in the action in which the judgment was rendered.—*Watkins v. Landon* (Minn.) 69 N. W. 711.

[h] (Wis.; 1896.)

In an action for the conversion of chattels seized by defendant for nonpayment of a mortgage, the failure of plaintiff to disclose to the justice the fact that the property was so seized by defendant is not ground for restraining the execution of the default judgment.—*Nye v. Sochor* (Wis.) 65 N. W. 854.

92 Wis. 40.

§ 110. Necessity of showing meritorious defense.

[a] (Iowa; 1896.)

A party who sues in equity to set aside a judgment by default rendered by a justice of the peace without jurisdiction need not show that he is not indebted to the party who obtained such judgment.—*Henkle v. Holmes* (Iowa) 66 N. W. 910.

[b] (Neb.; 1894.)

Even a void judgment will not be set aside, in equity, where no meritorious defense to the action is shown, if the invalidity is not apparent on its face.—*Pilger v. Torrence* (Neb.) 61 N. W. 99, 42 Neb. 903.

[c] (Neb.; 1897.)

The rule whereby a party seeking affirmative aid of a court of equity to relieve him against a void judgment is required to disclose a meritorious defense to the cause of action does not apply if the plaintiff is himself seeking affirmatively to enforce the judgment.—*Campbell Printing Press & Manuf'g Co. v. Marder, Luse & Co.* (Neb.) 69 N. W. 774.

[d] (Neb.; 1897.)

The enforcement of a judgment will not be enjoined because the judgment was rendered on an unauthorized service of summons, unless the existence of a defense on the merits be shown.—*Pickens v. Vick* (Neb.) 69 N. W. 951.

§ 111. Necessity of first moving for new trial.

(Neb.; 1895.)

The enforcement of a judgment taken on default will not be restrained in equity, where relief was not first sought by motion for a new trial, under Code Civ. Proc. § 602, unless, because of some fraud or unavoidable circumstance, the provisions of such section could not be availed of.—*Woodward v. Pike* (Neb.) 62 N. W. 230, 43 Neb. 777.

§ 112. Remedy by new trial.

(Minn.; 1895.)

A judgment was entered against plaintiff for the price of land sold and conveyed to him. Within a few weeks thereafter he discovered that the grantor had no title, and sued to set aside the judgment. *Held*, that his only remedy was by moving for a new trial in the former action on the ground of newly-discovered evidence.—*Hulett v. Hamilton* (Minn.) 61 N. W. 672.

60 Minn. 21.

XIII. ASSIGNMENT.

§ 113. Enforcing decree in name of assignor.

(Mich.; 1894.)

Where a decree for foreclosure of a mortgage is assigned, the assignee must pre-

sout a petition setting forth the assignment, and ask for a sale under the decree, and a foreclosure sale in the name of the assignor is void.—*Moore v. Smith* (Mich.) 61 N. W. 538.
103 Mich. 387.

§ 114. Effect.

(Iowa; 1896.)

Where a landlord's attachment is issued, property of the tenant seized, and judgment rendered for the landlord, an assignment of the judgment passes to the assignee all right of the judgment creditor to recover against the sheriff for negligence in the care of the property seized.—*Citizens' Nat. Bank v. Loomis* (Iowa) 69 N. W. 443.

XIV. ACTIONS ON JUDGMENTS.

Attachment in action on judgment, see "Attachment," § 1.
Limitations, see "Limitation of Actions," § 18.

§ 115. Showing as to jurisdiction.

(Mich.; 1895.)

In an action on a justice's judgment, the failure of the justice's docket to show that he acquired and retained jurisdiction cannot be supplied by memoranda made by him on the file wrapper.—*Haseh v. Bissel* (Mich.) 64 N. W. 7.

§ 116. Judgment ceasing to be lien.

(Iowa; 1895.)

A judgment which, by reason of lapse of time, has ceased to be a lien upon real estate, is still a valid judgment, and may be enforced by execution.—*Dunton v. McCook* (Iowa) 61 N. W. 977.

93 Iowa, 258.

§ 117. Action on foreign judgment—Pleading.

[a] (S. D.; 1895.)

A complaint in an action on a foreign judgment which alleged that the court in which the judgment was rendered was one of general jurisdiction, and that the summons, together with a copy of the complaint, in the action wherein the judgment was obtained, was duly and personally served on the defendant therein, stated facts sufficient to permit the admission in evidence of a certified copy of the judgment roll in said action, though the complaint therein failed to state, in terms, that the defendant therein, a corporation, was doing business in that state, or had an agent therein, when the action was commenced.—*Gude v. Dakota Fire & Marine Ins. Co.* (S. D.) 65 N. W. 27.

[b] (Wis.; 1896.)

In an action on a judgment of a court of another state, it is enough to allege that it was a court of general jurisdiction, that the judgment was rendered in that court, and that it was afterwards duly amended, without alleging any jurisdictional facts: jurisdiction being presumed from the facts alleged, and any want thereof being a fact to be set up by answer.—*Kunze v. Kunze* (Wis.) 68 N. W. 391.

JUDICIAL NOTICE.

See "Evidence," §§ 1-4.

JUDICIAL POWER.

See "Constitutional Law," §§ 5-7.

JUDICIAL SALES.

By assignee, see "Insolvency," § 8.
By executor or administrator, see "Executors and Administrators," § 38.

Collateral attack, see "Judgment," § 75.

Estoppel by acquiescence in, see "Estoppel," § 21.

Of ward's property, see "Guardian and Ward," §§ 12-15.

On attachment, see "Attachment," §§ 42, 43.

On execution, see "Execution," §§ 19, 20.

On mortgage foreclosure, see "Chattel Mortgages," §§ 47-51; "Mortgages," §§ 68-81.

On partition, see "Partition," § 6.

§ 1. In general.

[a] (Neb.; 1897.)

The court can appoint a person other than the sheriff special master to make a sale of real estate under a decree.—*Omaha Loan & Trust Co. v. Bertrand* (Neb.) 70 N. W. 1120.

[b] (Neb.; 1897.)

While there is no statute requiring a special master to take an oath or give a bond before making a sale, the court has authority to require it.—*Omaha Loan & Trust Co. v. Bertrand* (Neb.) 70 N. W. 1120.

§ 2. Objections to appraisement.

[a] (Neb.; 1896.)

Objection that the appraisement made as a part of the proceedings in a judicial sale is too low or too high must be made, and, with a motion to vacate the appraisement, be filed, in the cause in which the sale is about to be effected, before the sale.—*Overall v. McShane* (Neb.) 68 N. W. 383.

[b] (Neb.; 1897.)

Objections to the appraisement of property, made under an order of sale, should be filed in the trial court prior to the sale.—*Hamer v. McFeggan* (Neb.) 70 N. W. 937.

[c] (Neb.; 1897.)

Objection that property sold under a decree was appraised too low comes too late after the sale.—*Omaha Loan & Trust Co. v. Bertrand* (Neb.) 70 N. W. 1120.

[d] (Neb.; 1897.)

In the absence of fraud, an appraisement can be attacked as being too low only by motion filed before the sale.—*Griffith v. Jenkins* (Neb.) 70 N. W. 256.

§ 3. Erroneous appraisement—Remedy of lienholder.

(Neb.; 1896.)

Where a lien junior to that foreclosed was erroneously by the appraisers treated as a senior lien, and its amount deducted from the value of the property in making the appraisement, the purchaser bidding only two-thirds of the appraised value after deducting such lien, and the holder of such junior lien not being a party to the suit, such purchaser cannot be heard, in a subsequent suit to foreclose such lien, to say that it was junior to that under which he bought. Hence the holder of what was the junior lien is entitled to foreclosure, and is not compelled to redeem.—*Nye & Schneider Co. v. Fahrenholz* (Neb.) 68 N. W. 498.

§ 4. Recalling order.

[a] (Neb.; 1896.)

The district court has authority to recall an execution or order of sale and set aside an appraisement of property made thereunder.—*Beatrice Paper Co. v. Beloit Iron Works* (Neb.) 65 N. W. 1059, 46 Neb. 900.

[b] (Neb.; 1896.)

The fact that all the property made liable by a decree is not described in the order of sale issued thereunder is sufficient reason for the district court to recall the order and set aside the appraisement.—*Beatrice Paper Co. v. Beloit Iron Works*, 65 N. W. 1059, 46 Neb. 900.

[c] (Neb.; 1896.)

The district court may recall an order of sale issued under a decree in a case still on the docket, in term time, without notice, and set

aside an appraisalment of property made thereunder.—Beatrice Paper Co. v. Beloit Iron Works 65 N. W. 1059, 46 Neb. 900.

§ 5. Deterring bidders and chilling bidding.

[a] (Neb.; 1894.)

Where the purchaser of land at a mortgage sale induced another to refrain from bidding by paying him money, the sale was invalid, and the person entitled thereto may recover the land without repaying any part of the purchase price paid by the purchaser in satisfaction of the mortgage or other liens thereon.—Goble v. O'Connor, 61 N. W. 131, 43 Neb. 49.

[b] (Wis.; 1895.)

A confirmation of a mortgage sale was set aside on a showing that, prior to the sale, the sheriff had stated to prospective bidders that they would not be required to make their bids good by an immediate cash payment in full; that such bidders were at the sale, ready to bid on such terms, but that the sheriff refused to allow bids by any persons not ready to pay cash in full, or to adjourn the sale to allow such persons to procure cash; and that a resale would bring a higher price, and would not prevent a recovery in full of the amount due on the foreclosure judgment. *Held* not an abuse of discretion.—Koop v. Burris (Wis.) 70 N. W. 473.

Sufficiency of evidence as to chilling bidding, see "Evidence," § 127

§ 6. Inadequacy of price.

(Minn.; 1895.)

A sale on partition will be set aside for inadequacy of price where the land was valued at \$8,000, and it was sold for \$1,500.—Johnson v. Avery (Minn.) 62 N. W. 283.

60 Minn. 262.

§ 7. Confirmation.

[a] (Neb.; 1896.)

Where a judicial sale is fairly conducted, and all the provisions of the statute are complied with, and the property is sold for two-thirds of its appraised value, and, on report of the sale, no objections are made to its confirmation, the court cannot arbitrarily set the sale aside, but must confirm it.—Roberts v. Robinson (Neb.) 68 N. W. 1035.

[b] (Neb.; 1896.)

An officer selling land under a decree of foreclosure is bound, on confirmation, to pay the proceeds directly to the persons entitled thereto under the decree, payment to the clerk of court being insufficient.—Fire Ass'n of Philadelphia v. Ruby (Neb.) 68 N. W. 939.

[c] (Neb.; 1897.)

The rule that a decision on conflicting evidence will not be disturbed applies to orders confirming judicial sales.—Creighton University v. Riley (Neb.) 69 N. W. 943.

[d] (Neb.; 1897.)

An order confirming a judicial sale disclosed that the purchaser in open court raised his bid, but not why he did so, or that his so doing was in performance of any condition imposed by the court as essential to the confirmation. *Held*, that the confirmation at the higher price was without prejudice to the former owner, provided the sale as reported was regular.—Griffith v. Jenkins (Neb.) 70 N. W. 256.

§ 8. Effect of granting new trial.

(Iowa; 1894.)

Code, § 2878, providing that the title of a purchaser, in good faith, of property sold under a judgment, shall not be affected by a new trial secured by a defendant served by publication, does not apply in favor of a purchaser at a sale on foreclosure of a lien as against a defendant incumbrancer who was not served or

included in the publication notice.—Bartlett v. Bilger (Iowa) 61 N. W. 233.
92 Iowa, 732.

JURAT.

To affidavit, see "Affidavit," § 1.

JURISDICTION.

See "Courts," §§ 6-8.

Collateral attack for want of jurisdiction, see "Judgment," § 72.

Compelling court to assume, see "Mandamus," § 11.

Conflicting state and federal jurisdiction, see "Courts," § 27.

In criminal cases, see "Criminal Law," § 10.

In divorce cases, see "Divorce," §§ 3-5.

Jurisdictional amount, see "Appeal," §§ 39-43; "Error, Writ of," § 1; "Justices of the Peace," § 6.

Objections to, see "Abatement and Revival," § 3; "Appeal," § 194.

Of appellate court after remand, see "Appeal," § 302.

Of bastardy cases, see "Bastardy," § 3.

Of court commissioners, see "Court Commissioners."

Of drainage proceedings, see "Drainage," § 2.

Of equity, see "Equity," §§ 1-4.

Of justice, see "Justices of the Peace," § 3.

On appeal, see "Appeal," §§ 1-45.

On writ of error, see "Error, Writ of," § 1.

Power to punish for contempt, see "Contempt," § 9.

To appoint receivers, see "Receivers," § 1.

To sustain judgment, see "Judgment," § 3.

Waiver of objections to, see "Abatement and Revival," § 3; "Appearance," § 6.

JURY.

I. COMPETENCY OF JURORS, §§ 1-7.

II. SUMMONING AND IMPANELING, §§ 8-13.

III. CHALLENGE, EXEMPTION, AND DISCHARGE, §§ 14-22.

IV. RIGHT TO DEMAND OR REFUSE JURY TRIAL, §§ 23-29.

See, also, "Grand Jury."

Act providing for struck juries, class legislation, see "Constitutional Law," § 24.

Affidavits of jurors on motion for new trial, see "New Trial," §§ 13, 14.

Custody and conduct in criminal cases, see "Criminal Law," §§ 172-179.

Deliberations of, see "Criminal Law," §§ 169-171; "Trial," §§ 93-95.

Discharge of jury, when jeopardy begins, see "Criminal Law," §§ 32, 33.

Disqualification as ground for new trial, see "Criminal Law," § 197; "New Trial," § 18.

Indictment for offering bribe to juror, see "Bribery."

Juror as witness, see "Witness," § 4.

Misconduct of jurors as ground for new trial, see "New Trial," §§ 19-22.

Province of.

Alteration of instrument, see "Alteration of Instruments," § 8.

Construction of contract, see "Contracts," § 36.

Contributory negligence of passenger, see "Carriers," § 62.

—person injured by defects in street or sidewalk, see "Municipal Corporations," § 91.

—servant, see "Master and Servant," § 92.

Practice of.

- Contributory negligence of traveler on highway, see "Highways," § 37.
 Credibility of witness, see "Witness," § 51.
 Degree of offense, see "Homicide," § 10.
 Effect of custom, see "Custom and Usage," § 1.
 Fraud in conveyance, see "Fraudulent Conveyances," § 36.
 In actions for deceit, see "Deceit," § 7.
 — for injuries at crossing, see "Railroad Companies," § 44.
 — for injuries to servants, see "Master and Servant," § 52.
 — on bills and notes, see "Negotiable Instruments," § 87.
 — on contract, see "Contracts," § 74.
 — on policies, see "Insurance," § 127.
 In assumpsit, see "Assumpsit," § 9.
 Instructions, see "Criminal Law," §§ 151-157; "Trial," §§ 69-78.
 Libelous character of publication, see "Libel and Slander," § 10.
 Malice in publication, see "Libel and Slander," § 15.
 Negligence, see "Negligence," §§ 41-48.
 — of carrier, see "Carrier," § 53.
 — of foreman or person in superintendence, see "Master and Servant," § 60.
 Performance of contract, see "Contracts," § 50.
 Privileged character of communications, see "Libel and Slander," § 19.
 Probable cause for prosecution, see "Malicious Prosecution," § 5.
 Recalling jury for further instructions, see "Trial," § 61.
 Scope of servant's employment, see "Master and Servant," § 17.
 Sending back to correct verdict, see "Trial," § 102.
 Separation of jurors, see "Criminal Law," § 173.
 Statute fixing compensation, special legislation, see "Constitutional Law," § 17.
 Submitting issues to jury in equity, see "Equity," § 59.
 Taking case from jury, see "Trial," §§ 88-92.
 Testamentary capacity, see "Wills," § 6.
 Trial by the court without a jury, see "Trial," §§ 119-126.
 Undue influence, see "Wills," § 10.
 Usury, see "Usury," § 10.
 View by, see "Trial," § 3.
 What are necessities, see "Infancy," § 4.
 — constitutes payment, see "Payment," §§ 3, 4.

J. COMPETENCY OF JURORS.**§ 1. Qualification as voter.**

(Mich.; 1895.)

A person who is an elector, though not a full citizen, is competent to act as a juror, under Laws 1893, No. 204, § 5.—*People v. Considine* (Mich.) 63 N. W. 196.
 105 Mich. 149.

§ 2. Prejudice or bias.

(Iowa; 1896.)

A juror who heard part of the evidence and of the argument on the trial of one who was jointly indicted with defendant is not disqualified to serve as juror on the trial of defendant, where he says he has no opinion as to the guilt of accused.—*State v. Philpot* (Iowa) 66 N. W. 730.

(Mich.; 1895.)

On a question for violation of the local option law, who testifies, on his examination, that the proof is equally balanced he would render a verdict of guilty, is incompetent as a juror.—*People v. O'Neill* (Mich.) 63 N. W. 519.

§ 3. Entry of name on assessment rolls.

(Mich.; 1896.)

Iowa, St. §§ 7554, 7555, providing that the panel of jurors shall be drawn from persons whose names appear on the assessment rolls for that year, contemplate that only such persons shall be competent as jurors; and any juror called in a case whose name does not so appear may be challenged for cause.—*People v. Thacker* (Mich.) 66 N. W. 562.

§ 4. Prior service as juror.

(Mich.; 1896.)

Under Iowa, St. § 7584, a challenge for cause to a juror who has served on the regular panel in the same court within a year must be sustained.—*People v. Thacker* (Mich.) 66 N. W. 562.

§ 5. Formation of opinion on merits of case.

[a] (Iowa; 1895.)

Iowa, Code, § 4405, provides that a juror who has formed such an opinion as to the guilt of the prisoner as would prevent him from rendering a verdict on the evidence shall be subject to challenge. *Held*, that a conviction of murder will not be disturbed because a juror had formed the opinion that deceased was "murdered," where he stated that he knew of no reason why he could not render a verdict according to the evidence, and the facts on which his opinion was formed were not disputed.—*State v. Weems* (Iowa) 65 N. W. 387.

[b] (Mich.; 1895.)

A juror testified that he had known both parties to the action for a long time, but that he did not know that he had formed any opinion on the merits, though he might have formed some impressions. He answered a question as to whether he could try the case as fairly as if he had not heard of it and formed those impressions, "Possibly not"; and to the question, "You think you could not?" answered, "I presume I could not." *Held*, that the juror was not legally disqualified.—*Rice v. Rice* (Mich.) 62 N. W. 833.
 104 Mich. 371.

[c] (Mich.; 1895.)

The fact that a juror has formed an opinion is not ground for disqualification, if such opinion is not fixed, and he swears that he can render a fair and impartial verdict.—*People v. O'Neill* (Mich.) 65 N. W. 540.

[d] (Mich.; 1896.)

A juror called in the trial of a defendant for murder by poison, who had talked with a number of persons about the case, and, among others, with a member of the coroner's jury, who stated to him that poison was found in the stomach of the woman charged to have been murdered, which statement he believed, and who, from such conversations, had formed an opinion which it would require evidence to remove, was disqualified to act as a juror, although he believed himself able to render an impartial verdict.—*People v. Thacker* (Mich.) 66 N. W. 562.

§ 6. — From rumor and newspaper reports.

[a] (Iowa; 1896.)

A juror who has formed an opinion from reading newspaper accounts of the offense charged is not disqualified where he states that such opinion will not prevent his returning a fair and impartial verdict on hearing the evidence.—*State v. Yetzer* (Iowa) 66 N. W. 737.

[b] (Iowa; 1896.)

A juror who states that he has formed an opinion in reference to the guilt or innocence of the defendant, from what he has heard and read in the papers, but thinks that he can render a true verdict without reference to such opinion, is competent.—*State v. Brady* (Iowa) 69 N. W. 290.

[c] (Neb.; 1895.)

Under Cr. Code, § 468, providing that a juror who has formed an opinion as to the guilt or innocence of the accused from reading newspaper statements, or from rumor or hearsay, who shall say on oath that he can render an impartial verdict, is competent to serve, in the court's discretion, where a juror, who had formed a hypothetical opinion, founded solely on rumor and reading of newspapers, stated on oath that his opinion would not interfere with his rendering an impartial verdict, he was not disqualified.—*Basye v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

§ 7. Interest as taxpayer.**(Mich.; 1895.)**

How. Ann. St. § 466, providing that, in a trial in which a county is interested, the electors and inhabitants of the county shall be competent jurors, does not deprive the party opposed to the county of a trial by an impartial jury, as their interest as taxpayers is too remote to influence their conduct.—*Smith v. German Ins. Co.* (Mich.) 65 N. W. 236.

II. SUMMONING AND IMPANELING.**§ 8. Number of jurors.****[a] (Neb.; 1896.)**

In a district where there are two district judges, the court may, by special order, direct a jury of less than 48 to be drawn, under Comp. St. c. 5, § 8, providing that in such districts the judges may, "by appropriate rule," provide for the drawing of a less number of jurors than 48.—*Barney v. State* (Neb.) 68 N. W. 636.

[b] (Neb.; 1897.)

Comp. St. c. 5, § 8, authorizing a panel of less than 48 in a district having 2 judges, when the judges so provide "by appropriate rule," does not require a fixed or general rule of the court. A special order made as occasion requires is sufficient.—*Fanton v. State* (Neb.) 69 N. W. 953.

§ 9. Jury list.**[a] (Mich.; 1895.)**

2 How. St. § 7554, providing by whom the jury list shall be made, does not render invalid a list drawn in accordance with a city charter which provides that the list shall be made by different officers.—*People v. Fuhrman* (Mich.) 61 N. W. 865.

103 Mich. 593.

[b] (Mich.; 1896.)

Under Pub. Laws 1893, Act No. 201, authorizing the circuit judge to direct the return of new jury lists when the current lists are declared illegal for any reason, a circuit judge has authority, when no jury cases are pending, if he deems the current lists invalid, to declare the same invalid on his own motion, and order a return of new lists.—*Smaltz v. Boyce* (Mich.) 69 N. W. 21.

[c] (Minn.; 1895.)

A jury list, headed "Grand Jurors," followed by the names and residences of grand jurors, under which was a heading "Petit Jurors," followed by the names and residences of petit jurors, to which was attached a certificate of the county auditor and chairman of the county board, held a "separate list" of grand and petit jurors, within Gen. St. 1894, § 673.—*State v. Peterson* (Minn.) 63 N. W. 171.

61 Minn. 73.

[d] (Minn.; 1897.)

The Washington county jury law directs that the acting judge of the district court, the clerk thereof, the county auditor, and the chairman of the board of county commissioners shall constitute a board for making up the jury list for the county. *Held*, that it is sufficient if the

judge is present when the board meets, and then, after directing that the list be prepared, goes into the court room and holds court while the other members prepare the list, there being no adjournment until he returns, and he being always present before the completion of the work, and approving and signing the list.—*State v. Goodrich* (Minn.) 69 N. W. 815.

§ 10. — Striking names.**(Mich.; 1895.)**

Where the jury list contains an excessive number of jurors from any township the court may correct the list by striking off all names above the number to which the township is entitled. *Hewitt v. Circuit Judge* (1888) 39 N. W. 56, 71 Mich. 287, 296, followed.—*People v. Fuhrman*, 61 N. W. 865, 103 Mich. 593.

§ 11. Summoning talesmen.**(Neb.; 1895.)**

It was not error, on a prosecution for felony, for the court to order the summoning by the sheriff of persons qualified to serve as jurors in anticipation of a demand for talesmen after the regular panel should be exhausted.—*Pflueger v. State*, 64 N. W. 1094, 46 Neb. 493.

§ 12. Special venire.**[a] (Mich.; 1895.)**

The judge of the district court may, under Laws 1893, No. 204, on his own motion, order additional jurors, when enough are not drawn, and the fact that his attention was called to it by the county attorney is immaterial.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

[b] (Neb.; 1896.)

When the causes exist which authorize the court to order a special venire in a criminal case, under Crim. Code, § 465a, and the regular panel is disqualified from sitting in other cases during the term, the court may discharge that panel, and direct a new jury to be drawn, under Code Civ. Proc. § 664.—*Barney v. State* (Neb.) 68 N. W. 636.

[c] (Neb.; 1896.)

A district judge may, for any lawful cause, discharge a regular panel of the petit jury, and direct the sheriff to call other jurors to take its place.—*Barney v. State* (Neb.) 68 N. W. 636.

[d] (Neb.; 1897.)

In a county of 70,000 inhabitants or more, where there is pending for trial in the district court a felony case, the judge of said court, if satisfied that a jury cannot be obtained from the regular panel to try such case, may under section 668g, Code Civ. Proc., direct the drawing and summoning of a special panel.—*Davis v. State* (Neb.) 70 N. W. 984.

[e] (Neb.; 1897.)

If, in the selection of a jury, the regular panel be exhausted, and the jury selected be discharged before reaching a verdict, the judge of the district court may, under Code Civ. Proc. § 668g, direct the drawing and summoning of a second special panel from which to select a jury to try said case.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 13. Struck jury.**[a] (Minn.; 1897.)**

One who, without objection, takes part in striking a jury in the manner prescribed by Gen. Laws 1895, c. 328, § 1, cannot afterwards object that the lists of names were not selected by the sheriff at the time, as required by the statute, but were previously prepared by him.—*Riley v. Chicago, M. & St. P. Ry. Co.* (Minn.) 69 N. W. 718.

[b] (Minn.; 1897.)

Under Gen. Laws 1895, c. 328, § 1, relative to the manner of striking juries, a party is entitled to have the jurors called as they stand upon the panel.—*Riley v. Chicago, M. & St. P. Ry. Co.* (Minn.) 69 N. W. 718.

[c] (Minn.; 1897.)

It is error to refuse to hear evidence as to the impartiality of the list of jurors selected by the sheriff from which to strike a jury under Gen. Laws 1895, c. 338, § 1. *Riley v. Chicago, M. & St. P. Ry. Co.* (Minn.) 69 N. W. 718.

III. CHALLENGE, EXEMPTION, AND DISCHARGE.

§ 14. Sufficiency of challenge.

(Iowa; 1895.)

A challenge for cause, without specifying the ground thereof, is too indefinite.—*Davis v. Anchor Mut. Fire Ins. Co.* (Iowa) 64 N. W. 687.

§ 15. Number of challenges.

[a] (Mich.; 1896.)

While defendants charged together with a misdemeanor must be tried together, unless separate trials are ordered by the court, such trial is, in substance and effect, several; and under *Ilow. Aut. Sc.* § 7697, providing that "the defendant may challenge five persons peremptorily," each defendant is entitled to five challenges.—*People v. Welmer* (Mich.) 68 N. W. 111.

[b] (Neb.; 1895.)

Believing that the state was entitled to eight peremptory challenges, the challenging proceeded by the state challenging once, and the defense then twice. After the state exhausted five, and defendant ten, challenges, it was discovered that the state was originally entitled to but six challenges. *Held*, that it was not error for the court, in order to give the state the last challenge, to hold, after notifying defendant in advance, that by waiving his eleventh challenge he waived his remaining five.—*Gravelly v. State*, 64 N. W. 452, 45 Neb. 578.

§ 16. Several parties—Joint challenge.

(Iowa; 1895.)

Code, § 2763, provides that where there are several defendants, and no separate trial is allowed, they must join in their challenges to jurors. In an action on a note, after judgment for plaintiff, but in favor of one of the defendants as against the other two defendants, a new trial was granted to the two defendants only, and in impaneling the jury for the second trial a peremptory challenge by them was overruled because the other defendant did not join therein. The claim by the latter defendant of former adjudication, which was afterwards sustained, was not raised until after the jury was impaneled, and at the time the record did not show the proceedings in the former trial, nor did the record on appeal contain all the evidence. *Held*, that the ruling on the challenge would not be disturbed.—*Cleveland v. Atkinson* (Iowa) 63 N. W. 465.

§ 17. Challenge to array.

[a] (Mich.; 1896.)

The fact that a town clerk ordered returning officers of jury lists not to return persons over 60 years of age, who by statute were ineligible, was not ground of challenge to the array.—*Smaltz v. Boyce* (Mich.) 69 N. W. 21.

[b] (Mich.; 1896.)

The fact that return lists of jurors do not show that the names were taken from the proper assessment roll is not ground of challenge to the array, when it does not appear that any of them were persons not assessed on the proper assessment roll.—*Smaltz v. Boyce* (Mich.) 69 N. W. 21.

[c] (Mich.; 1896.)

The fact that return lists of jurors were returned from wards in a city by a single supervisor, or by a supervisor and an alderman, is not ground of challenge to the array, where it does not appear that in such wards those officers did not constitute a majority of the officers whose

duty it was to make the return.—*Smaltz v. Boyce* (Mich.) 69 N. W. 21.

[d] (Mich.; 1896.)

The fact that the order for return of jury lists directs the lists to be made by the aldermen and supervisors, instead of aldermen and assessing officers of wards in cities, is not ground of challenge to the array, when it does not appear that any of the supervisors who returned the lists were not assessing officers.—*Smaltz v. Boyce* (Mich.) 69 N. W. 21.

§ 18. Examination on voir dire.

[a] (Iowa; 1896.)

On the examination of a juror to ascertain whether he was subject to a challenge for cause, it was not error to sustain an objection to the question, "Would the fact that a man had been indicted raise in your mind any presumption of guilt?"—*State v. Cleary* (Iowa) 66 N. W. 724.

[b] (Mich.; 1895.)

Where, in a prosecution for illegally selling liquor, a juror is asked on his voir dire, "Which way would you desire to give your verdict if the evidence * * * was just even? * * * Which way would you lean, for the people or for defendant?"—it was not reversible error to require the question to be so framed as to merely require him to answer which way he would find.—*People v. Caldwell* (Mich.) 65 N. W. 213.

[c] (Mich.; 1896.)

Defendant has a right to question jurors upon the subject of their prejudices against the defense of limitations, as a means to determine whether or not to exercise the right of peremptory challenge.—*Towl v. Bradley* (Mich.) 66 N. W. 347.

[d] (Neb.; 1895.)

Where it appeared that a juror had read newspaper accounts of the killing under investigation, it was error not to permit him to answer on the voir dire whether he had formed an opinion as to whether defendant was guilty, or whether murder had been committed.—*Basye v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

[e] (Neb.; 1895.)

It was proper, in impaneling a jury, to ask a juror whether the fact that defendant was accused of murder would have any weight with him, and whether he could give the same credit to the testimony of defendant, should defendant testify, that he could give to the testimony of other witnesses under the same circumstances.—*Basye v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

§ 19. Excusing or discharging jurors.

[a] (Iowa; 1896.)

There is no abuse of discretion in excusing for cause a juror who has discussed the case with his son-in-law, a relative of defendant.—*Geiger v. Payne* (Iowa) 69 N. W. 554.

[b] (Mich.; 1896.)

The discharge of a juror who is called, for reasons personal to himself, and before he is sworn, is not error, though done in the absence of counsel for the defendant.—*People v. Thacker* (Mich.) 66 N. W. 562.

[c] (S. D.; 1896.)

After swearing the jury in a criminal case, the court adjourned until the next morning, when one of such jurors did not appear. Another juror was selected, defendant being given three additional peremptory challenges, none of which were used. *Held*, that a conviction would not be set aside.—*State v. La Croix* (S. D.) 66 N. W. 944.

§ 20. — Discharging panel.

[a] (Neb.)

A jury may be discharged because illegally drawn.—(1896) *Barney v. State* (Neb.) 68 N.

W. 636; (1897) *Fanton v. State* (Neb.) 69 N. W. 953.

[b] (Neb.; 1896.)

The fact that all, or nearly all, jurors upon the regular panel are disqualified from sitting in any case remaining to be tried at the term, is a sufficient cause for discharging the panel.—*Barney v. State* (Neb.) 68 N. W. 636.

[c] (Neb.; 1897.)

The regular panel may be discharged where all or nearly all are disqualified to sit in any case remaining to be tried at the term.—*Fanton v. State* (Neb.) 69 N. W. 953.

§ 21. What errors prejudicial.

[a] (Mich.; 1895.)

The improper dismissal of a juror on challenge for cause is not ground for reversal where no objection was made to the competency of the jury, and it does not appear that the regular panel was exhausted, or that the complaining party had exhausted his peremptory challenges.—*People v. Fowler* (Mich.) 62 N. W. 572. 104 Mich. 449.

[b] (Minn.; 1894.)

In impaneling a jury for the trial of an indictment for keeping a house of assignation, defendant challenged a juror for actual bias, and, in examining the juror, counsel admitted that defendant kept the house specified at the time charged, and asked the juror if he had heard any statement as to the character of the house, from which he had formed an opinion as to its character. The court held the question incompetent. *Held* reversible error, whether defendant's peremptory challenges were exhausted or not. *State v. Lawlor* (1881) 9 N. W. 698, 28 Minn. 216, and *State v. Kluseman* (1893) 55 N. W. 741, 53 Minn. 541, distinguished.—*State v. Bresland*, 61 N. W. 450, 59 Minn. 281.

[c] (N. D.; 1896.)

While a jury was being impaneled, the state had exercised five of the six peremptory challenges allowed by law. The state challenged a proposed juror for cause. The examination of the juror disclosed that he was generally disqualified. The court, however, denied the challenge, and thereupon the state challenged the juror peremptorily. Immediately thereafter the court sustained the challenge for cause, and the juror stepped aside. Subsequently the court permitted the state to exercise another peremptory challenge. *Held* no error.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

§ 22. — Overruling challenge for cause.

[a] (Iowa; 1896.)

Defendant cannot complain that a challenge for cause was improperly refused, where he afterwards waives a peremptory challenge by which the objectionable juror might have been excused.—*State v. Yetzer* (Iowa) 66 N. W. 737.

[b] (Neb.; 1895.)

It is not ground for reversal that a challenge to a juror for cause was erroneously overruled, when the record does not show that the complaining party exhausted his peremptory challenges.—*Brumback v. German Nat. Bank* 65 N. W. 198, 46 Neb. 540.

IV. RIGHT TO DEMAND OR REFUSE JURY TRIAL.

Constitutional right to jury trial, see "Constitutional Law," §§ 37-39.

Presumption as to waiver of jury trial, see "Appeal," § 219.

Right to demand jury trial on question of validity of marriage, see "Marriage," § 2.

§ 23. In general.

(Iowa; 1894.)

Where the evidence would have warranted the court in directing the verdict, error in ordering it tried to the court is not ground for reversal.—*Garretson v. Ferrall* (Iowa) 61 N. W. 251.

92 Iowa, 728.

§ 24. Nature of cause of action or of issues involved.

[a] (Minn.; 1895.)

Neither party is entitled as a matter of right to a jury trial on issues formed by a supplemental complaint and answer in a garnishment proceeding.—*Weibler v. Ford* (Minn.) 63 N. W. 1075.

61 Minn. 398.

[b] (Wis.; 1895.)

On the issue in garnishment as to whether the garnishee was indebted to the principal defendant at the time the former was served, the parties are not entitled to a jury trial as a matter of right.—*Delauey v. Hartwig* (Wis.) 64 N. W. 1035, 91 Wis. 412.

§ 25. — Equitable actions and issues.

[a] (Iowa; 1896.)

An answer in an action in equity to foreclose a mortgage, pleading payment and the statute of limitations as defenses, does not entitle defendant to a jury trial.—*Leach v. Kundson* (Iowa) 66 N. W. 913.

[b] (Iowa; 1896.)

In an action by an administrator for the conversion of horses, etc., delivered to defendant by deceased, defendant admitted the possession of the property, but denied the conversion. The answer contained a counterclaim, alleging that deceased gave him a note for \$200, and agreed that, to secure its payment, defendant should have a lien on the horses, etc.; that the agreement was indorsed on the note; that afterwards deceased turned over to him a horse described, for \$100, which was indorsed on the note; that, at deceased's request, defendant turned over to a person named two of the remaining horses, and released his lien; and that he had incurred expense in feeding the animals for which he was entitled to a lien. He asked for a lien for the amount due on the note, and for such expenses; for judgment for the amount due; and that the lien be foreclosed. The case was transferred to the equity docket. The reply denied deceased's signature to the note and to the indorsement thereon, and averred that, if the note was made, it was fully paid, etc. When the case was reached for trial, plaintiff conceded that, if the note and the stipulation indorsed on it were proved to be valid, they gave defendant a lien on the horses for its payment. *Held* that, while such concession dispensed with some proof, it did not entitle plaintiff to a jury trial.—*Marquis v. Hilsley* (Iowa) 68 N. W. 589.

[c] (Iowa; 1896.)

An action at law and a suit in equity for the collection of rent were consolidated as a cause in equity, with a proviso that the consolidation should not prejudice defendants' right to a jury trial. A substituted petition had been filed, asking equitable relief in the law action; and, subsequent to the consolidation, defendants filed an amended and substituted counterclaim, triable in equity. *Held*, that defendants were not entitled to a trial by jury.—*Gatch v. Garretson* (Iowa) 69 N. W. 550.

[d] (Minn.; 1896.)

Where the assignee in insolvency brings an action to set aside an execution sale, and to cancel the record of the sheriff's certificate thereof, upon the grounds that the judgment and sale thereunder constituted a preference permitted by the insolvent in favor of one of its creditors, the defendant is not entitled to a jury

trial.—*Vanish v. Pioneer Fuel Co.* (Minn.) 66 N. W. 198.

61 Minn. 175.

[1c] (Neb.; 1895.)

A jury cannot be demanded as a matter of right, when the petition states an equitable cause of action, and prays only for equitable relief.—*Sharmer v. Johnson* (Neb.) 61 N. W. 727, 43 Neb. 509.

[1d] (Neb.; 1895.)

In an action by a judgment creditor against the debtor and his vendee to set aside a transfer as in fraud of creditors, defendants were not entitled to a trial by jury.—*Monroe v. Reid*, 61 N. W. 983, 46 Neb. 316.

§ 26. — Disbarment proceedings.

(Mich.; 1896.)

Respondent in disbarment proceedings is not entitled to a jury trial.—*In re Shepard* (Mich.) 67 N. W. 971.

§ 27. Demand for jury.

(S. D.; 1896.)

A request by defendant for a trial by jury, made after plaintiff has closed his evidence,—the parties having noted the case for trial by the court,—comes too late.—*Webster v. White* (S. D.) 66 N. W. 1145.

§ 28. Waiver of right.

[1a] (Minn.; 1896.)

A jury trial is waived unless demanded.—*Leyne v. Lancashire Ins. Co.* (Minn.) 68 N. W. 855.

[1b] (Minn.; 1896.)

By waiving a jury before the first trial of an action of ejectment plaintiff did not waive a jury on a second trial, obtained under Gen. St. 1894, § 5845, by paying the costs after entry of the first judgment.—*Cochran v. Stewart* (Minn.) 68 N. W. 972.

§ 29. — In criminal causes.

[1a] (Iowa; 1895.)

Under Code, § 4347, relating to criminal trials in district courts, and providing that issues of fact shall be tried by a jury, and section 4350, providing that an issue of fact must be tried by a jury of the county in which the indictment is found, a jury cannot be waived in a criminal proceeding prosecuted by indictment. *Kinne, J.*, dissenting.—*State v. Douglass* (Iowa) 65 N. W. 151.

[1b] (Iowa; 1895.)

A jury trial cannot be waived in a criminal prosecution for a misdemeanor.—*State v. Tucker* (Iowa) 65 N. W. 152.

JUSTICES OF THE PEACE.

I. ELECTION, APPOINTMENT, AND TENURE, §§ 1, 2.

II. JURISDICTION AND POWERS, §§ 3-10.

III. LIABILITIES, §§ 11-13.

IV. COMPENSATION, § 14.

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Action on judgment of justice, see "Judgment," § 115.

Adjournment to holiday, validity of subsequent judgment, see "Holidays."

Amendment of pleading on appeal from, see "Appeal," § 171.

Approval of appeal bond, see "Appeal," § 68.

Certiorari to, see "Certiorari," § 5.

Change of venue in justice court, see "Venue in Civil Cases," § 19.

Jurisdictional amount on appeal from, see "Appeal," § 42.

Limitation of action on judgment of, see "Limitation of Actions," § 18.

Practice on appeal from, see "Appeal," §§ 161-176.

To what court appeal lies from justice, see "Courts," § 17.

I. ELECTION, APPOINTMENT, AND TENURE.

§ 1. Number of justices.

(Neb.; 1895.)

Laws 1895, c. 28, relating to township organization, and providing that there shall be but one justice of the peace for each township adopting organization, is not repugnant to Const. art. 6, § 19, providing that all laws relating to courts shall be of uniform operation.—*Van Horn v. State*, 64 N. W. 365, 46 Neb. 62.

§ 2. Tenure.

[1a] (Mich.; 1895.)

The language of the charter of Battle Creek (section 4) is identical with Const. art. 6, § 17, and provides for the election and duration of office of justice of the peace, but fixes no time for the term to begin or end. *How, Ann. St.* § 719, provides that the terms of justices of the peace shall commence July 4th, next succeeding their election. *Held*, that the legislature intended the terms of justices of the peace under the charter to be controlled by section 719.—*Hulbert v. Henry* (Mich.) 62 N. W. 1030.

105 Mich. 211.

[1b] (Mich.; 1895.)

An act providing for a term of four years for justices of the peace does not contravene Const. art. 6, § 17, declaring that they "shall hold their offices for four years and until their successors are elected and qualified."—*Messenger v. Teagan* (Mich.) 64 N. W. 499; *Engel v. Donovan*, *Id.*

II. JURISDICTION AND POWERS.

§ 3. Civil jurisdiction.

[1a] (Minn.; 1896.)

A justice of the peace, authorized by Gen. St. 1894, § 4955, to issue a writ directed to the proper officer of any county for the purpose of causing an attachment in said county, cannot obtain jurisdiction over the person of a party by issuing such a writ in the form prescribed by section 5002, and causing property to be attached, and the writ to be read to such party in the county to which it is sent for service.—*Perkins v. Mellicke* (Minn.) 69 N. W. 229.

[1b] (Neb.; 1896.)

After plaintiff had paid his taxes, the county treasurer caused a distress warrant to issue for collection of the same; and, in order to prevent a sale thereunder, plaintiff was obliged to repay the taxes, together with costs. Thereafter the treasurer repaid plaintiff the amount of the taxes, and subsequently plaintiff sued him for the amount of the costs. *Held*, that the action was based on defendant's misconduct as a public officer, and hence a justice of the peace was without jurisdiction.—*Warren v. Sadilek* (Neb.) 66 N. W. 15.

47 Neb. 53.

[1c] (Neb.; 1897.)

A justice of the peace has jurisdiction of an action for damages caused by a city maintaining or permitting a nuisance in its streets, where the amount claimed does not exceed \$200; such action not being within the limitations on the jurisdiction of the justices of the peace contained in Code, § 907.—*City of Hastings v. Mills* (Neb.) 70 N. W. 381.

§ 4. Justice acting as attorney.

(Mich.; 1897.)

One of the justices of the peace of Grand Rapids may act as attorney in circuit court in

a cause appealed from the other justice; the justices having separate courts and records, and no statute forbidding them to act as attorney.—*Grady v. Sullivan* (Mich.) 70 N. W. 1040.

§ 5. Residence of parties.

(Iowa; 1895.)

Code, § 3507, makes the jurisdiction of a justice of the peace coextensive with the county, unless specially restricted. Sections 3509 and 3510 provide that suits may be brought in the township where plaintiff or defendant resides, or in any other township of the same county, if actual service on the defendant is made in such township. *Held*, that a justice of the peace had no jurisdiction to enter judgment in an action by a nonresident of the county against a defendant who was not served with original notice in the township where the action was brought.—*Thompson v. Jackson* (Iowa) 61 N. W. 1004.
93 Iowa, 376.

§ 6. Amount in controversy.

[a] (Mich.; 1895.)

How. Ann. St. § 6988, provides that, if a constable neglects to pay over money collected on an execution, the person entitled to it may sue in assumpsit on the constable's bond. Section 6820 limits the jurisdiction of a justice of the peace to bonds not exceeding \$150. *Held*, that in assumpsit on a constable's bond the amount sought to be recovered fixes the jurisdiction of the justice court, irrespective of the amount of the bond.—*Montgomery v. Martin* (Mich.) 62 N. W. 578.

104 Mich. 390.

[b] (S. D.; 1895.)

Where the amount of a note sued on and the amount of attorney's fees stipulated therein to be paid exceed \$100 in the aggregate, a justice of the peace has no jurisdiction of the action, though the stipulation for attorney's fees is void under the statute.—*Warder, Bushnell & Glessner Co. v. Raymond* (S. D.) 64 N. W. 525

§ 7. Action concerning land.

[a] (Neb.; 1895.)

A justice of the peace has jurisdiction of a summary action, under Code Civ. Proc. § 1023, for the possession of land wrongfully detained.—*Blachford v. Frenzer* (Neb.) 62 N. W. 1101.

44 Neb. 829.

[b] (Neb.; 1895.)

A justice of the peace has jurisdiction of an action by a grantee against a grantor to recover the amount of taxes paid on the land to prevent the same from being sold, for which the grantor was liable.—*Campbell v. McClure* (Neb.) 63 N. W. 920.

45 Neb. 608.

[c] (Neb.; 1896.)

Const. art. 6, § 16, provides that a justice of the peace shall have no jurisdiction of actions in which title to real estate is sought to be recovered, or may be drawn in question, nor of actions on contracts for the conveyance of land. Section 18 provides that they shall have no jurisdiction in any matter wherein the title or the boundaries of land may be in dispute. Civ. Code, § 907, provides that they shall have no cognizance of actions on contracts for real estate, nor of actions in which the title to real estate is sought to be recovered or may be drawn in question. *Held*, nevertheless, that a county judge, acting as a justice of the peace, has jurisdiction of an action to recover liquidated damages upon the failure of defendant to convey real estate in accordance with an agreement which is the basis of the action.—*Lorius v. Abbott* (Neb.) 68 N. W. 486.

[d] (S. D.; 1897.)

Where plaintiff in an action of detainer pleads a written lease, by the terms of which defendant covenanted to surrender possession

at the expiration of the term, he is not required to plead title, and in such case no issue involving the title to the property can arise.—*Browne v. Haseltine* (S. D.) 70 N. W. 648.

§ 8. Transfer of causes involving title to land.

(Mich.; 1895.)

Where the declaration in trespass *q. c. f.* before a justice states that defendant entered "the lands and premises of the said plaintiff, situated," etc., and plaintiff, not having been in actual possession, seeks to prove title in himself, the issue of title is involved, and the justice cannot refuse to certify the case to the circuit court.—*Orris v. Kempton* (Mich.) 63 N. W. 68.

105 Mich. 229.

§ 9. Criminal jurisdiction.

[a] (Neb.; 1895.)

Since Const. art. 6, § 18, limits the jurisdiction of justices of the peace to offenses for which the penalty prescribed does not exceed three months' imprisonment, or a fine not exceeding \$100, the only authority of a justice of the peace under Cr. Code, § 17, relating to assault and battery, and providing as punishment therefor either a fine not exceeding \$100, or imprisonment for three months, or both, was that of an examining magistrate.—*Keeshan v. State*, 64 N. W. 695, 46 Neb. 155.

[b] (S. D.; 1895.)

A justice, on conviction for misdemeanor, cannot commit defendant for nonpayment of costs, as the judgment for costs is no part of the fine imposed as a penalty for the offense.—*In re Lackey* (S. D.) 62 N. W. 134.

6 S. D. 526.

[c] (Wis.; 1895.)

Laws 1882, c. 324, providing that justices of the peace of Milwaukee shall not have jurisdiction of criminal cases within the city, does not deprive a justice of the peace of jurisdiction of the crime of cruelty to animals committed without the city, but within the county, of Milwaukee, given by Rev. St. § 4739.—*State v. Bilder* (Wis.) 62 N. W. 415.

90 Wis. 10.

§ 10. Power to settle bill of exceptions.

[a] (Neb.; 1895.)

A justice of the peace cannot settle a bill of exceptions preserving testimony given at a hearing on a motion to discharge an attachment.—*Donaldson v. Fisher* (Neb.) 61 N. W. 609, 43 Neb. 260.

[b] (Neb.; 1895.)

A justice of the peace has no power to settle a bill of exceptions.—*Vlasek v. Wilson* (Neb.) 62 N. W. 245.

44 Neb. 10.

III. LIABILITIES.

§ 11. Performance of official duties.

[a] (Mich.; 1896.)

Where a justice issuing a warrant for the arrest of a person for a criminal offense has jurisdiction of the subject-matter, an action against him will not lie by one claiming to have been injuriously affected by his judicial action, either on the ground that he acted maliciously or that his judgment was erroneous.—*Curnow v. Kessler* (Mich.) 67 N. W. 982.

[b] (Minn.; 1896.)

The words "judicial duties," in a bond given by a justice of the peace for the faithful performance of his duty, mean "official duties."—*Larson v. Kelly* (Minn.) 66 N. W. 130.

64 Minn. 51.

§ 12. Failure to enter judgment.

(Minn.; 1896.)

Where a justice of the peace neglects to enter a judgment in his docket within three days

after the action is submitted to him for decision, and damages thereby result to the prevailing party to the action the justice and the sureties on his bond are liable therefor.—*Larson v. Kelly* (Minn.) 66 N. W. 130.
64 Minn. 51.

§ 13. Entry of void judgment.

(Iowa; 1895.)

A justice of the peace is not civilly liable for entering in good faith a judgment void for want of jurisdiction.—*Thompson v. Jackson* (Iowa) 61 N. W. 1004.
93 Iowa, 376.

IV. COMPENSATION.

§ 14. Fees.

(Neb.; 1896.)

The hearing of a motion to dissolve an attachment (Code Civ. Proc. §§ 235, 236), is a "trial" in an "action" or "cause," within section 279, declaring that "a trial is a judicial examination of the issues, whether of law or of fact, in an action," and Comp. St. c. 28, § 11, providing that a justice of the peace shall be allowed \$1 as fees for each day's attendance on "trial of a cause" after the first day.—*Gibson v. Sidney* (Neb.) 69 N. W. 314.

V. PROCEDURE.

§ 15. Venue.

(Mich.; 1896.)

How. Ann. St. § 6819, relating to actions in justices' courts, provides that if plaintiffs be all nonresidents of the county, or if the defendant be a nonresident of the county, then such action may be brought before any justice of the township or city where such plaintiffs or defendants, or either of them, may be. *Held*, that where a nonresident brings an action before a justice in the county, but not in the township, in which defendant resides, plaintiff need not be present in the township when the summons is taken out.—*Weaver v. Rix* (Mich.) 67 N. W. 970.

§ 16. Appearance.

(Minn.; 1896.)

A defendant who appears before a justice on the return day of a writ of attachment, and objects to any further proceedings, and moves to dismiss, on the ground that the justice has not obtained jurisdiction over him, does not make a general appearance, and waive his rights, by filing an answer, after his motion is denied, in which he insists that the court has no jurisdiction, and by taking part in the trial.—*Perkins v. Mellicke* (Minn.) 69 N. W. 220.

§ 17. — Dismissal for failure to appear.

(Minn.; 1896.)

Defendant in justice court answered, admitting an indebtedness of \$7, and the case was continued to July 20th. On July 18th counsel for the parties stipulated for judgment for \$7, with costs, waiving irregularities. On July 20th plaintiff made no appearance, but defendant appeared in person and by another attorney, and stated under oath that the attorney who answered for him was not engaged to defend him, nor authorized to stipulate in his behalf, and, further, that he was not indebted to plaintiff in any sum, and moved to dismiss for plaintiff's failure to appear. *Held*, that the motion was properly denied.—*Ramsland v. Roste* (Minn.) 68 N. W. 847.

§ 18. Summons—Return of service.

(Minn.; 1896.)

The return of service of summons in justice's court need not state the name of the person with whom the copy was left at de-

fendant's residence.—*Vaule v. Miller* (Minn.) 67 N. W. 510.

61 Minn. 485.

[1] (Minn.; 1896.)

A return of service of summons issued by a justice of the peace, by leaving a copy of the same at defendant's usual place of abode, need not state that defendant could not be found.—*Vaule v. Miller* (Minn.) 67 N. W. 510.
61 Minn. 485.

[1] (Minn.; 1896.)

A return of service of summons issued by a justice upon defendant, by leaving a copy thereof at defendant's "last usual place of abode," under Gen. St. 1894, § 4967, is not invalidated by its omission to use the word "last."—*Vaule v. Miller* (Minn.) 67 N. W. 510.
61 Minn. 485.

§ 19. Transfer of causes to mayor or other justice.

[1] (Iowa; 1896.)

Code, § 506, provides that the mayor of a city or town shall have the jurisdiction of a justice of the peace, "and the rules of law regulating proceedings before a justice shall be applicable to proceedings before such mayor." Section 4671 provides that on application for a change of venue a justice shall transmit the papers to the next nearest qualified justice. *Held*, that a justice, on granting a change of venue, cannot send the case to a mayor who is nearer than the next nearest justice.—*State v. Jamison* (Iowa) 69 N. W. 529.

[1] (Minn.; 1895.)

A party to an action in justice's court who obtained a transfer to another justice cannot object that the cause was improperly transferred because of an insufficient affidavit for removal.—*Oltman v. Yost* (Minn.) 64 N. W. 564.
62 Minn. 261.

[1] (Wis.; 1895.)

A justice before whom one charged with crime has been brought for preliminary examination, and who is charged by accused with prejudice, commits no error, on transferring the cause to another justice in compliance with Rev. St. § 4809, in entering on his docket, after delivering a transcript of the proceedings which have elapsed to the other magistrate, a statement that "further proceedings in this case were by the court removed to" such other justice.—*Jackson v. State*, 64 N. W. 838, 91 Wis. 253.

[1] (Wis.; 1895.)

The determination by a justice of the peace, before whom one charged with crime has been brought for preliminary examination, and who has made affidavit of prejudice asking a change of venue, as to who is the "nearest justice * * * qualified by law to conduct the examination" (Rev. St. § 4809), is not subject to retrial by the justice to whom he transfers the cause, or by the court on the trial.—*Jackson v. State*, 64 N. W. 838, 91 Wis. 253.

[1] (Wis.; 1895.)

When one charged with crime is brought before a justice for preliminary examination, and makes affidavit that the justice is prejudiced, the determination by the justice, in complying with Rev. St. § 4809, which requires him to "transmit all the papers in the case to the nearest justice * * * qualified by law to conduct the examination," as to who is such nearest justice is a question for him as the court, and not one of fact for a jury.—*Jackson v. State*, 64 N. W. 838, 91 Wis. 253.

§ 20. Set-off—Notice.

(Mich.; 1896.)

In an action commenced before a justice of the peace to recover damages for wrongfully cutting trees on plaintiff's land, contrary to an agreement between plaintiff and defendant, where the pleadings are verbal, a notice of

recompment which does not point out in what respect the contract was broken by plaintiff is insufficient.—*Kerr v. Bennett* (Mich.) 67 N. W. 564.

§ 21. Pleading—Amendment.

[a] (Mich.; 1895.)

A contract provided that, if plaintiff failed to deliver logs to be sawed at defendant's mill, a debt due him from defendant should become payable in lumber at the mill. *Held*, that a declaration thereon filed in a justice court, which failed to allege that plaintiff did not deliver the logs to be sawed, or that he demanded the lumber at the mill, could be amended by the insertion of allegations to that effect.—*Stanley v. Anderson* (Mich.) 65 N. W. 247.

[b] (Neb.; 1895.)

Where the pleadings before a justice do not show that the parties litigant were ever partners, it was error to dismiss the action on motion of defendant suggesting that such partnership had been shown by the evidence.—*Buckley v. Hook*, 61 N. W. 719, 43 Neb. 552.

§ 22. Adjournment.

[a] (Iowa; 1895.)

The jurisdiction of a justice in a criminal case is not lost by adjourning the cause more than three days without the consent of the parties.—*State v. Valure* (Iowa) 64 N. W. 280.

[b] (Mich.; 1895.)

Under 2 How. Ann. St. § 6903, authorizing a justice, under certain conditions, "at the time of the return" of a summons in replevin, to adjourn the cause, an adjournment by him on the return day of the writ, without any return of the writ, is unauthorized, and proceedings had under the adjournment would be void.—*Harbour v. Eldred* (Mich.) 64 N. W. 1054.

[c] (Minn.; 1896.)

A justice did not lose jurisdiction by continuing the case for more than one week without pleadings being filed, where it was agreed on the continuance that the pleadings should be filed on the adjourned day, and on the day before that day the parties appeared, and, by agreement, changed the adjourned day to one week later, at which time they appeared, filed pleadings without objection, and went to trial.—*West v. Berg* (Minn.) 68 N. W. 1077.

§ 23. — Number of adjournments.

[a] (Neb.; 1897.)

A party to an action before a justice cannot procure a second continuance extending more than 30 days from the return day, without compliance with Code Civ. Proc. § 961, by proving to the satisfaction of the justice that, for want of material evidence, he cannot sooner be ready for trial, and that the delay has not been made necessary by his negligence. A general affidavit under section 960 is not sufficient.—*Moran v. McCullum* (Neb.) 69 N. W. 938.

[b] (Wis.; 1896.)

Rev. St. § 3631, provides that no adjournment after the first shall be allowed on application of a party, unless he satisfy the justice, by oath, that he cannot safely proceed to trial; and section 3586 provides that if a justice of the peace be unable, from sickness, to attend to business when there is pending before him any matter undetermined, he may deliver his docket to some other justice, who may thereupon proceed to try and determine such matter. *Held*, that a justice lost jurisdiction by a second adjournment, "by consent of plaintiff, and in consequence of sickness of the court," in the absence of defendant.—*Gallager v. Serfling* (Wis.) 66 N. W. 692, 92 Wis. 544.

§ 24. Judgment.

[a] (Mich.; 1895.)

Under 2 How. Ann. St. § 7046, providing that no justice's judgment shall be reversed on account of any fees having been improperly allowed by the justice, a justice's judgment is not invalidated because an attorney's fee is improperly included therein.—*Backus v. Barber* (Mich.) 65 N. W. 379.

[b] (Neb.; 1896.)

A judgment of a justice of the peace for \$125, with interest from an anterior date, is sustainable, as to \$125, as a judgment for a present, definite amount.—*Coad v. Read* (Neb.) 66 N. W. 1002.

48 Neb. 40.

§ 25. — Rendition and entry.

[a] (Iowa; 1896.)

Under Code, § 3552, requiring judgment before a justice to be entered "forthwith," a judgment upon a verdict returned at 9 o'clock at night may properly be entered the next morning.—*Kuox v. Nicoli* (Iowa) 66 N. W. 876.

[b] (Neb.; 1896.)

A general finding for plaintiff of a justice of the peace is sufficient to sustain a judgment for plaintiff, as against an attempt to set the same aside in the district court on error.—*Coad v. Read* (Neb.) 66 N. W. 1002.

48 Neb. 40.

[c] (Neb.; 1896.)

Code Civ. Proc. § 1002, relating to the rendition and entry of judgment on a trial before a justice of the peace, applies to a county judge exercising the ordinary powers and jurisdiction of a justice.—*Best v. Stewart* (Neb.) 67 N. W. 881.

48 Neb. 859.

§ 26. — Opening default.

[a] (Iowa; 1896.)

Whether the fact that a notice to defendant in an action of forcible entry and detainer was not signed by plaintiff, or by the justice of the peace before whom the proceeding was returnable, as required by Code, § 3519, but was signed by plaintiff's attorney, is a "satisfactory excuse," within Code, § 3543, providing that the justice of the peace may set aside a judgment by default within six days after its rendition, on a showing of a "satisfactory excuse," is a question to be determined by the justice, the defect not being jurisdictional.—*Arts v. Rocksien* (Iowa) 67 N. W. 409.

[b] (S. D.; 1896.)

Under Comp. Laws, § 6065, permitting a justice, "on such terms as may be just, and on payment of costs," to set aside a judgment by default, the term "costs" includes the attorney's fee specified in section 6143.—*Erpenbach v. Chicago, M. & St. P. Ry. Co.* (S. D.) 67 N. W. 606.

§ 27. Execution.

[a] (Mich.; 1896.)

Under 2 How. Ann. St. § 6975, relating to the issuance of execution by justices of the peace, and authorizing a second execution only in case the first is returned unsatisfied, a second execution issued by a justice before a prior execution had been returned unsatisfied is void.—*Friyer v. McNaughton* (Mich.) 67 N. W. 978.

[b] (S. D.; 1896.)

Comp. Laws, pt. 2, c. 13, § 5124, provides that after the rendition of a judgment, any person indebted to defendant in execution may pay to the "sheriff" the amount of such indebtedness, or so much as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor. Section 6117 makes the provisions of part 2, c. 13, relating to the levy and sale or delivery of personal property, so far as the same are applicable, apply to executions issued by a justice of the peace. *Held*, that section 5124 applies to pay-

ments made to a cot table on an execution issued by a justice of the peace.—*Bedford v. Kissick* (S. D.) 67 N. W. 609.

§ 28. Attachments.

[a] (Minn.; 1896.)

Since Gen. St. 1891, § 5052, relating to attachments in justice courts, does not require that the affidavit shall state that it is made by plaintiff or some person in his behalf, such an affidavit is sufficient, though it neither states nor recites that fact, where the fact is apparent from the files and records in the action.—*West v. Berg* (Minn.) 68 N. W. 1077.

[b] (Minn.; 1896.)

Failure to serve on defendant a copy of the inventory of the property levied on in attachment does not affect the validity of the levy.—*West v. Berg* (Minn.) 68 N. W. 1077.

§ 29. Records and docket.

[a] (Mich.; 1895.)

A justice's judgment by default is void, where the justice's docket, although stating that the parties appeared and consented to an adjournment, does not state the place to which the case was adjourned, under How. St. Mich. § 7053, providing that a justice shall enter every adjournment in his docket, stating to what time and place.—*Waldron v. Palmer* (Mich.) 62 N. W. 731.

104 Mich. 556.

[b] (Mich.; 1896.)

A default judgment of a justice of the peace is void where the docket entry shows that the cause was adjourned for six days, without stating the place to which the same was adjourned.—*Waldron v. Palmer* (1895) 62 N. W. 731, followed. 104 Mich. 556.—*Fitzhugh v. Rivard*, 66 N. W. 947.

[c] (Mich.; 1896.)

The suspension of the trial of a case by a justice from noon until 10 o'clock the following morning is not an "adjournment," such as is provided for by 2 How. Ann. St. §§ 6899–6903, and which is required by section 7053 to be entered on the docket, with a statement of the time and place, and the justice does not by such action lose jurisdiction, though the place is not shown by the docket entry.—*Woempener v. Ketchum* (Mich.) 67 N. W. 1106.

[d] (Mich.; 1896.)

A justice's docket entries of a judgment recite the issue of a summons returnable on a certain day; that it was "returned duly served on" defendants named; that at 9 o'clock on the return day, it being a legal holiday, the case was continued to the next day; that on the latter day plaintiff appeared, but defendants did not appear; and that, after waiting one hour, the justice proceeded with the trial. *Held*, that the judgment was void, in that the entries did not show at what hour the summons was returnable, to what hour or what place the case was adjourned, at what hour on the day to which it was adjourned plaintiff appeared, or at what hour it was called by the justice.—*Stolte, Dangel & Foss Co. v. Cochran* (Mich.) 69 N. W. 247.

[e] (Mich.; 1897.)

An entry in a justice's docket that, the parties "having settled the matter in issue since last adjournment, this suit, on motion of the plaintiffs, was discontinued," etc., is not a bar to a subsequent suit, the justice having had no personal knowledge of the settlement.—*Shank v. Woodworth* (Mich.) 70 N. W. 140.

[f] (Minn.; 1896.)

Where defendant did not appear, and the cause was adjourned for three days, but the justice omitted to state in his docket on whose motion adjournment was had, the justice did not lose jurisdiction.—*Wheeler v. Paterson* (Minn.) 66 N. W. 964.

61 Minn. 231.

[g] (Minn.; 1896.)

It is not essential to the validity of a judgment obtained in a justice court without personal service of the summons that the justice docket or judgment should disclose the fact that a security bond was filed before the judgment was entered.—*Vaule v. Miller* (Minn.) 67 N. W. 540.

61 Minn. 485.

[h] (Neb.; 1895.)

The record of a judgment by default entered by a justice of the peace must show that the summons was served on defendant.—*Miller v. Plue*, 64 N. W. 232, 45 Neb. 701.

[i] (Neb.; 1895.)

The record of a judgment by default entered by a justice of the peace must show that plaintiff appeared within one hour of the time named in the summons.—*Miller v. Plue* (Neb.) 64 N. W. 232, 45 Neb. 701.

[j] (Neb.; 1895.)

The failure of a justice of the peace to enter on his docket the day and hour fixed in the summons for trial is fatal to a default judgment.—*Miller v. Plue*, 64 N. W. 232, 45 Neb. 701.

[k] (Neb.; 1896.)

Where a transcript shows the filing before a justice of a bill of particulars, accompanied by a demand for judgment, and an acknowledgment by defendant, in writing, of the indebtedness, with a request for entry of judgment therefor, the assent of plaintiff will be presumed.—*Spaulding v. Johnson* (Neb.) 67 N. W. 874, 48 Neb. 830.

[l] (S. D.; 1896.)

The record in an action in justice court specified the nature of the claim, and contained a transcript of docket, concluding with a recital that, "after hearing the evidence and law, judgment was given for plaintiff for \$20 against C., and costs, \$13.50, making in all \$33.50." *Held* to show a "final determination of the rights of the parties," within Comp. Laws, § 5024.—*Hunter v. Karcher* (S. D.) 67 N. W. 621.

[m] (Wis.; 1895.)

Where the docket of a justice does not show the nature of the action, whether any pleas were made by the parties, nor any other facts showing jurisdiction, the judgment rendered is void.—*Jones v. Hunt* (Wis.) 63 N. W. 81.

90 Wis. 199.

JUSTIFIABLE HOMICIDE.

See "Homicide," §§ 14–18.

JUSTIFICATION.

By sureties on appeal bond, see "Appeal," § 67.
—on bond of assignee, see "Assignment for Benefit of Creditors," § 21.
For libel or slander, see "Libel and Slander," §§ 20, 21.
Of assault, see "Assault and Battery," § 2.

L.

LABELS.

See "Trade-Marks and Trade-Names."

LABOR.

See "Master and Servant."

LACHES.

See "Equity," §§ 49, 50; "Limitation of Actions."

LANDLORD AND TENANT.

I. THE RELATION, §§ 1, 2.

II. RIGHTS AND LIABILITIES, §§ 3-13.

1. In General, §§ 3-7.
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3. Repairs, §§ 9-11.
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III. LEASES, §§ 14-30.

1. In General, §§ 14-19.
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IV. ASSIGNMENT AND SUBLETTING, §§ 31-34.

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VIII. HOLDING OVER, §§ 40-42.

IX. RENT, §§ 43-51.

X. LIEN FOR RENT AND ADVANCES, §§ 52-57.

XI. RECOVERY OF POSSESSION, §§ 58-62.

XII. RENTING ON SHARES, §§ 63-65.

See, also, "Forcible Entry and Detainer"; "Use and Occupation."

Adverse possession by tenant, see "Adverse Possession," § 19.

Right to fixtures, see "Fixtures," § 3.

Slander of tenant's title, see "Libel and Slander," § 33.

I. THE RELATION.

§ 1. When relation exists.

(Iowa; 1895.)

An agreement whereby a party had the exclusive right to mine coal under certain land for 20 years, unless the coal sooner gave out, and to use in connection with the mine five acres of the surface of the land to erect buildings thereon, and to build and operate railroads and flow water thereover, for a certain royalty per ton of coal mined, not to fall below a fixed amount per year, payable as rent for all the privileges granted, created the relation of landlord and tenant, within Code, § 2017, giving a landlord's lien for "rent."—*Lacey v. Newcomb* (Iowa) 63 N. W. 704.

§ 2. Implied tenancy.

[a] (Mich.; 1895.)

Where a teacher is given possession by the school district of the rooms in the school building, other than the school room, for the purpose of enabling him better to perform his duties as teacher, and there is no letting, in terms, or rent reserved, his possession is that of the school district, and the relation of landlord and tenant does not exist.—*School Dist. No. 11 of Alpine Tp. v. Batsche* (Mich.) 64 N. W. 196.

[b] (N. D.; 1895.)

An executory contract of sale of land, whereby the purchaser was let into possession with full use of the premises, but was bound to pay a stipulated price therefor, and to pay each year "so much as the one-half of all crops on said land shall amount to," did not create the relation of landlord and tenant.—*Moen v. Lillestal* (N. D.) 65 N. W. 694.

5 N. D. 327.

II. RIGHTS AND LIABILITIES.

Liability of tenant for injury to land rented on shares, see post, § 65.

Notice to quit, see post, § 61.

Option of landlord where tenant holds over, see post, § 40.

Waiver of lien for rent, see post, § 56.

1. IN GENERAL.

§ 3. Injuries to premises.

(Iowa; 1895.)

On an issue as to a tenant's negligence in causing the destruction of the premises by fire, it was proper to admit testimony that no water was kept in, or watchman stationed about, the building, as a protection against fire.—*Dner v. Allen* (Iowa) 64 N. W. 682.

§ 4. Disturbing tenant's possession.

(Iowa; 1896.)

Evidence that after defendant had leased to plaintiff part of a building to be erected, reserving a portion for his own use, and before the completion of the building, expensive changes were made therein; and that defendant thereafter used more of the building than was reserved to him in the lease, and that plaintiff kept an account of the space occupied by defendant, but made no charge therein for such extra space, and paid rent without deducting its value, and made no claim therefor until after the end of the term,—will support a finding that defendant occupied the additional space under oral agreement made at the time of the alterations, and in consideration thereof.—*Roach v. Cameron* (Iowa) 66 N. W. 194.

§ 5. Right to emblements.

(Neb.; 1895.)

A tenant for years of mortgaged land planted a crop after a decree foreclosing the mortgage, the tenant having been a defendant in the foreclosure suit. The land was sold, and the sale confirmed, while the crop was growing, and before it matured. The purchaser permitted the tenant to retain possession, merely notifying him that he (the purchaser) would expect from the tenant rent in money or in kind. Held that, as between the tenant and the purchaser, the former was entitled to the crop.—*Munday v. O'Neil* (Neb.) 63 N. W. 32.

44 Neb. 724.

§ 6. Wrongful eviction.

[a] (Iowa; 1897.)

A tenant is evicted where he leaves the premises during the term pursuant to a notice to quit, and, before he has left, the landlord takes possession of the barn and other outbuildings against the tenant's will. *Tarpy v. Blume* (Iowa) 70 N. W. 620.

[b] (Wis.; 1896.)

To constitute an eviction of a tenant by a landlord, which will authorize a recovery of damages, an actual expulsion is not necessary, but any act on the part of the landlord is sufficient which renders the premises unfit for the purpose for which they were leased, and compels their abandonment by the tenant. *Silber v. Larkin* (Wis.) 68 N. W. 406.

[c] (Wis.; 1896.)

Where a landlord, who owned another building adjoining that occupied by his tenant, the two being constructed together, tore such building down, rendering the leased building unsafe for occupancy, and then procured its condemnation and destruction by the city authorities, such acts constituted an eviction, for which the tenant may recover damages, and the landlord cannot avail himself of the action of the city authorities as a defense. *Silber v. Larkin* (Wis.) 68 N. W. 406.

§ 7. — Damages.

[a] (Mich.; 1895.)

In trespass against a lessor for keeping the lessee out of possession of the land, the measure of damages is the fair value of the use of the land, less the rent. — *Taylor v. Cooper* (Mich.) 62 N. W. 157.
104 Mich. 72.

[b] (Mich.; 1895.)

In trespass against a lessor for keeping the lessee out of possession of the land, evidence as to the probable value of a future crop which the lessee intended to raise is inadmissible to show the value of the use of the land. — *Taylor v. Cooper* (Mich.) 62 N. W. 157.
104 Mich. 72.

[c] (Mich.; 1895.)

In trespass against a lessor for keeping the lessee out of possession of the land, evidence of the amount paid by the lessor to another tenant to procure a surrender of a lease on other lands is inadmissible on the question of damages. — *Taylor v. Cooper* (Mich.) 62 N. W. 157.
104 Mich. 72.

2. ESTOPPEL TO DENY LANDLORD'S TITLE.

§ 8. Estoppel.

[a] (Mich.; 1895.)

Where defendant goes into possession of land under the guardian of minor heirs, he cannot question the title of the heirs. — *Wolf v. Holton* (Mich.) 62 N. W. 174.
104 Mich. 107.

[b] (Neb.; 1897.)

Defendant pleaded that he had been induced to enter into the lease by plaintiff's fraudulent representations that he owned the premises, whereas in fact he was not the owner, and had no authority to lease them; that thereafter the defendant had accepted a lease from, and paid rent to, the true owner. *Held* not to state a defense, there being no averment that the lessee had not entered into possession, or that he had been kept out of possession, or evicted by the holder of the paramount title, or that he had surrendered the lease. — *Nissen v. Turner* (Neb.) 69 N. W. 778.

[c] (Neb.; 1897.)

Where the lessee has entered under the lease, and has not surrendered his rights thereunder nor been evicted, he cannot defend

against an action for rent on the ground that the lessor was not owner of the premises, and that he has attorned to another. — *Mosher v. Cole* (Neb.) 70 N. W. 275.

[d] (N. D.; 1897.)

Where the purchaser of land under a contract for a deed takes actual possession, neither his tenant nor his vendor can defeat an action for the rent by showing that the vendee was in default under his contract. — *Nearing v. Coop* (N. D.) 70 N. W. 1011.

[e] (Wis.; 1895.)

Defendant contracted in writing to hold certain premises under plaintiff as "the owner thereof," and to occupy them "as his tenant," subject to removal on certain conditions. *Held*, that defendant was estopped to deny plaintiff's title. — *Ricketson v. Galligan* (Wis.) 62 N. W. 87, 89 Wis. 394.

3. REPAIRS.

§ 9. Liability of lessor.

[a] (Neb.; 1895.)

The making of repairs by a tenant whose lease does not require it, with a promise to pay a portion of the cost, constitutes a sufficient consideration for an oral promise by the landlord to pay the rest of the cost. — *Woodworth v. Thompson* (Neb.) 62 N. W. 450.
44 Neb. 311.

[b] (Wis.; 1897.)

A landlord who, at the request of his tenant, undertakes to put on a new roof, is liable for injury to the tenant from the negligent conduct of the work, the same as though he was bound by the lease to do the work. — *Wertheimer v. Saunders* (Wis.) 70 N. W. 824.

[c] (Wis.; 1897.)

A landlord is not relieved from liability for injury from rain to the tenant's property in the building, caused by the negligent manner in which a roof was being put on, though the work is being done for the landlord by an independent contractor. — *Wertheimer v. Saunders* (Wis.) 70 N. W. 824.

§ 10. Action for breach of lessor's covenant to repair.

[a] (Iowa; 1895.)

In an action for breach of an agreement to repair, an instruction which assumes that plaintiff "was deprived of the use of the premises," when the evidence shows that he was deprived of the use contemplated in the lease, is proper. — *Leick v. Tritz* (Iowa) 62 N. W. 855.

[b] (Iowa; 1895.)

The measure of damages for the loss of the use of leased premises is "the full rental value" of the premises for the term, and if the rent has not been paid the measure of damages is the difference between "the actual rental value (that is, the value of the use of the premises) and the rent reserved, estimated for the terms of the lease." — *Leick v. Tritz* (Iowa) 62 N. W. 855.

§ 11. Liability of lessee.

[a] (Neb.; 1895.)

A lease providing that the lessee shall, to a specified amount, "put cash in repairs" on the leased premises, confers no right to charge the tenant with repairs made by the landlord. — *Schrage v. Miller* (Neb.) 62 N. W. 1091.
44 Neb. 818.

[b] (Neb.; 1897.)

An agreement by a lessee to keep the premises in good repair, and, on the expiration of the term, to surrender the possession in as good condition as they were when he entered, natural decay, wear, and tear excepted, does not include a covenant to rebuild buildings destroyed without his fault. — *Wattles v. South Omaha Ice & Coal Co.* (Neb.) 69 N. W. 785.

4. IMPROVEMENTS BY TENANT.

§ 12. Option to purchase.

(Iowa; 1895.)

A lessee cannot, by performing acts which his lease recites shall give the lessor an option to purchase his improvements at an appraised valuation, insist that the lessor shall so elect.—*Kelly v. Chicago, M. & St. P. Ry. Co.*, 61 N. W. 957, 93 Iowa, 436.

5. DANGEROUS PREMISES.

§ 13. Injuries to tenants or occupants.

(a) (Iowa; 1895.)

Defendants leased to a troupe their opera house, which had, between the partitions back of its stage, an opening with a trapdoor without any railing. This opening could have been seen by the troupe's agent when he made the lease. The lease required the lessors to furnish light and heat, and provided that the stage carpenter was to act under the direction of the troupe's stage manager. *Held*, that the lessors were not liable for injuries to a member of the troupe from falling through the opening because the passage was insufficiently lighted.—*Holton v. Waller* (Iowa) 64 N. W. 633.

(b) (Iowa; 1895.)

Where, in an action against lessors of an opera house for injuries from falling through an opening not properly guarded, in an unlighted passageway, the complaint alleges that plaintiff is a member of the lessee opera troupe, evidence that she has no other interest in the troupe than as an employé, receiving a salary, is inadmissible.—*Holton v. Waller* (Iowa) 64 N. W. 633.

(c) (Minn.; 1896.)

When there is no agreement to repair the leased premises by the landlord, and the landlord is not guilty of fraud in concealment as to their condition, and defects therein are obvious, the landlord is not liable to the tenant, or to any one entering under the tenant's title, for injuries sustained by reason of the defects.—*Harpel v. Fall* (Minn.) 65 N. W. 913.

63 Minn. 520.

(d) (Minn.; 1897.)

Where a tenant leases the fourth story of a building with the use of the elevator to be operated by the tenant when required in his business, and the landlord covenants to keep the elevator in constant repair and retains general control over it, there is not such leasing as will exonerate the landlord from all responsibility for the safe condition of the elevator.—*Olson v. Schultz* (Minn.) 70 N. W. 779.

III. LEASES.

Continuance of terms of lease where tenant holds over, see post, § 41.

Recording lease as prerequisite to lien for rent, see post, § 53.

Contract for lease not to be performed within a year, see "Frauds, Statute of," § 26.

Lease by executor, see "Executors and Administrators," § 10.

Measure of damages for breach of contract to lease, see "Damages," § 18.

Mining leases, see "Mines and Mining," §§ 3-5.

Parol leases, see "Frauds, Statute of," § 14.

Power of partner to lease firm property, see "Partnership," § 17.

Transfer of good will under mining lease, see "Good Will."

1. IN GENERAL.

§ 14. In general.

(a) (Iowa; 1897.)

Effect is to be given to both the written and printed provisions of a contract if consis-

tent with each other, and a printed clause in a lease, providing that a failure by the lessee to perform any of the covenants shall authorize a re-entry, applies to a written provision that the lessee shall pay all taxes before they become delinquent.—*Heiple v. Reinhart* (Iowa) 69 N. W. 871.

(b) (Minn.; 1897.)

A lease providing that the tenant shall hold for five years, with a privilege of holding longer, provided he perform certain conditions as to keeping a general store, is a lease not merely for five years, but for such time as the lessee shall personally perform the conditions specified.—*Ely v. Randall* (Minn.) 70 N. W. 980.

(c) (Wis.; 1897.)

A lease of an office in a building on the corner of W. and J. streets, providing that, if the rent of any office on J. street front was reduced below \$1 per square foot, or any room on W. street front below \$1.25, or any corner room below \$1.50, "such reduction shall also be made to the lessee for the term of this lease, * * * but this agreement shall not apply to any rooms not specifically mentioned," contemplates the reduction of the rent of a room only in case the rent is reduced on a room of a similar class.—*Goldsmith v. Southwell* (Wis.) 70 N. W. 72.

§ 15. What constitutes lease.

(a) (Iowa; 1894.)

Plaintiff, by letter, offered to rent his farm to defendant, and, in a subsequent letter, asked defendant to make an offer. Defendant by letter offered a certain sum annually for three or five years. Plaintiff replied, "I will lease to you for three or five years, as you prefer," at the price named in the offer; and defendant, in reply, told plaintiff that he could make out a lease for five years accordingly. Plaintiff then wrote, "You have rented my place for five years," and told defendant to go ahead and attend to business, and spoke of making certain improvements. *Held*, that the letters constituted a lease.—*Culton v. Gilchrist* (Iowa) 61 N. W. 384.

92 Iowa, 718.

(b) (Mich.; 1895.)

In an action for rent it appeared that plaintiff consented to the assignment of a non-assignable lease of the premises on condition that the lessee should be liable if the assignee failed to pay the rent, and that defendant arranged to buy out the assignee; and plaintiff testified that, at a meeting of all the parties for perfecting this purchase, plaintiff made an oral lease of the premises to defendant. Defendant testified that on this occasion plaintiff consented to his occupancy, but was to look to the original lessee for the rent. The lessee testified that plaintiff agreed to let defendant take the assignee's place on condition that the lessee be liable for the rent. The assignee surrendered possession to defendant. *Held*, that the question whether plaintiff and defendant entered into an oral lease was for the jury.—*Youseff v. Kridler* (Mich.) 63 N. W. 439.

105 Mich. 344.

§ 16. Agreements for leases.

(a) (Iowa; 1896.)

The following writing: "Agreement. this is to certify that I have rented my farm for the year 1895 for the some of \$300.00 payment to be stated in contract to the said D. [Signed] L. M."—is a memorandum of the lease and not an executed lease.—*Martin v. Davis* (Iowa) 65 N. W. 1001.

(b) (Iowa; 1896.)

That the tenant in negotiations for the lease of a farm misrepresents that he has paid the rent of the farm last rented by him, and also that he owns considerable personalty for farming, when he is in fact insolvent, entitles the landlord to refuse to complete the lease.—*Martin v. Davis* (Iowa) 65 N. W. 1001.

§ 17. Validity.

(Wis.: 1896.)

A lease providing that the term and payment of rent shall not begin till the completion by the lessor of a building on the premises is not void for want of mutuality because it contains no covenant by the lessor to complete the building, if, after the making of the lease, the time for the payment of rent, and consequently for the commencement of the term, is fixed by agreement.—*Hammond v. Barton* (Wis.) 67 N. W. 412.

93 Wis. 183.

§ 18. Term—Commencement in futuro.

(Wis.: 1895.)

An agreement which recited that plaintiff "herely lets, demises, and leases" to defendant certain premises, "to have and to hold the same for a term ending" at a named date, at a specified annual rental payable in monthly installments, "said rental to begin when the building hereinafter described shall be ready for occupancy," and by which plaintiff bound himself to erect upon the premises a factory building of specified dimensions by a certain date, is a valid lease in present for a term to commence in futuro, the essential element of certainty as to the commencement of the term having been satisfied by the completion of the building.—*Colclough v. Carpeles*, 61 N. W. 836, 89 Wis. 239.

(Ib.) (Wis.: 1896.)

On March 21, 1891, defendant took a lease of a building in process of construction "for the term of five years from completion of said building," paying at that time a sum which was indorsed on the lease as "the first month's rent," the time when payment of rent should begin being left open. On June 12, 1891, it was agreed that payment for rent should begin May 11th, and defendant paid a second month's rent, indorsing on the lease, "Began paying rent May 11, 1891," and occupied the premises till May 31, 1893, paying rent as prescribed in the lease. *Held* a valid lease in present for a term to commence in futuro, the necessary element of certainty in the commencement of the term being satisfied by defendant's entering and paying rent under the lease. *Colclough v. Carpeles* (1895) 61 N. W. 836, 89 Wis. 239, followed.—*Hammond v. Barton*, 67 N. W. 412, 93 Wis. 183.

§ 19. Modification.

(Minn.: 1896.)

A lessee for a term of years having, before the expiration of the term, become insolvent, and unable to pay rent, and being about to abandon the premises and leave them vacant (the lease not binding him to occupy the property for any purpose), the lessor agreed to a modification of the lease, indorsed thereon, whereby the rent for a number of future years of the term was reduced, and certain repairs were made by him on the property necessary to protect it, as asked by the lessee; and thereupon the lessee continued to use the premises for a part of the remainder of the term, when he again became unable to fulfill his contract. *Held*, that the modification rested on a sufficient consideration.—*Ten Eyck v. Sleeper* (Minn.) 67 N. W. 1026.

2. COVENANTS AND CONDITIONS.

Covenant to repair, see ante, § 10.

—of renewal, see post, § 26.

Reservations in mining leases, see "Mines and Mining," § 4.

§ 20. Heating building.

(Iowa: 1896.)

A lease of a building at a certain rent, providing that, until the lessor should heat the building with steam, the rent should be an-

other smaller sum, does not require the lessor to furnish steam heat except as a condition precedent to his right to the higher rent.—*Gatch v. Garretson* (Iowa) 69 N. W. 559.

(Ib.) (Iowa: 1896.)

The burden is on a lessee to show that the lessor failed to heat the building sufficiently to entitle him to an increase of rent, which was, by the lease, conditioned upon his heating the building.—*Gatch v. Garretson* (Iowa) 69 N. W. 559.

3. TERMINATION AND SURRENDER.

Termination of tenancy from month to month, see post, § 37.

§ 21. Abandonment.

(Mich.: 1895.)

One leasing a farm agreed to give the landlord as rent a certain portion of the crop. One spring the weather was so wet that he did not put in any crop except some corn, which was "drowned out." He then rented an hotel, and moved his family there, leaving some of his furniture in the farm house, and some of his farm implements and some poultry on the farm. He locked up the farm house, and retained the key. After he moved to the hotel he did some work on the farm in repairing fences and planting corn. *Held*, that he did not abandon the farm.—*Hough v. Brown* (Mich.) 62 N. W. 143, 104 Mich. 109.

§ 22. Notice.

(Ib.) (Neb.: 1895.)

Where, before the termination of a lease, the tenant informed the landlord that he would remain but for a short time after the term, and pay rent at the old rate, and the landlord acquiesced, the tenant was not required to give notice of his intention to quit.—*Montgomery v. Willis* (Neb.) 63 N. W. 794.

45 Neb. 434.

(Ib.) (Neb.: 1896.)

In a lease for the term of 10 years it was provided that the lessor might terminate the lease at the end of 5 years by giving 60 days' notice, and paying the lessee the value of such improvements as meantime such lessee should have placed upon the premises. Before the lessor had the right to give the required notice, the lessee assigned his interest in the lease to another party, who in turn made still another assignment of such interest. *Held*, that, upon giving notice as required, the lessor was not bound to pay to the lessee the value of the aforesaid improvements as an indispensable condition precedent to his right to terminate the lease, but that, having tendered in a court of equity payment for the improvements to whomsoever should be found entitled thereto in such amount as upon an accounting should be found due, the court had jurisdiction to declare the lease to have been terminated at the end of five years of its existence, and grant full relief between the parties litigant.—*Estabrook v. Stevenson* (Neb.) 66 N. W. 286.

47 Neb. 206.

§ 23. Surrender.

(Ib.) (Mich.: 1895.)

In an action for rent under a lease for one year, it appeared that defendant held over and became a tenant for another year, but that before the expiration of such year he surrendered the premises, and that plaintiff entered and made repairs thereon. *Held*, that the fact that defendant had knowledge that such repairs were being made does not amount to a consent thereto which would charge him for the rent of the unexpired term notwithstanding plaintiff's acceptance of the surrender.—*Schulenberg v. Uffelman* (Mich.) 64 N. W. 460.

(Ib.) (Minn.: 1895.)

Where it appeared in an action for rent that on the tenants' removal the landlord ac-

cepted the key, took possession of the building, repaired and remodeled the same, and permitted theater posters to be placed in the windows, and ordered the tenants to remove their signs from the building, a finding of surrender and acceptance thereof was warranted, though before the removal the landlord objected thereto.—*Lafferty v. Hawes* (Minn.) 65 N. W. 87. 63 Minn. 13.

[c] (Wis.; 1895.)

Where defendant was in possession of a building under a lease for a term of years, retained the keys and the actual possession of the lower floor, where the office was, the fact that he moved out his stock and paid rent up to a certain date, under a verbal agreement between him and the lessor that the lease should determine at that date, but that defendant could remain in the office until the building was rented, is not a surrender by operation of law, within Rev. St. § 2302, providing that no interest in lands shall be surrendered unless by operation of law or by conveyance in writing.—*Burham v. O'Grady* (Wis.) 63 N. W. 1049. 90 Wis. 461.

§ 24. Acceptance of surrender.

[a] (Mich.; 1895.)

A lease of a mine provided that it should terminate 60 days after delivery of a written surrender to lessor, and payment of all royalties due; the machinery erected by lessee not to be removed before such surrender and payment. After defendant had given notice of surrender, an arrangement was made by which he was to run the pumps for a week, and his account therefor was allowed, whereupon he removed the machinery, and paid up royalties due. *Held*, that the allowance of the pumping charge and receipt for royalties was a ratification of defendant's surrender, and that his failure to pay the royalties prior to or concurrently with the removal of the machinery was but a nominal damage to plaintiff.—*Pendill v. Lucy Min. Co.* (Mich.) 62 N. W. 1024. 105 Mich. 221.

[b] (Neb.; 1895.)

Where a landlord accepts the possession of leased premises without objection, he will be deemed to have waived his right under the lease to a notice of the tenant's intention to quit.—*Elgutter v. Drisbaux* (Neb.) 63 N. W. 19. 44 Neb. 378.

4. EXTENSIONS AND RENEWALS.

§ 25. Privilege of renewal.

(Minn.; 1895.)

A stipulation that, if the leased premises are not sold or leased at the expiration of the term, the lessee is to have the lease renewed for a term of one year more on the same terms, is not a present demise for a second year.—*Swank v. St. Paul City Ry. Co.* (Minn.) 63 N. W. 1088. 61 Minn. 423.

§ 26. Covenants of renewal.

[a] (Mich.; 1896.)

A lease for a term of years provided that the lessor, his "executors, administrators, or assigns," should have the option at the end of the term to purchase from the lessee, "his executors, administrators, or assigns," the buildings erected, at a valuation, and on such purchase to re-enter; that should the lessor, his executors, etc., elect not to purchase, the lease should stand for another like term at a rental value to be determined by a reference, the same election to purchase being reserved at every succeeding term; and that the lease should be void for failure to perform all the covenants. The rent was reserved to the lessor, his executors, administrators, or assigns, and not to his heirs. *Held*, that the lease did not provide for perpetual re-

newals, but terminated on the death of the parties.—*Brush v. Beecher* (Mich.) 68 N. W. 420.

[b] (Mich.; 1896.)

A covenant in a lease for a term of years will not be construed as providing for perpetual renewals of the lease, in the absence of clear, unequivocal language to that effect.—*Brush v. Beecher* (Mich.) 68 N. W. 420.

[c] (Neb.; 1895.)

A lease providing that the tenant should have the premises for two years, "with the refusal of leasing said property for the term of two years longer," and providing that "if the tenant holds over the term of two years * * * this lease shall be binding upon both parties for the next two years," constituted an absolute lease for two years, and an agreement on the part of the lessor that at the expiration of that term he would release the premises to the tenant on the conditions of the first term.—*Steen v. Scheel*, 64 N. W. 957, 46 Neb. 252.

§ 27. By holding over.

[a] (Mich.; 1895.)

When a lease provides for a renewal thereof upon the giving by the lessees of notice of their option to that effect, the mere holding over by them of the premises does not show that the lease has been extended for a subsequent term.—*Cooper v. Joy* (Mich.) 63 N. W. 414. 105 Mich. 374.

[b] (Neb.; 1895.)

Where a lease provided that the lessor would release the premises to the tenant at the expiration of the term on the conditions of the first term, and for the same period, and that if the tenant held over the first term the lease should be binding on both parties for another term of the same length, and the tenant, before the expiration of the term, removed his property from the leased building, and locked the building up, and thereafter occupied no part of it, nor exercised control thereover, further than to retain the key for two months, at the end of which time it was sent to the lessor, the tenant was not liable for a succeeding term.—*Steen v. Scheel*, 64 N. W. 957, 46 Neb. 252.

5. FORFEITURE.

§ 28. Unauthorized subletting.

(Mich.; 1894.)

Where a lease of a hall to a voluntary society restricted its use to lodge meetings and socials, and provided that, if the lessee should sublet for other than society purposes, without written consent, the lease should be forfeited, evidence of a misuser by some of the joint owners of the term in holding a dance in the hall without written consent is not, in the absence of evidence that the hall was sublet for that purpose, sufficient to warrant a submission of an issue on the forfeiture of the lease.—*Sommers v. Reynolds* (Mich.) 61 N. W. 501. 103 Mich. 307.

§ 29. Nonpayment of taxes.

(Iowa; 1895.)

Where a lease for the life of the lessee recites that the consideration thereof is a deed by the lessee of her interest in the premises, except a life estate therein under the lease, and it is provided in the printed part of the lease that the lessee shall keep the premises in repair, and that, on a breach by the lessee "of any of the covenants herein contained," she will surrender possession, and following is a written clause, providing that "as a further consideration [lessee] hereby agrees to pay all taxes * * * which may be * * * assessed against said premises, * * * before they become delinquent," which is followed by a separate written clause, providing that the lessee shall make the repairs, and that "a failure so to do shall work a forfeiture of this lease," the lessor can-

not declare a forfeiture for nonpayment of taxes. *Hipple v. Reed* (Iowa) 65 N. W. 331.

§ 30. Waiver.

[a] (Mich.; 1895.)

Where, under a lease reserving a right of entry for nonpayment of rent in advance, the lessor accepts payment in advance of a part of the monthly rent, he waives his right to insist on a forfeiture of the lease during the period covered by such part payment of rent.—*Barber v. Stone* (Mich.) 62 N. W. 139.

104 Mich. 90.

[b] (Minn.; 1897.)

A landlord, upon default of the lessees in payment of rent and taxes, obtained judgment fixing the amount due, and, upon failure of the lessees to pay within the time fixed by the court, he obtained, and took possession under, a final decree declaring their interest under the lease and in the buildings erected by them terminated. *Held*, that he thereby waived strict forfeiture and right of re-entry reserved by the lease, and accepted the unexpired term, and the buildings erected by the lessees, in full satisfaction of his claim.—*Cook v. Parker* (Minn.) 69 N. W. 1099.

IV. ASSIGNMENT AND SUBLETTING.

Forfeiture for unauthorized subletting, *see ante*, § 28.

§ 31. Requisites of assignment.

(Wis.; 1896.)

Under Rev. St. § 2302, providing that no estate or interest in lands shall be surrendered unless by act or operation of law, or by deed of conveyance in writing subscribed by the party surrendering the same, or by his lawful agent, thereunto authorized by writing, a lessee under a written lease remains liable thereon to the lessor after an assignment of the lease to a third person as subtenant, where the consent of the lessor to such transfer, indorsed on the lease, expressly so provides, regardless of any oral agreement between the lessee and agents of the lessor, not shown to have written authority from him to make such agreement.—*Lovejoy v. McCarty* (Wis.) 68 N. W. 1003.

§ 32. Consent of lessor.

(Mich.; 1894.)

A lease of land on shares is not assignable by the lessee without the consent of the lessor.—*Lewis v. Sheldon* (Mich.) 61 N. W. 269.

103 Mich. 102.

§ 33. Construction and operation of assignments.

[a] (Iowa; 1896.)

A lease of a coal mine obligated the lessor not to lease to any other party any coal land to be operated during the life of the lease, and prevented the lessee from "dividing his time or attention with any other mine," for the reason that lessor's rent depended on the number of bushels mined. The lessee assigned his interests in the lease, and the assignees sought to restrain him from operating another mine, on the ground that he was still bound by the original lease. *Held*, that no right to insist on the obligation between lessor and lessee was transferred to the assignees, but that they acquired simply such rights as their assignor had under the lease, and were bound in his stead by its obligations.—*Findlay v. Carson* (Iowa) 66 N. W. 759.

[b] (Minn.; 1896.)

Whenever a lessee transfers and assigns the whole term for which he has leased premises, reserving no reversionary interest whatsoever to himself, the right of re-entry for a breach of a condition subsequent, cannot

be reserved or retained.—*Ohio Iron Co. v. Auburn Iron Co.* (Minn.) 67 N. W. 221.

64 Minn. 101.

§ 34. Liability of subtenant.

(Neb.; 1895.)

A subtenant is charged with notice of the existence of the tenant's lease, and is bound by the conditions thereof.—*Blachford v. Freuzer* (Neb.) 62 N. W. 1101.

44 Neb. 829.

V. TENANCIES FROM YEAR TO YEAR.

§ 35. When created.

[a] (Neb.; 1895.)

Where, before the expiration of a lease, the tenant informed the landlord that he would remain but for a short period after such expiration, during which he would pay rent at the old rate, and the landlord acquiesced, a tenancy from year to year was not created.—*Montgomery v. Willis* (Neb.) 63 N. W. 794.

45 Neb. 434.

[b] (Neb.; 1896.)

Where the guardian of the heirs of a long-absent owner of land who was supposed to be dead executed a lease of the land for five years, and before the expiration thereof the owner returned, and thereafter accepted rental under the lease, though the lease was void, a tenancy from year to year was thereby created.—*Farley v. McKeegan* (Neb.) 67 N. W. 161.

48 Neb. 237.

VI. TENANCY FROM MONTH TO MONTH.

§ 36. Creation.

[a] (Mich.; 1897.)

There is no evidence for an instruction as to a letting from month to month, plaintiff's testimony being that it was agreed defendant might use a stairway on paying \$20 per month for a year, and defendant's being that there was no agreement about the use of the stairway, but that he paid for the use during two months, and that, on his refusing to sign an agreement for a year, plaintiff said, "The only way you can have it is to pay your rent, and, if you do not pay the rent, I will lock the door, —\$20 per month"; the former being evidence of a letting for a year, and the latter of an agreement in the nature of a license, terminable without notice on failure to pay rent.—*Hirschfeld v. Franks* (Mich.) 70 N. W. 894.

[b] (Minn.; 1894.)

The fact that the tenant remained in possession of urban property two months after the end of the lease, paying rent each month at the rate provided for in the lease, creates merely a tenancy from month to month.—*Backus v. Sternberg* (Minn.) 61 N. W. 335.

59 Minn. 403.

§ 37. Termination.

[a] (S. D.; 1896.)

A statement by a lessee from month to month, that he "guessed he would have to give up the house," is not a sufficient notice of an intention to terminate the lease.—*Hunter v. Karcher* (S. D.) 67 N. W. 621.

[b] (S. D.; 1896.)

A lessee under a verbal lease from month to month gave notice on June 5th, of an intention to terminate the lease, but left his personal effects in the house after July 1st, and the premises were occupied by his wife during that month. *Held* that, as the lease was by operation of law renewed on July 1st, before the expiration of the 30 days required by Comp. Laws, § 3742, to terminate such tenancies after

notice, the lessee was liable for the July rent.—*Hunter v. Karcher* (S. D.) 67 N. W. 621.

VII. TENANCIES AT WILL AND BY SUFFERANCE.

§ 38. Tenancies at will.

[a] (Mich.: 1897.)

An oral agreement by which a life tenant leased the premises to persons already in possession during the full term of his life, in consideration of which they were to care for him at a certain price per week whenever he chose to occupy certain rooms reserved, being void under the statute of frauds, and no rental, due at stated periods, being reserved, does not fix any definite term of occupancy, but creates a tenancy at will.—*Barrett v. Cox* (Mich.) 70 N. W. 446.

[b] (Mich.: 1897.)

A lease for 21 months, void for want of authority in the lessor's agent, recited a covenant "to pay as rent for said demised premises the sum of \$2,475, payable in monthly installments of \$75 for the first nine months of said term, and \$150 per month for the last 12 months of said term, all payable monthly in advance." The lessee paid rent, occupied the premises for more than 12 months, and then vacated them. *Held*, that a tenancy from year to year, on the terms of the renting for the first year, was not thereby created, but the tenancy was at will, and hence the lease was admissible in an action for use and occupation.—*McIntosh v. Hodges* (Mich.) 70 N. W. 550.

§ 39. By sufferance.

(Mich.: 1895.)

One who has been given possession of a building as employé of the owner, without any relation of landlord and tenant being created, becomes a tenant by sufferance by continuing to hold possession after termination of his employment.—*School Dist. No. 11 of Alpine Tp. v. Batsche* (Mich.) 64 N. W. 196.

VIII. HOLDING OVER.

Creation of tenancy at will, see ante, § 38.

— by sufferance, see ante, § 39.

— from month to month, see ante, § 36.

— from year to year, see ante, § 35.

Extension or renewal by holding over, see ante, § 27.

§ 40. Option of landlord.

(Neb.: 1897.)

The landlord may, at his option, treat a tenant holding over as a tenant for another term or a trespasser.—*Bradley v. Slater* (Neb.) 70 N. W. 258.

§ 41. Continuance of terms of lease.

[a] (Mich.: 1897.)

Defendant, who had a lease from plaintiff for a term of years, notified his subtenant that, as his lease would expire on May 1st, the subtenant, if he wanted to remain, must arrange with plaintiff. The subtenant, on May 2d (the 1st of the month being Sunday), was moving his goods, when plaintiff's agent came to the premises, and took down the "To let" sign, and, on being asked why he did this, replied that the premises had been relet to defendant. The subtenant, believing defendant would not want possession at once, did not move his goods till May 9th. May 5th defendant learned that his subtenant had not vacated the premises. *Held* that, as the subtenant had remained because of the misrepresentation of defendant's agent, his possession was not such a holding over as would constitute a new lease by defendant for a year. *Montgomery and Hook-*

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er, JJ., dissenting.—*Campau v. Michell* (Mich.) 61 N. W. 890.

103 Mich. 617.

[b] (Neb.: 1895.)

In an action for rent, founded on a holding over, where the answer admitted the holding over but alleged a new agreement as to the continuance of the tenancy, the burden of proof was on the landlord to establish the holding over on the old terms.—*Montgomery v. Willis* (Neb.) 63 N. W. 794.

45 Neb. 434.

[c] (Neb.: 1897.)

When a tenant holds over with consent, express or implied, of his landlord, the law presumes a continuation of the original tenancy for another term, and on the same conditions.—*Bradley v. Slater* (Neb.) 70 N. W. 258.

[d] (Neb.: 1897.)

But this presumption may be overthrown by evidence of an agreement by the tenant with the landlord to pay rent only for such time as he should hold over.—*Bradley v. Slater* (Neb.) 70 N. W. 258.

[e] (Neb.: 1897.)

But the presumption is not overcome by proof that, before the expiration of the term, the tenant told the landlord that he had purchased other premises, and would not hold under the lease for another term, but that the premises purchased would not be ready for occupancy when the lease expired; and that he held over for two months without any express agreement, but with the landlord's knowledge, and without his protest.—*Bradley v. Slater* (Neb.) 70 N. W. 258.

§ 42. Waiver of right to rent.

[a] (Mich.: 1897.)

A tenant under a lease containing a provision for renewal, who remained in possession after the expiration of the term without any written extension, and then removed, may defend against an action on the lease to recover rent accruing after his removal by showing that at the expiration of the term the premises were untenanted, and he remained in possession under an agreement by the landlord to repair, in which case the lease was to be renewed, and that the landlord failed to perform the condition.—*Fisher v. Nergarian* (Mich.) 70 N. W. 1009.

[b] (Minn.: 1895.)

Evidence that plaintiff wrote to defendant, his landlord, that he would vacate at the expiration of the lease, "or within a few days of the time," and that defendant made no reply, but advertised the premises for rent; that plaintiff held over a few days, and later received a letter from defendant relative to the property, but asserting no claim for rent during such period; and that claim therefor was not made for two years thereafter,—will support a finding that defendant waived the right to rent for the period of holding over.—*Dobbin v. McDonald* (Minn.) 62 N. W. 437.

60 Minn. 380.

IX. RENT.

Right to interest on rent, see "Interest," § 3.
Waiver of right to rent where tenant holds over, see ante, § 42.

§ 43. In general.

[a] (Mich.: 1897.)

Plaintiff cannot recover rent of defendant, where, after letting to him the use of stairway in plaintiff's building, plaintiff, by lease, gives complete control of the stairway to another.—*Hirschfield v. Franks* (Mich.) 70 N. W. 894.

[b] (S. D.: 1897.)

Payment or tender of the rent by the lessee within three days after the notice to quit, given under Comp. Laws, § 6073, for nonpay-

ment, is served, prevents a forfeiture. *Dakota Hot Springs Co. v. Young* (S. D.) 70 N. W. 842.

§ 44. Implied agreements to pay rent.

(Minn.: 1895.)

Where a landlord gave a tenant under a lease, whereby the tenant was to occupy the premises rent free so long as the landlord should permit, notice to quit within a certain time, and, on failure of the tenant to vacate, notified him that, if he remained in possession longer, the rent should be \$75 per month, and subsequently brought an action for forcible entry and unlawful detainer, which was appealed to the supreme court, the tenant remaining in possession in the meantime without paying rent, the landlord could not, on affirmance of a judgment in his favor, recover of the tenant at the rate of \$75 per month for his occupation of the premises from the time of the last notice to the time of his ejection.—*Johnson v. Johnson* (Minn.) 64 N. W. 905.

62 Minn. 302.

§ 45. Untenantable condition of premises.

(Minn.: 1895.)

Where a monthly lease, with rent payable on the 1st day of each month, provided that the lessor should furnish sufficient heat for the premises, and the lessor failed to furnish heat at times from December to February 6th, when, by reason of the failure, the premises became untenable, and the lessee vacated them, the lessee was not liable for rent after the vacation.—*Bass v. Rollins* (Minn.) 65 N. W. 348.

63 Minn. 226.

§ 46. Abatement.

[a] (Mich.: 1895.)

Where a lease provided for the payment of rent monthly in advance, and the lessors served notice to quit, and excluded the lessees from a portion of the premises, they can recover rent only for that portion occupied, and for the length of time so occupied, by the lessees after service of the notice, and not for the full month.—*Wreford v. Kenrick* (Mich.) 65 N. W. 234.

[b] (Neb.: 1897.)

Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. *Post, C. J.*, and *Irvine and Ryan, CC.*, dissenting.—*Wattles v. South Omaha Ice & Coal Co.* (Neb.) 69 N. W. 785.

§ 47. Action for rent.

[a] (Minn.: 1895.)

On breach of a covenant to renew the lease at the end of the term, and on surrender of the premises by the lessee, the lessor cannot sue for rent under the lease.—*Swank v. St. Paul City Ry. Co.* (Minn.) 63 N. W. 1088.

61 Minn. 423.

[b] (Neb.: 1897.)

A landlord is not, upon the abandonment of the demised premises by the tenant in violation of his contract, required to relet for the protection of the latter, but may, at his election, suffer the premises to remain vacant, and recover his rent for the remainder of the term, by means of an action on the lease.—*Merrill v. Willis* (Neb.) 70 N. W. 914.

§ 48. — Pleading.

[a] (Minn.: 1895.)

An answer, in an action for rent, alleging that while defendants were in possession plaintiff took from them the second floor of the building, and leased it to another; that, at the time defendants surrendered the rest of the premises, they delivered to plaintiff the key of the building, and that plaintiff accepted the same, and took possession of the building, and

remodeled the same, and ordered defendants to remove their signs therefrom,—was broad enough to admit proof of an eviction or of a surrender by operation of law.—*Lafferty v. Hawes* (Minn.) 65 N. W. 87.

63 Minn. 13.

[b] (Minn.: 1897.)

In an action by a landlord against a tenant to recover rent, there is no inconsistency between an admission in the answer that the defendant is indebted for rent, and a counterclaim for repairs made by the defendant for which the plaintiff agreed to pay him.—*Hausman v. Mulheran* (Minn.) 70 N. W. 866.

§ 49. — Evidence.

[a] (Minn.: 1896.)

Where the defense to an action for rent was that the premises were leased on the agreement that they should be used for immoral purposes, and were so used with plaintiff's consent, evidence of the reputation of the place among the neighbors was competent to show its immorality.—*Egan v. Gordan* (Minn.) 68 N. W. 103.

[b] (Minn.: 1896.)

The defense to an action for rent being that the premises were leased for immoral purposes, and were so used, and it appearing that the lessee occupied the premises, and apparently carried on the same business upon them, before as well as after the execution of the lease, evidence of the reputation of the place for immorality before the lease was executed, and while the lessee occupied it, was admissible.—*Egan v. Gordan* (Minn.) 68 N. W. 103.

[c] (Minn.: 1896.)

The defense to an action for rent being that the premises were leased for immoral purposes, and were so used, evidence of acts done on the premises tending to show that the place was in fact of the character alleged was competent to prove its character, though plaintiff was absent when the acts were committed.—*Egan v. Gordan* (Minn.) 68 N. W. 103.

[d] (Minn.: 1896.)

The defense to an action for rent being that the premises were leased and used for immoral purposes, and there being evidence that the lessee occupied the premises before and after the lease was executed in the same general way, evidence of the reputation of the house after the execution of the lease was competent.—*Egan v. Gordan* (Minn.) 68 N. W. 103.

[e] (Neb.: 1896.)

In an action to recover rent upon an oral lease from plaintiff to defendant, it was properly ruled to be an immaterial inquiry whether or not defendant had subleased the premises to a third party for the term for which he was sought to be held liable.—*Kenyon v. Young* (Neb.) 67 N. W. 885.

48 Neb. 890.

§ 50. — Recoupment.

[a] (Mich.: 1895.)

In an action for rent a lessee cannot recoup damages for the lessor's injury to the premises during the occupation thereof by persons to whom the lessee sold his business, and who were to pay therefor by turning over the profits, after deducting a portion thereof, and who conducted the business in their own name.—*Powers v. Daily* (Mich.) 63 N. W. 979.

[b] (Neb.: 1895.)

A lessee who was induced to make the lease by the fraudulent statements of the lessor may, in an action by the lessor for rent, recoup the amount of any damage he may have suffered by reason of such fraud.—*Barr v. Kimball* (Neb.) 62 N. W. 196, 43 Neb. 766.

§ 51. — Surrender of rent notes.

(Iowa: 1895.)

Where notes are given by a tenant in payment of rent, the landlord, in an action for

rent based on the lease, cannot recover if he fails to surrender the notes for cancellation.—*Smith v. Dayton* (Iowa) 62 N. W. 650.

X. LIEN FOR RENT AND ADVANCES.

§ 52. Right to lien.

(Iowa; 1895.)

Under Code, § 2017, giving a landlord a lien "for his rent" on certain personal property of the lessee, a landlord cannot have a lien for rent where the consideration moving to him under the lease is for rent and other purposes, and it is impossible to determine what part is for rent.—*Crill v. Jeffrey* (Iowa) 64 N. W. 625.

§ 53. Recording lease.

(Iowa; 1895.)

A provision in a lease that the lessor shall have a lien for rent on the exempt property of the lessee creates a lien by contract, as to such property, which is inferior to the lien of subsequent mortgagees, unless the lease is recorded in the mortgage records.—*Smith v. Dayton* (Iowa) 62 N. W. 650.

§ 54. Rights of purchasers from tenant.

[a] (Iowa; 1895.)

A vendee of crops grown upon leased land will be liable to the landlord for the amount of the lien which he has thereon for rent, although, at the time of the purchase, he did not know that the vendor was a tenant.—*Evans v. Collins* (Iowa) 62 N. W. 810.

[b] (Iowa; 1895.)

Under Code, § 2017, giving a landlord a lien for rent on all crops grown on the premises, the lien exists as against one who buys the crops not knowing they were raised on leased premises.—*Blake v. Chas. Counselman & Co.* (Iowa) 63 N. W. 679.

[c] (Iowa; 1896.)

The purchaser of grain from a tenant, which is subject to a landlord's lien for rent, takes it subject to such lien, and is liable in damages therefor if it has been consumed, though he buys in open market in wagon-load lots, and pays for it, without knowledge of the tenancy.—*Prorer v. Hammer* (Iowa) 68 N. W. 564.

§ 55. Priority.

(Iowa; 1897.)

Landlords, who had a chattel mortgage on their tenant's property, wrote H., who had been asked to make a loan to the tenant, that they would release the mortgage, without mentioning a landlord's lien held by them. H. understood they intended to release the lien, and made the loan, secured by mortgage, believing, because of the promise to release, his would be the first lien; and they sent the release understanding that, because of it, he would make the loan, and that his intention was to have the first lien. *Held*, that H.'s lien was prior to the landlord's lien.—*Wood v. Duval* (Iowa) 69 N. W. 1061.

§ 56. Waiver.

(Iowa; 1895.)

A landlord does not waive, and is not estopped from claiming, a lien on corn raised on the premises, as against one who buys it not knowing it was raised on leased premises, merely because he made no effort to look up the oats raised on the premises which he knew had been sold, or because, though knowing of the sale of the oats, he did not, when visiting the premises during the harvesting of the corn, give any direction as to the disposition thereof, or make any inquiry as to what was to be done therewith.—*Blake v. Chas. Counselman & Co.* (Iowa) 63 N. W. 679.

§ 57. Enforcement.

[a] (Iowa; 1895.)

Where a landlord accepts the note of his tenant, secured by a mortgage, in which is included rent due, and also other items, and part of the mortgaged property is sold, and the proceeds applied in part payment of the note, the landlord will be presumed to have waived his lien for the rent, and to rely exclusively on the tenant's personal responsibility.—*Smith v. Dayton* (Iowa) 62 N. W. 650.

[b] (Iowa; 1895.)

A provision in a lease that the lessor shall have a lien for the rent on all property of the lessee used on the premises, though exempt, does not waive his statutory lien.—*Smith v. Dayton* (Iowa) 62 N. W. 650.

XI. RECOVERY OF POSSESSION.

§ 58. Actions for possession.

(Mich.; 1895.)

A suit begun on May 6, 1892, to recover possession of premises leased, by parol, on May 5, 1891, the term not being definitely fixed, was not premature, a month's notice to quit having been given.—*Fratcher v. Smith* (Mich.) 62 N. W. 832.

104 Mich. 537.

§ 59. — Defenses.

[a] (Mich.; 1895.)

A. leased to B., who held over on the expiration of his term: A. subsequently conveying to C., for whom B. declined to vacate. A., to protect himself from an action on his covenants, secured an oral lease of the premises from C., with permission to sublet, and executed a written lease to B., which contained a clause waiving notice to quit, and was for a term shorter than that of A.'s oral lease. Upon its expiration, B. again refused to vacate, and A. brought an action to oust him. *Held*, that B. could not resist A.'s entry, on the ground that there was no actual investiture of A. by C. with possession.—*Lewis v. Brandle* (Mich.) 64 N. W. 734.

[b] (Mich.; 1896.)

In an action against a tenant to recover possession, defendant may show that, after the commencement of the tenancy, another obtained a paramount tax title to the premises, to whom he attorned upon demand for possession.—*Jenkinson v. Winans* (Mich.) 67 N. W. 549.

§ 60. Action of forcible entry and detainer.

[a] (Iowa; 1897.)

The "knowledge of the plaintiff," referred to in Code, § 3621, is the knowledge of the defendant's possession, and not of the fact that a cause of action to terminate such possession has accrued.—*Heiple v. Reinhart* (Iowa) 69 N. W. 871.

[b] (Iowa; 1897.)

Under Code, § 3621, providing that "thirty days' peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued," shall be a bar to an action for forcible entry or detention of property, the service of a notice to quit, required by section 3614 to be made 3 days before the commencement of the action, within 30 days after default of a lessee, is not an interruption of the lessee's peaceable possession, and, unless the action itself is commenced within the 30 days, it is barred.—*Heiple v. Reinhart* (Iowa) 69 N. W. 871.

[c] (Mich.; 1897.)

That a landlord has violated a covenant in his lease to keep the demised premises in good repair, and that thereby damages have resulted to the tenant, is no defense in an action, under the forcible entry and detainer act (Gen. St.

1894, § 6118), for restitution of the premises for nonpayment of rent.—*Peterson v. Krenger* (Minn.) 70 N. W. 567.

[d] (Neb.: 1896.)

Provisions in a lease for years that the lessee should "give a chattel mortgage on the crops [raised on the premises] each year to secure the said note due for that year," and that breach of any of its terms would terminate the contract at the lessor's option, did not authorize the lessor to maintain forcible entry and detainer on the lessee's failure to give, on demand in November, a mortgage securing the rent note falling due the following February for the year ending in the succeeding March.—*Stevenson v. Brodahl* (Neb.) 68 N. W. 1021.

[e] (S. D.: 1897.)

Under Comp. Laws, § 6073, providing that the action of forcible entry and detainer may be maintained "when a lessee * * * fails to pay his rent for three days after the same shall be due," a clause of re-entry need not be contained in the lease to authorize the action.—*Dakota Hot Springs Co. v. Young* (S. D.) 70 N. W. 842.

§ 61. Notice to quit.

(Mich.: 1895.)

Plaintiff, holding a building under an unexpired lease, sold the furniture in certain stories to defendant, and let such stories to her at a monthly rate, by parol, the time not being definitely fixed. Held, that oral notice to quit, given defendant one month before the expiration of the year, was sufficient.—*Fratcher v. Smith* (Mich.) 62 N. W. 832.

104 Mich. 537.

§ 62. Summary proceedings.

[a] (Mich.: 1894.)

On a forfeiture by assignment of a lease of land on shares, the lessor may take immediate steps to recover possession of the premises from the assignee by summary proceedings.—*Lewis v. Sheldon* (Mich.) 61 N. W. 269.

103 Mich. 102.

[b] (Minn.: 1895.)

Where, in an action under Gen. St. 1894, § 6118, by a landlord for the recovery of premises for nonpayment of rent, the tenant tenders the rent due, with interest, and offers to pay the costs, and the tender is alleged in the answer subsequently filed, and stands admitted at the trial, plaintiff is not entitled to restitution.—*George v. Mahoney* (Minn.) 64 N. W. 911.

62 Minn. 370.

XII. RENTING ON SHARES.

§ 63. Nature of contract.

[a] (S. D.: 1896.)

Where plaintiff contracted to farm defendant's land, and sow certain crops thereon, supply all seeds, labor, machinery, etc., and deliver one-fourth of the crop to a certain elevator, title to the crops to remain in defendant, who, on his part, agreed, on the faithful performance of his part of the contract, to deliver to plaintiff three-fourths of the crops so produced, such contract is not one of hire, but in the nature of an adventure.—*Bowers v. Graves & Vinton Co.* (S. D.) 66 N. W. 931.

[b] (S. D.: 1896.)

On breach by defendant, the measure of plaintiff's damages is not the value of his services in sowing and harvesting the crop, but the value of his share thereof.—*Bowers v. Graves & Vinton Co.* (S. D.) 66 N. W. 931.

§ 64. Rights and liabilities as to crops.

[a] (Iowa: 1896.)

A landlord who is to receive as rent for a farm a share of the crop, to be delivered by the tenant, has such an interest in the crop that he

may, before its division, make a valid mortgage thereon, which will attach to his share as soon as segregated, and will take precedence of a garnishment of the tenant by a creditor of the landlord after the execution of the mortgage.—*Ridell v. Dow* (Iowa) 66 N. W. 1096; *Thompson Nat. Bank v. Dow*, 1d.

[b] (Iowa: 1897.)

Where a farm lease provides that, if one-fourth of the growing crop shall be destroyed by wind, the lessor will accept one-third of that remaining, in lieu of the cash rent, the lessee, by subletting his term, so as to make it impossible for him to deliver any of the crop, becomes liable for the cash payment, there being no privity between the lessor and the sublessee.—*Dassance v. Cold* (Iowa) 70 N. W. 719.

[c] (Mich.: 1896.)

A lease by the terms of which the tenant was to furnish one-half the seed grain and perform the work in raising the crop, which was to be equally divided between the landlord and tenant, does not entitle the tenant to a share of wheat sown the fall before, and growing at the time the lease went into effect.—*Williams v. Rogers* (Mich.) 68 N. W. 240.

[d] (S. D.: 1895.)

It was competent for the parties to a lease providing for the division of the crops between the landlord and tenant to stipulate that the title to the crops should be in the lessor until the division.—*Consolidated Land & Irrigation Co. v. Hawley* (S. D.) 63 N. W. 904.

§ 65. Liability of tenant for injury to land.

(Mich.: 1895.)

A tenant is not liable as a trespasser for injury done by his hogs, which he has turned loose on the land, or for fence boards removed, while in possession after expiration of his lease to harvest a crop in which the owner has a joint interest.—*Toles v. Meddaugh* (Mich.) 64 N. W. 329.

LAND OFFICE.

See "Public Lands," §§ 15-17.

LANDS.

Devolution of real estate, see "Descent and Distribution," § 5.

LAPSE.

Of legacy, see "Wills," § 60.

LARCENY.

- I. WHAT CONSTITUTES, §§ 1-4.
- II. EVIDENCE, §§ 5-7.
- III. INSTRUCTIONS, §§ 8-11.
- IV. VERDICT, § 12.

See, also, "Embezzlement"; "False Pretenses"; "Receiving Stolen Goods"; "Robbery."

Conviction of offense included in charge, see "Indictment and Information," § 30.
Liability of public officer for money stolen, see "Office and Officer," § 22.

I. WHAT CONSTITUTES.

§ 1. Possession acquired lawfully.

(Mich.: 1894.)

Defendant's buggy was destroyed by an electric car, and the superintendent of the car company procured a buggy belonging to a

third person for defendant to use. The owner of the buggy subsequently demanded the buggy of defendant, who promised to return it, but afterwards concealed it. *Held*, that defendant, having acquired possession lawfully, was not guilty of larceny.—*People v. Taugher* (Mich.) 61 N. W. 66.

102 Mich. 598.

§ 2. What may be the subject of larceny.

(Iowa: 1895.)

Code, § 3902, provides that if any person steal any instrument or writing whereby any demand, right, or obligation is created, increased, or diminished, he is guilty of larceny. *Held*, that "coupon" railroad tickets, sold by one road for transportation over another, and which were the evidences of the debt due by the former to the latter, and "local" tickets sold by a company over its own road, which were receipts to the conductor, are, after being taken up by the conductor, subjects of larceny.—*State v. Wilson* (Iowa) 64 N. W. 266.

§ 3. Appropriating property found.

[a] (Iowa: 1896.)

On a prosecution for the larceny of the contents of a pocketbook under Code, § 3907, providing that if a person find personal property of which he knows the owner, and unlawfully appropriates the same, he is guilty of larceny, it was not error to charge that defendant was guilty, if, at the time he came into possession of the pocketbook and its contents, he knew, or by an examination of the papers in said pocketbook might reasonably have known, that it belonged to a certain person. *Granger and Robinson, JJs.*, dissenting.—*State v. Hayes* (Iowa) 67 N. W. 673.

[b] (Iowa: 1896.)

On a prosecution for larceny of the contents of a pocketbook under Code, § 3907, providing that if a person find personal property, the owner of which he knows, and unlawfully appropriates the same, he is guilty of larceny, though it must be shown that the intent to steal existed at the time of the finding, and was not subsequently formed, it was not error to charge that the jury were to arrive at the intent of defendant in taking the property from his conduct with reference thereto at or closely following the taking of the same, where it appeared that defendant did not discover the money until he opened the pocketbook.—*State v. Hayes* (Iowa) 67 N. W. 673.

[c] (Iowa: 1897.)

One indicted for larceny from a store in the nighttime may be convicted of larceny on evidence that he found and appropriated the property, under Code, § 3907, providing that, if any person come by finding to the possession of personal property of which he knows the owner, and unlawfully appropriates it, he is guilty of larceny.—*State v. Nordman* (Iowa) 70 N. W. 621.

§ 4. Want of consent.

[a] (Mich.: 1895.)

On a trial for the larceny of bonds, where there is no contest as to their ownership or genuineness, it is sufficient to prove that they were taken without the consent of the surviving partner of the firm to whom they had belonged, or of the person who had the actual possession, without showing that no consent was given by the executors of the deceased partners.—*People v. Parsons* (Mich.) 63 N. W. 69.

105 Mich. 177.

[b] (Neb.: 1895.)

In a prosecution for larceny, if the owner of the property alleged to have been stolen is examined as a witness, his testimony that he did not consent to the taking of the property is indispensable to a conviction.—*Perry v. State* (Neb.) 63 N. W. 26.

44 Neb. 414.

II. EVIDENCE.

Of other crimes, see "Criminal Law," §§ 124, 125.

§ 5. Admissibility.

[a] (Iowa: 1896.)

On trial for larceny of hogs, evidence as to when certain other hogs had been returned to the owner, after having been taken, was admissible to fix the time when he first missed the hogs which were the subject of the indictment.—*State v. Brown* (Iowa) 69 N. W. 277.

[b] (Mich.: 1895.)

Where larceny from a vault was alleged to have been committed on the 4th, evidence of the condition of the vault on the morning of the 6th, when the larceny was discovered, is admissible.—*People v. Parsons* (Mich.) 63 N. W. 69.

105 Mich. 177.

§ 6. Possession of stolen property.

[a] (Iowa: 1896.)

Code, § 3907, provides that if any person come by finding into the possession of personal property of which he knows the owner, and unlawfully appropriates the same, he is guilty of larceny. *Held*, that where the property is so marked as to be capable of identification, proof of the possession and of the immediate subsequent conversion is admissible to establish the corpus delicti.—*State v. Hayes* (Iowa) 67 N. W. 673.

[b] (Iowa: 1896.)

Evidence that the prosecuting witness, on the morning of the theft of his harness, found tracks leading from his barn to a place where a horse and cart had been hitched, and followed the tracks of the cart to within a short distance of defendant's home; that it rained just before the theft; that two tracks, evidently made by the same vehicle, were plainly seen; that a cart was found standing in defendant's yard; and that the harness was found two days afterwards in a box which defendant was shipping to another state,—is sufficient to sustain a conviction, notwithstanding evidence tending to show an alibi, and that defendant purchased the harness from third persons.—*State v. McKinstry* (Iowa) 69 N. W. 267.

See, also, "Burglary," § 6.

§ 7. Sufficiency.

[a] (Iowa: 1894.)

On the trial of one indicted for larceny of clover seed, it appeared that defendant was at a certain place on a day within the period during which the theft was committed, and that under an assumed name he sold an amount of clover seed corresponding to that stolen. His testimony that he was not at the place where the seed was sold, at the time it was sold, could be little credited, because of his former convictions for similar felonies. *Held*, that a verdict of guilty was warranted.—*State v. Filmore* (Iowa) 61 N. W. 191.

92 Iowa, 766.

[b] (Iowa: 1895.)

Where there was evidence, though contradicted, that defendant sold a stolen hog, a verdict of guilty will not be set aside.—*State v. Stuhlmiller* (Iowa) 64 N. W. 279.

[c] (Iowa: 1896.)

The fact that some 20 head of cattle out of a herd of about 1,800 were found in a herd of 2,700 belonging to defendant was insufficient to sustain a conviction of theft, where defendant testified that they were unwittingly taken by his herders while searching for escaped cattle.—*State v. Deyoe* (Iowa) 66 N. W. 733.

III. INSTRUCTIONS.

§ 8. Propriety in general.

(a) (Iowa; 1896.)

In a prosecution under Code, § 3907, providing that if any person finds personal property of which he knows the owner, and unlawfully appropriates the same, he is guilty of larceny, it is not error to give the definition of larceny generally as contained in section 3902, as the legislature did not intend by the enactment of section 3907 to create a distinct crime, but to declare a rule of evidence, which, being fulfilled, constitutes the crime as defined in the latter section, and particularly as there was evidence from which the jury might have found defendant guilty of larceny independent of said section 3907.—State v. Hayes (Iowa) 67 N. W. 673.

(b) (Iowa; 1896.)

Where the articles stolen consisted of wearing apparel which had been used, it was not error to instruct the jury that, in determining the market value of the articles, they were not confined to the price at which the dealers in second-hand clothing would buy or sell them.—State v. Hathaway (Iowa) 69 N. W. 449.

(c) (Neb.; 1895.)

An instruction that every sane person is presumed to intend the natural consequences of his voluntary acts was applicable on a prosecution for larceny as bailee.—Ford v. State 64 N. W. 1082, 46 Neb. 390.

(d) (Neb.; 1895.)

An instruction on a prosecution for larceny as bailee was not erroneous for failing to charge that the original taking of the property must have been felonious.—Ford v. State (Neb.) 64 N. W. 1082, 46 Neb. 390.

(e) (Neb.; 1896.)

Where the jury were fully advised respecting the distinction between grand and petit larceny, it was proper to tell them that they had nothing to do with the question of the penalty, and that it was their duty to render a verdict without regard to its effect on accused.—Lawhead v. State, 65 N. W. 779, 46 Neb. 607.

(f) (Neb.; 1896.)

On the trial of an indictment for larceny of a team, it appeared that defendant hired the team of prosecutor for a certain time, and there was evidence that he disposed of it, and converted the proceeds. *Held*, that it was error to instruct that if the jury found that, after taking the property, defendant sold it, or any part of it, or attempted to sell it, intending to appropriate the proceeds to his individual use, it was presumptive evidence that the original taking was felonious, and that, unless such sales or attempted sales were satisfactorily explained, they should find defendant guilty.—Haskins v. State 65 N. W. 894, 46 Neb. 888.

§ 9. Identity of property stolen.

(Mich.; 1895.)

There being testimony that 1,700 pounds of new brass and 1,300 pounds of scrap brass or old journals were stolen at W.; that at the same place a horse and light buggy were taken; that the horse was discovered on the road between W. and D., near D., and the wagon in W., with a broken axle; that defendant, with two other persons, was seen on the road, near D., with a broken-down wagon laden with heavy material; that an expressman from D. was employed, who brought it to D., where it was sold by defendant; that the material in the expressman's wagon consisted of scrap brass or old journals; that the amount delivered to the purchaser weighed 800 pounds; that defendant gave to the purchaser a false name, and, on the check being made to that name, requested it to be made payable to bearer; that the brass, after being bought, was melted,—it was proper to leave to the jury the question of the identity of the brass, but error to charge

that, if defendant was the person who had charge of and sold the brass, identification of the property sold as that stolen was sufficiently proven.—People v. Kiley (Mich.) 65 N. W. 237.

§ 10. Possession of stolen property.

(a) (Iowa; 1895.)

Where all the property stolen was in a valise, it was not error to charge that, if a considerable part of the stolen property was found a few hours afterwards, in defendant's possession, the presumption would arise that defendant stole it all.—State v. Wilson (Iowa) 64 N. W. 266.

(b) (Neb.; 1895.)

It was error, on a prosecution for larceny, to instruct that the unexplained possession of the stolen property, recently after the theft, constituted prima facie evidence of the guilt of the party in possession.—Dobson v. State (Neb.) 64 N. W. 956, 46 Neb. 230.

§ 11. — Explanation.

(a) (Iowa; 1895.)

Where stolen property was found in the possession of defendant, and defendant testified that he bought it, his defense was sufficiently covered in an instruction that the possession of the property raised a presumption of guilt, unless his explanation, either alone or with other circumstances, raised a reasonable doubt as to the honesty of defendant's possession.—State v. Wilson (Iowa) 64 N. W. 266.

(b) (Iowa; 1895.)

Where defendant explained his possession of stolen hogs by stating that he was assisting another to sell them, not knowing them to have been stolen, his defense was sufficiently covered by an instruction that "if defendant assisted in driving the hogs to town, and disposing of them, not knowing the same to have been stolen, then he would not be guilty of larceny."—State v. Cross (Iowa) 64 N. W. 614.

IV. VERDICT.

§ 12. Value.

(Neb.; 1894.)

On a trial for larceny, a verdict that "we, the jury, * * * do find defendant guilty as he stands charged. * * * Amount, estimated, of stolen property, \$95."—*held* an estimate only, and not an ascertainment of the value of the property stolen, within the requirement of Cr. Code, § 488.—McCormick v. State, 61 N. W. 99, 42 Neb. 866.

LATERAL SUPPORT.

See "Adjoining Landowners."

LAW OF THE CASE.

See "Appeal," §§ 190, 191, 301.

LAW OF THE ROAD.

See "Highways," § 39.

LEADING QUESTIONS.

See "Witness," § 29.

LEASES.

See "Landlord and Tenant," §§ 14-19.
Of convict labor, see "Convicts."

LEGACIES.

See "Wills."

LEGISLATIVE POWER.

See "Constitutional Law," §§ 5-7.

LEGISLATURE.

See "State Legislature."

LETTERS.

As evidence, see "Evidence," §§ 80, 81.
Presumption of receipt of matters sent by mail,
see "Evidence," § 5.

LEVEES.

See "Wharves."

LEVY.

Of attachment, see "Attachment," §§ 24, 25.
Of execution, see "Execution," §§ 11, 12.
Of taxes, see "Taxation," §§ 25-37.

LEWDNESS.

See "Adultery"; "Fornication"; "Incest"; "Indecent Assault."

LIBEL AND SLANDER.

- I. WHAT ACTIONABLE, §§ 1-10.
- II. MALICE, §§ 11-15.
- III. PRIVILEGED COMMUNICATIONS,
§§ 16-19.
- IV. JUSTIFICATION, §§ 20, 21.
- V. PLEADING, EVIDENCE, AND IN-
STRUCTIONS, §§ 22-28.
- VI. DAMAGES, §§ 29-32.
- VII. SLANDER OF TITLE, § 33.
- VIII. CRIMINAL PROSECUTION, §§ 34-37.

Liability of husband for slander by wife, see
"Husband and Wife," § 21.

I. WHAT ACTIONABLE.

§ 1. Words actionable per se.

[a] (Iowa: 1897.)

Where an information charging insanity is not well grounded, the person who filed it is answerable in an action for libel, unless he acted in good faith and upon probable cause.—*Comfort v. Young* (Iowa) 69 N. W. 1032.

[b] (Mich.: 1895.)

A letter, written of plaintiff, to the judge presiding at the trial of an action to which plaintiff was a party, stating that, if the judge wished to know what kind of a man plaintiff was, the writer could tell him: "he is a liar and dead beat of the first order, and I would like to sue him, and get what he owes me,"—is libelous per se.—*Morgan v. Andrews* (Mich.) 64 N. W. 869.

[c] (Mich.: 1895.)

A publication by a newspaper of the fact that certain persons had refused to sign the official bond of a preceding county treasurer, if plaintiff, who was at the time a nominee for

the office, was appointed his deputy, with the comment that such persons did not wish to be held in any way responsible for the public funds if plaintiff had any share in the handling of them, as a matter of law, is not libelous. *Hooker, J., dissenting.*—*Dunnebacke v. Tribune Printing Co.* (Mich.) 65 N. W. 583.

[d] (Minn.: 1895.)

In determining whether a publication is libelous per se, the headlines of the article should be considered.—*Landon v. Watkins* (Minn.) 63 N. W. 615.

61 Minn. 137.

[e] (Minn.: 1895.)

A circular headed, "Beware of Counterfeits and Base and Dangerous Imitations of our Well-Known Dr. Ward's Vegetable Anodyne Liniment," and containing direct and covert references to plaintiffs, charging them with base and dishonest practices in the manufacture of a certain liniment, is libelous per se.—*Landon v. Watkins* (Minn.) 63 N. W. 615.

61 Minn. 137.

[f] (Minn.: 1895.)

A statement that a person was continually drunk, had drunken people in his room, and got people drunk, is actionable per se.—*Morgan v. Kennedy* (Minn.) 64 N. W. 912.

62 Minn. 348.

[g] (Minn.: 1895.)

A publication charging one with being "a dangerous, able, and seditious agitator" is actionable per se.—*Wilkes v. Shields* (Minn.) 64 N. W. 921.

62 Minn. 426.

[h] (Wis.: 1896.)

A newspaper published the following article: "Choke them off. Blood-sucking police officers, who insist on sitting on juries." "Salaries as officers sufficient." "They neglect their duties as policemen, and cheat some honorable citizen out of \$1.20 fee. Speaking about hogs, they can be found on the Racine police force. The great American hog is not in with some of them. Now this has no reference to Georgie, the chief of police. He is beneath our notice until after the coming spring appointments. Should he be retained as the great 'I am' for another year, he might probably receive a little more notoriety." *Held*, that such article was libelous as to such chief of police.—*Smith v. Utley* (Wis.) 65 N. W. 744.

92 Wis. 133.

[i] (Wis.: 1897.)

An article addressed to the proprietor of a medicine, published in a newspaper, stated that "your advertisements will not be received in the columns of the" paper, "although you offer us big money. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled," etc. *Held* libelous per se.—*Dr. Shoop Family Medicine Co. v. Wernich* (Wis.) 70 N. W. 160.

§ 2. — Exposing to ridicule, hatred, or contempt.

[a] (Iowa: 1894.)

A complaint in a libel suit, which alleges the publication of matter charging plaintiff with having, for the purpose of gain, availed himself of the confidence of his partner, and, after learning his necessities, having induced him by false representations to sell his stock to plaintiff, states a cause of action for libel, under Code, § 4097, as tending to expose him to public contempt.—*Stewart v. Pierce* (Iowa) 61 N. W. 388; *Same v. Young*, *Id.*

93 Iowa, 136.

[b] (Minn.: 1896.)

Written publications calculated to expose a person to public contempt and ridicule, and thereby impair him in the good opinion and respect of others, are libelous, although they involve no imputation of crime.—*Byram v. Aikin* (Minn.) 67 N. W. 807.

[c] (Neb.; 1895.)

A publication concerning a clergyman, that: "We charge him with repeatedly and persistently uttering statements that are contrary to the truth. We charge him with giving way to violent and unchristian temper. We charge him with defaming the good name of members of this church."—*held* libelous per se.—*Piper v. Woolman*, 61 N. W. 588, 43 Neb. 280.

§ 3. Words imputing crime.

[a] (Neb.; 1894.)

Defendant published concerning plaintiff, in effect, that certain of plaintiff's property, which was insured, had burned; that there were a number of suspicious circumstances surrounding the destruction of the property, which caused the insurance company to refuse to pay the loss; that the insurance company at least suspected plaintiff of burning the property himself, or being an accomplice therein; and that it was reported that plaintiff had burned the insured property. *Held*, libelous per se. — *Geisler v. Brown* (1877) 6 Neb. 254, overruled.—*World Pub. Co. v. Mullen*, 61 N. W. 108, 43 Neb. 126.

[b] (Neb.; 1894.)

A publication charging the commission of a crime need not contain the technical statutory language in order to be libelous per se.—*World Pub. Co. v. Mullen* (Neb.) 61 N. W. 108, 43 Neb. 126.

[c] (Neb.; 1896.)

Words spoken imputing an indictable offense are actionable per se, and no special damage need be proved.—*Herzog v. Campbell* (Neb.) 66 N. W. 424.

47 Neb. 370.

§ 4. Words imputing dishonesty.

(Minn.; 1896.)

A message as follows: "Slippery Sam, your name is pants. [Signed] Many Republicans,"—delivered over the wires of a telegraph company, is fairly susceptible of a libelous meaning.—*Peterson v. Western Union Tel. Co.* (Minn.) 67 N. W. 646.

§ 5. Charges of official misconduct.

[a] (Minn.; 1897.)

To render a charge of official misconduct libelous it is not necessary that the officer be such at the time of the publication.—*Sharpe v. Larson* (Minn.) 70 N. W. 1.

[b] (Minn.; 1897.)

A publication charging that a county attorney, after having admitted to a litigant that he had received notice of his appeal, was persuaded by the other party to claim that he did not receive such notice, whereby the appeal was dismissed, is libelous per se.—*Sharpe v. Larson* (Minn.) 70 N. W. 1.

§ 6. Words imputing want of chastity.

(Neb.; 1895.)

Words falsely charging a woman with being a prostitute are actionable per se.—*Barr v. Birkuer* (Neb.) 62 N. W. 494.

44 Neb. 197.

§ 7. Review by critic.

[a] (Mich.; 1896.)

Where there is no misstatement of facts or of the propositions set forth in a book under review by a newspaper critic, it is not libelous for him to attack with sarcasm and ridicule the theories of the author.—*Dowling v. Livingstone* (Mich.) 66 N. W. 225.

[b] (Mich.; 1896.)

In an action for an alleged libelous review of plaintiff's book, it is error to charge that defendant had the right to ridicule the book if, in the candid judgment of any fair man, the book deserved ridicule, since the critic himself is the

judge of the language of his criticism.—*Dowling v. Livingstone* (Mich.) 66 N. W. 225.

[c] (Mich.; 1896.)

Where an author has quoted from another a paragraph inclosed in quotation marks, but not credited by name, a statement by a reviewer that the author has quoted another without giving him credit does not charge him with plagiarism.—*Dowling v. Livingstone* (Mich.) 66 N. W. 225.

[d] (Mich.; 1896.)

For a critic to write, "Of course, like all quack remedies, it would intensify the trouble," does not characterize the author under review as a quack.—*Dowling v. Livingstone* (Mich.) 66 N. W. 225.

[e] (Mich.; 1896.)

In a book review it is not libelous to write of one of the author's views that Horace Greeley advocated the same doctrine, though it should appear that such was not the case.—*Dowling v. Livingstone* (Mich.) 66 N. W. 225.

[f] (Mich.; 1896.)

Where an author, in discussing Mr. George's proposition, to take the land from the present owners without compensation, denounces it as "a gigantic piece of robbery," it is not libelous for a critic to write that the author "denounces the single-tax scheme as robbery."—*Dowling v. Livingstone* (Mich.) 66 N. W. 225.

§ 8. Who liable—Managing editor of newspaper.

(Wis.; 1896.)

The managing editor of a newspaper published by a corporation is equally liable with the proprietor and publisher for the consequences, in a civil action, of the publication of a libelous article, and this, whether he knows of the publication or not, since it is his business to know, and mere want of knowledge constitutes no defense.—*Smith v. Utley* (Wis.) 65 N. W. 744.

92 Wis. 133.

§ 9. Publication.

(Minn.; 1894.)

The cashier of plaintiff, having heard that defendant had circulated reports regarding the solvency of the bank, requested a friend to go with him to interview defendant and "see what there was about it." What was said by defendant on this occasion was induced by the cashier and his friend, and was not addressed to or heard by any one else. *Held*, that words uttered under such circumstances are not actionable.—*Irish-American Bank v. Bader* (Minn.) 61 N. W. 328.

59 Minn. 329.

§ 10. Question for jury.

(Minn.; 1897.)

If the publication is reasonably susceptible of a defamatory meaning as well as an innocent one, according to its circumstances, the question whether it is libelous is for the jury.—*Sharpe v. Larson* (Minn.) 70 N. W. 1.

II. MALICE.

§ 11. Transuission of telegram.

(Minn.; 1896.)

Where a message offered for transmission to a telegraph operator is on its face clearly susceptible of a libelous meaning, and is not signed by a responsible person, and there is no reason to believe that it is a cipher message, the company may be held to have maliciously published the libel.—*Peterson v. Western Union Tel. Co.* (Minn.) 67 N. W. 646.

§ 12. Evidence.

[a] (Mich.; 1895.)

In an action for publication in a daily paper, charging an attempt to bribe a state

senator, an alleged interview with plaintiff, published in another paper, and defendants' belief in its truth, are admissible to rebut the presumption of malice.—*Owen v. Dewey* (Mich.) 65 N. W. 8.

[b] (Mich.; 1896.)

In an action for slander, to prove malice, plaintiff may prove other slanderous statements than the words laid in the declaration.—*Botsford v. Chase* (Mich.) 66 N. W. 325.

§ 13. — Presumption.

[a] (Mich.; 1894.)

Where a libelous article is published for no justifiable end, the law presumes that it was malicious, though no actual malice in fact existed.—*Davis v. Marxhausen* (Mich.) 61 N. W. 504.

103 Mich. 315.

[b] (Mich.; 1895.)

A publication libelous per se is presumed to be voluntary and malicious.—*Owen v. Dewey* (Mich.) 65 N. W. 8.

[c] (Minn.; 1897.)

Where a publication is libelous per se, plaintiff is entitled to a verdict without proof of malice.—*Sharpe v. Larson* (Minn.) 70 N. W. 1; *Id.* 554.

§ 14. — Repetition.

[a] (Iowa; 1895.)

In an action for slander, evidence of repetitions of the slander counted on or of words of similar import are admissible for the purpose of showing malice, though the words charged are actionable per se.—*Bailey v. Bailey* (Iowa) 63 N. W. 341.

[b] (Minn.; 1895.)

Where defamatory words of the same import as those sued on were repeated on several occasions prior to the time alleged in complaint, evidence thereof is admissible to show malice.—*Frederickson v. Johnson* (Minn.) 62 N. W. 388. 60 Minn. 337.

§ 15. Question for jury.

(Mich.; 1896.)

Where a communication to an officer imputing the commission of a crime by a person is made in a public place before others than the officer, the question whether it was made with actual malice, so as to prevent it from being privileged, is for the jury.—*Garn v. Lockard* (Mich.) 65 N. W. 764.

III. PRIVILEGED COMMUNICATIONS.

§ 16. In general.

[a] (Minn.; 1895.)

Where it appeared that a merchants' protective association, of which defendant was a member, agreed, in consideration of an annual fee, to make no charge against members for collections made by use of "special reference lists of unsettled claims," and that defendant caused to be published in such list the name of an alleged debtor, and, on the debtor's asking him to have his name removed from the list, agreed to do so as soon as the alleged debt was paid, the publication was not privileged.—*Traynor v. Seiloff* (Minn.) 64 N. W. 915. 62 Minn. 420.

[b] (Neb.; 1895.)

Charges preferred against a clergyman by members of his church, pursuant to the usage and discipline of the church organization, are privileged communications.—*Piper v. Woolman* 61 N. W. 588, 43 Neb. 280.

§ 17. In judicial proceedings.

[a] (Mich.; 1896.)

A complaint for larceny, made before a justice of the peace, is privileged, and cannot be made the basis of an action for libel.—*Graham v. Cass Circuit Judge* (Mich.) 66 N. W. 348.

[b] (Minn.; 1895.)

A defamatory allegation in a pleading is not privileged where it was wholly gratuitous, irrelevant, and immaterial, was known to be untrue, and was published without justification, and with express malice.—*Sherwood v. Powell* (Minn.) 63 N. W. 1103. 61 Minn. 479.

§ 18. Concerning public officer.

[a] (Mich.; 1895.)

A publication in a paper, charging an attempt to bribe a state senator, is not privileged.—*Owen v. Dewey* (Mich.) 65 N. W. 8.

[b] (Wis.; 1896.)

Publication in a newspaper of remarks made, at a meeting of a city council, by the city's representative in the state assembly, purporting to give information as to the conduct of the representative of the city in the state senate with reference to passage of city charter amendments, is not privileged, though the newspaper be the official paper of the city, the article being a mere voluntary unofficial report, published as a matter of news; especially where the paper circulated outside the city and the senator's district.—*Buckstaff v. Hicks* (Wis.) 68 N. W. 403.

§ 19. Question for jury.

(Mich.; 1896.)

Whether what defendant said was said either for the purpose of making an investigation he had a right to make, or to impart information to one who had a right to know, and therefore privileged, was a question for the jury, under proper instructions.—*Hewitt v. Morley* (Mich.) 69 N. W. 245.

IV. JUSTIFICATION.

Burden of proof, see post, § 26.

§ 20. What constitutes.

[a] (Mich.; 1895.)

Probable cause to suspect does not excuse an imputation of crime, especially where the truth which would dispel the suspicion is easy of access.—*Long v. Tribune Printing Co.* (Mich.) 65 N. W. 108.

[b] (Neb.; 1895.)

The judgment in a church trial, finding a clergyman guilty on charges preferred, is no defense in an action by such clergyman for libel in the publication of such charges.—*Piper v. Woolman*, 61 N. W. 588, 43 Neb. 280.

§ 21. Truth as a defense.

(Mich.; 1895.)

In an action of libel it is only necessary to show by a preponderance of evidence that the charge made was true.—*Owen v. Dewey* (Mich.) 65 N. W. 8.

V. PLEADING, EVIDENCE, AND INSTRUCTIONS.

Evidence as to damages, see post, §§ 30, 31.

— in criminal prosecution, see post, § 37.

— of malice, see ante, §§ 12–14.

§ 22. Complaint.

[a] (Minn.; 1895.)

When the injury complained of in an action for a libel is a loss of trade, a general allegation of such loss is sufficient.—*Landon v. Watkins* (Minn.) 63 N. W. 615. 61 Minn. 137.

[b] (Wis.; 1896.)

A complaint for slander which fails to allege the particular defamatory words spoken is insufficient.—*Schubert v. Richter* (Wis.) 66 N. W. 107. 92 Wis. 199.

[c] (Wis.: 1897.)

In an action for publication of a libelous article in the German language, the complaint set forth the article in German, and alleged that, being translated into the English language, it "reads as follows," setting out the alleged translation in words and figures. *Held* a sufficient allegation that the translation was correct.

Tr. Shoop Family Medicine Co. v. Wernich (Wis.) 70 N. W. 160.

§ 23. — Colloquium and innuendo.

[a] (Minn.: 1895.)

Where the slanderous words sued on charge plaintiff with being a "robber" and a "thief," an innuendo as to the meaning of such words is surplusage.—*Frederickson v. Johnson* (Minn.) 62 N. W. 388.

60 Minn. 337.

[b] (Minn.: 1895.)

A complaint alleging that defendant maliciously caused to be published in a circular issued and distributed by a merchants' protective association of which he was a member, under the heading, "Special Reference List of Unsettled Claims," the words, "Traynor John, semm Belle Plaine Mdse. \$1.00," and setting up other facts showing the application of those words to plaintiff, and their meaning, stated a cause of action.—*Traynor v. Seiloff* (Minn.) 64 N. W. 915.

62 Minn. 120.

[c] (Minn.: 1896.)

A complaint alleging the publication of the following: "One of the B. M. U.'s occupied a pulpit in a local church on Sunday night. Saturday he was engaged in the endeavor to rob his neighbor, and Monday returned to his avocation of doing the Meehans up, as well as their friends and sympathizers. This religious hypocrite was the first to cry 'Boycott.'"—and sufficiently showing the publication to refer to plaintiff, stated a cause of action.—*Knox v. Meehan* (Minn.) 66 N. W. 1149.

64 Minn. 280.

[d] (Wis.: 1895.)

A complaint in an action for slander alleged that the defendant said to plaintiff, in the presence of others, "Just as well as you believe of mother that my wife has beaten her, just so well we can believe that mother said, 'E. (meaning plaintiff) has penned up pigs belonging to T., and has knocked them on the head, and devouringly eaten them up.'" *Held*, that such words are not actionable per se, and, in the absence of anything to show the circumstances leading up to the alleged charge, and by way of innuendo, the complaint was demurrable.—*Pandow v. Eichsted* (Wis.) 63 N. W. 284.

90 Wis. 298.

§ 24. Answer.

(Neb.: 1895.)

Where it is alleged that defendant spoke certain words of the plaintiff, and their meaning is averred in an innuendo, a statement in the answer, by which the defendant admits the uttering of the words as alleged, but avers "that it was not in the sense of nor with the intent to convey the idea" claimed in the petition, is not a denial that the words had the alleged significance.—*Barr v. Birkner* (Neb.) 62 N. W. 494.

44 Neb. 197.

§ 25. Pleading and proof.

[a] (Mich.: 1895.)

Where defendant published that plaintiff was arrested, charged with assault with intent to do great bodily harm, less than murder, and that plaintiff drove a pitchfork into the thigh of a certain person, and, in an action for libel, there were facts proving plaintiff guilty of the offense charged, it was not error to permit defendant to prove, under a plea and notice of justification, that the pitchfork penetrated the clothing, and not the person, of the man as-

saulted.—*Maguire v. Vaughan* (Mich.) 61 N. W. 44.

[b] (Mich.: 1896.)

Where the pleading alleged slander in charging plaintiff with theft, there is no variance where the testimony would lead the jury to infer that defendant intended by statements made to charge the plaintiff with the larceny of the things mentioned by him.—*Hewitt v. Morley* (Mich.) 65 N. W. 245.

[c] (Minn.: 1894.)

The slanderous words charged were: "There is a run on the Irish-American Bank"; "the Irish-American Bank has suspended"; "the Irish-American Bank is no good anyway"; "the Irish-American Bank closed its doors at two o'clock to-day." The words proved were: "Have you got any money in the Irish-American Bank? If you have any there, you had better be getting it out." *Held* a material variance.—*Irish-American Bank v. Bader* (Minn.) 61 N. W. 328.

59 Minn. 329.

[d] (Wis.: 1896.)

In an action by a chief of police for libel, the articles alleged to be libelous charged plaintiff with general official dishonesty, and that he had, "in manifold ways, proved his absolute unfitness for the office which he fills, or for any other office of a public nature where honor counts for aught," etc. *Held*, that it was error to strike from the answers allegations that, when the district attorney advised the supervisors against the allowance of certain fees claimed by plaintiff, the latter publicly and in a boisterous manner reproved the district attorney, and sought to coerce him to certify to the correctness of the bill; that, to increase his fees, plaintiff procured the issuance of warrants for the arrest of persons without proper cause, and against the district attorney's advice; that plaintiff went to another city to arrest a boy, became drunk while there, conducted himself on the train in a disorderly manner, fell asleep, and the boy released himself, and escaped from the train; that for such service he presented a bill for \$17.12; that the plaintiff was drunk and disorderly in public places, and while in such condition used profane and indecent language, and perpetrated assaults upon sundry residents; and that, during a strike, plaintiff ostentatiously sympathized with the strikers, and prevented the taking of proper means to prevent the strikers from intimidating, by threats and violence, others from taking their places.—*Adamson v. Raymer* (Wis.) 68 N. W. 1000.

§ 26. Evidence.

[a] (Mich.: 1894.)

In an action for libel for publishing a newspaper article stating that plaintiff was arrested for larceny, in which the number of his residence was given, evidence that another person of the same name as plaintiff was arrested does not show, as a matter of law, that defendant intended in good faith to refer to such other person.—*Davis v. Marxhausen* (Mich.) 61 N. W. 504.

103 Mich. 315.

[b] (Mich.: 1895.)

In an action for libel, for a publication in a paper, charging an attempt to bribe a state senator, an alleged interview with plaintiff, published in another paper, on which the charge was based, is inadmissible to prove the truth of the libel.—*Owen v. Dewey* (Mich.) 65 N. W. 8.

[c] (Mich.: 1896.)

In an action for slander the jury may consider the wealth and standing of defendant, to determine the influence of his statements.—*Botsford v. Chase* (Mich.) 66 N. W. 325.

[d] (Mich.: 1896.)

In an action for slander the complaint alleged that, by reason of the slander, plaintiff's neighbors refused to have business dealings with

him, and that he was compelled to resign his position as manager of a corporation, and to sell his stock therein. *Held*, that the gravamen of the claim for damages was the refusal of plaintiff's neighbors to have dealings with him, and the loss of his position with the corporation, and therefore evidence to show that he received, in the sale of his stock, its full value, is immaterial.—*Botsford v. Chase* (Mich.) 66 N. W. 325.

[c] (Mich.: 1896.)

The admission of testimony of witnesses who heard the words spoken by defendant, to the effect that they understood them to refer to plaintiff, was without prejudice, where the witnesses gave the facts which induced such understanding, and were corroborated as to such facts by other evidence.—*Provost v. Bruck* (Mich.) 67 N. W. 1114.

[f] (Mich.: 1897.)

Where the alleged slanderous words charged plaintiff with dishonesty in handling horses as trainer for defendant, it was proper to permit defendant to show on the question of damages plaintiff's general reputation as to integrity in similar transactions.—*Finley v. Widner* (Mich.) 70 N. W. 433.

[g] (Mich.: 1897.)

When plaintiff has shown the uttering of slanderous words in the presence of others than himself and defendant, the burden is on defendant to prove his justification.—*Finley v. Widner* (Mich.) 70 N. W. 433.

[h] (Mich.: 1897.)

Though slanderous words impute a crime, a justification of their truth need be proved by only a preponderance of evidence.—*Finley v. Widner* (Mich.) 70 N. W. 433.

[i] (Mich.: 1897.)

In an action for slander, consisting of a statement of defendant, after defeat of plaintiff for an office for which he was a candidate, that he had been informed plaintiff was a safe-cracker, and had served time for safe-blowing, it is error to admit testimony of witnesses that several years before they had heard that plaintiff had been a safe-cracker and had served time, where it appears that defendant's and witnesses' information came from different sources. *Grant and Moore, JJs.*, dissenting from reversal on the ground that plaintiff had no cause of action.—*Wolf v. Smith* (Mich.) 70 N. W. 1010.

[j] (Minn.: 1895.)

In an action against a member of a merchants' protective association for causing plaintiff's name to be published in a debtors' list, it was proper to permit defendant to be cross-examined, under the statute, as to his understanding of the character of the list, whether it referred to plaintiff, and the duty of members of the association in reference to giving credit to persons whose names were published in the list.—*Traynor v. Seiloff* (Minn.) 64 N. W. 915.

62 Minn. 420.

[k] (Wis.: 1897.)

It was error to admit letters to plaintiff from third persons referring to the publication, and stating the effect, and the writers' opinions.—*Dr. Shoop Family Medicine Co. v. Wernich* (Wis.) 70 N. W. 160.

§ 27. Instructions.

[a] (Mich.: 1895.)

In an action by a policeman against a newspaper for libel it appeared that the headlines of the article published were: "Policeman and burglar. The Detroit department said to have one of that sort. He pretends to be sick, and is suspected of having gone at once and robbed a store." The article stated that it was claimed that certain property found in plaintiff's possession had been identified by the owner of the store burglarized, the possession of which plaintiff could not satisfactorily explain. It also stated other things which were true. *Held*, that it was not error to refuse to

charge that the only statements in such article for which the jury can find plaintiff is entitled to any damages are those concerning the discovery of stolen property in his possession, its identification by the proprietor of the store, and plaintiff's inability to explain his possession of it.—*Long v. Tribune Printing Co.* (Mich.) 65 N. W. 108.

[b] (Mich.: 1897.)

Where the charge was one of dishonesty in certain transactions, and evidence of plaintiff's general reputation for integrity was admitted on the question of damages, and defendant attempted to justify by showing the truth of the charge, it was error to deny plaintiff's request for an instruction that said evidence was not competent on the question of justification.—*Finley v. Widner* (Mich.) 70 N. W. 433.

[c] (Wis.: 1896.)

The word "condition," in the instruction in an action for libel that, in estimating damages, the jury are to consider plaintiff's injured feelings and tarnished reputation, "taking into account the nature of the imputation, the extent of its publication, the character, condition, and influence of the parties, and all the surrounding circumstances," will not be held open to construction by the jury as meaning "wealth," rather than as referring to social standing.—*Buckstaff v. Hicks* (Wis.) 68 N. W. 403.

[d] (Wis.: 1896.)

As actual damages for libel cannot be mitigated by circumstances showing good faith, an instruction that, if the publication was a fair and accurate account of the remarks concerning plaintiff, this might be considered in mitigation, is properly refused; plaintiff having abandoned claim for punitive damages, and the court having so instructed.—*Buckstaff v. Hicks* (Wis.) 68 N. W. 403.

§ 28. Province of jury.

(Mich.: 1895.)

Where defendant based his libel on an alleged interview with plaintiff, published in another paper, the jury must determine whether the interview was had, and was correctly reported.—*Owen v. Dewey* (Mich.) 65 N. W. 8.

VI. DAMAGES.

§ 29. What may be considered.

(Neb.: 1895.)

In an action for slander, the alienation of the affections of plaintiff's husband, and the loss of home and support, which resulted from the circulation of the slanderous words, are elements of damage.—*Case v. Case* (Neb.) 63 N. W. 867.

45 Neb. 493.

§ 30. Evidence.

[a] (Iowa: 1897.)

Where the slanderous words are actionable per se, plaintiff need not allege or prove special damages.—*Trimble v. Tautlinger* (Iowa) 69 N. W. 1045.

[b] (Mich.: 1895.)

In an action against a newspaper for libel, where there are no facts warranting the giving of exemplary damages, the jury may consider the recklessness or negligence of defendant's employes as bearing on the question of damages.—*Long v. Tribune Printing Co.* (Mich.) 65 N. W. 108.

§ 31. — Mitigation.

(Mich.: 1894.)

Evidence of a retraction by a newspaper of a libelous article is only admissible in mitigation of the damages.—*Davis v. Marxhausen* (Mich.) 61 N. W. 504.

103 Mich. 315.

§ 32. Excessive damages.

[*Minn.*; 1896.)

Where a telegraph company forwarded a libelous message, and delivered it to the addressee, and there was no evidence that its contents were ever made public, a verdict for \$5,200 is excessive.—*Peterson v. Western Union Tel. Co.* (*Minn.*) 67 N. W. 646.

[*Neb.*; 1896.)

A verdict of \$1,000 for a charge of incest, repeated over and over again, against a girl on the verge of womanhood, is not excessive.—*Herzog v. Campbell* (*Neb.*) 66 N. W. 424.

47 Neb. 370.

VII. SLANDER OF TITLE.

§ 33. Of tenant.

[*Mich.*; 1896.)

A landlord, by falsely stating to a person, to whom the tenant is attempting to sublease, that the premises cannot be used for saloon purposes, and thereby preventing the consummation of the sublease, is not liable to the tenant unless the statement was malicious.—*Harrison v. Howe* (*Mich.*) 67 N. W. 527.

VIII. CRIMINAL PROSECUTION.

§ 34. What constitutes offense.

[*Mich.*; 1896.)

A complaint charging that the defendant imputed to the affiant a crime by falsely and maliciously saying, "You are a swindler; you beat the poor people out of their money, and are a cheat and a fraud," charges an offense, under *How. Ann. St.* § 9315, making it a misdemeanor to impute to another the commission of "any crime, felony or misdemeanor or any infamous or degrading act."—*Schultz v. Huebner* (*Mich.*) 66 N. W. 57.

[*Neb.*; 1897.)

A false and malicious publication, in print or writing, which tends to injure the reputation of another person, or to bring him in contempt, hatred, or ridicule, constitutes criminal libel.—*Raker v. State* (*Neb.*) 69 N. W. 749.

§ 35. Libel of several persons—Single offense.

[*Minn.*; 1895.)

A libel on two or more persons not associated in business, containing in a single writing, and published by a single act, constitutes but one offense. *Canty, J.*, dissenting.—*State v. Hoskins* (*Minn.*) 62 N. W. 270.
60 Minn. 168.

§ 36. Indictment.

[*Wis.*; 1896.)

An indictment for libel, alleging that defendant did "publish, and did cause to be published in a certain newspaper called *Torch of Liberty* in a certain part of which newspaper so published as aforesaid there were and are contained the false, scandalous, and malicious libel," etc., when attacked after verdict, will be held to sufficiently allege the publication of the libel.—*Baruum v. State* (*Wis.*) 66 N. W. 617.
92 Wis. 586.

§ 37. Evidence.

[*Neb.*; 1897.)

When the part of the article set out in the information does not import defamation, on its face, of a particular person, nor mention the name of the complaining witness, and, standing alone, requires inducements, innuendoes, and evidence to make it apply to him, and to show that the words were employed in a libelous sense, the state must prove that the publication tended to

injure one's reputation and expose him to public hatred, contempt, or ridicule.—*Raker v. State* (*Neb.*) 69 N. W. 749.

LICENSE.

Adverse possession by transferee of licensee, see "Adverse Possession," § 18.

Authority of city, see "Municipal Corporations," § 29.

Construction of contract, creation of easement or license, see "Easements," § 4.

Injuries on trains, see "Railroad Companies," §§ 23-25.

— to licensees, see "Negligence," § 23.

Regulations interfering with interstate commerce, see "Constitutional Law," §§ 50-52.

To conduct ferry, see "Ferry."

To manufacture or sell patented articles, see "Patents for Inventions," § 3.

To marry, see "Marriage," § 3.

To practice medicine, see "Physicians and Surgeons," § 2.

To sell decedent's land for debts, see "Executors and Administrators," § 40.

— liquor, see "Intoxicating Liquors," §§ 8-23.

§ 1. Between individuals.

[*Mich.*; 1895.)

Where a contract giving permission to construct a railroad over land provides that the agreement shall be void unless the road is completed within a certain time, the licensor may enjoin the further extension of the road over the land after such time has elapsed.—*Detroit & Birmingham Plank-Road Co. v. Detroit Suburban Ry. Co.* (*Mich.*) 61 N. W. 880.
103 Mich. 585.

[*Wis.*; 1896.)

An instrument executed by a railroad company by its attorney in fact, conveying to the grantee and his assigns the right to cut and remove, for his own use, during a period of 20 years, all the pine timber on certain land, for a full consideration, the receipt of which was acknowledged,—being sealed with a scroll, but not signed by the president of the company, nor countersigned by its secretary,—is a mere license to cut the timber, and vests no title thereto in the licensee until it is actually severed.—*Keystone Lumber Co. v. Kolman* (*Wis.*) 69 N. W. 165.

[*Wis.*; 1896.)

A license to cut and remove timber is assignable, whether made so by express words or not.—*Keystone Lumber Co. v. Kolman* (*Wis.*) 69 N. W. 165.

§ 2. — Revocation.

[*Mich.*; 1895.)

The occupation of land and the making of valuable manufacturing improvements thereon in execution of a void agreement, such occupancy not having ripened into a right by prescription, does not create a license to use the land, irrevocable as long as the improvements are maintained.—*Carley v. Gitchell* (*Mich.*) 62 N. W. 1003.
105 Mich. 38.

[*Wis.*; 1895.)

An executed parol license to use another's land for drainage purposes is revocable.—*Thoenke v. Fiedler*, 64 N. W. 1030, 91 Wis. 386.

[*Wis.*; 1895.)

The fact that expenditures have been made under an executed parol license to use another's land for drainage purposes will not render it irrevocable.—*Thoenke v. Fiedler* (*Wis.*) 64 N. W. 1030, 91 Wis. 386.

[*Wis.*; 1895.)

The fact that an executed parol license to use another's land was based on a valuable consideration will not render it irrevocable.—*Thoenke v. Fiedler*, 64 N. W. 1030, 91 Wis. 386.

§ 3. From government—Revocation.

(Minn.: 1896.)

A grant of special privileges on land dedicated to a particular public use, if rightfully made, is not revocable at the arbitrary pleasure of the state or municipality, but, if acted on, the licensee has vested rights therein, which are subject only to the paramount interests of the public.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.* (Minn.) 68 N. W. 458.
63 Minn. 330.

LIENS.

See, also, "Agistment"; "Maritime Liens"; "Mechanics' Liens"; "Pledge."

Created by creditors' bill, see "Creditors' Bill," § 8.

Estoppel to claim, see "Estoppel," § 29.

For price of goods, see "Sale," § 48.

For rent, see "Landlord and Tenant," §§ 52-57.

Of agister, see "Agistment."

Of assessment for public improvements, see "Municipal Corporations," § 145.

Of attachment, see "Attachment," §§ 28, 29.

Of attorney, see "Attorney and Client," §§ 18-23.

Of bank on collections, see "Banks and Banking," § 23.

— on stock, see "Banks and Banking," § 1.

Of bona fide purchaser, see "Negotiable Instruments," § 55.

Of carrier for charges, see "Carrier," § 32.

Of commission merchant for advances, see "Factors and Brokers," § 6.

Of corporation on stock, see "Corporations," § 48.

Of creditor on partnership assets, see "Partnership," § 37.

Of execution, see "Execution," §§ 13, 14, 42.

Of factor or broker for compensation, see "Factors and Brokers," § 17.

Of innkeeper, see "Innkeepers."

Of judgment, see "Judgment," §§ 62-67.

— for alimony, see "Divorce," § 30.

Of livery stable keeper, see "Livery Stable Keepers."

Of mortgage, see "Chattel Mortgages," § 26; "Mortgages," §§ 17-23.

Of pledge, see "Pledge," § 7.

Of tax, see "Taxation," §§ 55-57.

Of vendor, see "Sale," §§ 57, 58.

On logs and lumber, see "Logs and Logging," §§ 7-10.

On trespassing animals, see "Animals," § 1.

Rights of junior lienholders, see "Marshaling Assets and Securities," § 1.

§ 1. For advances.

(Iowa: 1896.)

A coal company, in consideration of advances for its pay roll, agreed that all its accounts for coal sold should be assigned to the bank. At the request of the bank, it was agreed that the accounts should be put under the control of the bookkeeper of the coal company, who should pay the money into the bank, when collected. *Held*, that the bank thereby acquired a lien on the accounts, entitling it to the amount collected thereon in the hands of a receiver of the coal company.—*Atlantic Trust Co. v. Carbondale Coal Co.* (Iowa) 68 N. W. 697.

§ 2. For storage.

(Mich.: 1897.)

A lessee of a store notified his landlord that he had sold his stock of goods to S., that the lease was surrendered, and that he must look to S. thereafter for his rent. S. disclaimed any interest in the goods, as did the lessee. Both refused to take them away, and left them in the store, though the landlord notified them that he would claim a lien for storage if the goods were not removed. The store was locked up, and the key left at a local bank, and

the landlord kept watch over the store to see that it was properly fastened. *Held*, that the landlord was entitled to a lien for storage.—*Schneider v. Stone* (Mich.) 69 N. W. 829.

(b) (Neb.: 1896.)

A contract for the storage and forwarding of goods, by which the consignor reserves the right to withdraw at pleasure for reshipment the goods stored, and under which each may draw at sight on the other for any balance in his favor, the consignee relying on the personal credit of the consignor, does not create a lien in favor of the consignee for his charges thereunder.—*Moline, Milburn & Stoddard Co. v. Walter A. Wood Mowing & Reaping Mach. Co.* (Neb.) 69 N. W. 405.

§ 3. Contract between lessor and lessee.

(S. D.: 1895.)

Where a lease of an hotel provides for monthly payment of rent, and also stipulates for the purchase of the hotel furniture by the lessee at a fixed price payable in installments, and that the lessor shall have a lien on the furniture to secure the purchase price, the latter has a lien, not only for the purchase price, but also for all rent that may accrue under the lease, which is valid against all persons having notice of the condition of the lease.—*Esshom v. Watertown Hotel Co.* (S. D.) 63 N. W. 229.

§ 4. Enforcement—Thresher's lien.

(a) (N. D.: 1895.)

The failure of an officer making the sale on the foreclosure of a thresher's lien to file a record of the sale with the register of deeds within the prescribed time did not invalidate the sale.—*Martin v. Hawthorne* (N. D.) 63 N. W. 895.

5 N. D. 66.

(b) (N. D.: 1895.)

A party seizing grain under a thresher's lien must establish that the grain was grown on the land described in the statement for lien.—*Martin v. Hawthorne* (N. D.) 63 N. W. 895.

5 N. D. 66.

(c) (S. D.: 1895.)

Where, in an action to enforce a threshing lien under Laws 1889, c. 88, the court failed to find that the plaintiff's assignor owned and operated the threshing machine with which the grain was threshed, or that the lien contained the statement of facts required by section 3 of the act, a judgment for plaintiff is unauthorized.—*Anderson v. Alseth* (S. D.) 62 N. W. 435.

6 S. D. 566.

(d) (S. D.: 1895.)

A complaint for a threshing lien, under Laws 1889, c. 88, alleging that "the said F. [plaintiff's assignor] duly executed his claim for a lien upon the said grain hereinbefore described, for threshing the same, * * * and caused the said claim to be filed in the office of the register of deeds," without alleging that an account had been made, stating the kind of grain threshed and the number of bushels, with a description of the land on which it was grown, as required by section 3 of the act, is sufficient, as against an objection for insufficiency not taken until the trial.—*Anderson v. Alseth* (S. D.) 62 N. W. 435.

6 S. D. 566.

LIFE ESTATE.

See "Estates."

Adverse possession by life tenant against remainder-men, see "Adverse Possession," § 22.

LIFE INSURANCE.

See "Insurance."

Exemption of, see "Exemptions," §§ 9, 11.

LIGHT AND AIR.

Rights of adjoining landowners, see "Adjoining Landowners," § 3.

LIMITATION.

- In will, see "Wills," § 49.
 Of amount of exemptions, see "Taxation," § 21.
 Of city indebtedness, see "Municipal Corporations," §§ 170, 171.
 Of district indebtedness, see "Schools and School Districts," § 21.
 Of liability, see "Carriers," §§ 15-19, 25, 33; "Telegraph Companies," §§ 5-7.
 Of risk in policy, see "Insurance," § 11.
 Of state indebtedness, see "States and State Officers," § 12.
 Of term in lease, see "Landlord and Tenant," § 18.

LIMITATION OF ACTIONS.

- I. WHEN STATUTE APPLICABLE, §§ 1-8.
- II. RUNNING OF STATUTE, §§ 9-31.
 1. Accrual of Cause of Action, §§ 9-20.
 2. Disabilities and Exceptions, §§ 21-26.
 3. Interruption by Legal Proceedings, §§ 27-31.
- III. ACKNOWLEDGMENT, NEW PROMISE AND PART PAYMENT, §§ 32-37.
- IV. PLEADING AND PRACTICE, §§ 38-42.
- V. CRIMINAL PROSECUTION, §§ 43, 44.

See, also, "Adverse Possession."

- Against national bank for penalties for exacting usury, see "Usury," § 16.
 Creation of highway by prescription, see "Highways," §§ 4, 5.
 Effect of admissions after running of statute, see "Adverse Possession," § 32.
 For accounting by guardian, see "Guardian and Ward," § 8.
 For deficiency on foreclosure, see "Mortgages," § 66.
 For partition, see "Partition," § 2.
 Limitation of right to set up usury, see "Usury," § 21.
 Objections to tax title cured by limitation, see "Taxation," § 113.
 Of proceedings to sell lands for debts, see "Executors and Administrators," §§ 41, 42.
 On guardians' bonds, see "Guardian and Ward," §§ 16, 17.
 On insurance policies, see "Insurance," § 106.
 Raising defense for first time on appeal, see "Appeal," § 198.
 Relief where claims against estate are barred, see "Executors and Administrators," §§ 20, 21.
 Right of defendant in ejectment to recover taxes barred, see "Ejectment," § 12.
 — to plead the statute after relief from default judgment, see "Judgment," § 14.
 To assail tax titles, see "Taxation," § 112.
 To collect taxes, see "Taxation," § 73.
 To enforce lien, see "Mechanics' Liens," § 51.
 To foreclose mortgages, see "Mortgages," § 46.
 What law governs, see "Conflict of Laws," § 3.

I. WHEN STATUTE APPLICABLE.

§ 1. In general.

1a1 (Minn.: 1896.)

The fact that by Gen. St. 1894, § 1832, the rights of the owner of lands abutting on a road are barred, as against the public, in six years, does not render that period of limitation applicable by analogy, in favor of the private owner,

and against the public. *Rice v. Town of Walcott*, 67 N. W. 359, 61 Minn. 459.

1b1 (Minn.: 1897.)

Gen. St. 1894, § 5136, subd. 5, providing that the six year statute of limitations shall apply to actions for injury to the person or rights of another, not arising on obligation, and not thereafter enumerated, was not amended or repealed by Gen. St. 1894, § 5138, subd. 1. — *Brown v. Village of Heron Lake* (Minn.) 69 N. W. 710.

§ 2. Actions relating to land.

1a1 (Iowa: 1896.)

The general statute of limitation contained in Code, § 2529, providing that an action to recover real property shall not be brought after 10 years from the time the cause of action accrues, cannot be invoked in favor of a tax title to land of which the holder has not held actual possession for 10 years. — *Phillips v. Wilmarth* (Iowa) 66 N. W. 1053.

1b1 (Neb.: 1895.)

An action by a subsequent mortgagee to enforce his equities as against the mortgagor and purchaser through a decree foreclosing the prior mortgage, to which he was not made a party, may be brought at any time within 10 years after the action accrued, under Code, § 6, rather than within 4 years, under section 16. — *Baldwin v. Burt*, 61 N. W. 601, 43 Neb. 245.

1c1 (Wis.: 1895.)

Ten years limitation does not run against a demand against a railroad company for damages for the use and occupation of land provided for in Rev. St. §§ 1846, 1852, where the railroad company was a mere trespasser. — *Tucker v. Chicago, St. P. M. & O. Ry. Co.* (Wis.) 65 N. W. 515, 91 Wis. 576.

§ 3. Action to have deed declared a mortgage.

(Neb.: 1896.)

An action to have an absolute conveyance declared to be a mortgage, and to compel a reconveyance to plaintiff because of the debt having been extinguished, is prescribed in 10 years. — *Names v. Names* (Neb.) 67 N. W. 751, 48 Neb. 701.

When cause of action accrues, see post, § 12.

§ 4. Relief on the ground of fraud or mistake.

1a1 (Iowa: 1894.)

An action to subject land conveyed in fraud of creditors to the payment of their claims is not an action to enforce a trust, so as to prevent the application thereto of the statute of limitations, but is one for "relief on the ground of fraud" (Code, § 2529), and must therefore be brought within five years after the fraud has been discovered. — *Sims v. Gray* (Iowa) 61 N. W. 171.

93 Iowa, 38.

1b1 (Iowa: 1894.)

Under Code, § 2530, providing that, in actions for relief on the ground of mistake, the cause of action shall not be deemed to have accrued until the mistake shall have been discovered by the party aggrieved, and that the limitation thereon shall be five years, an action against a county, by one of its cities, to recover excessive charges for collection of taxes made by the former, is not barred if brought within two years of the time when the parties discovered that such overcharges had been made, through ignorance of a change in the law. — *Iowa City v. Johnson County* (Iowa) 61 N. W. 995.

When cause of action accrues, see post, § 13.

§ 5. Action on open account or on account stated.

1a1 (Iowa: 1896.)

Plaintiff commenced work for defendant railroad company in 1882, and worked until 1888

without any fixed agreement as to salary, when the directors fixed his salary at a certain sum for the current year. On a meeting of the board in 1889, plaintiff presented an account for services from 1884 to 1888, which was allowed and ordered paid; and thereafter, in the same year, plaintiff's salary was fixed at a certain sum "annually for the year commencing June 1, 1889, and continuing at that rate until otherwise ordered." Plaintiff continued in the company's employ until 1894, having received in 1893 a payment on the sum allowed by the directors in 1889 for services rendered between 1884 and 1888, and sues for the balance. *Held* that, in the absence of a showing that the sum found due on the settlement made in 1889 had been carried forward on the books of the company as a continuing account, plaintiff's claim was not on a continuous, open, and current account, within the statute of limitations.—*Porter v. Chicago, I. & D. Ry. Co.* (Iowa) 68 N. W. 724.

[b] (Iowa: 1896.)

Such claim was on an account stated, within the statute limiting the time for bringing actions on such accounts.—*Porter v. Chicago, I. & D. Ry. Co.* (Iowa) 68 N. W. 724.

[c] (Iowa: 1896.)

Plaintiff had made shipments over defendant's railroad during several years, and settled the freight bills presented by defendant. In each of the bills the company had charged defendant overweight. *Held*, that the several items of money paid defendant as freight on the excessive weight constituted an open current account within the statute of limitations.—*Higley v. Burlington, C. R. & N. Ry. Co.* (Iowa) 68 N. W. 829.

§ 6. Action against sheriff.

(Minn.: 1896.)

The mere failure of a sheriff, receiving money on redemption of land sold by him, to pay the same to the party entitled thereto before any demand is made on him for it, is not the omission of an official duty, within the three-years limitation of Gen. St. 1894, § 5137.—*Hall v. Swenson* (Minn.) 67 N. W. 1024.

§ 7. Breach of covenant.

(Iowa: 1895.)

A complaint alleging that defendant conveyed land to plaintiff by deed with covenant of warranty of title, and that there was a mortgage on the land which was known to defendant, and concealed from plaintiff, and that plaintiff has been compelled to pay such mortgage to his damage, does not state a cause of action for deceit, but one for breach of warranty against incumbrances, which, under Code, § 2529, may be begun within 10 years after the execution and delivery of the deed.—*Yancey v. Tatlock* (Iowa) 61 N. W. 997.
93 Iowa, 386.

§ 8. Effect of statute on existing causes.

[a] (Minn.: 1895.)

Gen. Laws 1887, c. 69, changing the time within which an action to foreclose a mortgage may be brought from 10 to 15 years, applied to all cases in which the prior statute had not fully run before the act took effect.—*Bradley v. Norris* (Minn.) 65 N. W. 357.
63 Minn. 156.

[b] (Minn.: 1895.)

Gen. St. 1894, § 5147, limiting the time for bringing actions, contains a saving clause as to persons under disability, permitting them to sue within one year after removal of disability. Before the time for bringing an action to redeem from a mortgage expired as to a minor heir of the mortgagor, but after it had expired as to adult heirs, Gen. Laws 1887, c. 69, was passed, amending section 5141 by extending the time within which to foreclose by action from 10 to 15 years. *Held*, that the time within which the minor heir might bring her action to

redeem was thereby extended to 15 years also.—*Backus v. Burke* (Minn.) 65 N. W. 459.
63 Minn. 272.

II. RUNNING OF STATUTE.

1. ACCRUAL OF CAUSE OF ACTION.

On note, see "Negotiable Instruments," § 75.
To redeem, see "Mortgages," § 96.

§ 9. When cause of action accrues.

[a] (Iowa: 1895.)

A cause of action does not "accrue," within the meaning of that word as used in Code, § 2529, providing that actions may be commenced within certain times "after their causes accrue," until the right to bring an action upon it exists. *Robinson, J., dissenting.*—*Weiser v. McDowell* (Iowa) 61 N. W. 1094.
93 Iowa, 772.

[b] (Iowa: 1896.)

Limitations begin to run against an action to recover a balance alleged to be due from property turned over to defendant to secure him from liability as accommodation indorser for plaintiff, from the time plaintiff is aware that defendant claims to have accounted in full therefor, and it is barred in five years, under Code, § 2529, subd. 4.—*Wolf v. Wolf* (Iowa) 66 N. W. 170.

[c] (Iowa: 1897.)

An account is closed, so that limitations begin to run against it, by the giving of a note for the amount due, and the opening of a new account between the parties, which is subsequently paid and the payment receipted for as "in full of account."—*Morse v. Minton* (Iowa) 70 N. W. 691.

[d] (Mich.: 1895.)

A logging contract provided that the amount of lumber was to be determined by the saw bills. A subsequent contract for sawing provided for payment of part as fast as the lumber was delivered, and of the remainder when the sawing was completed. An inspection was made, and a bill for a certain number of feet paid. It afterwards appeared that the amount of lumber was overestimated. *Held*, that the claim for overpayment accrued when such inspection was made.—*Busch v. Wilcox* (Mich.) 64 N. W. 485.

[e] (Mich.: 1895.)

Where a general managing agent retains in his hands notes executed by him to his principal, as a part of his account with his principal, limitations do not begin to run against an action on the notes until an accounting is had between them.—*Shepherd v. Shepherd's Estate* (Mich.) 65 N. W. 580.

[f] (Mich.: 1896.)

Where members of a school board fail to require a contractor to give the statutory bond for the payment of laborers and material men, and they thereby become personally liable, a material man's right of action against them for brick furnished the contractor with which to build a schoolhouse accrues, as to any installment, immediately on default in payment by the contractor, in accordance with the terms of his contract with him; and limitations run against each installment from the time it becomes due, and not from the date of the last item furnished.—*Staffon v. Lyon* (Mich.) 68 N. W. 151.

[g] (Minn.: 1894.)

Where there is a condition precedent to the accruing of a cause of action, and it is in the power of plaintiff to perform that condition, the statute of limitations, by analogy, applies, and will commence to run as soon as the time to perform the condition arrives; and, when performance is thereby barred, it will prevent the cause of action from ever accruing.—*State v. Norton* (Minn.) 61 N. W. 458.
59 Minn. 424.

(Ib.) (Neb.; 1896.)

Where an agent for the sale of a machine was, by agreement, to take, from his first receipts of cash paid to apply on the price, money expended by him in relation to the transaction, the cause of action against the principal for the recovery of money so expended did not accrue until money was collected by the agent from the sale.—*C. Aultman & Co. v. Martin* (Neb.) 68 N. W. 340.

§ 10. To attack fraudulent conveyances.**(a) (Iowa; 1894.)**

The record of a deed fraudulent as to creditors is notice to them of the fraudulent character of the deed, so that the statute of limitations begins to run therefrom. *Granger, C. J., and Robinson, J., dissenting.*—*Sims v. Gray* (Iowa) 61 N. W. 171.

93 Iowa, 38.

(b) (Iowa; 1896.)

In an action to set aside a conveyance as in fraud of creditors, it appeared that the tort which was the basis of plaintiff's recovery was committed, at least in part, prior to the time the conveyance in question was made. *Held*, that plaintiff's cause of action accrued prior to the execution of the deed.—*Carbiener v. Montgomery* (Iowa) 66 N. W. 900.

§ 11. Assumption of mortgage.**(Iowa; 1895.)**

Where a mortgage is past due when assumed, limitations commence to run against the assumer's liability from the time the agreement to assume is made.—*Robertson v. Stuhlmiller* (Iowa) 61 N. W. 986.

93 Iowa, 326.

§ 12. To declare deed absolute a mortgage.**(Neb.; 1896.)**

The statute of limitations runs against a bill to declare a deed absolute in form a mortgage in favor of a grantee in possession, from the time such possession becomes adverse to the grantor's title.—*Stall v. Jones* (Neb.) 66 N. W. 653.

47 Neb. 706.

§ 13. Relief on account of fraud.**(Iowa; 1896.)**

Under Code, §§ 2529(4), 2530, by which an action in equity for relief on the ground of fraud is barred in five years after the fraud is discovered, the statute commences to run when the creditor has such knowledge or notice as would lead a man of reasonable prudence to make inquiries which would disclose the fraud.—*Nash v. Stevens* (Iowa) 65 N. W. 825.

§ 14. On supersedeas bond.**(a) (Mich.; 1895.)**

A cause of action on a supersedeas bond on appeal arises on the rendition of the judgment of the appellate court, affirming the judgment below.—*Busch v. Wilcox* (Mich.) 64 N. W. 485.

(b) (Mich.; 1895.)

The fact that costs were not taxed when the judgment below was affirmed on appeal does not operate to stay the right of action on the supersedeas bond beyond the period during which such costs might have been taxed.—*Busch v. Wilcox* (Mich.) 64 N. W. 485.

§ 15. Liability of new township for share of debts of old township.**(Mich.; 1895.)**

On the creation of one township from a portion of another, limitations do not begin to run against the liability of the new township to pay its portion of bonds issued by the old township, prior to the division, until the liability of the old township thereon has been established by judgment, the bonds being only

valid in the hands of bona fide holders.—*Township of Grant v. Township of Reno* (Mich.) 65 N. W. 376.

§ 16. Damages to abutting owner.**(Iowa; 1896.)**

Limitations did not begin to run to an action to recover damages for the construction of an approach to an embankment leading to a railway crossing, which approach extended to and abutted on plaintiff's premises, from the time the embankment was made, though the approach may have been a part of its plan; a right of action accruing to plaintiff only from the construction of the part abutting on his property.—*Kelcher v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 66 N. W. 91.

§ 17. Flowage and diversion of water.**(a) (Iowa; 1895.)**

A cause of action in favor of a landowner for the diversion of the natural flow of water to his lands by the construction by an adjoining landowner of a permanent tile drain commences to run at the time damages are sustained because of such drain, and the action is barred in five years thereafter, under the Iowa statute.—*McCormick v. Winters* (Iowa) 62 N. W. 655.

(b) (Neb.; 1897.)

Plaintiff's cause of action for damage to his land and crops by water cast thereon by ditches negligently constructed by defendant arose when the injury occurred, and not when the ditches were completed.—*Fremont, E. & M. V. R. Co. v. Harlin* (Neb.) 70 N. W. 263.

§ 18. On judgment.**(a) (Iowa; 1895.)**

Under Code, § 2541, providing that, when the commencement of an action shall be stayed by statute, the time of such stay shall not be a part of the time limited for the commencement of the action, and section 2521, providing that no action shall be brought on any judgment within 15 years after its rendition, without leave of court, for good cause shown, unless the record thereof is lost or destroyed, where no cause exists for bringing an action on a judgment within 15 years, and the record is not lost or destroyed, limitations do not commence to run against it until the expiration of said 15 years. *Robinson, J., dissenting.*—*Weiser v. McDowell* (Iowa) 61 N. W. 1094.

93 Iowa, 772.

(b) (Mich.; 1895.)

Limitations begin to run against the docket entry, authorized by How. Ann. St. § 6948, of a transcript of a justice's judgment on the records of the circuit court, from the date of the entry of the justice's judgment, and not from the date of the entry of the transcript.—*Wilcox v. Lantz* (Mich.) 64 N. W. 735.

§ 19. Action by legatee.**(Iowa; 1895.)**

Where testator gave his property to his wife and child, with a provision that, if either died before the child reached majority, the share of the one dying should go to the survivor, and, if both died before that time, the property should go to testator's heirs, the cause of action of the heirs does not accrue prior to distribution of or claim to the property adverse to them.—*Jordan v. Woodin* (Iowa) 61 N. W. 948.

§ 20. Demand.**(Mich.; 1895.)**

How. Ann. St. c. 282, relating to the voluntary dissolution of corporations and the appointment of receivers therefor, in section 12 provides that, if there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receiver shall immediately proceed to recover the same. *Held*, that the statute of limitations begins to run against the sum remaining due immediately upon the ap-

pointment of the receiver, and not upon demand therefor.—*Webber v. Hovey* (Mich.) 65 N. W. 619.

2. DISABILITIES AND EXCEPTIONS.

§ 21. Insanity.

[a] (Iowa; 1895.)

Code, § 2535, extends the time within which actions on behalf of insane persons may be brought to one year after the termination of the insanity. Section 2536 provides that, if a person entitled to sue dies within one year before the expiration of the limitation, such limitation shall not apply until one year after such death. *Held*, that the statute commences to run when the cause of action accrues, notwithstanding the insanity of the party, and, in case he dies insane within one year before the statutory period expires, such period is merely extended until one year after his death.—*McNeill v. Sigler* (Iowa) 64 N. W. 604.

[b] (Minn.; 1897.)

Gen. St. 1894, § 5147, providing that if a person entitled to bring a certain suit "is, at the time the cause of action accrued, * * * insane," "the time of such disability is not a part of the time limited for the commencement of the action," refers only to a disability existing at the time the cause of action accrues.—*Kelly v. Gallup* (Minn.) 69 N. W. 812.

§ 22. Nonresidence.

(Iowa; 1896.)

Under Code, § 2533, providing that the time during which a defendant is a nonresident shall not be included in computing the periods of limitations, the nonresidence of the owner of land to whom materials were furnished for a building thereon prevents the running of the statute against an action to enforce a mechanic's lien for the materials, as against persons having liens on the land against which the mechanic's lien is sought to be enforced.—*Leeds Lumber Co. v. Haworth* (Iowa) 67 N. W. 383.

§ 23. Absence from state.

[a] (Iowa; 1895.)

The absence of a mortgagor from the state suspends the running of limitations against an action to foreclose the mortgage.—*Robertson v. Stuhlmiller* (Iowa) 61 N. W. 986.

93 Iowa, 326.

[b] (Iowa; 1895.)

The absence of a mortgagor from the state does not suspend the statute of limitations against a resident who assumed payment of the mortgage.—*Robertson v. Stuhlmiller* (Iowa) 61 N. W. 986.

93 Iowa, 326.

[c] (Mich.; 1897.)

Where suit was brought in Michigan on a bond made in New Jersey, plaintiff's ignorance of the fact that the maker of the bond had removed to Michigan will not arrest the running of limitations.—*Home Life Ins. Co. v. Elwell* (Mich.) 70 N. W. 334.

[d] (Wis.; 1895.)

Defendant, after the cause of action against him had accrued, left the state on three different occasions, being absent in all about 30 months, but still maintained a residence in the state. *Held*, that Rev. St. § 4231, providing that, if the debtor "shall depart from and reside out of the state" after the cause of action has accrued, the running of the statutes of limitations shall be suspended during such absence, did not apply.—*Farr v. Durant* (Wis.) 63 N. W. 274.

90 Wis. 341.

§ 24. Knowledge of cause of action—Fraudulent concealment.

[a] (Iowa; 1896.)

Where an administratrix knew that her intestate was killed while in defendant's employ,

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the running of limitations against the claim for damages was not interrupted by defendant's representations that it was in no manner to blame for deceased's death, nor by its concealment of the facts concerning the accident which caused his death.—*McBride v. Burlington, C. R. & N. Ry. Co.* (Iowa) 66 N. W. 73.

[b] (Iowa; 1896.)

A complaint against plaintiff's guardian disclosed a settlement eleven years prior to the suit, and alleged that such settlement did not include all the money that the guardian had received for plaintiff's benefit from the pension office, and that defendant had fraudulently concealed the receipt of a certain sum, but failed to set out facts showing that plaintiff could not have obtained from the pension office a correct statement of the money paid to defendant within five years after the settlement. *Held*, that it did not show such diligence in discovering the fraud as would relieve plaintiff from the bar of the statute.—*Mather v. Rogers* (Iowa) 68 N. W. 700.

[c] (Mich.; 1896.)

Where moneys of complainant's intestate were fraudulently obtained by defendant by means of an apparent indorsement of a certificate of deposit by intestate, a few days before her death, and when she was incapable, on account of old age and physical and mental infirmity, of transacting business, and the possession thereof was fraudulently concealed by defendant, and not discovered by complainant until a short time before he brought suit for the recovery thereof, as belonging to his intestate's estate, the cause of action was not barred by limitations.—*Stebbins v. Patterson* (Mich.) 66 N. W. 484.

[d] (Mich.; 1897.)

When a guardian fraudulently conceals that certain property belongs to the ward, and appropriates such property to his own use, the statute does not commence to run against the ward's right to an accounting until his discovery of the fraud. *How, Ann. St. § 8724*.—*Allen v. Conklin* (Mich.) 70 N. W. 339.

[e] (Neb.; 1896.)

The concealment or absconding which, under Code Civ. Proc. § 20, suspends the operation of the statute of limitations, must be such as affects the commencement of judicial proceedings in Nebraska.—*Talcott v. Bennett* (Neb.) 68 N. W. 931.

§ 25. — Mistake.

(Iowa; 1897.)

A suit to rescind a deed for mistake is not barred by limitations, though not brought within the statutory time, if plaintiff did not discover the mistake until one month before bringing suit.—*Clapp v. Greenlee* (Iowa) 69 N. W. 1049.

§ 26. Trusts.

[a] (Mich.; 1895.)

Where money has been deposited with a trustee, the statute of limitation does not begin to run against an action therefor until the beneficiary is entitled thereto or an accounting is demanded.—*Havens v. Church* (Mich.) 62 N. W. 149.

104 Mich. 135.

[b] (Minn.; 1895.)

Where a receiver of defendant's property purchased the same in his own name, the statute of limitations did not run against an action to enforce the trust thereby resulting in favor of defendant until the receiver repudiated the trust by conveying the land as his own.—*Donahue v. Quackenbush* (Minn.) 64 N. W. 141.

62 Minn. 132.

[c] (Minn.; 1896.)

Stillwater City Charter provides that, if the owner of land condemned by the city fails to furnish an abstract of title showing himself entitled to the award, the amount thereof shall be appropriated and set apart in the city treas-

ary for the party showing himself entitled thereto. *Held*, that the setting apart of an award does not constitute a trust, within Gen. St. 1894, § 5136, subsec. 7, a cause of action to enforce which does not accrue until the trustee has repudiated or neglected to discharge the trust; hence the cause of action to recover the award accrued when the fund was set apart, irrespective of the furnishing of an abstract of title, though the abstract is a condition precedent to the right of action.—*Stillwater & St. P. R. Co. v. City of Stillwater* (Minn.) 68 N. W. 836.

3. INTERRUPTION BY LEGAL PROCEEDINGS.

§ 27. In general.

[a] (Iowa; 1895.)

The depositing of a claim with an assignee for creditors within the time fixed by law was a commencement of an action on the claim within Code, §§ 2017, 2018, which provide that a landlord's lien shall exist for one year only after the rent falls due, and that the lien shall be effected by the commencement of an action for the rent within that time.—*Lacey v. Newcomb* (Iowa) 63 N. W. 704.

[b] (Iowa; 1897.)

An action is not commenced, within the meaning of the general statute of limitations (Code, § 2532), by delivering the original notice for service to one who was not a sheriff or officer, and who did not serve it on any person on whom service was authorized.—*Lesure Lumber Co. v. Mutual Fire Ins. Co.* (Iowa) 70 N. W. 761.

[c] (Mich.; 1896.)

Where, under an order granting leave to bring an action at law against the maker and sureties on a mortgage pending foreclosure, an action is brought in one county, and afterwards discontinued as to one of the defendants, a supplemental order giving leave to bring suit in another county against such defendant, entered nunc pro tunc, is not objectionable, as depriving that defendant of the right to plead the statute, the original suit having been commenced in time.—*Steele v. Grove* (Mich.) 67 N. W. 963.

[d] (Minn.; 1895.)

The commencement of an action to quiet title, by a purchaser at void foreclosure sale, who went into possession at the expiration of the year for redemption, against the mortgagor, which resulted in a judgment for defendant, stopped the running of the statute against the right of action to redeem from the mortgage, where the answer of the mortgagor denied that the purchaser was ever in possession, and alleged that he, and not the purchaser, owned the property, and prayed the court so to adjudge, though it did not ask that he be allowed to redeem.—*Backus v. Burke* (Minn.) 65 N. W. 459. 63 Minn. 272.

[e] (Wis.; 1897.)

Where the real party in interest, as against plaintiff, is made defendant by amendment, limitations continue to run in his favor till he is thus made a party, both at common law and under Rev. St. §§ 4239, 4240.—*Levy v. Wilcox* (Wis.) 10 N. W. 1109.

§ 28. Amendment of complaint.

[a] (Mich.; 1895.)

An amendment introducing a new cause of action cannot be permitted after the statute of limitations has run against the cause of action so sought to be set up.—*Pratt v. Montcalm Circuit Judge* (Mich.) 63 N. W. 506.

105 Mich. 499.

[b] (Mich.; 1895.)

A declaration containing merely common counts cannot, after the expiration of the statute of limitations, be amended so as to authorize recovery for breach of a special contract,

which could not have been proven under the common counts.—*Flint & P. M. R. Co. v. Donovan* (Mich.) 65 N. W. 582.

§ 29. New action after dismissal or failure of first.

[a] (Iowa; 1895.)

Code, § 2537, providing that where a plaintiff after commencement of an action fails to prosecute it for any reason other than negligence, a new suit brought within six months shall be deemed a continuation of the first does not apply where the action first commenced was prematurely brought, and dismissed for that reason.—*Hensinkveld v. Capital Ins. Co. of Des Moines* (Iowa) 61 N. W. 534.

[b] (Iowa; 1896.)

Where a suit on a policy is prematurely brought, and prosecuted to judgment, when plaintiff might at any time have dismissed without prejudice, and commenced a new action within the time limited by the policy, his failure in the action is because of "negligence in its prosecution," within McClain's Code, § 3742, providing that where plaintiff fails in his action, unless by "negligence in prosecution," a new suit within six months shall be deemed a continuance of the first suit.—*Wilhelmi v. Des Moines Ins. Co.* (Iowa) 68 N. W. 782.

[c] (Iowa; 1897.)

Where plaintiff relies on Code, § 2537 (providing that, if the plaintiff fails in a suit for any cause except negligence in its prosecution, a new suit brought within six months shall be deemed a continuation of the first), before such a suit can be held a continuation, plaintiff must show that the failure was from some such other cause.—*Pardey v. Incorporated Town of Mechanicsville* (Iowa) 70 N. W. 189.

§ 30. Presentation of claim against decedent's estate.

(Iowa; 1894.)

Under Code, § 2408, providing that claims against a decedent's estate shall be filed with the clerk, and 10 days' notice of the hearing thereof served on the executor, an action on a claim against the estate is commenced when the claim is filed, so as to prevent the running of the statute of limitations.—*Fritz v. Fritz* (Iowa) 61 N. W. 169.

93 Iowa, 27.

§ 31. Motion for rehearing.

(Mich.; 1895.)

The fact that a motion for a rehearing was made on appeal does not operate to stay the proceedings, so as to affect the running of the statute of limitations against a cause of action on a supersedeas bond.—*Busch v. Wilcox* (Mich.) 64 N. W. 485.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

Pleading facts tolling the statute, see post, § 40.

§ 32. Acknowledgment and new promise.

(Minn.; 1895.)

Where one of two judgment debtors and a third person executed to the judgment creditor a note for the amount of the judgment, reciting that it was given to secure an extension of time for payment of the judgment, it constituted an acknowledgment, and a new promise by such debtor.—*D. M. Osborne & Co. v. Heuer* (Minn.) 64 N. W. 1151.

62 Minn. 507.

§ 33. Part payment.

[a] (Minn.; 1897.)

In order to prevent the running of limitations, a partial payment must have been made

by the debtor himself, or for him by his authority, or subsequently ratified, if made in his name, without his authority.—*Pfenninger v. Kokesch* (Minn.) 70 N. W. 867.

[1b] (Minn.: 1897.)

Where one of two joint and several debtors makes a payment in his own behalf, the mere fact that the other debtor, after knowledge of such payments, verbally promises to pay the balance, will not constitute a ratification of the payments as having been made for him or in his behalf.—*Pfenninger v. Kokesch* (Minn.) 70 N. W. 867.

§ 34. Sufficiency.

(Iowa: 1895.)

Letters written by the maker of notes within 10 years before suit thereon, which refer to the notes as being not fully paid, revive the cause of action thereon, though there is no admission of the amount due.—*First Nat. Bank v. Woodman* (Iowa) 62 N. W. 28.

93 Iowa, 668.

§ 35. Who bound.

[a] (Iowa: 1896.)

Defendant gave to plaintiff's intestate a note secured by a mortgage upon certain lands. After the statute of limitations had run against the note, by indorsement on the back thereof he renewed his promise to pay, and continued the mortgage in force. Prior to this renewal, and before the statute had run, he conveyed a portion of the mortgaged premises to a third party; and, six years after the renewal, his grantee conveyed the same lands to intervenor. Neither intervenor nor his grantor had any knowledge or notice of the renewal. *Held* that, as to the tract so conveyed, the mortgage was barred by the statute of limitations. 63 N. W. 187 (1895) reversed.—*Cook v. Prindle* (Iowa) 66 N. W. 781.

[b] (Mich.: 1896.)

Plaintiff deposited with a third person money to be used by defendants in buying wheat for plaintiff; and defendants, after using the greater part of such money, went out of the business, and, more than six years before the commencement of an action to recover an alleged balance, turned over to such third person the amount of wheat on hand, and ordered such third person to turn it and the amount of the unused deposit over to plaintiff, but he failed to do so for more than a year from the time of the order. *Held*, that a payment of the unused deposit, made at such time, and within six years from the bringing of the action, could not take the case out of the statute.—*Sweet v. Ellis* (Mich.) 67 N. W. 535.

[c] (Mich.: 1897.)

Lands covered by mortgage were conveyed by the mortgagor, subject to the mortgage, which was then past due. All subsequent payments of interest were made by the vendee, in whose name the receipts therefor were given, no demand being made on the mortgagor. *Held* that, in the absence of anything to show that the payments by the vendee were made otherwise than for his own benefit, they did not arrest the running of the statute as to the mortgagor.—*Home Life Ins. Co. v. Elwell* (Mich.) 70 N. W. 324.

[d] (Neb.: 1896.)

If the trustee in a deed sells the premises, and pays the proceeds to the holder of the note secured, and the latter indorses such proceeds on the note, this is not such part payment as will take it out of the statute of limitations. *Campbell v. Baldwin* (1881) 130 Mass. 199, followed.—*Moffit v. Carr*, 67 N. W. 150, 48 Neb. 403.

§ 36. Statement for judgment by confession.

(Iowa: 1895.)

A statement of indebtedness made as the basis of a judgment by confession creates a new

cause of action, against which the statute of limitations will run independently of the original cause of action.—*Trenery v. Swan* (Iowa) 61 N. W. 947.

93 Iowa, 619.

§ 37. Revival of debt as revival of lien.

(Iowa: 1895.)

An admission or promise which suspends the operation of the statute of limitations, as against mortgage notes, keeps alive the lien of the mortgage.—*First Nat. Bank v. Woodman* (Iowa) 62 N. W. 28.

93 Iowa, 668.

IV. PLEADING AND PRACTICE.

§ 38. Pleading in general.

[a] (Iowa: 1896.)

Where a petition sets out the obstruction of a public street as a continuing nuisance, and claims damages from the time limitations began to run against the claim, a demurrer is properly sustained to a division of answer pleading limitations applicable to and running against such obstructions as a permanent nuisance.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

[b] (Mich.: 1897.)

Limitations must be pleaded.—*Shank v. Woodworth* (Mich.) 70 N. W. 140.

§ 39. Who may plead statute.

(Iowa: 1895.)

Plaintiff brought an action against the grantor and grantee in a deed to have it declared a mortgage, and to have the grantor's interest subjected to the payment of certain judgments against him which plaintiff, being liable on as surety, paid and took an assignment of. *Held*, that the statute of limitations, requiring the action by a surety to enforce his claim against the principal to be brought within five years from the date of payment of the claim by the surety, being personal to the principal, could not be pleaded in bar of the action by the grantee.—*Dunton v. McCook* (Iowa) 61 N. W. 977.

93 Iowa, 258.

§ 40. Pleading facts tolling the statute.

[a] (Iowa: 1895.)

The petition on a note barred by limitation alleged that, before the note became due, the payee became insane, and so remained until her death; that defendants, the makers, were her confidential friends, and were in possession of the note until she became insane, when they turned the note over to her, and, "by their fraudulent acts and actual fraudulent concealment, prevented plaintiff and the legal heirs of the said [payee] from obtaining knowledge of the existence of said note"; that none of the payee's relatives except defendants knew of the existence of the note until after the payee's death, when it was accidentally found among her papers. *Held* not to support the conclusion of fraudulent concealment by defendants.—*McNeill v. Sigler* (Iowa) 64 N. W. 604.

[b] (Minn.: 1895.)

Where stockholders seek to set aside a conveyance by the corporation for fraud committed more than six years before the action was begun, they must allege and show that the fraud was not discovered until within six years of the commencement of the action.—*Morrill v. Little Falls Manuf'g Co.* (Minn.) 62 N. W. 548.

60 Minn. 405.

[c] (Minn.: 1897.)

In an action for money loaned, an allegation is sufficient which alleges an indebtedness and part payment thereon at such times as would toll the running of the statute, without alleging words or acts indicating that the debtor acknowledged that more was due and would

be paid.—*Overman v. Loebertmann* (Minn.) 70 N. W. 1084.

§ 41. Burden of proof.

(S. D.; 1896.)

When a party has pleaded the statute of limitations as a defense to a promissory note, and such note is introduced in evidence by the opposing party, and it appears upon its face to be barred by the statute, the burden of proving such facts as will show the note is not in fact barred devolves upon the party claiming under the note.—*Dielmann v. Citizens' Nat. Bank* (S. D.) 66 N. W. 311.

§ 42. Waiver of defense.

(Neb.; 1897.)

The defense of the statute of limitations may be waived.—*Bell v. Rice* (Neb.) 70 N. W. 25.

V. CRIMINAL PROSECUTION.

§ 43. Time of commencement.

(Neb.; 1895.)

An indictment or information must be filed within the time specified by Cr. Code, § 256; merely the arrest of defendant on the complaint, and his examination thereunder, not being sufficient to bar the running of the statute.—*Bonghu v. State* (Neb.) 62 N. W. 1094.

44 Neb. 889.

§ 44. Right to plead limitations.

(Iowa; 1896.)

Under Code 1873, § 4399, providing that "there are but three pleas to an indictment" (guilty, not guilty, former conviction or acquittal), limitation is not the subject of plea, though the court should charge with regard to the time within which the alleged offense must have been committed to authorize a conviction.—*State v. Whalen* (Iowa) 68 N. W. 554.

LIMITED PARTNERSHIP.

See "Associations"; "Partnership," § 43.

LIQUIDATED DAMAGES.

See "Damages," §§ 7-9.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Notice in action to enforce lien, see "Mechanics' Liens," § 52.

[a] (Mich.; 1895.)

S. filed a bill against V. for an accounting of their partnership affairs, alleging a partnership between them for dealing in lands, and that V. held, for the benefit of the partnership, some title or interest in certain tracts of land, including the O. tract. At the same time S. filed a lis pendens. *Held*, that a bill filed by H., alleging that before S. filed the lis pendens, H., having a contract for the O. tract, sold an interest therein to V., and that, after the filing of the lis pendens, V. resold his interest therein to H., does not entitle H. to have the lis pendens discharged as a cloud on his title, his position being merely that of a purchaser after filing of lis pendens and before termination of suit.—*Hesselbacher v. Sprague* (Mich.) 62 N. W. 296.

104 Mich. 197.

[b] (Minn.; 1896.)

The office of a lis pendens is merely to charge a subsequent purchaser with notice of the pendency of the action.—*Jewett v. Iowa Land Co.* (Minn.) 67 N. W. 639.

64 Minn. 531.

[c] (Wis.; 1896.)

The purchaser of a tax certificate, pending a suit, to which his vendor is a party, to annul the certificate, is bound by the judgment, though no lis pendens was filed. Rev. St. § 3187, providing for filing a lis pendens applies only to the cases therein provided for.—*Brown v. Cohn* (Wis.) 69 N. W. 71.

LITTORAL RIGHTS.

See "Riparian Rights"; "Waters and Water Courses."

LIVERY STABLE KEEPERS.

Care of horses—Lien.

[a] (Minn.; 1896.)

Gen. Laws 1889, c. 199 (Gen. St. 1894, § 6248), does not give a lien to a servant of the owner for his services as groom or caretaker of horses or other domestic animals, but only to those, such as boarding stable keepers or agisters, who board or keep animals bailed to them for this purpose.—*Skinner v. Caughey* (Minn.) 67 N. W. 203.

64 Minn. 375.

[b] (Minn.; 1896.)

The owner of a horse bailed it to the keeper of a boarding stable, to be boarded and stabled, but hired the defendant to water, feed, groom, and exercise the animal. For these purposes, the defendant had exclusive charge of the horse, but he had nothing to do with furnishing it food or stabling, which were furnished by the keeper of the stable. *Held*, that defendant's services were merely those of a groom, and his custody of the animal merely that of a servant.—*Skinner v. Caughey* (Minn.) 67 N. W. 203.

64 Minn. 375.

[c] (Minn.; 1896.)

The lien of a livery or boarding stable keeper for his charges for keeping and caring for animals and vehicles at the request of the owner or person in lawful possession is acquired solely by virtue of Gen. St. 1894, § 6249, and by the terms of section 6250 is expressly made subordinate to the lien of any previously executed and properly filed chattel mortgage.—*Petzenka v. Dallimore* (Minn.) 67 N. W. 365.

64 Minn. 472.

[d] (Minn.; 1896.)

Where a horse, which is exempt from sale on execution, is delivered by the owner to the keeper of a livery or boarding stable, with a request to feed and care for him, it becomes thereby subject to a lien to secure such feed and keeping, as provided by Gen. St. 1894, § 6248.—*Flint v. Luhrs* (Minn.) 68 N. W. 514.

[e] (N. D.; 1895.)

The lien given a stable keeper by Comp. Laws, § 5486, is not lost, as against an attaching creditor of the owner, because at the time the attachment was levied the horse was in possession of the owner, who was using it in the usual manner, where the owner intended to return the horse to the stable as soon as he finished a temporary use of it, and the arrangement under which the horse was kept at the stable was in existence at the time of the levy.—*Welsh v. Barnes* (N. D.) 65 N. W. 675.

5 N. D. 277.

LIVE STOCK.

See "Animals."

Shipment by carrier, see "Carriers," § 14.

Killed or injured on track, see "Railroad Companies," §§ 51-67.

LOANS.

See "Bailment"; "Building and Loan Associations."

LOBBYING.

Contracts against public policy, see "Contracts," § 22.

LOCAL LAWS.

See "Constitutional Law," §§ 16-25.

LOCAL OPTION.

See "Intoxicating Liquors," §§ 3-7.

LOCAL PREJUDICE.

As ground for change of venue, see "Venue in Civil Cases," § 20.

LOCAL SELF-GOVERNMENT.

Invasion of right, see "Constitutional Law," § 63.

LOGS AND LOGGING.

- I. IN GENERAL, §§ 1-5.
- II. DRIVING LOGS, § 6.
- III. LIENS, §§ 7-10.

Assumpsit for advances, right to set-off, see "Set-off and Counterclaim," § 1.
Measure of damages for breach of contract to cut, see "Damages," § 20.
Place of taxing logs, see "Taxation," § 17.

I. IN GENERAL.

§ 1. Contract for sale.

(Mich.: 1895.)

In an action to recover for logs cut by plaintiff for defendant under a contract calling for logs of a certain standard, where it appears that some logs below that standard were accepted by defendant, plaintiff may recover their reasonable market value.—*Bresnahan v. Ross* (Mich.) 61 N. W. 793.
103 Mich. 483.

§ 2. Sales of standing timber.

[a] (Mich.: 1896.)

Timber sold to be removed from land within a specified time, and which remains uncut at the expiration of the time limited, reverts to the owner of the realty.—*Macomber v. Detroit, L. & N. R. Co.* (Mich.) 66 N. W. 376.

[b] (Mich.: 1896.)

Under a contract of sale of the timber on a tract of land to be "removed" in two years, timber that had been cut into logs before the end of that time, which still remained on the land, having been changed in kind and converted into personalty, will be considered as removed, and will not revert as forfeited to the owner of the

land.—*Macomber v. Detroit, L. & N. R. Co.* (Mich.) 66 N. W. 376.

§ 3. Sale of logs or lumber.

[a] (Mich.: 1895.)

3 How. Ann. St. §§ 8427a-8427c, giving laborers a lien on lumber, provide that no such claim shall "remain a lien" unless there shall be filed a statement within 30 days after the completion of such labor; and that any sale "during the time limited for the filing of said statement shall in no way affect such lien." *Held* that, where a purchaser of lumber agrees to pay for it as received and scaled, and the seller's employes, on delivery of the lumber within 30 days after manufacture, file liens in excess of its value, such purchaser is justified in declining to pay for the lumber until released from such liens or indemnified.—*Saxton v. Krein* (Mich.) 64 N. W. 868.

[b] (Wis.: 1895.)

A contract for the sale of logs provided that the vendor should retain the title solely as security for the price, and that they were to be paid for at a specified price per 1,000 feet, according to the scale to be thereafter made on the vendee's mill deck. The logs were delivered in vendee's boom at his mill, and the vendor did all that he was to do under the contract. *Held*, that the vendee was liable for the price of logs lost from the boom before they were scaled.—*Osborn v. South Shore Lumber Co.* (Wis.) 65 N. W. 184, 91 Wis. 526.

§ 4. Scaling or measuring logs.

[a] (Mich.: 1895.)

In an action to recover a balance due on a logging contract, it appeared that the logs cut thereunder were "to be scaled merchantable by" a certain individual named, and that at defendant's direction this person went to the woods, where the logs were on skids, and scaled them; but it was in evidence that at that time they were under two feet of snow, and that their ends were covered with ice. The contract called for logs cut from "good, sound, green, body timber," and no "rough, knotty, wormy, or top logs" were to be taken. *Held*, that it was for the jury to determine whether the scale so made was such a one as was called for by the contract.—*Bresnahan v. Ross* (Mich.) 61 N. W. 793.
103 Mich. 483.

[b] (Wis.: 1895.)

In an action for the price of logs bought as scaled by a designated scaler, it appeared that the scaler was competent; that he scaled the logs in three lots; that the scale of one lot was admitted to be correct; that he actually scaled all those of the second lot that he could reach easily, and, after counting the rest, averaged them with those of the lot already scaled; that he found the third lot partly scaled, with the scaled logs separated from the unscaled; that he actually scaled all those unscaled, and adopted the scale already made of the rest, after he had convinced himself that it was correct by scaling half of them; and that the methods adopted in scaling were those customary in the locality where the logs were situated. *Held* a fair scale, according to the usual method.—*McIntyre v. Rodgers* (Wis.) 65 N. W. 503.
92 Wis. 5.

[c] (Wis.: 1895.)

In an action for the price of logs bought on a given scale of a designated scaler, it appeared that the contract provided for a rescale, if desired, "by a competent scaler, acceptable to both parties, and appointed by the district scaler"; that a scaler appointed by the mill of which the vendee was president, without the consent or knowledge of the vendor, made a rescale. *Held*, that the rescale was not according to contract, and was not binding on the vendor.—*McIntyre v. Rodgers* (Wis.) 65 N. W. 503.
92 Wis. 5.

§ 5. Conversion of logs.

(Wis.; 1895.)

Sanh. & B. Ann. St. § 4149, providing that it shall constitute grand larceny to willfully take any log, being in any river, or on or near the bank of such river or adjoining land, and making the taker liable for twice the value of the logs converted, does not apply where the logs were situated 80 rods from the bank of a river.—Parkhurst v. Staples (Wis.) 64 N. W. 882, 91 Wis. 196.

II. DRIVING LOGS.

§ 6. Action on contract—Evidence.

(Minn.; 1895.)

In an action on a contract to drive defendant's logs to a certain boom, it could not be shown that plaintiff converted any number of the logs to its own use, or failed to drive any part of them to the boom, by proof as to the number of feet scaled after the logs had been driven an additional 150 miles beyond the boom by another contractor.—Itasca Lumber Co. v. Gale (Minn.) 64 N. W. 916.
62 Minn. 356.

III. LIENS.

§ 7. In general.

[a] (Minn.; 1896.)

Where logs were all delivered to a boom company in the same season by one party as the property of one owner, for the same purpose, for delivery at one place, to the same consignee, there was but one bailment of the logs, though, from the very nature of the business, they could not all arrive at their destination ready for delivery at the same time.—Akeley v. Mississippi & R. R. Boom Co. (Minn.) 67 N. W. 208.
64 Minn. 108.

[b] (Minn.; 1896.)

The lien of the M. & R. R. Boom Co. for boom charges on logs in its possession is valid, as against bona fide purchasers, though not recorded in the office of the surveyor general of logs and lumber; Gen. St. 1894, §§ 2405, 2408, not applying.—Akeley v. Mississippi & R. R. Boom Co. (Minn.) 67 N. W. 208.
64 Minn. 108.

[c] (Minn.; 1896.)

Under the provisions of the log lien law (Gen. St. 1894, §§ 2451-2464, inclusive), a cook and his assistant, employed at a logging camp for the purpose of cooking for the men actually and directly engaged in cutting, hauling, and banking logs, are entitled to liens upon such logs for the amount due for such services.—Breault v. Archambault (Minn.) 67 N. W. 348; Lane v. Same, *Id.*
64 Minn. 420.

[d] (Minn.; 1896.)

Held, further, that a blacksmith employed at such camp in shoeing the horses, in repairing the sleds, and in mending and keeping in order tools used by the men actually and directly engaged in the common enterprise, is also entitled to a lien upon the logs.—Breault v. Archambault (Minn.) 67 N. W. 348; Lane v. Same, *Id.*
64 Minn. 420.

[e] (Minn.; 1896.)

The manual labor for which a lien is given under section 2451 is not merely the personal labor of a lien claimant, but includes labor performed by his teams and servants under a contract for a gross price per month for both.—Breault v. Archambault (Minn.) 67 N. W. 348; Lane v. Same, *Id.*
64 Minn. 420.

[f] (Wis.; 1895.)

Rev. St. § 3329, provides that any person who performs labor on logs "shall have a lien" on the same, and section 3331 requires a written claim of lien to be filed within certain time. *Held*, that the lien attaches when the labor is performed, and is not defeated by the failure to file the claim in the lifetime of the debtor.—Viles v. Green, 61 N. W. 856, 91 Wis. 217.

§ 8. Enforcement.

[a] (Mich.; 1895.)

In an action by an employé of the holder of a tax title to enforce a logger's lien, the owners of the land may try the question of the validity of the tax title, where the only purpose of the holder thereof in going on the land was to cut the timber thereon.—Cook v. Cook (Mich.) 64 N. W. 12.

[b] (Mich.; 1895.)

In an action to establish a lien on the products of a sawmill, it appeared that defendant's tenants operated the sawmill, lumber camp, and farm; that defendant owned the farm, timber land, and products; that plaintiff was engaged in and about the mill, in the lumber camp, and on the farm; that his time had been kept, but was not apportioned; and that plaintiff was compelled to estimate the proportion of time which was devoted to the several departments of the work, and did apportion it. *Held*, that the question as to the amount for which plaintiff was entitled to a lien was for the jury.—Menery v. Backus (Mich.) 65 N. W. 235.

[c] (Mich.; 1895.)

Pub. Acts 1887, No. 229, provides that any person who performs any labor or services in manufacturing lumber, or cutting, skidding, scaling, or hauling any forest product, shall have a lien thereon. *Held*, that where a judgment in an action to foreclose such a lien states that the amount due plaintiff is for labor in manufacturing, cutting, skidding, scaling, and hauling the property mentioned in the declaration, and the declaration describes the property as lumber, boards, plank, and scantling, the judgment sufficiently shows, on collateral attack, that the claim was for services on the material out of which the lumber was manufactured.—Backus v. Barber (Mich.) 65 N. W. 379.

[d] (Mich.; 1895.)

A logging lien is not vitiated by an excessive levy thereunder.—Backus v. Barber (Mich.) 65 N. W. 379.

[e] (Mich.; 1895.)

Whether a levy under a logging lien is excessive is a question of fact.—Backus v. Barber (Mich.) 65 N. W. 379.

[f] (Mich.; 1896.)

Where one has separate contracts with several owners of separate, but adjoining, tracts of timber land to cut and put afloat logs from such land, an employé of the contractor cannot maintain an action on behalf of himself and others against the contractor and owners to establish a lien on the logs cut by the contractor on all the tracts, and mixed together, without showing the amount of labor each claimant did on the logs of each separate owner, or that the labor to be performed was necessarily to be performed indiscriminately on intermingled logs.—McGuire v. McCallum (Mich.) 67 N. W. 1092.

[g] (Wis.; 1896.)

In an action to enforce a lien for labor performed on lumber, where the petition for a lien was filed August 24, 1894, the plaintiff testified that his work on the lumber was continuous up to July 31st, but he also testified positively and repeatedly that the last work he did was done about the time the defendant finished hauling the lumber. In this respect he was corroborated by other witnesses and circumstances, and it further appeared by other testimony that the last lumber was hauled on July 6th. The plaintiff also

testified that the last work he did on the lumber was the work of sorting and piling, and it appeared from other testimony that the work of sorting and piling was completed on the 8th of July. *Held*, that the evidence was insufficient to justify a finding that plaintiff completed his work on the lumber within 30 days preceding the time of filing his claim for lien.—*McGinley v. Laycock* (Wis.) 68 N. W. 871.

[b] (Wis.; 1896.)

Rev. St. § 2331, giving liens for labor performed on lumber, provides that, if the labor is done between November 1st and May 1st, the claim shall be filed on or before June 1st, and that if it is done after May 1st, and before November 1st, or if the doing of it is "continuous from" November 1st, or a date prior thereto, and to a date beyond May 1st, the claim shall be filed within 30 days after the last day of doing such labor. *Held*, that the word "from" is used inclusively.—*McGinley v. Laycock* (Wis.) 68 N. W. 871.

[i] (Wis.; 1896.)

In an action to enforce a lien on lumber under Laws 1891, c. 139, for labor in manufacturing it, where it appears that plaintiff was employed by defendant in other capacities, plaintiff must show clearly how much time and labor he spent in manufacturing the lumber.—*Glover v. Hynes Lumber Co.* (Wis.) 69 N. W. 62.

§ 9. — Attachment.

[a] (Minn.; 1895.)

Where the attachment of logs, to enforce a laborer's lien thereon, in an action against a contractor, is otherwise regular, the fact that the sheriff certified that he had attached all the right, title, and interest of defendant in the logs does not render the attachment invalid.—*Brown v. Markham* (Minn.) 62 N. W. 123, 60 Minn. 233.

[b] (Minn.; 1895.)

Under Gen. St. 1894, § 2453, providing for an attachment of logs to enforce a laborer's lien thereon, a seizure of logs is valid when made by the sheriff of the county in which they are situated, under process directed by him by a court of the judicial district wherein is situated the surveyor general's office, in which the brand of the logs is recorded, though the county wherein the seizure was made is not within such judicial district.—*Foley v. Markham* (Minn.) 62 N. W. 123, 60 Minn. 216.

[c] (Minn.; 1895.)

A return of an attachment of logs, that the sheriff served a copy of the writ and inventory attached thereto on the surveyor general of the lumber district by handing to and leaving with him a true copy thereof, was insufficient, in failing to show that the copy was filed in the office of the surveyor general as required by Gen. St. 1894, § 2454.—*Scott & Holston Lumber Co. v. Sharvey*, 64 N. W. 1132, 62 Minn. 528.

§ 10. Waiver or loss.

[a] (Mich.; 1897.)

Where the owner of logs gave his notes for the saw bill, evidence that the sawyers discounted the notes, and protected them in the hands of the holders by collateral security, is incompetent to show a waiver of the lien for sawing.—*McEwan Bros. & Co. v. Carpenter* (Mich.) 69 N. W. 1117.

[b] (Minn.; 1896.)

A vendor of logs delivered them at the limits of the boom of the defendant boom company, but retained ownership of the marks of record as security for the price. Defendant took possession of the logs, and drove them to the vendee's mills, where it delivered part of them, and thereafter extended the time of payment of its boom charges by the vendee. *Held*, that the extension released defendant's lien on the logs remaining in its possession as against the lien of

the vendor.—*Clough v. Mississippi & R. R. Boom Co.* (Minn.) 66 N. W. 209.

64 Minn. 87.

[c] (Minn.; 1896.)

The lien of a boom company for charges on logs turned out without payment of their proper charges was merely a specific one on remaining logs of the same mark. In the course of business logs were arriving from time to time at the boom from one owner, deliverable to him on demand, and were being demanded from time to time as needed. At the end of each month the company's charges for boom fees were stated, and it accepted one note from the owner for the entire charges on all the logs, which were of many different marks, turned out during the month, without regard to how much was due for charges on logs of any particular mark. The notes were uniformly payable in 90 days, without regard to how many logs might be called for during that time, or how many would remain undelivered at its expiration, and were frequently renewed. They were also negotiable, and the company was in the habit of selling them on the market. There was no agreement that logs remaining in the company's possession should be retained as security for payment of the notes at maturity. *Held*, that there was a waiver by the company of any lien on the logs remaining in its possession for charges on logs previously delivered.—*Akeley v. Mississippi & R. R. Boom Co.* (Minn.) 67 N. W. 208, 64 Minn. 108.

LORD'S DAY.

See "Sunday."

LOST INSTRUMENTS.

Lost deeds, see "Deed," § 21.

Lost will, see "Wills," § 21.

Secondary evidence of contents, see "Evidence," §§ 10, 12-14.

Supplying lost indictment, see "Indictment and Information," § 2.

[a] (Mich.; 1894.)

In an action against a railroad company for breach of a lost contract, plaintiff testified it was signed by an officer of the company, who made a settlement with him for injuries, of which he claimed it was a part, and his attorney, while testifying that the contract was made and drawn, admitted that he was not sure that it was signed. *Held*, that the question whether the contract was made was for the jury.—*Brighton v. Lake Shore & M. S. Ry. Co.* (Mich.) 61 N. W. 550, 103 Mich. 420.

[b] (Wis.; 1895.)

In an action against heirs to quiet title under a lost, unrecorded deed from their intestate, plaintiff, on showing execution of the deed for the cancellation of a judgment, who the witnesses were, who took the acknowledgment, unconditional delivery of the deed to her husband for her, and cancellation of the judgment when the deed was made, is entitled to judgment vesting the title to the land in her.—*Matteson v. Hartman*, 65 N. W. 58, 91 Wis. 485.

LUMBER.

Lien on, see "Logs and Logging," §§ 7-10.

LUNATICS.

See "Insanity."

M.

MAGISTRATE.

See "Justices of the Peace."

MAINTENANCE.

See "Champerty and Maintenance."

Of wife separately, see "Husband and Wife," §§ 34, 35.

MALICE.

See "Homicide," § 4; "Libel and Slander," §§ 11-15; "Malicious Mischief"; "Malicious Prosecution," §§ 3, 4; "Threats and Threatening Letters," § 2.

MALICIOUS MISCHIEF.

(Iowa; 1895.)

On a trial, under Code, § 3985, for maliciously secreting and injuring a horse, it need not be shown that defendants knew who the owner of the horse was, if they acted with malice towards whomsoever might prove to be the owner.—*State v. Phipps* (Iowa) 64 N. W. 411.

MALICIOUS PROSECUTION.

I. WHEN ACTION LIES, §§ 1, 2.

II. MALICE—WANT OF PROBABLE CAUSE, §§ 3-8.

III. ADVICE OF COUNSEL, §§ 9, 10.

IV. PLEADING AND PRACTICE, §§ 11-15.

V. DAMAGES, §§ 16-18.

See, also, "Abuse of Process"; "False Imprisonment."

Maliciously suing out attachment, see "Attachment," §§ 65, 66.

I. WHEN ACTION LIES.

§ 1. For criminal prosecution.

[a] (Iowa; 1891.)

Where defendant furnished an inspector with facts on which he filed an information against plaintiff charging a distinct offense, defendant cannot escape liability for malicious prosecution on the ground that the prosecution was instituted through mistaken judgment on the part of the inspector. *Newman v. Davis* (1881) 10 N. W. 852, 58 Iowa, 449, distinguished.—*Holden v. Merritt*, 61 N. W. 390, 92 Iowa, 707.

[b] (Mich.; 1895.)

Instructions from which the jury would understand that the mere refusal to permit an inspection of the books would justify the issuing of the warrant for plaintiff's arrest, without regard to the other elements of a criminal conspiracy, and that if defendant's purpose was merely to enable a newspaper reporter to obtain access to the books for his personal purposes, as claimed by plaintiff, the refusal constituted an offense, were erroneous.—*Tryon v. Pingree* (Mich.) 70 N. W. 905.

[c] (Neb.; 1895.)

An action for malicious prosecution cannot be maintained where plaintiff was convicted, in the absence of proof impeaching the good faith of the court rendering the judgment of

conviction, or of the complainant in the criminal prosecution. *Murphy v. Ernst* (Neb.) 64 N. W. 353, 46 Neb. 1.

[d] (Wis.; 1895.)

A warrant for an arrest issued by a justice, and returnable before another justice, residing in another town of the same county, is regular on its face, so as to constitute the basis of an action for malicious prosecution and false imprisonment, under Rev. St. §§ 4740, 4776, providing that such a warrant shall direct the officer to bring the person before the justice issuing it or some other justice of the same county.—*Messman v. Ihlenfeldt*, 62 N. W. 522, 89 Wis. 585.

§ 2. Procuring criminal warrant in action for penalty.

(Wis.; 1895.)

An action for malicious prosecution will lie for maliciously and without probable cause procuring a criminal warrant to be issued on a complaint under Laws U. S. 1885, c. 161, providing for the recovery of a penalty for assisting the immigration of aliens under contract to perform labor, even though the statute is not criminal.—*Buethner v. Ellinger* (Wis.) 63 N. W. 756.

90 Wis. 439.

II. MALICE—WANT OF PROBABLE CAUSE.

§ 3. Malice—Evidence.

[a] (Iowa; 1894.)

Evidence of a statement by defendant that if plaintiff did not act peaceably, and behave himself, he would "put him behind the bars," is admissible to show malice.—*Holden v. Merritt* (Iowa) 61 N. W. 390.

92 Iowa, 707.

[b] (Iowa; 1895.)

Evidence that defendant said that plaintiff was a rascal, and that, before he got through with him, he would have him behind the bars, is admissible on the issue of malice.—*Hidy v. Murray* (Iowa) 69 N. W. 1138.

[c] (Minn.; 1895.)

Where plaintiff dismisses an action for malicious prosecution, and afterwards commences another suit against the same defendant on the same grounds, the bringing of the latter suit is evidence of malice.—*Severns v. Brainerd* (Minn.) 63 N. W. 477.

61 Minn. 265.

[d] (Neb.; 1896.)

Malice may be inferred from the fact that a criminal prosecution was instituted for the collection of a debt, rather than for the enforcement of the laws against crime. *Ross v. Langworthy* (1882) 14 N. W. 515, 13 Neb. 492, followed.—*Peterson v. Reisdorph*, 68 N. W. 943.

§ 4 — Question for jury.

(Iowa; 1897.)

Where the fact of plaintiff's discharge by the examining magistrate has placed on defendant the burden of showing probable cause, the question of malice should be submitted to the jury.—*Hidy v. Murray* (Iowa) 69 N. W. 1138.

§ 5. Probable cause for criminal prosecution.

[a] (Iowa; 1895.)

Where one institutes a criminal prosecution knowing that the facts did not authorize such action, there was no probable cause for the prosecution, and the finding of an indictment or the fact that a justice of the peace required plaintiff to enter into an undertaking to abide the or-

der of the district court is not conclusive proof of probable cause.—*Flackler v. Novak* (Iowa) 63 N. W. 348.

[b] (Mich.; 1895.)

A bookkeeper, hired for one year, fearing he was to be discharged before the expiration of that time, had a note payable to his employers discounted at a bank other than the one at which they did business, and retained enough of the proceeds to cover the amount of his unearned wages, knowing that he had no right to do so. *Held*, that there was probable cause for his prosecution by his employers for embezzlement.—*Rankin v. Crane* (Mich.) 61 N. W. 1007. 104 Mich. 6.

[c] (Mich.; 1895.)

The fact that a plaintiff in an action for malicious prosecution was discharged upon his examination is not conclusive evidence of a want of probable cause for the prosecution.—*Rankin v. Crane* (Mich.) 61 N. W. 1007. 104 Mich. 6.

[d] (Mich.; 1895.)

The fact that the defendants in an action for malicious prosecution offered to refrain from prosecuting the plaintiff if he would repay the money he had misappropriated is not sufficient to show a want of probable cause for the prosecution.—*Rankin v. Crane* (Mich.) 61 N. W. 1007. 104 Mich. 6.

[e] (Mich.; 1896.)

Evidence that there had been frequent thefts of goods from a railroad company; that plaintiff was with one who stole goods from the company; that such goods were afterwards found with goods belonging to plaintiff; and that plaintiff carried them away with him, and had them sent to his house,—sufficiently shows probable cause for the prosecution of plaintiff for receiving stolen goods with knowledge of the theft.—*Fletcher v. Chicago & N. W. Ry. Co.* (Mich.) 67 N. W. 330.

[f] (Minn.; 1896.)

Communications made to a person by others may constitute probable cause for instituting a prosecution, if the prosecutor had reasonable ground to believe, and did believe, the communications to be true.—*Smith v. Munch* (Minn.) 68 N. W. 19.

[g] (Neb.; 1896.)

An agent of a firm having taken money furnished him by the firm to invest in potatoes, and, after investing the same, having refused to deliver the potatoes unless the firm would pay him a certain sum demanded in settlement of a prior transaction, the firm caused him to be arrested for embezzlement. Before taking the money which he invested, the agent had voluntarily demanded the check previously offered him in settlement of the prior transaction, and received and cashed the same. *Held*, that the firm was justified in causing his arrest.—*Rider v. Murphy* (Neb.) 66 N. W. 837. 47 Neb. 857.

[h] (Neb.; 1896.)

A city marshal, who saw defendant selling liquor, and knew that he had no license to sell the same, had probable cause for instituting a prosecution of defendant for a violation of the liquor law.—*Fry v. Kaessner*, 66 N. W. 1126. 48 Neb. 132.

[i] (Wis.; 1896.)

In an action to recover damages for malicious prosecution, an instruction that, to warrant the arrest of a person for crime, the facts must be such as would justify an ordinarily intelligent and reasonably prudent person in entertaining the belief of guilt, is not erroneous.—*Billingsley v. Maas* (Wis.) 67 N. W. 49. 93 Wis. 176.

§ 6. — Evidence.

[a] (Iowa; 1894.)

Evidence that defendant, before making complaint, consulted an attorney in regard to

prosecuting plaintiff, is inadmissible on the question of probable cause; it appearing that the attorney gave no advice, but referred defendant to the United States officers.—*Holden v. Merritt* (Iowa) 61 N. W. 390. 92 Iowa, 707.

[b] (Iowa; 1897.)

In an action for malicious prosecution, the fact that the examining magistrate discharged plaintiff without evidence in his behalf is prima facie evidence of want of probable cause.—*Hidy v. Murray* (Iowa) 69 N. W. 1138.

[c] (Iowa; 1897.)

Evidence that, when defendant instituted the prosecution, which was for stealing chickens, he knew that a great many chickens had been stolen in the neighborhood, was properly excluded.—*Philpot v. Lucas* (Iowa) 70 N. W. 625.

[d] (Iowa; 1897.)

The acquittal of a defendant in a criminal prosecution is no evidence of want of probable cause.—*Philpot v. Lucas* (Iowa) 70 N. W. 625.

§ 7. — Province of court and jury.

[a] (Iowa; 1897.)

In an action for malicious prosecution, where the fact of plaintiff's discharge by the examining magistrate has placed on defendant the burden of showing probable cause, there is such a conflict of evidence as requires the issue to be sent to the jury.—*Hidy v. Murray* (Iowa) 69 N. W. 1138.

[b] (Mich.; 1895.)

When the evidence in an action for malicious prosecution is conflicting as to the facts claimed by plaintiff to show a want of probable cause, the court must specially instruct the jury what facts, when established, will justify a finding of want of probable cause.—*Rankin v. Crane* (Mich.) 61 N. W. 1007. 104 Mich. 6.

[c] (Mich.; 1895.)

In an action for malicious prosecution, in causing plaintiff's arrest for selling liquor without a license, a witness for defendant testified that defendant sent him to plaintiff to buy whisky, which he did, and brought it to defendant in a certain bottle. The next day the bottle was found to contain whisky. Plaintiff denied selling the witness whisky, but said he sold him wine under his "beer license." *Held*, that whether probable cause was shown was for the jury.—*Fine v. Navarre* (Mich.) 62 N. W. 142. 104 Mich. 93.

[d] (Minn.; 1896.)

What facts, and whether particular facts, constitute probable cause, is a question of law for the court.—*Smith v. Munch* (Minn.) 68 N. W. 19.

§ 8. Instructions.

[a] (Iowa; 1895.)

A charge that probable cause is a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty, is objectionable in failing to indicate the degree of caution required to ascertain the guilt of plaintiff.—*Flackler v. Novak* (Iowa) 63 N. W. 348.

[b] (Iowa; 1897.)

In an action for malicious prosecution in causing plaintiff to be arrested for an offense triable before a justice of the peace, by whom he was discharged, an instruction that the discharge "by a magistrate of a person accused of crime upon preliminary examination is prima facie evidence of want of probable cause" is inapplicable and erroneous.—*Philpot v. Lucas* (Iowa) 70 N. W. 625.

III. ADVICE OF COUNSEL.

§ 9. Submitting material facts to counsel.

[a] (Mich.: 1894.)

In an action for malicious prosecution, proof that defendant placed all the facts before the counsel, and acted upon his opinion, establishes probable cause.—*Le Clair v. Perkins* (Mich.) 61 N. W. 357.
103 Mich. 131.

[b] (Mich.: 1895.)

If a prosecutor has fairly submitted to his counsel all the facts that he knows are capable of proof, and has acted bona fide on the advice given, he is not liable in an action for malicious prosecution, even though the facts did not warrant the advice and prosecution.—*Pompard v. Dumas* (Mich.) 63 N. W. 301.
105 Mich. 326.

[c] (Mich.: 1896.)

That all the material facts were fairly submitted to an attorney of 18 years' experience, and that the criminal complaint was made on his advice, is a good defense to an action for malicious prosecution.—*Fletcher v. Chicago & N. W. Ry. Co.* (Mich.) 67 N. W. 330.

[d] (Neb.: 1896.)

The fact that counsel advised prosecutor to institute the prosecution is no defense, where prosecutor withheld material facts in stating the case to counsel.—*Peterson v. Reisdorph* (Neb.) 68 N. W. 943.

[e] (Wis.: 1896.)

Though a full statement of the facts, to a reputable attorney, and a criminal charge on his advice, in good faith, are a complete defense to an action for malicious prosecution, the question of good faith is one for the jury, where different conclusions might be drawn from the evidence.—*Billingsley v. Maas* (Wis.) 67 N. W. 49.
93 Wis. 176.

§ 10. Instructions.

(Wis.: 1895.)

Where the evidence shows that the complaint was merely signed by defendant, who was present at an investigation of the charge before a magistrate, upon defendant's being advised by the district attorney, who conducted the investigation, that the evidence was sufficient to warrant him in making the complaint, and there is no evidence that defendant made any statements or withheld any facts from the district attorney, it is proper to refuse a charge on the law applicable to the ordinary defense of advice of counsel, and to give an instruction to the effect that defendant's belief should be deemed reasonable if the testimony on such examination in his presence would lead a prudent man to believe that plaintiff was guilty, and defendant in fact so believed, especially when such belief was reinforced by the advice of the district attorney.—*Messman v. Ihlenfeldt*, 62 N. W. 522, 89 Wis. 585.

IV. PLEADING AND PRACTICE.

Evidence of malice, see ante, §§ 3, 4.
— of probable cause, see ante, § 6.

§ 11. Defenses.

(Neb.: 1897.)

Defendant cannot urge the insufficiency of the complaint on which he caused the plaintiff's arrest as a defense to the action.—*Minneapolis Threshing-Mach. Co. v. Regier* (Neb.) 70 N. W. 934.

§ 12. Complaint.

(Neb.: 1896.)

A petition in an action for malicious prosecution alleged that plaintiff was convicted in

the county and district courts; that the conviction was reversed by the supreme court, and the cause dismissed; that defendant was aware of facts which established plaintiff's innocence; that he had himself testified to those facts; that the conviction was not on any consideration of the evidence, but was due to a misapprehension of law. *Held*, that the petition sufficiently pleaded want of probable cause.—*Neher v. Dobbs* (Neb.) 66 N. W. 861.
47 Neb. 803.

§ 13. Pleading and proof.

(Mich.: 1895.)

Where the declaration stated that plaintiff's credit was impaired by his arrest, so that his creditors demanded security, it was proper to allow plaintiff to show that his creditors refused him further credit, and required him to execute a chattel mortgage as security.—*Pine v. Navarre* (Mich.) 62 N. W. 142.
104 Mich. 93.

§ 14. Evidence.

[a] (Iowa: 1894.)

In an action for malicious prosecution it appeared that defendant first complained of plaintiff to a United States deputy marshal, who sent an inspector to interview him. The inspector filed the information wholly on facts stated to him by defendant. *Held*, that testimony as to the conversation between defendant and the marshal was properly excluded.—*Holden v. Merritt* (Iowa) 61 N. W. 390.
92 Iowa 707.

[b] (Iowa: 1895.)

In an action for malicious prosecution, the pleadings and decree in an action between the same parties, wherein plaintiff claimed to be owner of the land, and relied upon the same facts to establish his rights that he relied upon in the criminal case for which he was prosecuted to justify his acts in destroying fences, are admissible to show that plaintiff had no right to destroy the fences in question, and that defendants had probable cause.—*Flackler v. Novak* (Iowa) 63 N. W. 348.

[c] (Mich.: 1896.)

In an action for malicious prosecution, the docket entry of the justice of the peace who conducted the criminal examination was inadmissible in so far as it embodied an unwarranted recital that the prosecution was discontinued by one who represented the prosecutor.—*Fletcher v. Chicago & N. W. Ry. Co.* (Mich.) 67 N. W. 330.

[d] (Mich.: 1896.)

In an action for malicious prosecution, a newspaper article, containing the details of the arrest, and other matter which was not shown to have been prompted by defendant or its agent, was admissible in so far as it stated the bare fact of arrest, but was inadmissible in so far as it stated what defendant intended to do in the matter.—*Fletcher v. Chicago & N. W. Ry. Co.* (Mich.) 67 N. W. 330.

[e] (Mich.: 1897.)

In an action for malicious prosecution, it appeared that defendant was mayor of a city whose charter authorizes him at all times to examine the books of the fire commissioners; that plaintiff and others prevented defendant from examining such books; and that defendant caused plaintiff to be arrested and prosecuted on a charge of conspiracy. *Held*, that it was error to exclude evidence to show, as claimed by plaintiff, that defendant's object in seeking to examine such books was merely to aid a newspaper reporter, who had been refused permission to examine them, in obtaining facts for a newspaper article.—*Tryon v. Pingree* (Mich.) 70 N. W. 905.

[f] (Neb.: 1897.)

To show the injury to his reputation, plaintiff may prove newspaper publications containing plain accounts of the prosecution, without

comment thereon.—Minneapolis Threshing-Mach. Co. v. Regier (Neb.) 70 N. W. 934.

§ 15. — Instigation of prosecution.

(Iowa; 1894.)

Evidence of statements by defendant that plaintiff had been opening his mail, and he could prove it, and that he would "put him where the dogs wouldn't bite him," and evidence that defendant complained to United States officers, and that an inspector, after an interview with defendant, filed the information on which plaintiff was arrested, and evidence that defendant afterwards said to plaintiff, "If you had behaved yourself and made no disturbance, I wouldn't have done anything with you," will sustain a finding that defendant instigated the prosecution, though there is no evidence that he ordered the process to issue, or participated in its execution.—Holden v. Merritt (Iowa) 61 N. W. 390.

92 Iowa, 707.

V. DAMAGES.

§ 16. Remote injury.

(Mich.; 1896.)

In an action for malicious prosecution, there was evidence that prior to his arrest plaintiff had been under surgical treatment, and had been advised by his physician to be careful about taking cold, and he testified that on his way to the examining justice he was compelled to be out in the cold, and that he suffered therefrom. It also appeared that plaintiff unnecessarily exposed himself to the weather while waiting for his examination. *Held*, that plaintiff's injury from the cold could not be considered in estimating damages.—Fletcher v. Chicago & N. W. Ry. Co. (Mich.) 67 N. W. 330.

§ 17. Excessive damages.

(Wis.; 1896.)

A verdict for \$3,500, as damages for malicious prosecution, where plaintiff was not in actual confinement, and was in custody but one hour, and was dismissed without an examination, and in the absence of other circumstances of aggravation, is excessive.—Billingsley v. Maas (Wis.) 67 N. W. 49.

93 Wis. 176.

§ 18. Instructions.

(Neb.; 1894.)

An instruction which, in effect, left the determination of general damages resulting from malicious prosecution to the jury, guided by their judgment as reasonable men, *held* proper, where no evidence of special damages had been offered.—Ellison v. Brown (Neb.) 61 N. W. 97, 43 Neb. 68.

MALPRACTICE.

§ 1. Degree of skill and care required.

[a] (Iowa; 1896.)

A physician is required to exercise only the average degree of skill possessed by physicians practicing in his locality.—Whitesell v. Hill (Iowa) 66 N. W. 894.

[b] (Iowa; 1897.)

A physician is required to exercise that degree of knowledge and care which physicians practicing in similar localities ordinarily possess, and not merely the knowledge, etc., possessed by physicians practicing "in his locality."—Whitesell v. Hill (Iowa) 70 N. W. 750.

[c] (Iowa; 1897.)

It appeared that there were several educated and experienced physicians who practiced in the town where defendant resided, and vicinity. *Held*, that plaintiff was not prejudiced by an instruction that a physician is required to

exercise that degree of skill, etc., possessed by physicians practicing "in his locality," instead of "in similar localities."—Whitesell v. Hill (Iowa) 70 N. W. 750.

[d] (Mich.; 1896.)

In a malpractice case, an instruction that defendant was required to use only the degree of care and skill of the physicians in his neighborhood is not ground for reversal, where there was evidence that there were other physicians in the neighborhood presumably of average ability, when compared with similar localities.—Pelky v. Palmer (Mich.) 67 N. W. 561.

§ 2. What constitutes negligence or malpractice.

[a] (Minn.; 1896.)

Unexplained, the fact that the physician attending a woman at childbirth failed to remove all the placenta, thereby occasioning blood poisoning, justified a conclusion of negligence.—Moratzky v. Wirth (Minn.) 69 N. W. 480.

[b] (Neb.; 1896.)

There being evidence in an action for malpractice that an operation should not be attempted for a suspected uterine or ovarian tumor without a most thorough examination of the patient; and that in all cases of doubt, the theory of pregnancy being excluded, the uterus should be explored by means of a sound, in order to ascertain its depth; and that defendant made a mere external examination of plaintiff's wife, not lasting over 10 minutes, for one of said troubles, though she was not deemed pregnant, by reason whereof the diagnosis was incorrect, and injury consequently resulted from the operation which followed,—it was error to direct a verdict for defendant.—Griswold v. Hutchinson (Neb.) 66 N. W. 819.

47 Neb. 727.

[c] (Wis.; 1896.)

In an action by a physician for services rendered in treating defendant's son, defendant filed a counterclaim for damages on account of unskillful treatment. There was evidence that the son got worse under plaintiff's treatment, and got better after plaintiff had been discharged. It appeared that other physicians were in attendance on the son, but their evidence was not produced, and no medical witness was called to show that the treatment was improper or negligent. *Held*, that there was no evidence to support the counterclaim, or entitling defendant to have the question of damages submitted to the jury.—Wurdeman v. Barnes (Wis.) 66 N. W. 111.

92 Wis. 206.

§ 3. Contributory negligence on part of patient.

[a] (Iowa; 1896.)

In an action for malpractice, the burden is upon plaintiff to show his freedom from negligence contributing to the result complained of.—Whitesell v. Hill (Iowa) 66 N. W. 894.

[b] (Iowa; 1896.)

Where plaintiff, in an action for malpractice, claimed that a certain bandage was negligently placed on his arm by defendant, causing him excessive pain, and defendant introduced evidence of directions given plaintiff, which, if followed, would have saved the trouble complained of, it was proper to instruct as to plaintiff's duty to follow defendant's directions, and as to the care which he should have used.—Whitesell v. Hill (Iowa) 66 N. W. 894.

§ 4. Action for negligence or malpractice.

(Wis.; 1897.)

A complaint in an action for malpractice was sufficient where it alleged that plaintiff's leg was broken; that he employed defendant to examine the injury and treat the leg; that defendant did examine it and undertook to

treat it; that he failed to ascertain that the leg was broken, or the extent of the injury; that he treated it as though it was not broken; and that by reason thereof plaintiff suffered much pain and was put to great expense, to his damage.—*Crowty v. Stewart* (Wis.) 70 N. W. 558.

§ 5. — Instructions.

[a] (Iowa; 1894.)

In an action for malpractice, a charge that, if plaintiff disobeyed defendant's orders, he cannot recover, does not shift to defendant the burden of proof as to contributory negligence, when a former instruction clearly placed the burden on plaintiff.—*Swanson v. French* (Iowa) 61 N. W. 407.

92 Iowa, 695.

[b] (Iowa; 1896.)

Where, in an action for malpractice alleged to have caused the disablement of plaintiff's arm, the answer charged that plaintiff was guilty of contributory negligence, it was proper to instruct as to the care required of plaintiff, and his necessity to follow defendant's instructions.—*Whitesell v. Hill* (Iowa) 66 N. W. 894.

[c] (Iowa; 1897.)

In an action against a physician for malpractice, the court charged that a physician must exercise the average degree of skill possessed by physicians in his locality, and that negligence consists in the doing by defendant, in treating plaintiff, of some act which a physician possessing such average skill would not do under like circumstances, or the omission to do some act which such a physician would ordinarily do under like circumstances. *Held*, that the instructions were not inconsistent.—*Whitesell v. Hill* (Iowa) 70 N. W. 750.

[d] (Mich.; 1896.)

An instruction requiring a judgment for defendant unless plaintiff shows, by a preponderance of the evidence, a state of facts from which no other "rational conclusion" can be drawn than that defendant was unskillful, requires too high a degree of proof on plaintiff's part.—*Pelky v. Palmer* (Mich.) 67 N. W. 561.

§ 6. Measure of damages.

(Neb.; 1896.)

In an action for malpractice in setting and treating a broken arm, the measure of damages is the damage accruing to plaintiff in excess of that which would have accrued naturally from the breaking of his arm had he been treated with that degree of skill ordinarily possessed by surgeons, and not the damage resulting from the breaking of the arm.—*Miller v. Frey* (Neb.) 68 N. W. 630.

MANDAMUS.

- I. WHEN LIES—JURISDICTION, §§ 1-9.
- II. TO COURTS AND OFFICERS THEREOF, §§ 10-13.
- III. TO STATE BOARDS AND OFFICERS, § 14.
- IV. TO MUNICIPAL BOARDS AND OFFICERS, §§ 15-20.
- V. TO PRIVATE CORPORATIONS, §§ 21, 22.
- VI. PROCEDURE, §§ 23-29.

Appeal from writ, see "Appeal," § 8.

Manner of serving writ, delegation of legislative power to court or judge, see "Constitutional Law," § 15.

To compel count of rejected votes, see "Elections and Voters," § 21.

— issuance of license to sell intoxicating liquors, see "Intoxicating Liquors," § 11.

— levy of assessment, for drains, see "Drainage," § 9.

To compel canvass of votes, see "Elections and Voters," § 22.

To enforce right of access to records, see "Records," § 1.

I. WHEN LIES—JURISDICTION.

Original jurisdiction of supreme court, see "Courts," § 14.

§ 1. When lies.

[a] (Neb.; 1896.)

Mandamus will not issue to compel officers of the grand lodge of a society to notify subordinate lodges that all action taken by respondents looking to an abandonment of the regular session of the grand lodge is void, and to direct said lodges to elect representatives to the grand lodge, as prescribed by the by-laws, if such officers are not charged with that particular duty by either constitution or by-laws.—*Lafin v. State* (Neb.) 68 N. W. 1022.

[b] (Neb.; 1896.)

One employed to teach in a public school is not a public officer, but his rights rest on contract; hence mandamus will not lie to compel the district school board to permit him to take charge of the school under his contract.—*State v. Smith* (Neb.) 69 N. W. 114.

[c] (S. D.; 1896.)

Mandamus will not lie to compel the disbursing officer of a municipal corporation to pay out public funds in open disobedience of a restraining order made by a court of competent jurisdiction.—*Wilmarth v. Ritschlag* (S. D.) 68 N. W. 312.

§ 2. Remedy by assumpsit.

(Mich.; 1896.)

The defendant county was at one time a part of plaintiff county, and was set off and organized subsequent to the state equalization of 1881. In the apportionment of state taxes for the years 1883, 1884, and 1885, the defendant county was not mentioned, and, as a result, the tax for the whole territory was apportioned to and paid by plaintiff county. *Held* that, as plaintiff county had an adequate remedy by assumpsit to recover the amount of the taxes so paid, mandamus would not lie to compel defendant county to raise the amount by tax upon property within its limits.—*Board of Sup'rs of Bay County v. Board of Sup'rs of Arenac County* (Mich.) 69 N. W. 146.

§ 3. Remedy by appeal or writ of error.

[a] (Mich.; 1895.)

Appeal, and not mandamus, is the proper remedy to review an order made pursuant to findings of the court based upon the merits of a case in chancery.—*Sherwood v. Ionia Circuit Judge* (Mich.) 63 N. W. 509.

105 Mich. 540.

[b] (Mich.; 1897.)

Where an order issued on an application for a writ of assistance is erroneous, the remedy of the parties aggrieved is by appeal, and not by mandamus.—*Aldrich v. Donovan* (Mich.) 69 N. W. 1108.

[c] (Mich.; 1897.)

Mandamus will not issue to compel a circuit judge to vacate an order denying a motion to quash a summons for insufficient service, and to grant the motion; the remedy by writ of error being adequate.—*Michigan Mut. Fire Ins. Co. of Lansing v. Donovan* (Mich.) 70 N. W. 582.

§ 4. To determine validity of county seat election.

(N. D.; 1896.)

Where there is no other adequate and speedy remedy to test the validity of an election held to relocate a county seat, mandamus to compel the county officers to hold their offices

at the legal county seat is the proper remedy to determine whether the county seat has been legally changed.—*State v. Langlie* (N. D.) 67 N. W. 958.
5 N. D. 594.

§ 5. Trial of title to office.

(Neb.; 1896.)

The title to an office cannot be tried and adjudicated in an action of mandamus.—*State v. Smith* (Neb.) 69 N. W. 114.

§ 6. — Enforcing right of possession.

[a] (N. D.; 1895.)

An action of mandamus to compel a county officer, who is merely holding over after the expiration of his term, to turn over the office to plaintiff, who holds a certificate of election, and has duly qualified, cannot be defeated by an answer which admits plaintiff's prima facie title, but alleges facts which would require a trial of title in another form of action.—*State v. Callahan* (N. D.) 61 N. W. 1025.
4 N. D. 481.

[b] (N. D.; 1895.)

Mandamus will issue to admit in office a candidate holding a valid certificate of election, who has qualified by taking the official oath, furnishing an official bond, and who has demanded possession of the incumbent.—*State v. Callahan* (N. D.) 61 N. W. 1025.
4 N. D. 481.

[c] (N. D.; 1896.)

Mandamus is the proper remedy to compel one who has no color of title to an office to surrender it to one who holds the prima facie title to it.—*State v. Archibald* (N. D.) 66 N. W. 234.
5 N. D. 359.

§ 7. Collection of taxes.

(Mich.; 1895.)

Mandamus will not lie for the collection of taxes where other adequate remedy is provided. *Grant, J., dissenting.*—*Eyke v. Lange* (Mich.) 63 N. W. 535.
104 Mich. 26.

§ 8. Demand before instituting proceeding.

[a] (Mich.; 1897.)

Where a recount of votes for alderman was not completed by a committee of the common council till late Saturday night, a petition for mandamus filed on the following Monday afternoon, requiring the council to issue to petitioner his certificate, based on the original returns, was properly granted, without a previous application to the council, their next meeting being on Monday night, at which time they could have acted on the recount before petitioner's application could be presented.—*Hilton v. Common Council of City of Grand Rapids* (Mich.) 70 N. W. 1043.

[b] (Neb.; 1896.)

Where a county board, after allowing a claim against the county, on a reconsideration disallowed the same, the claimant was not required to make a formal demand on the board, after the disallowance, for the drawing of a warrant for the claim as first allowed before applying for mandamus to compel the board to take that action, since the disallowance on the reconsideration was equivalent to a positive refusal to draw the warrant.—*State v. Bushhausen* (Neb.) 68 N. W. 950.

[c] (S. D.; 1895.)

Where the law imposes on an officer unconditionally an imperative duty, which he neglects to perform, no personal demand on him to perform the act is required before instituting mandamus proceedings against him.—*Heintz v. Moulton* (S. D.) 64 N. W. 135.

§ 9. Raising question of constitutionality of statute.

[a] (Neb.; 1895.)

Ministerial officers, on whom the legislature has sought to impose a duty by statute, may assert the unconstitutionality of the statute as a defense to a proceeding to compel them to perform the supposed duty.—*Van Horn v. State*, 64 N. W. 365, 46 Neb. 62.

[b] (N. D.; 1896.)

In a mandamus proceeding by one elected judge of a municipal court created by Rev. Codes, § 2209, to compel the mayor and auditor of the city for which he was elected to issue warrants for his salary, respondents could raise the question of the constitutionality of said section.—*McDermont v. Dinnie* (N. D.) 69 N. W. 294.

II. TO COURTS AND OFFICERS THEREOF.

§ 10. Review pending proceedings below.

(Mich.; 1895.)

Mandamus will not lie to review questions arising during a proceeding until after final judgment.—*Walsh v. St. Clair Circuit Judge* (Mich.) 64 N. W. 1045.

§ 11. Compelling court to assume jurisdiction.

(Mich.; 1895.)

Where an inferior court has refused to entertain jurisdiction of a matter preliminary to a hearing on the merits, mandamus is an appropriate remedy.—*Brown v. Mesnard Min. Co.* (Mich.) 63 N. W. 1000; *Same v. Pontiac Min. Co., Id.*; *Same v. Houghton Circuit Judge, Id.* 105 Mich. 653.

§ 12. Compelling reception of verdict.

(Neb.; 1896.)

The duty of the district court to receive a verdict sufficient in form and responsive to the issues, and to enter the same of record, is ministerial, and hence may be enforced by mandamus issued out of the supreme court.—*State v. Beall* (Neb.) 67 N. W. 868.
48 Neb. 817.

§ 13. Compelling court to vacate decree.

[a] (Mich.; 1895.)

An order of the trial court permitting amendments, part of which are properly allowed, will not be vacated on mandamus proceedings.—*Flint & P. M. R. Co. v. Donovan* (Mich.) 65 N. W. 583.

[b] (Mich.; 1896.)

A party failed to take its proofs in an important case within the time fixed, by reason of the illness of one of its solicitors, and an order extending the time was granted by the circuit court commissioner. *Held*, on the facts of the particular case, that the circuit court would be required to vacate an order closing proofs, entered regardless of the extension given by the commissioner.—*Lansing Lumber Co. v. Ingham Circuit Judge* (Mich.) 66 N. W. 41.

[c] (Mich.; 1896.)

Where, after a return of nulla bona, a judgment creditor's bill was filed, and a receiver appointed, and the judgment debtor moved in the suit at law to set aside the return, and in the equity suit filed a plea setting up that he had property subject to sale on execution, and conflicting affidavits were filed by both parties, mandamus to compel the circuit judge to vacate orders setting aside the return and vacating the order appointing the receiver will be denied.—*William Wright Co. v. Frazer* (Mich.) 66 N. W. 954.

[d] (Mich.; 1896.)

Mandamus lies to compel the vacation of a judgment by default where the judgment defendant's uncontradicted petition states that

there was no service on him, that he did not know of the entry of any rule or order or judgment until after the expiration of the time for bringing a writ of error, and that, on learning of the proceedings, he moved to vacate them, and the motion was denied, and the testimony brought up with the petition does not show any fault on his part to the plaintiff.—*Campbell v. Donovan* (Mich.) 69 N. W. 514.

III. TO STATE BOARDS AND OFFICERS.

§ 14. Compelling award of state contract.

(Neb.; 1897.)

Act 1883 provides that no bid for state printing shall be considered unless accompanied by a bond conditioned to give bond for performance of the contract, if awarded. *Held*, that the bidder, though otherwise entitled to the contract, was not entitled to mandamus to compel the awarding thereof to him, without showing that his bid was accompanied by the required bond.—*State v. Bartley* (Neb.) 70 N. W. 367.

IV. TO MUNICIPAL BOARDS AND OFFICERS.

Necessity of demand, see ante, § 8.

§ 15. Subjects of relief.

[a] (Mich.; 1896.)

Mandamus will issue to compel the board of health to award compensation to one whose property it has occupied or destroyed to prevent the spread of contagious disease.—*Safford v. Board of Health of City of Detroit* (Mich.) 67 N. W. 1094.

[b] (Mich.; 1897.)

Where an illegality exists, in a municipal election authorizing the issuance of bonds, which would constitute ground for enjoining their issuance at the suit of a taxpayer, an officer charged with the duty of signing the bonds may refuse to act, though the result of the election has been officially declared, and may set up such illegality in defense to a mandamus proceeding to compel his action.—*Daniels v. Long* (Mich.) 69 N. W. 1112.

[c] (Mich.; 1897.)

Mandamus will not lie to compel a city to contract with relator for the official printing, where such contract has been let to another and partly performed.—*Clark v. City of West Bay City* (Mich.) 70 N. W. 581.

[d] (Minn.; 1896.)

Where a county board illegally strikes the names of electors from a petition for the removal of a county seat, so that the number thereon is reduced below the minimum prescribed for a valid petition, mandamus will lie to compel a restoration of the names.—*State v. Geib* (Minn.) 68 N. W. 1081.

[e] (Neb.; 1894.)

Where no election is held on the day designated by the charter for the annual election of village officers, the president and board of trustees should call an election at the earliest practical day, and mandamus will lie to compel the performance of such duty.—*State v. Young* (S. D.) 61 N. W. 165.

6 S. D. 406.

[f] (Neb.; 1896.)

Mandamus will not lie to compel the school board to purchase text-books for the use of pupils when there are not sufficient funds in the treasury of the school district to pay the regular running expenses of the school, and also to furnish the books.—*Harris v. State* (Neb.) 65 N. W. 890, 46 Neb. 857.

[g] (Neb.; 1896.)

A mandamus will issue, even after the expiration of the term of office of a county clerk, to compel him to perform the duty of reporting all the fees of his office, and also to pay into the treasury of the county any excess above the amount he was entitled by law to retain.—*State v. Boyd* (Neb.) 68 N. W. 519.

[h] (Neb.; 1897.)

A mandamus will not issue to a county board to compel the construction of a drain ditch, under Comp. St. c. 89, art. 1, where the relator is not shown to be interested in the improvement, independent of that which he has in common with the public at large.—*Van Horn v. State* (Neb.) 70 N. W. 941.

§ 16. To enforce right of redemption.

(Minn.; 1895.)

Where, by reason of an ineffectual attempt to give the statutory notice of expiration of the period for redeeming from a tax sale, the period has not expired, mandamus will lie to compel the county auditor to allow a redemption and to execute a certificate thereof.—*State v. Halden* (Minn.) 64 N. W. 568.

62 Minn. 246.

§ 17. Removal of schoolhouse.

(S. D.; 1895.)

Under Laws 1893, c. 5, § 1, providing that the patrons of a school may petition the school board for the removal of a schoolhouse to a more convenient location, or for the erection of a new one, but that nothing shall prevent the board from exercising a sound discretion as to the propriety or expediency of acceding to the petition, mandamus will not lie to compel school officers to remove a schoolhouse after petition therefor by the patrons of the school and a refusal of the officers to remove the house.—*Heintz v. Moulton* (S. D.) 64 N. W. 135.

§§ 18, 19. Compelling approval and payment of claims.

[a] (Minn.; 1895.)

When there is sufficient money in the city treasury to the credit of the appropriate fund to pay a valid claim against the city, mandamus will lie to compel the city comptroller to audit and adjust the claim, and report it to the city council for payment.—*State v. McCurdy* (Minn.) 64 N. W. 1133.

62 Minn. 509.

[b] (Neb.; 1895.)

A city treasurer will not be compelled by mandamus to pay warrants of the city, which the city has directed him not to pay.—*State v. Cook*, 61 N. W. 693, 43 Neb. 318.

[c] (Neb.; 1895.)

The supreme court has no authority to compel, by mandamus, a county board to allow a claim against such county, though the court may be of opinion that such claim is a valid obligation against the county, and that it has no defense thereto.—*State v. Merrell* (Neb.) 61 N. W. 754, 43 Neb. 575.

[d] (S. D.; 1894.)

Since Laws 1891, c. 56, forbids the employment of any school teacher unless holding a lawful certificate, and makes an attempted contract therefor void, in a proceeding in mandamus to compel a school treasurer to pay an order for services of a teacher, an answer denying that such teacher held the necessary certificate presents a material issue, to be determined before granting the writ.—*Hardy v. Purinton* (S. D.) 61 N. W. 158.

6 S. D. 382.

§ 20. — Payment of judgment.

[a] (Neb.; 1896.)

A writ of mandamus to compel county officers to pay judgments against the county is

not void because the judgments were void.—Boasen v. State (Neb.) 66 N. W. 303.
47 Neb. 245.

[b] (Neb.; 1896.)

The merits of a case in which a judgment was rendered against a county cannot be inquired into in mandamus proceedings, instituted on the relation of the judgment creditor to compel payment of the judgment by the county commissioners.—Stenberg v. State (Neb.) 67 N. W. 190.
48 Neb. 299.

[c] (Neb.; 1896.)

A county cannot be permitted, in mandamus proceedings to compel it to pay a judgment against it, to interpose a set-off against the judgment.—Stenberg v. State (Neb.) 67 N. W. 190.
48 Neb. 299.

V. TO PRIVATE CORPORATIONS.

§ 21. To railroad companies.

(Neb.; 1896.)

The duty of railroad companies to construct or repair viaducts within the city of Omaha may be enforced by writ of mandamus.—Chicago, B. & Q. R. Co. v. State (Neb.) 66 N. W. 524.
47 Neb. 549.

§ 22. To street-railway company.

(Mich.; 1896.)

Mandamus will lie to compel a street-railway company to pave the street between its tracks as required by the ordinance granting it the franchise to lay the tracks upon the street.—City of Lansing v. Lansing City Electric Ry. Co. (Mich.) 66 N. W. 949.

VI. PROCEDURE.

§ 23. In general.

[a] (Neb.; 1895.)

The practice of attacking the application for a writ of mandamus by motion or demurrer is irregular.—State v. Home St. Ry. Co. (Neb.) 62 N. W. 225, 43 Neb. 830.

[b] (Neb.; 1896.)

Under Code Civ. Proc. § 649, requiring an application for mandamus to be made by motion supported by an affidavit stating the facts upon which the application is predicated, an application for mandamus, based solely upon a petition verified the same as a pleading in a civil action under the Code, is properly denied.—State v. Commissioners of Lancaster County (Neb.) 68 N. W. 336.

§ 24. Who may apply for writ.

[a] (Neb.; 1895.)

A member of a county board may be relator in a proceeding to compel the board to perform a duty imposed by law.—Cooperrider v. State, 64 N. W. 372, 46 Neb. 84.

[b] (Neb.; 1896.)

The duty enjoined upon the owner of milldams to construct and maintain fishways by Cr. Code, § 87a, is designed to promote the public welfare, and may be enforced by mandamus, on the relation of the county attorneys of the several counties.—West Point Water Power & Land Imp. Co. v. State (Neb.) 66 N. W. 6.

[c] (S. D.; 1896.)

Const. art. 9, § 2, provides that in counties already organized, where the county seat has not been located by a majority vote, the county board shall submit the location of the county seat to the electors of said county at a general election. *Held*, that a citizen of the United States who is a resident freeholder, taxpayer, and elector of the county has such interest in the matter as entitles him, as relator, to apply

for a writ of mandamus to compel such board to perform the duty prescribed by such section.—State v. Lien (S. D.) 68 N. W. 748.

§ 25. Parties.

[a] (Neb.; 1895.)

To compel, by mandamus, a corporation to perform a corporate duty, other corporate officers than stockholders as such must be made parties defendant.—State v. Home St. Ry. Co. 62 N. W. 225, 43 Neb. 830.

[b] (Neb.; 1895.)

There was no defect of parties to a proceeding by members of a county board to compel the performance of a duty imposed on the board by statute, where all the members of the board who were not relators were made respondents.—Cooperrider v. State (Neb.) 64 N. W. 372, 46 Neb. 84.

[c] (Neb.; 1895.)

In a proceeding against a county board to compel the performance of a duty, it was proper to name as respondents, and direct the writ against, the individual members of the board in their official capacity.—Cooperrider v. State, 64 N. W. 372, 46 Neb. 84.

[d] (S. D.; 1895.)

In mandamus proceedings to enforce a private right the real party in interest, and not the state, should be named as plaintiff.—Heintz v. Moulton (S. D.) 64 N. W. 135.

[e] (S. D.; 1895.)

In mandamus proceedings to enforce a private right against the majority of a school board, where it appears that plaintiff is the chairman of the board, and has at all times held himself in readiness to perform the act sought to be enforced, he is not a necessary party defendant as such chairman.—Heintz v. Moulton (S. D.) 64 N. W. 135.

§ 26. Pleading.

[a] (Neb.; 1895.)

Allegations in an application for a mandamus, showing a special interest of the relator, need not be stricken out as immaterial, even in a case where it is not necessary to show such interest.—State v. Home St. Ry. Co. (Neb.) 62 N. W. 225, 43 Neb. 830.

[b] (Neb.; 1896.)

Since pleadings in mandamus proceedings are to be construed as those in ordinary civil actions (Code Civ. Proc. § 653), a material averment in a petition for mandamus, which is not denied by the answer, is taken as true.—State v. Bushhausen (Neb.) 68 N. W. 950.

[c] (Neb.; 1896.)

Where an alternative writ of mandamus alleged that respondent, as treasurer of a city, had collected a certain sum from specified sources, of which, under the statutes, as its pro rata share according to the school census taken for the proper year, it was the duty of respondent to pay to the relator school district a certain amount, and that on demand respondent had refused to pay any part of such sum to relator, claiming that the same belonged only to the city, it was not subject to demurrer, on the ground that the right of relator to the fund was not particularly described as disclosed by the school census.—King v. State (Neb.) 69 N. W. 307.

[d] (S. D.; 1894.)

Comp. Laws, § 5521, provides that in proceedings for a mandamus the party against whom the writ is asked "may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action." *Held*, that an answer which denies "each and all the allegations in the affidavit contained, except such as are hereinafter admitted or qualified," is a sufficient denial.—Hardy v. Purinton (S. D.) 61 N. W. 158.
6 S. D. 382.

[e] (Wis.; 1897.)

The alternative writ of mandamus and return are governed by the same rules as plead-

ings in other civil actions, and allegations of the writ, not denied in the return, are admitted.

State v. City of Oshkosh (Wis.) 70 N. W. 500.

§ 27. Variance between petition and writ.

(Neb.; 1896.)

A petition for mandamus to compel officers of a benevolent society to notify subordinate lodges that all action taken by respondents looking to an abandonment of a session of the grand lodge prescribed by the constitution is void, and to direct the subordinate lodges to elect representatives to that session of the grand lodge in the manner prescribed by the by-laws, was in fatal variance with a writ commanding respondents to immediately inspect the proceedings of the subordinate lodges touching the abandonment of said session, and to require said proceedings to conform to the laws of the society.—Lalim v. State (Neb.) 68 N. W. 1022.

§ 28. Effect of demanding excessive relief.

(Iowa; 1895.)

The fact that petitioner in mandamus proceedings to compel the officers of a corporation to permit him to examine the corporate books asks that the officers be compelled to permit him to examine some books which he has no right to examine does not justify the court in refusing him all relief.—Ellsworth v. Dorwart (Iowa) 63 N. W. 588.

§ 29. Time of entering judgment.

(S. D.; 1894.)

Comp. Laws, § 5527, relating to proceedings in mandamus, and providing that, "if judgment be given for the applicant, he may recover the damages, * * *; and a peremptory mandamus must also be awarded without delay," contemplates the entry of a judgment before the issuance of the peremptory writ.—State v. Young (S. D.) 61 N. W. 103, 6 S. D. 406.

MANDATE.

See "Appeal," §§ 296-301; "Bailment"; "Mandamus"; "Powers."

MANSLAUGHTER.

See "Homicide," §§ 11-13.

MANUFACTURES.

Contract to manufacture goods, effect of statute of frauds, see "Frauds, Statute of," § 23. Measure of damages for breach of contract to manufacture goods, see "Damages," § 21. Place of taxing manufacturers, see "Taxation," § 16.

MANUFACTURING CORPORATIONS.

Liability of stockholders, see "Corporations," § 72.

MAPS.

As evidence, see "Evidence," § 83.

MARGINS.

Dealing in, see "Gaming," § 3.

MARINE INSURANCE.

[a] (Mich.; 1895.)

Defendant, by its policy, written upon a blank marine policy, insured plaintiff against loss by fire of a certain vessel and appurtenances therein described from December 4, 1893, till May 1, 1894. The policy contained a warranty by plaintiff that the vessel should navigate only certain waters "between noon of April 1st and noon of November 30th; * * * and between noon of November 30th and noon of April 1st ensuing said vessel shall be laid up and safely moored, satisfactorily to this company." Riders on the policy gave "permission to do painting and to make necessary repairs and to fit out in the spring," while the steamer was "laid up and properly moored in" a certain harbor, and to "move from dock to dock for the purpose of loading and unloading cargo," and limited the risk to loss by fire, and provided that the policy was issued "on the terms and conditions of the standard form fire policy of the state of New York," and waived anything in the policy conflicting therewith. The standard policy adopted provides that the same shall become void if mechanics are employed in repairing more than 15 days. The vessel was destroyed by fire while navigating waters outside of the designated harbor between April 1 and May 1, 1894. Held, that plaintiff was entitled to recover for such loss. Grant, J., dissenting.—Jackson v. British America Assur. Co. (Mich.) 63 N. W. 899.

[b] (Mich.; 1895.)

Under a provision in a fire policy on a vessel that the insurer shall not be liable for more than it would cost the insured to repair or replace the same with material of like kind and quality, the insured cannot be compelled to prove the exact extent of the damage, where the vessel, while burning, sunk in water so deep that she could be examined only by divers.—Jackson v. British America Assur. Co. (Mich.) 63 N. W. 899.

[c] (Mich.; 1895.)

Where, in an action on a fire policy on a vessel, a witness, in answer to a question as to the extent of the injury to the vessel, states that for rebuilding purposes she is a total loss, and then voluntarily adds that he could not estimate the cost of repair, such witness may, after cross-examination, be asked whether he considers the boat in her present condition a total loss.—Jackson v. British America Assur. Co. (Mich.) 63 N. W. 899.

MARITIME LIENS.

§ 1. What the subject of—"Watercrafts."

(Mich.; 1895.)

Steam dredges, to be used solely for digging under water, and not for navigation or the transportation even of the material which they bring up from the lake or river beds, are not watercrafts, within the meaning of the act (2 How. Ann. St. c. 285, § 2) providing that "every watercraft of above five tons burthen, used or intended to be used in navigating the waters of this state, shall be subject to a lien thereon," etc.—Bartlett v. Steam Dredge No. 14 (Mich.) 64 N. W. 951.

§ 2. Pleading.

[a] (Mich.; 1896.)

Under How Ann. St. § 8236, providing for liens on water craft for all debts contracted by the owner, master, or agent of such craft on account of work done, etc., a complaint alleging that the work was done at the request of a corporation then engaged in building defendant vessel sufficiently alleged that the debt was contracted by the agent of such craft.—Sarmiento v. The Catherine C. (Mich.) 67 N. W. 1085.

[b] (Mich.: 1896.)

How. Ann. St. § 8236, provides for liens on water craft to be used in navigating the waters of this state, for work done, etc. *Held*, that it was not error, in a proceeding to enforce such lien, to permit the complaint to be amended on the trial so as to allege that the craft was to be used in navigating the waters of the state. —Sarmiento v. The Catherine C. (Mich.) 67 N. W. 1085.

[c] (Mich.: 1896.)

How. Ann. St. § 8256, limiting the time of amendments to 10 days after filing the complaint or answer in proceedings to enforce liens against water craft, should be construed in connection with the general statute of amendments, and therefore does not prohibit amendments at the trial. —Sarmiento v. The Catherine C. (Mich.) 67 N. W. 1085.

§ 3. Waiver of lien.

(Mich.: 1896.)

It is not a waiver of a lien arising under How. Ann. St. § 8236, providing for liens on water craft for all debts contracted by the owner, master, or agent on account of work done, that the lien claimant took a note which included a claim for work done on another vessel and also the first installment under his contract for working on the vessel in suit. —Sarmiento v. The Catherine C. (Mich.) 67 N. W. 1085.

MARKETABLE TITLE.

See "Vendor and Purchaser." § 24.

MARKETS.

See "Municipal Corporations," § 53.

MARRIAGE.

See, also, "Adultery"; "Breach of Marriage Promise"; "Divorce"; "Husband and Wife."

Offer to marry mother of bastard, see "Bastardy," § 7.

—woman seduced, see "Seduction," § 5.

Restoring property obtained by, see "Divorce," § 39.

Revocation of will by marriage, see "Wills," § 17.

§ 1. Validity—Common-law marriage.

(Minn.: 1896.)

It is not necessary to the validity of a marriage by contract in the present tense that the contract be followed by the parties' holding themselves out to the public as husband and wife, or that it be acted on by their professedly living together in that relation. *State v. Worthingham* (1877) 23 Minn. 528, distinguished. —In re Hulett's Estate, 69 N. W. 31; *Carey v. Hulett*, Id.

§ 2. — Jury trial.

[a] (Mich.: 1897.)

How. Ann. St. § 6622, declaring that all issues on the legality of marriage (except where physical capacity is involved) shall be tried by a jury, is not mandatory; and where a proceeding to annul a marriage has been noticed for hearing without mention of a desire for a jury, and complainant is in attendance, ready for trial, the court may, in its discretion, refuse defendant's request for a jury trial on the issue of complainant's mental competency, on the ground that the right to such trial has been waived. —Maier v. Lillibridge (Mich.) 70 N. W. 1032.

[b] (Mich.: 1897.)

Since, under How. Ann. St. § 6622, declaring that issues on the legality of marriage shall be tried by a jury, the court may, on its 4 N.W.DIG.—38

own motion, frame and submit an issue to a jury, possible error in granting a request for jury trial without a special motion therefor will not justify the vacation of the order by mandamus. —Maier v. Lillibridge (Mich.) 70 N. W. 1032.

[c] (Mich.: 1897.)

Under said statute the verdict of the jury is not conclusive on the court, but is merely advisory. —Maier v. Lillibridge (Mich.) 70 N. W. 1032.

§ 3. License.

(Mich.: 1896.)

It is no defense to a prosecution of a clergyman or magistrate under 3 How. Ann. St. § 6222f, for marrying parties without a license having been issued to them, that one of the parties married was under a legal disability to enter into the marriage relation. —People v. McGlaughlin (Mich.) 66 N. W. 385.

§ 4. Proof.

[a] (Iowa: 1895.)

Where a person, after his second marriage, lived in the town where the first wife lived, and the latter never questioned the validity of the second marriage, nor the legitimacy of the issue thereof, the presumption is that the parties to the first marriage were divorced before the second marriage, and that the issue of each marriage will inherit from their father. —Leach v. Hall (Iowa) 64 N. W. 790.

[b] (Mich.: 1896.)

The testimony of a clergyman and others participating in a marriage ceremony in a foreign country between defendant and a certain woman was admissible. —People v. Imes (Mich.) 68 N. W. 157.

[c] (Minn.: 1896.)

On an issue whether deceased executed a marriage contract with petitioner, conveyances executed by him subsequent to the contract, in which he is described as a single man, are not admissible against petitioner. —In re Hulett's Estate (Minn.) 69 N. W. 31; *Carey v. Hulett*, Id.

§ 5. — Weight and sufficiency.

[a] (Mich.: 1895.)

In a prosecution for seduction alleged to have been accomplished by a mock marriage, prosecutrix testified that she and defendant went over to Canada, where, as she supposed, she was married by a minister; that defendant afterwards, having previously cohabited with her, told her that the marriage was a mock one; and also testified, against defendant's objection, and without showing her means of knowledge, that a marriage license was required by the laws of Canada for a valid marriage. *Held* that, as a declaration of marriage before a third person together with cohabitation would constitute a valid common-law marriage in this state, and as it will be presumed that the laws of Canada are the same, the evidence was insufficient to show that the marriage was invalid. —People v. Loomis (Mich.) 64 N. W. 18.

[b] (Mich.: 1896.)

The testimony of persons who had long known H. and S. that they were generally reputed to be married, and had lived together and held themselves out as husband and wife for many years, and that K. had grown up in the family, and was always called "daughter" by the parties, who had no other children, so far as known to witnesses, was prima facie sufficient to show the legitimacy and sole heirship of K. —Hoffman v. Simpson (Mich.) 67 N. W. 1107.

[c] (Mich.: 1896.)

Proof of a marriage ceremony in a foreign country, between a certain man and woman, and of their subsequent cohabitation as man and wife, is sufficient to establish such relation, though it does not show that the cere-

mony was in accordance with the laws of such country.—*People v. Innes* (Mich.) 68 N. W. 157.

See, also, "Adultery," § 3.

§ 6. Dissolution by sentence of one party to life imprisonment.

(Wis.; 1895.)

The effect of Rev. St. § 2355, as dissolving a marriage on the sentence of either party to life imprisonment, is not affected by the subsequent reversal of the sentence.—*State v. Duket* (Wis.) 63 N. W. 83.

90 Wis. 272.

Necessity of divorce proceeding, see "Divorce," § 1.

MARRIAGE SETTLEMENTS.

See "Husband and Wife," § 23.

MARRIED WOMAN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

§ 1. Rights of junior lienholder.

(Neb.; 1897.)

Equity will require a creditor having a lien upon two funds, upon one of which alone another creditor has a subordinate lien, to first exhaust the fund to which he alone is entitled.—*Norfolk State Bank v. Schwenk* (Neb.) 70 N. W. 970.

§ 2. Rights of attaching creditor.

(Mich.; 1894.)

The fact that an officer of a corporation orally promised to answer for a corporate debt does not compel the creditor to collect his debt from such officer instead of making it out of the property of the company attached by him, as against the holder of a mortgage on such property which is invalid as against the attaching creditor, as, in case such officer defended under the statute of frauds, the attaching creditor would be defeated.—*Ramsdell v. Citizens' Electric Light & Power Co.* (Mich.) 61 N. W. 275.

103 Mich. 89.

§ 3. Mortgage liens.

[a] (Iowa.)

Where a landlord has a first lien for rent on a stock of goods which is mortgaged, and also on another stock which was formerly a part of the mortgaged stock, but which is not covered by the mortgages, and at the mortgage sale he waives his lien on the mortgaged stock in favor of the mortgagees, he thereby waives his lien on the stock not mortgaged, as against the purchasers of the latter.—(1894) *John V. Farwell Co. v. Stick*, 61 N. W. 565; (1895) *Id.*, 64 N. W. 614.

[b] (Mich.; 1897.)

A mortgagee cannot be required by judgment creditors of the mortgagor, having a junior lien on all the property covered by the mortgage, to resort first to a subsequent security taken by him for the same indebtedness on land situated in a foreign country, where it is not made to appear that he could do so without prejudice to his own rights.—*Farwell v. Bigelow* (Mich.) 70 N. W. 579.

[c] (Wis.; 1891.)

A firm having agreed that one partner should furnish the bulk of the capital necessary in the business, such partner, without contributing money, gave to a third person a first mortgage bond on his individual property to secure

credit for the firm. The mortgagee afterwards levied an attachment on the firm property. *Held* that, as between the attaching mortgagee and a subsequent unsecured attaching creditor of the firm, the security given by the individual member constituted his contribution to the capital, and was firm property, and that equity would require the mortgagee to exhaust it before sharing in the proceeds of a sale under his attachment.—*C. Gotzian & Co. v. Shakman* 61 N. W. 304, 89 Wis. 52.

[d] (Wis.; 1891.)

In an action by an unsecured attaching creditor of a firm to compel a prior attaching creditor to exhaust a mortgage security on land of the firm before sharing in the proceeds of a sale under his attachment, equity will not deny relief on the ground that the prior creditor will be delayed thereby, if it appears that such proceeds have been deposited in court, and that no injury will be done to the rights of such prior creditor.—*C. Gotzian & Co. v. Shakman* 61 N. W. 304, 89 Wis. 52.

MASTER AND SERVANT.

I. THE RELATION AND ITS INCIDENTS, §§ 1-13.

II. MASTER'S LIABILITY FOR ACTS AND TORTS OF SERVANTS, §§ 14-21.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANTS, §§ 22-55.

1. In General, §§ 22-29.

2. Rules of Master—Method of Work, §§ 30-34.

3. Defective and Dangerous Appliances and Places, §§ 35-45.

4. Actions—Pleading and Practice, §§ 46-55.

IV. VICE PRINCIPALS AND FELLOW SERVANTS, §§ 56-66.

V. ASSUMPTION OF RISK BY SERVANT, §§ 67-79.

VI. CONTRIBUTORY NEGLIGENCE OF SERVANTS, §§ 80-94.

See, also, "Principal and Agent."

Authority of agent to make contract of employment, see "Corporations," § 32; "Principal and Agent," § 6.

Contracts of employment not to be performed within a year, see "Frauds, Statute of," § 25. Employers' liability insurance, see "Insurance," § 73.

Evading exemption laws as to wages, see "Exemptions," § 21.

Garnishment of exempt earnings, see "Abuse of Process."

Wages as preferred claims against insolvent corporations, see "Corporations," § 94.

I. THE RELATION AND ITS INCIDENTS.

§ 1. Statutory regulation—Police power.

(Mich.; 1896.)

In the exercise of police power, the state may prescribe regulations for the protection of those who by their contract of employment willingly perform dangerous service, and have no legal remedy if injured.—*People v. Smith* (Mich.) 66 N. W. 382.

§ 2. When relation exists.

(Mich.; 1896.)

Men employed by a foreman under authority from a manager, who in turn was authorized by the owner to hire them, and who were paid by the owner, are the owner's servants.—*Smaltz v. Boyce* (Mich.) 69 N. W. 21.

§ 3. Contract of employment.

[a] (Mich.; 1896.)

Where an employé who had been working for two years by the month was told by his employer, at the beginning of the third year, that his salary would have to be reduced to a certain sum for the year, which was accepted, a contract of employment for the year was thereby made.—*Graves v. Lyon Bros. & Co. (Mich.)* 68 N. W. 985.

[b] (Mich.; 1897.)

It is not a breach of a traveling salesman's contract for him to go to a place off his route to spend Sunday with his family, where it does not seriously interfere with his compliance with his contract.—*Milligan v. Sligh Furniture Co. (Mich.)* 70 N. W. 133.

[c] (Mich.; 1897.)

An employer of a traveling salesman is not bound by a custom allowing such salesman to work in retail stores during the holiday season, where he has no knowledge thereof.—*Milligan v. Sligh Furniture Co. (Mich.)* 70 N. W. 133.

§ 4. Terms and duration of employment.

[a] (Mich.; 1896.)

A contract of employment reciting that the employé is to receive a certain salary "per year until further notice, or during the year 1893. The salary is not to be reduced in any event," is not a contract for a yearly hiring, preventing a discharge, after the employé has entered on a second year's term, until the end of that year.—*Fuller v. Peninsular White-Lead & Color Works (Mich.)* 69 N. W. 492.

[b] (Wis.; 1896.)

Plaintiff, a filer, wrote defendant, a mill owner, relative to the "coming sawing season," asking him "how long a run" he expected to have, whether he was "going to run nights," and what he would pay plaintiff "to come and keep the saws up." Defendant, in reply, stated what he would pay plaintiff for day, and for night and day, runs; that he did not know whether he would run nights or not, but that he expected to have "a good season's work." Plaintiff accepted, and commenced work. *Held*, a contract to hire plaintiff so long as defendant ran his mill during the season.—*Lewis v. Newton (Wis.)* 67 N. W. 724.

93 Wis. 405.

[c] (Wis.; 1896.)

In December, 1891, plaintiff, who had been working for defendant on a yearly salary for several years, wrote defendant, demanding \$1,800 per year, or \$1,500 and a certain percentage on business. After much correspondence, defendant, on January 26, 1892, wrote plaintiff that the salary should be \$1,800, as requested. Plaintiff worked under such arrangement during 1892 and 1893. *Held*, that a finding that a contract was made for a year's service at \$1,800, commencing January 1, 1893, was justified.—*Kellogg v. Citizens' Ins. Co. of Pittsburgh (Wis.)* 69 N. W. 362.

§ 5. Evidence.

[a] (Iowa; 1896.)

A writing in which one promised another that for six months he would not use intoxicating liquors does not tend to show that the one making the promise was during such time in the employ of the other, or to contradict the statement of the former that he was not in such employ.—*Smith v. Jackson (Iowa)* 66 N. W. 80.

[b] (Minn.; 1896.)

On an issue whether one who employed plaintiff, and through whose negligence plaintiff was injured in the employment, was an independent contractor, and not defendants' employé, evidence was admissible that defendants held a policy indemnifying them "to a certain extent" from liability "by reason of any injury to any employé, including this plaintiff," who might be injured while about defendants' place

of business, where plaintiff was employed, and that the insurer was defending the suit against defendants, it not appearing that the insurer undertook by the policy to defend in all cases in which defendants might be charged with liability.—*Barg v. Bousfield (Minn.)* 68 N. W. 45.

§ 6. Discharge.

[a] (Mich.; 1895.)

In an action for breach of contract, it appeared that plaintiff, who had contracted to measure all of defendant's lumber for a year, requested permission to leave for a few days, and was informed that, on account of the dissatisfaction of one of defendant's customers with him, he might go, and that defendant would telegraph him when he should return. After plaintiff left, defendant wrote advising him, on account of the customer's dissatisfaction, to stop the work, which plaintiff refused to do. Defendant then wrote complaining of the measurements by the man plaintiff had left to do the work, and concluded by saying, "You had better call your man home, and quit," whereupon plaintiff wrote offering to give up the contract on a compromise, to which defendant replied stating that plaintiff's man was not measuring the lumber, and that he had written for a man to come and measure a few boat loads. Plaintiff answered offering to perform the contract, and threatening suit if not permitted to do so, and defendant answered with an intimation that plaintiff might sue. *Held*, the evidence warranted a finding that defendant discharged plaintiff.—*Pinet v. Montague (Mich.)* 61 N. W. 876.

103 Mich. 516.

[b] (Minn.; 1895.)

Intoxication of a railroad engineer to such an extent as to imperil the safety of passengers justifies his discharge.—*Smith v. St. Paul & D. R. Co. (Minn.)* 62 N. W. 392.

60 Minn. 330.

[c] (Minn.; 1896.)

It was no ground for discharge of one hired for such time as he should hold in his own name 50 shares of capital stock of the employer corporation, that the employé pledged his stock as security for the payment of a debt.—*McMullan v. Dickinson Co. (Minn.)* 65 N. W. 661.

63 Minn. 405.

[d] (Wis.; 1897.)

Retention of a servant in the service and payment of wages to him without protest, after knowledge of defective work done by him, is prima facie evidence of a waiver of the right to discharge him, or deduct from his wages on that account.—*Tickler v. Andrae Manuf'g Co. (Wis.)* 70 N. W. 292.

§ 7. Actions for wrongful discharge.

[a] (Mich.; 1897.)

In an action by a traveling salesman for wrongful discharge, evidence of the small amount of business done by plaintiff on one of his trips is inadmissible to show that he did not comply with instructions.—*Milligan v. Sligh Furniture Co. (Mich.)* 70 N. W. 133.

[b] (Mich.; 1897.)

In an action for wrongful discharge, where defendant admits the contract, the burden is on him to show cause for the discharge.—*Milligan v. Sligh Furniture Co. (Mich.)* 70 N. W. 133.

[c] (Mich.; 1897.)

In an action for breach of a contract for services for two months, it appeared that plaintiff was discharged at the end of one month. He testified that he spent 18 days in an endeavor to adjust his claim against defendant. *Held*, that it was for the jury to determine whether plaintiff's excuse for not seeking other employment was reasonable.—*Chisholm v. Preferred Bankers' Life Assur. Co. (Mich.)* 70 N. W. 415.

[d] (Mich.; 1897.)

Where a railroad company, in settlement for injuries to an employé, agreed to employ him at a specified salary for life, and the employé accepted a much smaller salary for several years, he could testify, in an action by him for breach of the contract, for the purpose of rebutting the presumption of waiver of his right to the larger salary, to what was told him as to the effect of his accepting employment at a reduced rate, and that he protested against the reduction.—*Brighton v. Lake Shore & M. S. Ry. Co.* (Mich.) 70 N. W. 432.

[e] (Minn.; 1896.)

In an action for damages for wrongful discharge, plaintiff need show only readiness and willingness to render the services, and an honest effort to obtain other employment, an actual effort to perform being unnecessary.—*McMullan v. Dickinson Co.* (Minn.) 65 N. W. 661.

63 Minn. 405.

§ 8. — Damages.**[a] (Iowa; 1896.)**

A teacher, employed for a year, who is discharged without cause before expiration of that time, when it is impossible for her to secure another position, is entitled to recover full compensation at the contract price for the remainder of the year.—*Worthington v. Oak & Highland Park Imp. Co.* (Iowa) 69 N. W. 258.

[b] (Iowa; 1897.)

In an action to recover for defendant's refusal to let plaintiff complete a contract to cut and deliver wood, evidence that, when plaintiff stopped work under the contract, he could get no other work, was admissible on the question of damages.—*Mounce v. Kurtz* (Iowa) 70 N. W. 119.

[c] (Mich.; 1894.)

Where a contract of employment provides that it may be terminated by the employer on one week's notice, the employé is entitled to only one week's salary as damages on refusal of the former to continue his employment.—*Derry v. Board of Education of City of East Saginaw* (Mich.) 61 N. W. 61.

102 Mich. 631.

[d] (Mich.; 1894.)

Where an employer, in settling with an employé for injuries, agrees to employ him at a specified salary for life, or during his ability and disposition to perform the duties required, and afterwards discharges him without cause, such employé may recover prospective damages.—*Brighton v. Lake Shore & M. S. Ry. Co.* (Mich.) 61 N. W. 550.

103 Mich. 420.

[e] (Mich.; 1897.)

Where an employé is prevented by his employer from performing his contract, he is not bound, for the purpose of lessening the damages, to accept new employment from the same employer, where it is not offered under circumstances inconsistent with the condition that such employment would be a modification of the original contract.—*Chisholm v. Preferred Bankers' Life Assur. Co.* (Mich.) 70 N. W. 415.

[f] (Mich.; 1897.)

In an action for breach of a contract entered into by a railroad company in settlement for injuries to an employé, whereby it agreed to employ him at a specified salary for life, it was proper, on the question of damages, for the employé to testify as to his general condition, aside from the disability caused by the injury.—*Brighton v. Lake Shore & M. S. Ry. Co.* (Mich.) 70 N. W. 432.

[g] (Minn.; 1895.)

Where a servant, whose wages are payable, under a contract, by installments, is dismissed without fault, he may consider the breach total, and sue for all damages up to the time of trial, but prospective damages beyond

such time, being speculative, cannot be allowed.—*McMullen v. Dickinson Co.* (Minn.) 62 N. W. 120.

60 Minn. 156.

[h] (S. D.; 1895.)

In an action by a traveling salesman, who by his contract was to be paid a percentage on the amount of his sales, for breach of the contract, the measure of damages is the amount plaintiff could have made on his sales had he been permitted to complete his contract, and not the value of his monthly services as a salesman.—*Cranmer v. Kohn* (S. D.) 61 N. W. 125.

[i] (Wis.; 1896.)

In an action by an employé for wrongful discharge, the amount of wages for the remainder of the term of service under the contract is, *prima facie*, the measure of damages; and the amount earned by plaintiff during such time, or that he might reasonably have earned, is matter of defense, in mitigation of damages.—*Babeock v. Appleton Manuf'g Co.* (Wis.) 67 N. W. 33.

93 Wis. 124.

[j] (Wis.; 1897.)

A servant is not entitled to recover his expenses in seeking other employment, in an action for wrongful discharge, though his earnings in such other employment are charged in reduction of his damage.—*Tiekler v. Andrae Manuf'g Co.* (Wis.) 70 N. W. 292.

§ 9. — Indemnity for loss of wages.**(Minn.; 1895.)**

Where, under a contract for services, the wages are payable in installments, and the master dismisses the servant without fault, and the wages are paid up to the time of dismissal, the liability of the master is a contingent liability of indemnity for loss of wages. *McMullen v. Dickinson Co.* (Minn.) 62 N. W. 120.

60 Minn. 156.

§ 10. Wages and other remuneration.**[a] (Iowa; 1895.)**

One suing for the value of services while a minor, and living with defendant, is entitled to recover on overcoming the presumption that his services were gratuitous by evidence that it was the understanding of the parties that compensation should be paid.—*Resso v. Lehan* (Iowa) 64 N. W. 689.

[b] (Iowa; 1896.)

Where an agreement for compensation provided that if the employé should leave the service of her employer without her fault, in case of a disagreement as to the amount due her it should be determined by arbitrators, if she left the service because of her own fault she was entitled to no compensation, and there would be no necessity for arbitration.—*Haggin v. Garwood* (Iowa) 65 N. W. 989.

[c] (Mich.; 1895.)

A contract by a salesman to sell \$40,000 of goods in a year for a compensation of \$800, with a commission on all goods sold over that amount, and a deduction for sales of a less amount, there being no time stated for payment of the compensation, will be construed to mean that the compensation is payable when the \$40,000 worth of goods are sold.—*Reynolds v. Reeder* (Mich.) 62 N. W. 355.

104 Mich. 265.

[d] (Mich.; 1896.)

Where the employer directed the servant to perform extra work, under the belief that it fell within his employment, and the servant did not indicate that additional compensation would be expected, and for nearly two years afterwards received in full each month for his services, he cannot recover for the extra services.—*Forster v. Green* (Mich.) 69 N. W. 647.

§ 11. — Rate of compensation.

[a] (Minn.: 1895.)

Where, in an action by a servant, who was wrongfully discharged July 15th, for his salary during the remainder of the year, defendant stated in his answer that he agreed on June 15th to pay plaintiff \$50 per month from that day, and that, if plaintiff's services continued to be satisfactory, plaintiff should be raised \$25 per month, commencing with August, until his salary should reach \$100 per month, the amount theretofore paid him, a finding that plaintiff should recover at the rate of \$50 per month for July, \$75 for August, and \$50 for each succeeding month, is justified.—Metzdorf v. Western Supply Co. (Minn.) 62 N. W. 397.
60 Minn. 365.

[b] (Neb.: 1895.)

Where the wages contracted for were \$60 per month in cash, and \$40 per month in work rights, the servant's measure of damages in an action for wages is \$100 per month.—Culbertson Irrigating & Water-Power Co. v. Wildman (Neb.) 63 N. W. 947.
45 Neb. 663.

§ 12. — Action for wages.

[a] (Iowa: 1895.)

Where one who took a minor to live in his family is sued by the minor for services, evidence as to how long plaintiff was with the person from whom defendant received him, what efforts had been made to get him a home, and whether plaintiff considered himself defendant's adopted son, are immaterial.—Resso v. Lehan (Iowa) 64 N. W. 689.

[b] (Iowa: 1895.)

Where defendant in such action alleges that the services were to be paid for by his care and education of plaintiff, evidence as to amount of clothing furnished, of plaintiff's ability for work, and the amount and quality of his work, is admissible.—Resso v. Lehan (Iowa) 64 N. W. 689.

[c] (Iowa: 1895.)

In such case, evidence that defendant promised to give plaintiff a sum of money, and a team and harness, if he continued to live with him till a certain time, is admissible to show that he expected to pay for plaintiff's services.—Resso v. Lehan (Iowa) 64 N. W. 689.

[d] (Mich.: 1896.)

In an action at law for services rendered, plaintiff's testimony tended to show that defendant was engaged in the grocery business; that he employed plaintiff, and agreed to pay him a stated salary, and, in addition, 2 per cent, of the profits of the business; and that for the first year the percentage was paid, but after that time no inventory was made showing the profits, and no payment on account thereof was made to plaintiff. *Held*, that plaintiff could maintain the action, though he had a remedy in equity.—Stockman v. Michell (Mich.) 67 N. W. 336.

[e] (Mich.: 1896.)

On an issue as to whether defendant collected the proceeds of an insurance policy for plaintiff under an agreement not to make any charge for his services, where defendant asserted that, in the collection of a policy for another person, he was acting also for the benefit of plaintiff, it was proper to permit him to be interrogated as to his agreement with said person.—Dillon v. Pinch (Mich.) 67 N. W. 1113.

[f] (Mich.: 1896.)

On an issue as to whether defendant collected the proceeds of an insurance policy for plaintiff under an agreement not to make any charge for his services, or whether he was to receive one-half of the amount collected, evidence as to the value of the services rendered in collecting said proceeds was immaterial.—Dillon v. Pinch (Mich.) 67 N. W. 1113.

[g] (Neb.: 1895.)

In a suit for wages under a special contract, an averment that plaintiff performed all the conditions thereof, so far as defendant permitted, is a sufficient averment of performance, unless attacked by motion.—Culbertson Irrigating & Water-Power Co. v. Wildman (Neb.) 63 N. W. 947.

45 Neb. 663.

§ 13. — Recovery of value of services.

[a] (Iowa: 1896.)

Evidence that plaintiff boarded himself when he worked for intervenor is admissible on the value of the services performed for intervenor.—Kassing v. Walter (Iowa) 65 N. W. 832.

[b] (S. D.: 1895.)

One prevented by sickness, occasioned by no fault of his, from completing a contract to labor for a certain time at a specified price, may recover reasonable compensation for the services performed under the contract, under Comp. Laws, § 3773.—McClellan v. Harris (S. D.) 64 N. W. 522.

[c] (Wis.: 1896.)

Where plaintiff had worked for intestate for several years during and after his minority, receiving his board and clothing, but with an agreement that, in consideration for his services during her life, intestate would compensate him at her death, on the failure of intestate to make any provision for him, by will or otherwise, he is entitled to recover from her estate the value of his services.—Slater v. Cook's Estate (Wis.) 67 N. W. 15.

93 Wis. 104.

II. MASTER'S LIABILITY FOR ACTS AND TORTS OF SERVANTS.

§ 14. Master maintaining hospital and charitable institutions.

(Iowa: 1895.)

A railway company voluntarily furnishing a hospital for the treatment of its employes in case of injury is not liable, provided it employ competent surgeons, for their malpractice.—Eighmy v. Union Pac. Ry. Co. (Iowa) 61 N. W. 1056.

93 Iowa, 538.

§ 15. Independent contractors — Who are.

[a] (Minn.: 1896.)

There being evidence that one performing work for another represented the will of that other, not only as to the result of the employment, but also as to the means by which that result was to be accomplished, the question whether he was an independent contractor, or an agent for whose acts the employer was responsible, should have been submitted to the jury.—Barg v. Bousfield (Minn.) 68 N. W. 45.

[b] (Minn.: 1896.)

Defendant's roof leaked because of the melting of ice thereon, and defendant asked a contractor and builder to repair the same, telling him to "fix it up, and bring me the bill," and not to "bother me about it," and the contractor agreed to do so. In removing the ice, which it was understood would have to be removed, an employe of the contractor threw part of it to the ground, injuring a traveler. *Held*, that whether the contractor was an independent contractor, relieving defendant from liability for the injuries, was a question for the jury.—Rait v. New England Furniture & Carpet Co. (Minn.) 68 N. W. 729.

[c] (Minn.: 1897.)

The manager of defendant's farm having directed an employe to leave certain work and go to another part of the farm, and there plow a fire break preparatory to burning the stubble, *held* that, on the evidence, it was a question for the jury whether the action of the employe in

burning the stubble was that of a servant of defendant or an independent contractor.—*Whitson v. Ames* (Minn.) 70 N. W. 793.

[d] (Wis.; 1895.)

Contractors who have agreed to erect a building according to fixed plans, of certain materials, and who are empowered to perform the work thereunder in their own manner and with their own machinery, subject only to inspection by the architect, are independent contractors.—*Smith v. Milwaukee Builders' & Traders' Exchange*, 61 N. W. 1041, 91 Wis. 360.

[e] (Wis.; 1895.)

Where, in an action for damages caused by the negligent opening of a dam for the purpose of driving logs, there is evidence that the person in charge of the drive was acting as defendants' agent, and also evidence that he had full control of the drive and dam, and that he employed the men and obtained the supplies, defendants merely paying him for driving their logs, it is for the jury to determine whether such person was an independent contractor or not.—*Carlson v. Stocking*, 65 N. W. 58, 91 Wis. 432.

§ 16. — Liability of employer.

[a] (Mich.; 1894.)

A person who has hired a contractor to do certain work, and has no immediate control over the servants of the contractor, is not liable to a person injured through the negligence of one of such servants. *De Forrest v. Wright* (1852) 2 Mich. 368, followed.—*Riedel v. Moran*, (Pitzsimons & Co., 61 N. W. 509, 103 Mich. 262.

[b] (Wis.; 1895.)

Where two different persons are engaged as independent contractors in the erection of a building, the one performing the masonry work and the other the iron work, setting girders, beams, and floor joists in the walls erected by the other, each is required to comply with an ordinance requiring "any owner or contractor who shall build or cause to be built" any building abutting on the public sidewalk to erect a roofed passageway over the sidewalk after the completion of the first story.—*Smith v. Milwaukee Builders' & Traders' Exchange* (Wis.) 64 N. W. 1041, 91 Wis. 360.

[c] (Wis.; 1895.)

The nonperformance by the owner of a building in the course of erection of the duty imposed by an ordinance requiring the erection of a roofed passageway over the sidewalk after the completion of the first story, cannot be excused by a plea that an independent contractor has agreed to perform the duty.—*Smith v. Milwaukee Builders' & Traders' Exchange* (Wis.) 64 N. W. 1041, 91 Wis. 360.

[d] (Wis.; 1895.)

Where the performance of a specific job by an independent contractor in the ordinary mode of doing the work necessarily or naturally results in causing an injury, the employer is subject to the same liability to the injured person as the contractor.—*Carlson v. Stocking* 65 N. W. 58, 91 Wis. 432.

[e] (Wis.; 1896.)

Where a city contract with one for the disposal of garbage regulates the place of deposit by providing that it shall be thrown into Lake Michigan, at a point not less than 15 miles from the city, and reserves no right to control the mode or manner of its performance, the city is not liable for injuries to nets set in the lake caused by the garbage floating into them.—*Kuehn v. City of Milwaukee* (Wis.) 65 N. W. 1030, 92 Wis. 263.

§ 17. Scope of employment.

[a] (Minn.; 1896.)

Where a person bribed a brakeman to permit him to ride among the freight in a freight car, the brakeman and such person thereby be-

came joint trespassers, and the brakeman's implied authority to permit it his employer in ejecting such person thereby ceased, so that, unless it appeared that the brakeman received subsequent express authority to eject such person, his doing so in an improper manner was simply the assault of one joint trespasser upon another, and not the act of the railway company. *Brevig v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 66 N. W. 401.

61 Minn. 168.

[b] (Minn.; 1896.)

A freight-train brakeman has implied authority to eject trespassers and apparent trespassers from the cars of the train.—*Brevig v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 66 N. W. 401.

61 Minn. 168.

[c] (Minn.; 1896.)

The superintendent of a manufacturing corporation had general charge of the premises, of the business, and of the employes while at work. While plaintiff was on the premises, he caused his arrest without any warrant on a charge of disorderly conduct, committed several hours before, in unlawfully entering the factory, and attempting by threats to induce the employes to quit work. This act on part of the superintendent was done, not for his own interest or benefit, but in furtherance of the interest of the corporation by protecting its premises and employes from trespassers and intruders. *Held*, that the facts brought the case within the general rule that a master is responsible for the torts of his servant done with a view to the furtherance of the master's business, whether the same be done negligently or willfully, but within the scope of his agency; and that the corporation was liable for the act of its superintendent in directing the unlawful arrest.—*Smith v. Munch* (Minn.) 68 N. W. 19.

[d] (Minn.; 1897.)

In determining whether the doctrine of respondent superior applies, the test is whether, with reference to the matter out of which the alleged wrong sprung, the person sought to be charged had the right, under the contract of employment, to control, in the particular complained of, the action of the person doing the wrong.—*Gahagan v. Aerometer Co.* (Minn.) 69 N. W. 914.

[e] (Neb.; 1895.)

A master is not liable for the acts of his servant committed outside the line of his duty.—*Western Union Tel. Co. v. Mullins* (Neb.) 62 N. W. 880.

44 Neb. 732.

[f] (Wis.; 1895.)

The act of the foreman of a building contractor in stretching a guy rope across a railroad track to aid in taking down a derrick is within the scope of his authority, so as to render the contractor liable for an accident caused by the rope to a switchman standing on a moving car, when the foreman had general charge of the work, and special charge of moving derricks, though the contractor had instructed him to employ a derrick specialist when moving derricks.—*Reinke v. Bentley* (Wis.) 63 N. W. 1055, 90 Wis. 457.

[g] (Wis.; 1897.)

The minor son of defendant, who was directed by him to shoot crows in a field, but who went into the woods to hunt squirrels, and when some two miles from defendant's premises, by his negligence, injured plaintiff, was not at the time of the act engaged in defendant's business, so as to render defendant liable for the injury.—*Winkler v. Fisher* (Wis.) 70 N. W. 477.

§ 18. — Question for jury.

[a] (Mich.; 1896.)

In an action for loss of a mill by fire set from defendant's land, where it appears that the foreman of defendant's logging camp, when

the men were out of work, employed them to clear the land to raise potatoes for use in camp, and in clearing it, ordered them to set the fire from which plaintiff's mill caught fire, the question whether the foreman, in so employing the men, was performing a duty usually expected of foremen of lumber camps, and therefore acting within the scope of his employment, is for the jury.—*Smaltz v. Boyce* (Mich.) 69 N. W. 21.

[b] (Minn.; 1897.)

Where a contract of employment by defendant of a "sales agent" tended to show that the latter was to be governed by defendant's instructions as to the manner of conducting the business, and that he had received and followed certain instructions as to advertising, the question whether defendant had the right to control the agent's action in setting up for advertising purposes the machinery causing the injury sued for, was for the jury.—*Gahagan v. Aerometer Co.* (Minn.) 69 N. W. 914.

[c] (S. D.; 1895.)

Where, in an action for damages resulting from fires set in violation of law, it appeared that the fire was set by defendant's employé, whether such employé was acting within the scope of his employment is a question for the jury.—*Knight v. Towles* (S. D.) 62 N. W. 964. 6 S. D. 575.

§ 19. Disobedience of orders.

(Minn.; 1896.)

The fact that a superintendent, in causing a person's unlawful arrest, in order to protect the master's premises from intruders, may have exceeded his actual authority, or even disobeyed his express instructions, does not relieve the master from liability.—*Smith v. Munch* (Minn.) 68 N. W. 19.

§ 20. Actions.

[a] (Iowa; 1896.)

Evidence that a farmer sent a servant, with his son, to clear up a meadow, and that the servant, with consent of the son, who had general authority to act for his father, set fire to an old stack of hay, warrants the submission of the issue whether the servant was acting within the scope of his employment in setting the fire, so as to render the farmer liable for damages caused by his allowing it to escape from his control in violation of Code, § 3890.—*Lewis v. Schultz* (Iowa) 67 N. W. 266.

[b] (Iowa; 1896.)

A complaint for damages caused by allowing a fire set to prairie land to escape from control in violation of Code, § 3890, which alleged that defendants, their servants and agents, set the fire, and allowed it to escape from their control, is sufficient to raise the issue whether the person who set the fire was defendants' agent, and, if so, whether in so doing he was acting within the scope of his employment.—*Lewis v. Schultz* (Iowa) 67 N. W. 266.

[c] (Mich.; 1895.)

In an action for injuries arising from the careless driving of defendant's teamster, who admitted that he drank some liquor on the day of the accident, evidence that defendant knew of the teamster's intemperate habits was admissible.—*Vernon v. Cornwell* (Mich.) 62 N. W. 175, 104 Mich. 62.

[d] (Minn.; 1897.)

A verdict for plaintiff in an action for injuries is sustained by evidence that defendant's servant, engaged in hoisting materials to the tower of the building, knowing that plaintiff, an employé of another independent contractor, was standing on a scaffold near which the rope used in hoisting the materials passed, started the hoisting apparatus when the rope was below the scaffold, and that the rope caught under the plank on which plaintiff stood,

throwing him to the ground.—*Pickman v. Lauer* (Minn.) 69 N. W. 893.

§ 21. — Punitive damages.

(Wis.; 1896.)

In an action for plaintiff's wrongful expulsion from defendant's street car, it appeared that plaintiff was so expelled September 12, 1894; that the only notice to defendant that the conduct of its conductor who expelled plaintiff was malicious was the allegation in the complaint served September 25, 1894; that the conductor continued in defendant's employment till December 18, 1894, when the service was voluntarily ended. The record did not show that the jury were acquainted with the contents of the complaint, and they were instructed that, if the conductor maliciously put plaintiff off the car, plaintiff was entitled to punitive, as well as compensatory, damages. *Held* that, within the rule that punitive damages can be recovered against the principal for the malicious act of the agent only when such act is either authorized or ratified by the principal, the court erred in taking the question of ratification from the jury.—*Robinson v. Superior Rapid-Transit Ry. Co.* (Wis.) 68 N. W. 961.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANTS.

What law governs, see "Conflict of Laws," § 2.

1. IN GENERAL.

§ 22. Relation of parties.

[a] (Iowa; 1895.)

A mill owner, who, retaining charge of the running of the machinery in his mill, contracts with another to do the manual labor, knowing that such person will have to employ others, will be liable for injury to an employé of such contractor, resulting from defects in the machinery.—*Neimeyer v. Weyerhaeuser* (Iowa) 64 N. W. 416.

[b] (Iowa; 1896.)

It appeared that defendants, desiring to erect a brick barn, contracted with certain mechanics for its construction; that the contract for the brick work was let to H., and provided that the scaffolding should be furnished by the brick layer, and that the work should be done under the direction of the architect and defendants and to their entire satisfaction; that the contract for the carpenter work was let under similar conditions to another mechanic; that defendants had no control over the employés of such contractors, or over the method in which the work should be performed; and that plaintiff was employed by H. as a brick layer on the building. *Held*, that the mechanics were independent contractors, and that defendants were not liable for injuries which happened to the servants of such contractors through negligence of the contractors or their servants.—*Humpton v. Unterkircher* (Iowa) 66 N. W. 776.

[c] (Mich.; 1896.)

Where a company furnished an independent contractor with the building, tools, and machinery with which to perform the contract work, and the contractor employed, paid, and had sole control over his workmen, the company was not liable, as master, to one of such employés for injuries sustained from defects in the machinery.—*Reier v. Detroit Steel & Spring Works* (Mich.) 67 N. W. 120.

[d] (Minn.; 1896.)

The owner of an old building, which had become dangerous by reason of decay, engaged an independent contractor to tear it down. The work was dangerous, and the contractor was incompetent personally to superintend the same, all of which the owner knew when he let the contract. By reason of the contractor's incompe-

teney, his servant was injured while employed in the work. *Held*, the owner is not liable to the servant.—*Schib v. Pabst Brewing Co.* (Minn.) 66 N. W. 3.

64 Minn. 22.

§ 23. Cause of injury.

(Iowa: 1895.)

In an action for negligence causing the death of plaintiff's husband, it appeared that he had been employed by defendant, and while off duty, because of sickness, was taken by defendant to its works to make repairs, and died soon after returning. It was not shown that any force or persuasion was used to induce deceased to go, or that he was not capable of deciding whether he was able to stand the trip, and the jury found specially that defendant did not know that deceased was not in possession of his mental faculties. *Held*, that a verdict for plaintiff should be set aside.—*Kerr v. Keokuk Waterworks Co.* (Iowa) 64 N. W. 596.

§ 24. Accidental injury.

(Mich.: 1895.)

In an action by an employé against his employer for injury caused by an explosion of a barrel of paint containing benzine, it appeared that the barrel had taken fire, and while plaintiff and others, at the request of defendant's foreman, were endeavoring to extinguish the flames, the explosion took place, and that such paint was of common and necessary use in defendant's business. *Held*, that plaintiff could not recover.—*Burke v. Parker* (Mich.) 64 N. W. 1065.

§ 25. Line of duty and scope of employment.

(Iowa: 1895.)

A finding that deceased, a section hand in the employ of defendant railroad, was rightfully on the track when killed, is not supported by evidence that his day's work was done, and he was going home, merely because his foreman had told him any time he was going over the road to notice the track closely, and if anything was found wrong to let him know.—*Baker v. Chicago, R. I. & P. Ry. Co.* (Iowa) 63 N. W. 667.

§ 26. Negligence of surgeon.

[a] (Iowa: 1896.)

A railroad company is not liable for any negligence of its surgeon, employed by it to treat gratuitously its injured employes, in causing an injured employé to be moved from one place to another.—*York v. Chicago, M. & St. P. Ry. Co.* (Iowa) 67 N. W. 574.

[b] (Neb.: 1895.)

A master who calls a surgeon to aid an injured employé is not liable for the negligence or malpractice of the surgeon, providing the latter has knowledge and skill ordinarily possessed by other surgeons, and the master had no reason to suspect that the surgeon would fail in his duty.—*Chicago, B. & Q. R. Co. v. Howard* (Neb.) 63 N. W. 872.

45 Neb. 570.

§ 27. Warning and instructing employes.

[a] (Iowa: 1897.)

In an action for the death of a servant, no presumption arises that he was warned of the danger from the absence of evidence that he was not warned.—*Grimmelman v. Union Pac. Ry. Co.* (Iowa) 70 N. W. 90.

[b] (Minn.: 1895.)

The complaint alleged that defendant engaged plaintiff to ride in a running race for horses, which was promoted and controlled by it; that knowing a certain horse was dangerous and unsafe to run in a race, owing to a vicious habit of track-bolting, of which plaintiff was ignorant, it negligently permitted such horse to run in the race in which plaintiff rode under engagement with defendant, without warning her

of the unusual danger to which she was thus exposed; and that by the bolting of such horse from the track during the race she was thrown from her own horse and injured. *Held*, that the complaint stated a cause of action.—*Lane v. Minnesota State Agricultural Soc.* (Minn.) 61 N. W. 382.

62 Minn. 175.

[c] (Neb.: 1895.)

Where it was necessary, for the safety of workmen constructing a tunnel, to erect supports for the top of the tunnel as the work proceeded, and a common laborer, working alone at the excavation, was not instructed to erect supports, and by reason of his neglect to do so the tunnel caved in and killed him, the company was liable for his death.—*Kearney Electric Co. v. Laughlin* (Neb.) 63 N. W. 911.

45 Neb. 390.

[d] (Wis.: 1895.)

An employer is not bound to anticipate every probable risk which may happen in the use of a machine, but discharges his duty if he gives such general instructions as will enable the employé to comprehend the danger.—*Thompson v. Edward P. Allis Co.*, 62 N. W. 527, 89 Wis. 523.

Disregarding warnings as contributory negligence, see post, § 88.

§ 28. — Inexperienced or youthful employes.

[a] (Iowa: 1896.)

An instruction that plaintiff's minority could be considered only upon the question whether or not one of his age, experience, and intelligence could and did know or appreciate the dangers incident to the work is proper.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co.* (Iowa) 69 N. W. 743.

[b] (Iowa: 1896.)

An instruction that defendant was liable if he put plaintiff, a minor, at more hazardous work than that for which he was employed, without explaining the dangers incident thereto, without limiting it to those dangers of which the master knew, or had reason to believe, plaintiff was ignorant, and which were not so obvious as that, with care, they could have been known to plaintiff, is erroneous.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co.* (Iowa) 69 N. W. 743.

[c] (Iowa: 1896.)

A master is liable for injuries from improperly using, for one kind of work, for which proper machinery is furnished, machinery sufficient and proper for other work, if such improper use is made by a minor employé by order of a vice principal, who fails to explain that the machine is not the proper one for the work.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co.* (Iowa) 69 N. W. 743.

[d] (Minn.: 1896.)

A boy 15 years of age, having but an hour's experience in working around machinery, attempted under orders to remove a pile of refuse from beneath a rapidly revolving circular saw, and his fingers came in contact with the saw and were cut off. He testified that there appeared to be about five inches of space between the pile of refuse and the saw, but that the saw came further down than it appeared to come. *Held*, whether the employer was guilty of negligence in failing to instruct the boy as to the danger was a question for the jury.—*Barg v. Bousfield* (Minn.) 68 N. W. 45.

[e] (Wis.: 1896.)

In an action by a minor, 19 years old, against his master, for personal injuries, there was evidence that plaintiff was at work near a table on one side of which there was a circular saw in rapid motion, about three inches of which extended above the table; that he was unaware of the existence of the saw; that the saw was difficult to see; and that, while at

work, his hand came in contact with the saw. *Held*, that the question whether defendant was negligent in failing to warn plaintiff of the danger arising from the presence of the saw was for the jury.—*Egan v. Sawyer & Austin Lumber Co. (Wis.)* 68 N. W. 756.

§ 29. — Known and obvious dangers.

[a] (Iowa; 1894.)

A railroad company is not required to instruct one entering its service as brakeman how to mount moving cars, when such employé knows from observation the dangers attendant thereon.—*Yeager v. Burlington, C. R. & N. Ry. Co. (Iowa)* 61 N. W. 215.

[b] (Mich.; 1896.)

Where the danger connected with doing certain work is obvious to any one of common intelligence, it is not negligence in a master not to warn his servant of it.—*Findlay v. Russel Wheel & Foundry Co. (Mich.)* 66 N. W. 50.

[c] (Mich.; 1896.)

In an action against a railroad company, by a brakeman, for injuries received while attempting to couple cars supplied with double deadwoods, it appeared that plaintiff sought employment of defendant, stating that he had 27 days' experience; that he had been at work for defendant over a month where cars with double deadwoods were in common use; that he frequently worked on trains containing them; and that he saw the deadwoods, and recognized the danger, and attempted to couple the cars by reaching under the deadwoods, in the manner that he testified that it should be done. *Held*, that the facts failed to show negligence of defendant.—*Fenlon v. Duluth, S. S. & A. Ry. Co. (Mich.)* 66 N. W. 51.

2. RULES OF MASTER—METHOD OF WORK.

Disobedience of rules as contributory negligence, see post, § 87.

§ 30. Rules and orders of master.

[a] (Iowa; 1895.)

Rules of a railway company prohibiting trainmen from using any unsafe appliances, and stating that the company will furnish its employes safe appliances, do not prohibit an attempt by an employé to couple a box car to an engine with a pilot-bar coupling, where, although such a coupling requires more care than in making ordinary couplings, it could be safely made by the use of due care.—*Kerns v. Chicago, M. & St. P. Ry. Co. (Iowa)* 62 N. W. 692.

[b] (Iowa; 1895.)

The attempt of a brakeman to make a coupling in a manner prohibited by a rule of defendant will not preclude recovery for injury caused thereby, if it was the general practice of the employes to disregard such rule, and defendant had knowledge thereof.—*Strong v. Iowa Cent. Ry. Co. (Iowa)* 62 N. W. 799.

[c] (Iowa; 1896.)

In an action by an engineer for injuries, where there was evidence that he was violating the rules of defendant as to the speed of the train, it was error to allow him to introduce a rule not applicable to the place where the accident occurred, allowing trains to run 25 miles an hour.—*Laird v. Chicago, R. I. & P. Ry. Co. (Iowa)* 69 N. W. 414.

[d] (Minn.; 1896.)

Carpenters working on a scaffold, in attempting to insert one end of a heavy beam in a mortise in a wall, had some difficulty, when the master ordered one of them to pry with a crowbar against the other end of the beam, which rested against the opposite wall. The order was obeyed, and the other end of the beam slipped into the mortise so suddenly that the end resting upon the wall fell upon the scaffold,

breaking it down, and injuring plaintiff, a co-employé of the carpenter who pried the beam. *Held*, that whether the master was negligent in giving the order was a question for the jury.—*Myhre v. Tromanhauser (Minn.)* 67 N. W. 660.

64 Minn. 541.

§ 31. — Customary violation.

[a] (Iowa; 1896.)

A rule of a railway company, directing brakemen to not uncouple cars while in motion, may be waived by the company by disregard thereof on the part of brakemen for such a time that the officers were chargeable with notice, though the brakemen have knowledge of the rule, and also the dangers incident to the employment.—*Fish v. Illinois Cent. R. Co. (Iowa)* 65 N. W. 995.

[b] (Iowa; 1896.)

It was competent for the plaintiff to show that it was the custom generally on defendant's road to uncouple cars in motion, though contrary to the rules, and that the officers of the defendant company knew of the custom, and had made no objection to it.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co. (Iowa)* 67 N. W. 227.

[c] (Minn.; 1897.)

When it is proved that a custom as to the operation of trains, designed for the protection of employes, has been disregarded, but that its observance would not have prevented the accident, a verdict for damages cannot be based solely on failure to observe it.—*Moore v. Great Northern Ry. Co. (Minn.)* 69 N. W. 1103.

§ 32. Orders from stranger.

(Iowa; 1896.)

A master is not liable for injuries to a servant caused by orders received from another because the servant believed that he had been told to obey such orders, if such belief was not founded on fact.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co. (Iowa)* 69 N. W. 743.

§ 33. Method of work.

[a] (Iowa; 1894.)

An instruction that when plaintiff, an employé, was directed to go with a car, it was the duty of those in charge of the engine to wait till plaintiff had boarded it before starting the car, is not prejudicial, as justifying plaintiff in delaying any length of time, where it was not claimed that he unreasonably delayed in getting on the car.—*Light v. Chicago, M. & St. P. Ry. Co. (Iowa)* 61 N. W. 380.

93 Iowa, 83.

[b] (Iowa; 1894.)

Plaintiff was a section hand on defendant's railroad. He and his fellow workmen were preparing to go home on a hand car, when plaintiff stepped on the car, and reached over to put his mittens in the tool box through an opening in which the car machinery moved, and one of the men who was on the car started it, causing plaintiff's hand to be injured by such machinery. It appeared that none of plaintiff's companions knew of his peril when the car was started, and the foreman had given no orders to start. *Held*, that there was no negligence in starting the car.—*Hamilton v. Chicago, R. I. & P. Ry. Co. (Iowa)* 61 N. W. 415.

93 Iowa, 46.

§ 34. Method of running engines or cars.

[a] (Iowa; 1895.)

The kicking of cars within city limits at a rate of speed prohibited by ordinance, without any one being stationed near at hand or on them to check the speed or give warning of their approach to men working on a parallel track, is negligence per se, so as to render the company liable for injuries to a track repairer who was struck by them just after he had stepped off the track on which he was working, to let an

engine pass, and who was himself without fault contributing to the accident.—*Tobey v. Burlington, C. R. & N. Ry. Co. (Iowa)* 62 N. W. 761.

[b] (*Iowa; 1895.*)

To suddenly, and without notice, increase the speed of an engine, after it has been slowed in response to the signal of a brakeman about to couple it to a car, and without his orders, is negligence.—*Strong v. Iowa Cent. Ry. Co. (Iowa)* 62 N. W. 789.

[c] (*Iowa; 1896.*)

An engineer of a train following a hand car propelled by sectionmen familiar with the running of trains has a right to suppose that they knew the train was approaching, and is bound to use all his efforts to stop the engine only when it appears to him that they are not aware of the approach of the train, and are not likely to leave the track in time to allow it to pass.—*Nelling v. Chicago, St. P. & K. C. Ry. Co. (Iowa)* 67 N. W. 401.

[d] (*Minn.; 1897.*)

That the train injuring a switchman in the yards was started while the smoke from the locomotives obscured the tracks in the direction the train was moving was not negligence.—*Moore v. Great Northern Ry. Co. (Minn.)* 69 N. W. 1103.

3. DEFECTIVE AND DANGEROUS APPLIANCES AND PLACES.

§ 35. Improper use of appliances.

(*Mich.; 1896.*)

An employé cannot recover for injuries from defective appliances while using them, without necessity, in a manner and for a purpose not intended, where the defects would not render such appliances unfit to be used as intended.—*Jayne v. Sebawaing Coal Co. (Mich.)* 65 N. W. 971.

§ 36. Knowledge of defect and opportunity to remedy.

[a] (*Iowa; 1895.*)

In an action against a railroad company for personal injuries received while coupling cars, it is error to instruct that defendant is required to furnish cars of such construction that couplings could be made without "any" danger of the brakeman being squeezed.—*Van Winkle v. Chicago, M. & St. P. R. Co. (Iowa)* 61 N. W. 929.

93 Iowa, 509.

[b] (*Mich.; 1895.*)

A brakeman cannot recover for injuries received through being thrown in front of a moving train by stumbling over a pile of ashes wrongfully dumped between the rails by a fireman, and negligently allowed to remain there by the sectionmen, in the absence of proof of notice, either actual or constructive, to the company, that the ashes were there.—*Loranger v. Lake Shore & M. S. Ry. Co. (Mich.)* 62 N. W. 137.

104 Mich. 80.

[c] (*Mich.; 1895.*)

Where a railroad company makes no provision for inspection of locomotives except by engineers, and an accident occurs to a brakeman from a defective pushbar on an engine known to the engineer before starting on the trip, it is a question for the jury whether the engineer does not occupy such relation to the company that notice to him is notice to the company. Grant, J., dissenting.—*McDonald v. Michigan Cent. R. Co. (Mich.)* 65 N. W. 597.

[d] (*Minn.; 1896.*)

Where, in an action to recover for the death of a brakeman on one of defendant's freight trains, which occurred while he was coupling a flat car loaded with rails projecting over the deck of the car, there was evidence that the

conductor knew that the car was so loaded, and that the manner in which it was loaded rendered it dangerous to couple the car, the question of defendant's negligence in hauling the car was for the jury.—*Corbin v. Winona & St. P. Ry. Co. (Minn.)* 66 N. W. 271.

64 Minn. 185.

[e] (*Wis.; 1895.*)

Where it is shown that a safety appliance used on railroads generally has become defective by continued wear, it is not necessary, in an action for injuries caused thereby, to prove that defendant had notice of such condition.—*Paine v. Eastern Ry. Co. of Minnesota (Wis.)* 64 N. W. 1005, 51 Wis. 319.

§ 37. Care required of master.

(*Wis.; 1896.*)

In an action by an employé of a malt company for injuries caused by his falling on machinery near which he was working on being overcome by fumes of sulphur burned in another part of the building, and which entered the room, the question whether defendant knew that the fumes would pervade the whole building and might overcome employés exposed to it, and whether, knowing this fact, defendant used proper care to prevent accidents, and whether sulphur, as used by defendant, created a real danger to the employés, should be submitted to the jury for determination in ordering a special verdict.—*Deisenrieter v. Kraus-Merkel Malting Co. (Wis.)* 66 N. W. 112.

92 Wis. 164.

§ 38. — Sufficiency of appliances.

[a] (*Iowa; 1894.*)

The employer is not required to warrant the safety of the working place, but he must use reasonable care and skill to make the place reasonably safe.—*Fosburg v. Phillips Fuel Co. (Iowa)* 61 N. W. 409.

93 Iowa, 51.

[b] (*Mich.; 1897.*)

One furnishing his servants with appliances in general use by others doing a similar work is not liable because better and safer appliances are obtainable.—*Shadford v. Ann Arbor St. Ry. Co. (Mich.)* 69 N. W. 661.

[c] (*Wis.; 1897.*)

A master is not liable to an employé for using a cast-iron bend in the blow-off pipe of a boiler, that being usually employed, though there are other and safer bends known and in general use.—*Innes v. City of Milwaukee (Wis.)* 70 N. W. 1064.

§ 39. Inspection.

(*Mich.; 1896.*)

In an action by an engineer against a railroad company for injuries by an explosion of the boiler of the engine, there was evidence that there were 50 or 60 broken bolts in the boiler, the ends of which were worn smooth; that the process of wearing them smooth required considerable time; that, in the inspection of boilers by the hammer test, 90 per cent. of all broken bolts could be discovered; and that the bolts break gradually. Held that the evidence was not, as a matter of law, insufficient to prove that, in an inspection by hammer test, made 14 days before the accident, defendant was negligent.—*Woods v. Chicago & G. T. Ry. Co. (Mich.)* 66 N. W. 328.

§ 40. Duty to repair.

(*Wis.; 1895.*)

Plaintiff, an employé of defendant, was injured while operating a defective lathe. It was shown that employés were not permitted to repair their own machines; that plaintiff had called defendant's attention to the defect in this lathe, and, relying on the promises of defendant to have it repaired, had continued to operate it for several weeks, and until the injury occurred. There was evidence that plaintiff at the time of the injury was using reasonable care. Held, that he was

entitled to recover.—*Ferriss v. Berlin Machine Works* (Wis.) 63 N. W. 234.
90 Wis. 541.

§ 41. Proximate cause of injury.

[a] (Mich.; 1895.)

Where a sluice which was used to drain the tracks was frozen up, and water gathered in a depression, and formed into ice, causing the derailment of a car, it cannot be said, as a matter of law, that the proximate cause of the injury was the frozen drain, as distinguished from defendant's negligence.—*Balhoff v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 592.

[b] (Mich.; 1896.)

Hiring a boy in contravention of 3 How. Ann. St. § 1997c3, declaring it unlawful for a manufacturing establishment to hire a child under 14 years of age without the written consent of the parent, is not the proximate cause of his injury received from falling into uncovered cogwheels while scuffling with another boy.—*Bork v. Michigan Bolt & Nut Works* (Mich.) 69 N. W. 254.

[c] (Mich.; 1897.)

In an action for the death of plaintiff's intestate, caused by the bursting of a joint of a steam pipe, no complaint was made that the joint was not properly constructed, and the cause of the explosion was speculative. There was evidence that an examination showed a fracture, part of which was old; that for some time before the accident there was an escape of steam or water at the joint, and that such leaking was common. There was no evidence that the old fracture could have been discovered, that the escape was the result of such fracture, or that the explosion was the effect of such defect, even if the escape indicated something wrong. *Held*, that there was no evidence of defendant's negligence.—*Voigt v. Michigan Peninsular Car Co.* (Mich.) 70 N. W. 1103.

[d] (Minn.; 1896.)

Evidence that plaintiff's intestate was killed while working at a defective machine does not justify a verdict for plaintiff, in the absence of evidence that the defect was the proximate cause of the accident causing the death.—*Koslowski v. Thayer* (Minn.) 68 N. W. 973.

[e] (Minn.; 1896.)

The negligence of those in charge of the second of two hand cars going in the same direction, in running within about 60 feet of the first car, in violation of the rules of the company, and at such speed that they could not have stopped the car within less than 100 feet, was the proximate cause of injury to plaintiff, who fell from the first car, and was struck by the second.—*Christianson v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 640.

§ 42. Unprotected machinery.

[a] (Mich.; 1896.)

The provision in 3 How. Ann. St. § 1997c6, that "all gearing and belting shall be provided with proper safeguards," need be complied with only after notice by the inspector mentioned in the section; section 1997c7 providing that, if belting, shafting, and gearing are located so as to be dangerous to employes, and not sufficiently guarded, "after due notice of such defect said proprietors * * * shall be deemed guilty" of violating the act.—*Bork v. Michigan Bolt & Nut Works* (Mich.) 69 N. W. 254.

[b] (Wis.; 1895.)

The provision of Sanb. & B. Ann. St. § 1636f, that all gearing of machines so located as to be dangerous to employes when engaged in their ordinary duties shall be covered, applies to employes a part of whose duties requires them to clean the gears themselves, as well as to those not employed directly upon or about them.—*Thompson v. Edward P. Allis Co.* (Wis.) 62 N. W. 527, 89 Wis. 523.

[c] (Wis.; 1896.)

Whether an employer was negligent in failing to cover, when not in use, a rapidly revolving circular saw, which, extending but three inches above a table near which workmen were employed, was difficult to see, was a question for the jury.—*Egan v. Sawyer & Austin Lumber Co.* (Wis.) 68 N. W. 756.

[d] (Wis.; 1897.)

Whether certain shafting in a sawmill was "so located as to be dangerous to employes when engaged in their ordinary duties," within Sanb. & B. Ann. St. § 1636f, subsec. 2, requiring it to be guarded, is a question for the jury.—*Guinard v. Knapp-Stout & Co. Company* (Wis.) 70 N. W. 671.

§ 43. Railroad tracks and roadbeds.

[a] (Mich.; 1895.)

In an action against a railroad company for the death of a brakeman, it was error to charge that if defendant did not provide a reasonably safe track, and keep the same in repair, and that if the want of repair was the cause of the accident, plaintiff should recover, as, if the track, as originally built, was safe, the only duty defendant owed deceased was to exercise reasonable care to see that it continued safe.—*Anderson v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 585.

[b] (Mich.; 1895.)

Where water froze upon the tracks, causing the derailment of a car, and killing an employe, the question of defendant's negligence, in not foreseeing the danger and providing a drain, is, on conflicting evidence, for the jury.—*Balhoff v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 592.

[c] (Mich.; 1896.)

The fact that, at the time of an injury to an employe by stepping into a cattle guard placed at the termination of the railroad fence, where it joined the grounds of a station, such fence was not joined to the guard on one side of the track, does not affect the question of the railroad company's liability for the injury.—*Fuller v. Lake Shore & M. S. Ry. Co.* (Mich.) 66 N. W. 593.

[d] (Wis.; 1894.)

In an action by a brakeman for personal injuries, it appeared that plaintiff was walking along waiting for cars to stop, so that he might put a coupling pin under the wheel, and that, when he stooped over to put in the pin, he fell on some loose ice, and the car ran over his hand. A witness testified that the track and ties were covered with snow and ice, which came up two-thirds to the top of the rail, probably thrown there by the section man in flanging off the tracks. Another witness testified that it was icy clear along the track outside from between the flanges. *Held* not sufficient to warrant a finding that defendant was negligent in caring for its tracks.—*Ortell v. Chicago, M. & St. P. Ry. Co.*, 61 N. W. 289, 89 Wis. 127.

[e] (Wis.; 1895.)

In an action for the negligent killing of plaintiff's intestate, it appeared that the ties of defendant's tracks at its sawmill were irregular and defectively laid; that the rails were insecurely fastened, and were not a uniform distance apart; and that while deceased was bringing a car of lumber into the dry house, by means of a pinch bar, under the directions of defendant's general manager, the wheels of the car went off the track, and the lumber fell on plaintiff's intestate. *Held* sufficient to support a verdict for plaintiff.—*Suter v. Park & Nelson Lumber Co.* (Wis.) 62 N. W. 927.
90 Wis. 118.

[f] (Wis.; 1895.)

A railroad company is liable for injury to an employe, caused by a defective roadbed, only where such defect was the result of its negligence, and such as might have been expected to result in such an injury.—*McGowan v. Chi-*

cago & N. W. Ry. Co., 61 N. W. 591, 91 Wis. 117.

[a] (Wis., 1896.)

Where a railroad company allows ashes to be thrown on its tracks, and an employé, while coupling cars, falls over them, and is injured, it is liable therefor.—Kennedy v. Lake Superior Terminal & Transfer Ry. Co. (Wis.) 66 N. W. 1137.

93 Wis. 32.

§ 44. Low bridge over railroad track.

(Iowa; 1895.)

In an action against a railroad company for the death of a brakeman, alleged to have been struck by a low bridge, evidence that the bridge was one and one-half inches higher than the top of deceased's head while standing on a furniture car, some of which cars were in the train, and that a man gains in height one and a half inches while walking, and that deceased's body was found near the bridge, does not warrant a finding that deceased was struck thereby.—Donald v. Chicago, B. & Q. Ry. Co. (Iowa) 61 N. W. 971.

93 Iowa, 284.

§ 45. Mines.

[a] (Iowa; 1897.)

McClain's Code, §§ 2463, 2465, which by implication furnish a rule of the relative duties of miner and mine owner as to proping entries under control of the miner, do not apply where the miner is not bound to look after the safety of the entry in which he works.—Corson v. Coal Hill Coal Co. (Iowa) 70 N. W. 185.

[b] (Mich.; 1896.)

Portions of the stope or room from which the ore is being taken, and which, as the work progresses, it becomes necessary to timber, are not, from the time it becomes necessary to timber them, places for work, within the rule requiring a master to furnish his employés a safe place to work.—Petaja v. Aurora Iron Min. Co. (Mich.) 66 N. W. 951.

4. ACTIONS—PLEADING AND PRACTICE.

§ 46. Complaint.

[a] (Wis.; 1895.)

A complaint alleging that defendant's machinery was defective, to his knowledge; that plaintiff was inexperienced, and ignorant of such defect, and was injured thereby,—states a good cause of action.—Greenberg v. Whitcomb Lumber Co. (Wis.) 63 N. W. 93.

[b] (Wis.; 1897.)

A complaint alleging that, without giving any warning of the approach of an engine around a curve on the track where deceased was pushing one of a string of cars, in the discharge of his duties, defendant railroad company, by its servants in charge of the engine, so carelessly managed the same that by their negligence the engine ran against said cars, forcing them upon deceased, and mortally injuring him, does not show that the proximate cause of the injury was the negligent conduct of defendant's servants on the engine, since it does not directly allege that there was a curve or that an engine came from beyond it, and struck the string of cars.—Ean v. Chicago, M. & St. P. Ry. Co. (Wis.) 69 N. W. 997.

§ 47. Pleading and proof.

[a] (Iowa; 1895.)

A railroad company cannot avail itself of a rule, in its defense to an action for personal injuries, unless it has been pleaded.—Strong v. Iowa Cent. Ry. Co. (Iowa) 62 N. W. 799.

[b] (Neb.; 1896.)

In an action by a servant against the master to recover for injuries received from defective appliances used in the employment, evidence

that the machinery was so used under a promise by the master to remove the defect was not admissible, where such promise was not pleaded.—Mahn v. Thielen (Neb.) 66 N. W. 650.

47 Neb. 686.

[c] (Wis.; 1895.)

In an action by an employé for personal injuries, sustained while attempting to remedy a hot box at night, evidence as to the distance of the light, and that there was a shadow over the box, is admissible as part of the res geste, and on the questions of the assumption of risk, and of defendant's negligence, though the complaint did not charge insufficiency of light.—Kneera v. Merrill Lumber Co. (Wis.) 65 N. W. 374, 91 Wis. 637.

§ 48. Evidence.

[a] (Iowa; 1895.)

Evidence as to what constitutes a completed bridge is admissible in an action against a railroad company for injuries resulting to an employé from the use of a bridge while in the course of construction.—Kentley v. Illinois Cent. R. Co. (Iowa) 63 N. W. 569.

[b] (Neb.; 1895.)

Where a car running seven miles an hour collided with a stationary coal car, the fact that the drawbar in connection with the coupling was bent was not evidence that that make of couplings was defective.—Chicago, B. & Q. R. Co. v. Howard (Neb.) 63 N. W. 872.

45 Neb. 570.

[c] (Wis.; 1895.)

In an action for the death of a switchman, caused by his foot being caught between the rails at a frog, evidence that it was impossible for a foot to be so caught with the blocking in use by defendant was admissible to show that the particular blocking complained of was out of repair.—Paine v. Eastern Ry. Co. of Minnesota, 64 N. W. 1005, 91 Wis. 340.

[d] (Wis.; 1895.)

It was also proper to show that, if guard rails were properly blocked, a foot could not be caught between the rails.—Paine v. Eastern Ry. Co. of Minnesota, 64 N. W. 1005, 91 Wis. 340.

[e] (Wis.; 1896.)

On the issue as to whether the failure to put cold water in a digester was the personal fault of plaintiff, thereby causing an injury to him, it was error to permit plaintiff to testify that, in a conversation had, three months after the accident, with certain of defendant's officers, one of the latter stated, in response to a demand for a settlement, that when they came to see plaintiff they hoped he would die in his bed, and that another of said officers became enraged at plaintiff's request for assistance.—Berlick v. Ashland Sulphite & Fiber Co. (Wis.) 67 N. W. 712.

93 Wis. 437.

[f] (Wis.; 1896.)

In an action by one employed to take care of defendant's daughter while sick, to recover damages on the ground that the daughter was ill of typhoid fever, that defendant concealed such fact, and that plaintiff contracted such disease, defendant denied that he called on plaintiff, or authorized any one to call on her, to take care of his daughter, and in effect denied that he employed her at all, though admitting that she was at his house for a time, rendering assistance. *Held*, that it was not error to permit plaintiff to prove that defendant sent one P. to her house to ask her to come, and that he did so, and told her in the course of the conversation that defendant's daughter had nervous prostration.—Kliegel v. Aitken (Wis.) 69 N. W. 67.

§ 49. — Causes and circumstances of injury.

[a] (Iowa; 1896.)

Where defendant had been allowed to introduce testimony tending to show that uncoupling cars while in motion was dangerous, it

was proper to allow it to be shown in rebuttal that it was not more dangerous for plaintiff's intestate to uncouple cars in such circumstances than when the cars were standing still.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co. (Iowa) 67 N. W. 227.*

[b] (*Iowa; 1896.*)

In an action against a railroad company for the death of plaintiff's intestate, killed while uncoupling cars, plaintiff could show the kind of couplings used on the train on which intestate was working at the time of his death, for the purpose of showing the nature of the work he was obliged to do, even though there was no issue raised as to the kind and condition of the couplings.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co. (Iowa) 67 N. W. 227.*

[c] (*Minn.; 1896.*)

Carpenters working on a scaffold, in attempting to insert one end of a heavy beam in a mortise in a wall, had some difficulty, when the master ordered one of them to pry with a crowbar against the other end of the beam, which rested against the opposite wall. The order was obeyed, and the other end of the beam slipped into the mortise so suddenly that the end resting upon the wall fell upon the scaffold, breaking it down, and injuring plaintiff, a co-employee of the carpenter who pried the beam. *Held*, that it was not error to admit evidence of the peremptory manner in which the master gave the order.—*Myhre v. Tromanhauser (Minn.) 67 N. W. 660.*

64 Minn. 541.

§ 50. — Weight and sufficiency.

[a] (*Iowa; 1895.*)

In an action against a railroad company for injury from an insufficiently blocked frog, while plaintiff was coupling cars, plaintiff alone testified that the blocking was insufficient. Disinterested witnesses for defendant testified that, at the time of the accident, the blocking was sound, but that, 10 days after it occurred, it was broken. Weather-stained pieces taken from the broken block 10 days after the accident were put in evidence, showing that the block was an old one. *Held* sufficient to sustain a finding that the blocking was defective at the time of the accident.—*Allen v. Chicago, M. & St. P. Ry. Co. (Iowa) 64 N. W. 613.*

[b] (*Iowa; 1895.*)

Where, in an action against a railroad company for injuries to a brakeman by slipping on ice formed by water leaking from a tank, several witnesses testified that the tank was out of repair, and that its spout was too short, whereby more water escaped than otherwise would, the question of defendant's negligence was for the jury.—*McFall v. Iowa Cent. Ry. Co. (Iowa) 65 N. W. 321.*

[c] (*Iowa; 1896.*)

Evidence that a switchman, stepping between a standing car and cars that were being slowly backed, made a coupling, and then, starting to go out from between the cars, from some cause fell or was thrown so that one or two wheels of the car ran over one of his legs, the train, however, being stopped by the engineer immediately on striking the standing car, so that the cars only moved about three feet after the switchman fell, is not sufficient to establish any negligence on the part of the railroad company.—*Smith v. Chicago, R. I. & P. Ry. Co. (Iowa) 68 N. W. 908.*

[d] (*Iowa; 1897.*)

Plaintiff, a switchman on defendant's railroad, fell while attempting to climb upon the footboard of a slowly-moving switch engine, but caught hold of the footboard, by which he was dragged for 167 feet, when his foot was crushed. During this time he continually cried out for the engineer to stop. A person on the footboard, near its center, though standing, would be shut off from the view of those on the engine. The bell was ringing, and there were

four persons on the engine, all of whom testified that they heard no outcry, but stopped the train at once on being signaled by a bystander. *Held*, that the fact that plaintiff's outcry was heard by persons standing at a distance from the engine would not justify a finding that it was heard by those on the engine, and that there was no evidence of negligence on the part of the employees.—*Ferguson v. Chicago, M. & St. P. Ry. Co. (Iowa) 69 N. W. 1026.*

[e] (*Mich.; 1895.*)

Evidence that just after a train of flat cars, loaded with gravel, started down a grade, a brakeman thereon, who had been told by the conductor that the brakes were to be left set till the bottom of the grade was reached, and who, so far as appears, had no occasion to go to them till such time, was run over by the train, that his cap was found at the foot of a tree, which stood 18 inches from the side of the cars on which were the brakes; that his body was 16 feet beyond the tree, and that a bruise was on that side of his face which would probably have been exposed to the tree, if he had taken hold of the brake to tighten or loosen it,—does not warrant a submission to the jury of the cause of the accident, as it is a mere matter of conjecture. *Montgomery, J., dissenting.*—*Manning v. Chicago & W. M. Ry. Co. (Mich.) 63 N. W. 312.*

105 Mich. 260.

[f] (*Mich.; 1895.*)

In an action by a brakeman for injuries received in coupling cars, alleged to have been due to the defective condition of the draught irons on the car, the mere evidence that the draught irons were out of order after the accident is not sufficient to show that they were so out of order when the cars were inspected, where there is evidence that at the time of the coupling the cars came together with sufficient force to have caused the defect. *McGrath, C. J., and Montgomery, J., dissenting.*—*Perry v. Michigan Cent. R. Co. (Mich.) 65 N. W. 608.*

[g] (*Minn.; 1896.*)

While plaintiff was standing on the footboard at the end of the tender of the engine, stooping over, without having hold of the hand rail on the tender, and attempting to make a coupling with a car towards which the engine was moving, a sudden motion of the engine threw him off his balance, causing him to throw his hand on the bumper of the car, where it was caught by the bumper of the engine before he had time to remove it. *Held* that, there being no evidence that the jerking of the engine was any more than ordinarily occurs in the business of coupling cars, plaintiff could not recover, since the mere fact that he was thrown off his balance was not sufficient to show negligence on the part of the engineer.—*Puffer v. Chicago G. W. Ry. Co. (Minn.) 68 N. W. 39.*

[h] (*Minn.; 1896.*)

Proof that defendant's servants running the second of two hand cars going in the same direction, down grade, on a slippery track, at high speed, ran within 60 feet of the first car, in violation of a rule of the company requiring hand cars to run 540 feet apart, and that plaintiff, who fell from the first car, was struck by the second before it could be stopped, justifies a finding that the servants on the second car were negligent.—*Christianson v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 69 N. W. 640.*

[i] (*Nebr.; 1897.*)

The foreman of a gravel train ordered plaintiff, who had been working on a flat car, to work on the track, and at the same time ordered the train ahead a car length. Plaintiff, preparatory to alighting, stepped upon the platform of the caboose, where he stood while the train was moving. Upon the foreman's signal, the train, which was moving about 1½ miles per hour, was stopped instantaneously, throwing plaintiff against the brake. *Held*, that the facts did not sustain a finding that defendant's negligence was the proximate

cause of the injury.—*Union Pac. Ry. Co. v. Doyle* (Neb.) 70 N. W. 43.

[b] (Neb.; 1897.)

Plaintiff, a section hand, while working beside the track with his back toward the approaching train, was struck and injured. The train was running on schedule time, and the engineer testified that the bell was rung and the whistle sounded. A strong wind was blowing at the time. Plaintiff and others working near him testified that they heard neither the bell nor the whistle, but did not state whether the wind would have prevented their hearing them if sounded. *Held*, that the evidence did not sustain a finding that the company was negligent.—*Chicago, B. & Q. R. Co. v. Soderburg* (Neb.) 70 N. W. 230.

[k] (Wis.; 1895.)

In an action for damages for the death of plaintiff's decedent, based on the negligence of the master in employing an incompetent engineer to run the engine by which heavy beams were hoisted, it appeared that decedent was placing the timbers after they were hoisted, and by the negligence of the engineer in lowering a piece of timber, without having been signaled to do so by the foreman, was knocked from the structure and killed. There was evidence that the engineer, during the two weeks he had been employed, had repeatedly disobeyed signals. *Held*, that it was error to grant a nonsuit on the ground that decedent had the same means of knowledge as to the engineer's negligence as defendant did.—*Daly v. Sang*, 64 N. W. 997, 91 Wis. 336.

[l] (Wis.; 1896.)

Plaintiff, after a month's experience at the work, was scalded in attempting to remove wood pulp from a boiler or digester which was used by defendant in the manufacture of such pulp by cooking chips in sulphurous acid. It appeared that it was customary to fill the digester with cold water, before removing the contents thereof, in order to cool and compress the mass. *Held*, that, as the great weight of the evidence showed that plaintiff requested that no water should be put into the digester at the time of the accident, and that the proximate cause of the accident was the failure to put in said water, and was due either to the request of plaintiff or to the negligence of a fellow servant who had charge of the cooking of the pulp, a verdict for plaintiff should be set aside though he testified that he did not make such request.—*Berkel v. Ashland Sulphite & Fiber Co.* (Wis.) 67 N. W. 712, 93 Wis. 437.

[m] (Wis.; 1896.)

Proof of a customary way of doing certain work in a railroad yard, introduced on the question whether certain acts resulting in injury to a switchman constituted negligence, need be by no higher degree or greater quantity of evidence than proof of other facts in civil cases.—*Pier v. Chicago, M. & St. P. Ry. Co.* (Wis.) 68 N. W. 464.

§ 51. Trial.

[a] (Wis.; 1896.)

The issue being whether the backing of a train by order of the foreman of a switch crew against the cars on a switch track, after he was warned that a car was about to be chained on that track, resulting in injury to plaintiff, who was doing the chaining, was negligence, there was no error in refusing to submit to the jury the interrogatory, "Did the gang foreman, W., after he was notified that P. [plaintiff] was going to chain up a car, do what a man of ordinary intelligence and prudence conducting the business carried on by defendant, and in W.'s place and stead, would not have done in the light of attending circumstances?" as not only was it confusing, but no answer would cast any light on the issues.—*Pier v. Chicago, M. & St. P. Ry. Co.* (Wis.) 68 N. W. 464.

[b] (Wis.; 1897.)

Plaintiff testified that while he was standing on the fourth or fifth round of a ladder 12 feet long, which leaned against a wall, its foot being about 3½ feet from the wall, one of the side pieces of the ladder broke near the top, whereby he was injured. The ladder was of somewhat brittle wood, but not defective or rotted, and had shortly before carried the weight of two men. An expert testified that, as it stood when plaintiff was injured, it would carry 900 pounds steady load. *Held*, that the improbability of the ladder breaking in the manner testified by plaintiff was so great as to justify a nonsuit.—*Rader v. W. Janesville Cotton Mills* (Wis.) 70 N. W. 687.

§ 52. — Questions for the jury.

[a] (Iowa; 1895.)

Where the testimony is conflicting as to whether deceased was killed through his own negligence in blasting and removing coal, or through the negligence of defendant in not properly caring for the roof, the issue should be left to the jury.—*Morris v. Excelsior Coal Co.* (Iowa) 61 N. W. 627.

[b] (Mich.; 1895.)

In an action by a servant against his master for personal injuries received in a runaway, alleged to have been due to defendant's negligence in furnishing him an unmanageable horse to drive, and improper harness, it appeared that plaintiff, a boy 18 years of age, had just recovered from a severe illness, and was employed by defendant to drive a delivery wagon. On the afternoon of the second day of plaintiff's employment, the horse in question was hitched up. The harness was without a cheekrein, and without a ring on the saddle to guide the driving rein. One of plaintiff's witnesses, who lived near defendant's store, testified that he had never known the horse to have been used before by defendant in a delivery wagon, and that the horse was very nervous. Another witness testified that the horse was high-spirited, and that he had seen her jump when mud would fly from the wheel and strike her. No warning was given to plaintiff concerning the horse. *Held*, that the question of defendant's negligence was for the jury.—*Hoffman v. Adams* (Mich.) 64 N. W. 7.

[c] (Mich.; 1895.)

Whether it was contributory negligence for a brakeman to sit between two piles of logs upon a car, when riding on a side track, on conflicting evidence as to the danger of the position, is for the jury.—*Balhoff v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 592.

[d] (Mich.; 1895.)

A car having been derailed, and an employé killed, by reason of the formation of ice in a depression between the tracks, the issue of his assumption of the risk, on conflicting evidence as to his knowledge thereof, is for the jury.—*Balhoff v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 592.

[e] (Minn.; 1895.)

Whether a railroad company, in removing snow from the track, by piling it within a few feet of the track, acted with ordinary care for the safety of employé, is a question for the jury.—*Lawson v. Truesdale* (Minn.) 62 N. W. 546, 60 Minn. 410.

[f] (Minn.; 1896.)

In an action for the death of a brakeman killed while attempting to couple an engine with a flat car, where the evidence as to whether the engineer handled the engine properly was conflicting, the question of his negligence was for the jury.—*Leonard v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.) 65 N. W. 1084, 63 Minn. 489.

[g] (Neb.; 1895.)

In an action for death by wrongful act, it was error to instruct, unqualifiedly, that, if deceased was exposed to unusual danger in per-

forming his duties, that fact would be negligence on the part of defendant.—*Kearney Electric Co. v. Laughlin* (Neb.) 63 N. W. 941.
45 Neb. 390.

[b] (Wis.: 1895.)

Deceased was employed by defendant to assist in putting logs on a skidway at the foot of a steep hill, to accomplish which the logs were rolled down the hill, the employes keeping them straight by means of cant hooks; and, while engaged in this work, deceased was caught by a rolling log and killed, no one witnessing the accident. There was evidence that the employment was attended by danger not obvious to one unaccustomed to the work, and that deceased, a minor, had no experience, and was not warned of the danger, though testimony for defendant tended to show that he had been cautioned. *Held*, that the question of defendant's liability was for the jury.—*Wolski v. Knapp, Stout & Co. Company* (Wis.) 63 N. W. 57.
90 Wis. 178.

[c] (Wis.: 1895.)

Plaintiff, while at work before sunrise in the yards of defendant, was struck by a rapidly moving car shunted onto the main track by order of defendant's foreman from a point out of plaintiff's vision. Its approach was not signaled, and was not heard by plaintiff. Plaintiff was obliged to work very near the tracks. *Held*, the question of defendant's negligence should have been left to the jury.—*Promer v. Milwaukee, L. S. & W. Ry. Co.* (Wis.) 63 N. W. 90.
90 Wis. 215.

[d] (Wis.: 1895.)

In an action to recover of an employer for injuries to a minor employe received in the course of a dangerous employment, an instruction which refers to the jury for their determination, from their observance of the injured employe as a witness and their hearing of his testimony, the question of how much allowance should be made for his youth in determining the degree of care and discretion to be expected of him by his employer, is not erroneous.—*Distott v. Henry Luther Co.* (Wis.) 64 N. W. 425.
90 Wis. 635.

[k] (Wis.: 1895.)

Where a railroad company used wooden blocking between the rails at frogs, to prevent employes' feet from being caught, and there was evidence to show that a switchman, whose duty it was to couple moving cars, started to make a coupling, and when next seen he was lying with his foot between the rails about a foot from a frog, the car having passed over his body, and there was testimony that the blocking at that point was out of repair, the issue of negligence is for a jury.—*Paine v. Eastern Ry. Co. of Minnesota*, 64 N. W. 1005, 91 Wis. 340.

[l] (Wis.: 1896.)

Where the facts relied on to show negligence of the master, though undisputed, are ambiguous, and of such a nature that reasonable men without prejudice may disagree as to the inference to be drawn therefrom, the question should be submitted to the jury.—*Kutchera v. Goodwillie* (Wis.) 67 N. W. 729.
93 Wis. 448.

[m] (Wis.: 1896.)

That the foreman of a switch crew, after being warned that a car was about to be chained on a certain track, deliberately ordered a train to be backed against the cars standing on that track, which moved them, injuring the person doing the chaining, is in itself evidence sufficient to go to the jury on the question of negligence.—*Pier v. Chicago, M. & St. P. Ry. Co.* (Wis.) 68 N. W. 464.

[n] (Wis.: 1896.)

The question whether defendant was negligent in requiring of plaintiff too great service, by assigning him three tasks to perform in a sawmill, which were to a very considerable extent coincident in their requirements upon his

attention, and one of which alone had theretofore been the sole duty of another employe, is for the jury.—*Egan v. Sawyer & Austin Lumber Co.* (Wis.) 68 N. W. 756.

§ 53. — Instructions.

[a] (Iowa: 1895.)

Where it was shown that the decedent, at the time of the accident causing his death, was engaged, under the direction of defendant's foreman, in building a wall, which formed no part of the bridge causing the accident, and that the actual work on the bridge was under the direction of another foreman, a charge that it was "the duty of the person who was in charge of the men, including the deceased, or the several persons having control of the different parts of the work of the rebuilding and repairing the bridge, to know the condition of the bridge, and its ability to support the approaching train, and to flag or give warning to the approaching train in time to stop the same," was error.—*Keatley v. Illinois Cent. R. Co.* (Iowa) 63 N. W. 560.

[b] (Neb.: 1896.)

In an action by an employe of an electric street-railway company to recover for injuries caused by the burning of a wire and the falling thereof on plaintiff, instructions which made defendant's liability turn upon the question whether the wires were safely strung, instead of upon defendant's negligence in furnishing and maintaining them, were erroneous.—*Lincoln St. Ry. Co. v. Cox* (Neb.) 67 N. W. 740.
48 Neb. 807.

[c] (Neb.: 1896.)

In an action by a servant for injuries received in attempting to obey an order of the master to board a moving train, an instruction that "it is in general the duty of an employe to obey the orders of his superior, and, in the absence of knowledge or means of knowledge to the contrary, he may presume it safe for him to do so," was erroneous, as implying that the servant might, as a matter of law, presume it safe for him to obey the command.—*Chicago, R. I. & P. R. Co. v. McCarty* (Neb.) 68 N. W. 633.

[d] (N. D.: 1894.)

In an action for injuries to an employe, where defendant's negligence is not established as a matter of law, charging the jury that defendant is liable if plaintiff was free from contributory negligence is reversible error.—*Bennett v. Northern Pac. R. Co.* (N. D.) 61 N. W. 18.
4 N. D. 348.

[e] (Wis.: 1894.)

In a suit for injuries to an employe, after charging that if the employment was dangerous, and plaintiff did not know it, and was not so informed, but used ordinary care, he could recover, it was error not to charge that the injury must have been caused directly by the dangerous character of the employment.—*Craven v. Smith*, 61 N. W. 317, 89 Wis. 119.

[f] (Wis.: 1896.)

In an action for personal injury, where defense pleaded assumption of the risks of the employment and contributory negligence, the refusal to give instructions to the effect that if the plaintiff, because of his age, understanding, and experience, knew and comprehended the dangers, or if, from all the circumstances, he ought to have known and comprehended such dangers, the jury should find that he assumed the risk of such injury as incidental to his employment, is error.—*Klatt v. N. C. Foster Lumber Co.* (Wis.) 66 N. W. 791.
92 Wis. 622.

[g] (Wis.: 1897.)

After correctly instructing that if defendant furnished plaintiff a place in which to work, "which was as safe and free from danger as other persons of ordinary care, engaged in like business, and under like circumstances, ordina-

rily furnish," the jury should find for defendant on that fact, it was reversible error to add, "but not if you find that places provided by such other employers * * * are not reasonably safe places."—*Guinard v. Knapp, Stout & Co. Company (Wis.)* 70 N. W. 671.

§ 54. — Verdict or findings.

[a] (Wis.; 1895.)

In an action by an employé for personal injuries inflicted by certain machinery, a special verdict should find whether there was any actionable negligence, in what it consisted, and whether it was the proximate cause of the injury; and a finding that defendant should have anticipated the danger to plaintiff is not equivalent thereto. *Kucera v. Merrill Lumber Co.,* 65 N. W. 374, 91 Wis. 637.

[b] (Wis.; 1896.)

In an action by a servant for injuries, a special verdict, finding that plaintiff was injured, while in defendant's employ, by the breaking of a stringer used in a staging; that defendant did not furnish plaintiff with a reasonably safe place to work, and reasonably safe materials with which to build the staging; that defendant's secretary had given special instructions to use the defective stringer; that there was no other safe lumber at hand provided by defendant; and that plaintiff could not have known, by using ordinary care, that the material was defective,—will support a judgment for plaintiff.—*Stanwick v. Butler-Ryan Co. (Wis.)* 67 N. W. 723.

93 Wis. 420.

[c] (Wis.; 1896.)

In an action by a servant, 11 years of age, for injuries caused by a planing machine near where he was working, a special verdict reciting that defendant ought reasonably to have known that there was danger of a workman of plaintiff's age and experience, while exercising ordinary care, slipping and getting his hand into the knives of the planer; that plaintiff could not, by the use of ordinary care, have known of the risks of the employment; and that plaintiff was not guilty of any contributory negligence was insufficient to sustain a judgment for plaintiff in the absence of findings that plaintiff did slip, and that such slipping was caused by defendant's want of ordinary care in failing to warn plaintiff, or to provide guards for the machine, or that such want of ordinary care was the proximate cause of the injury. *Kucera v. Lumber Co. (1895)* 65 N. W. 374, 91 Wis. 637, followed.—*Kutchera v. Goodwillie,* 67 N. W. 729, 93 Wis. 448.

[d] (Wis.; 1896.)

In an action by an employé for personal injuries (defendant being charged with negligence in not furnishing safe appliances, in not warning plaintiff of the danger of the work, and with other negligence which was that of fellow servants of plaintiff), a special verdict finding that defendant had furnished a safe place to work and safe appliances; that defendant did not warn plaintiff of the danger in performing the work; that plaintiff did not tell defendant he was familiar with the kind of work he was doing when injured; that plaintiff did not know, and could not by the use of reasonable diligence have learned, of the dangerous character of the work; and returning the answer, "Yes," to the question, "Was the defendant guilty of negligence, or a want of ordinary care, or such care as persons * * * of ordinary care ordinarily use, which was the proximate cause of plaintiff's said injury?"—will not support a judgment for plaintiff, as, even if the negligence imputed to defendant was the failure to warn plaintiff of any danger in performing the work required of him, it was necessary, in order to charge defendant, to find that defendant knew or ought to have known of the dangerous character of the work, and knew that plaintiff was inexperienced and ignorant of the danger. *Kloehinski v. Shores Lumber Co. (Wis.)* 67 N. W. 934.

93 Wis. 117.

[e] (Wis.; 1896.)

A special verdict finding that plaintiff was injured while operating a machine in defendant's factory by direction of the foreman, that there was a defect or want of repair in the machine, and that defendant or its agent did not give plaintiff such general instructions and caution as would enable him to comprehend the danger which he might incur, etc., is insufficient to sustain a judgment for plaintiff; it not appearing from such verdict that defendant's negligence was the proximate cause of the injury.—*Bagnowski v. A. J. Lindermann & Hoverson Co. (Wis.)* 67 N. W. 1131.

93 Wis. 532.

[f] (Wis.; 1897.)

Plaintiff, a foreman in defendant's saw-mill, put his hand under the sleeve of a band saw to examine the machinery instead of using the manhole provided for that purpose, and was injured by the sleeve, which fell by reason of the breaking of the nut which supported it. The jury found specially that the nut was broken prior to the accident; that with the nut so broken the machine was not reasonably safe for use in the mill, that its condition could have been discovered by defendant by the exercise of ordinary care, and that plaintiff was not negligent. *Held*, that the verdict would not support a judgment for plaintiff, since it did not find that the use of the machine in its defective condition was negligence as to plaintiff, and the danger of such an accident from the defect was not, as a matter of law, apparent.—*Rysdorp v. George Pankratz Lumber Co. (Wis.)* 70 N. W. 677.

[g] (Wis.; 1897.)

A finding that "the machine was not safe to be used in the mill" does not necessarily show that the use of it was negligent as against an employé.—*Rysdorp v. George Pankratz Lumber Co. (Wis.)* 70 N. W. 677.

[h] (Wis.; 1897.)

A special verdict finding defendant both free from and guilty of actionable negligence will not support a judgment.—*Innes v. City of Milwaukee (Wis.)* 70 N. W. 1064.

§ 55. Review.

(Iowa; 1896.)

In an action for the death of plaintiff's decedent, a brakeman, while coupling cars, alleged to have been due to the negligence of the company in leaving cobblestones on the track, a judgment for plaintiff will not be disturbed, on appeal, for failure of proof of a want of contributory negligence on the part of decedent, there being no direct evidence thereof, no one having seen the accident, where it appears that decedent was acting in the line of his duty when killed.—*Fish v. Illinois Cent. R. Co. (Iowa)* 65 N. W. 995.

IV. VICE PRINCIPALS AND FELLOW SERVANTS.

§ 56. In general.

[a] (Iowa; 1894.)

A workman, employed by a vice principal to put a place of work in proper repair, does not become himself a vice principal, but is a fellow servant with one working in the place being repaired, and who has been employed by the same authority as himself.—*Fosburg v. Phillips Fuel Co. (Iowa)* 61 N. W. 400.

93 Iowa, 54.

[b] (Mich.; 1895.)

As it is the duty of a railroad company to furnish trainmen with a reasonably safe track, a sectionman, whose duty it was to keep the track in condition, is not a fellow servant

with a brakeman upon a freight train. *Grant, J.*, dissenting.—*Balloff v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 592.

[c] (Mich.; 1896.)

The master's duty to his servants, in the employment of fellow servants, is to use all ordinary care in the selection and retention of competent men.—*Lewis v. Emery* (Mich.) 66 N. W. 569.

[d] (Minn.; 1897.)

The employé of an independent contractor is not a fellow servant of another independent contractor engaged in a different line of work on the same building.—*Eckman v. Laner* (Minn.) 69 N. W. 893.

[e] (Neb.; 1897.)

Whether one of several employés is vice principal as to his co-employés is generally a mixed question of law and fact.—*Union Pac. Ry. Co. v. Doyle* (Neb.) 70 N. W. 43.

§ 57. Persons performing duties of master or of servant.

(Wis.; 1896.)

Where the duty of a master to furnish a reasonably safe place for an employé to work is delegated to another employé, such employé is not, as regards the performance of such duty, a fellow servant of the other, and his negligence is that of the master.—*Eingartner v. Illinois Steel Co.* (Wis.) 68 N. W. 664.

§ 58. Foreman or person engaged in superintendence.

[a] (Iowa; 1896.)

The petition in an action for injuries to one shoveling for a city, caused by the negligence of D., who was in charge of the work, states that D. was vice principal, by alleging that for doing the work he was, by the board of public works, authorized, in the name of the city, to employ and discharge men and manage the work so done, and that he was given the entire charge of all persons employed to do the work, and of the manner in which it should be done, and that, being so authorized, he, for and on behalf of the city, assumed the control of the work, and employed plaintiff to work for the city, under his control in the performance of the work.—*Hathaway v. City of Des Moines* (Iowa) 66 N. W. 188.

[b] (Mich.; 1894.)

In an action to recover from a railroad company for injuries sustained by one of its employés occupied in unloading dirt from its cars and leveling it upon its premises, it appeared that plaintiff was one of a gang of men under a foreman, who directed the men where and how to work, saw that they did their work properly, assisting them therein, and himself under the control of a higher official of defendant, who was often present, but by whom he was sometimes invested with the power of discharging men. *Held*, that the foreman was plaintiff's fellow servant.—*Schroeder v. Flint & P. M. R. Co.* (Mich.) 61 N. W. 663.

103 Mich. 213.

[c] (Mich.; 1896.)

A railroad section boss and the laborers under his control are fellow servants.—*Gavigan v. Lake Shore & M. S. Ry. Co.* (Mich.) 67 N. W. 1097.

[d] (Minn.; 1895.)

The foreman of a crew of common laborers, of which plaintiff was a member, having authority to hire and discharge men, and superintend the work of constructing and repairing bridges, in the absence of defendant's engineer, *held* to be a vice principal, for whose negligence, resulting in injury to plaintiff, defendant is liable. *Canty, J.*, dissenting.—*Blomquist v. Chicago, M. & St. P. Ry. Co.* (Minn.) 62 N. W. 818.

60 Minn. 426.

[e] (Minn.; 1896.)

Defendant, in excavating a ditch, placed the work and the men employed thereon in

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charge of a foreman having general oversight of the work, and authority to employ and discharge men, and to direct them regarding the work. *Held*, that the negligence of the foreman in ordering one of the men to work at a place of unusual danger in the ditch, without warning him of the danger, was the negligence of a vice principal.—*Carlson v. Northwestern Tel. Exch. Co.* (Minn.) 65 N. W. 914.

63 Minn. 428.

[f] (Neb.; 1897.)

A section hand, who, with his fellow workmen and the boss who controlled them, while working on the section, is employed on a gravel train subject to the orders of a foreman having no power to hire or discharge such workmen, is not a fellow servant of the foreman.—*Union Pac. Ry. Co. v. Doyle* (Neb.) 70 N. W. 43.

[g] (Neb.; 1897.)

That an employé has authority to hire and discharge other employés is not conclusive that he is a vice principal.—*Union Pac. Ry. Co. v. Doyle* (Neb.) 70 N. W. 43.

[h] (Neb.; 1897.)

The best evidence that one is, as to his co-employés, a vice principal, is that they are under his supervision and control, and subject to his orders.—*Union Pac. Ry. Co. v. Doyle* (Neb.) 70 N. W. 43.

[i] (Wis.; 1895.)

Under Laws 1889, c. 438 (Sanb. & B. Ann. St. § 1816a), declaring a railroad company liable for damages to an employé caused by the negligence of a "train dispatcher, telegraph operator, superintendent, yard master, conductor or engineer, or of any other employé, who has charge or control of any stationary signal, target point, block or switch," the word "superintendent" applies only to one having to do with the movement of trains and cars, and does not include the foreman of a repair shop.—*Hartford v. Northern Pac. R. Co.*, 64 N. W. 1033, 91 Wis. 374.

[j] (Wis.; 1896.)

Though, where one, as superintendent, negligently directs an employé to work on a log deck with him, in handling logs as they are brought into a sawmill, without giving him necessary instructions as to the danger, such negligence will be regarded as that of the master, yet, having himself voluntarily taken part in the work, which was no part of his duty as superintendent, a negligent direction of his to the employé while they are working together will be regarded as that of a fellow servant.—*Klochinski v. Shores Lumber Co.* (Wis.) 67 N. W. 934.

93 Wis. 417.

[k] (Wis.; 1897.)

The "shift boss" of a mine acts as a vice principal in directing a miner to work at a certain place without notifying him of unexploded blasts at such place, the existence of which is known to the boss.—*McMahon v. Ida Min. Co.* (Wis.) 70 N. W. 478.

§ 59. — Superintendent assisting in work.

[a] (Mich.; 1896.)

The foreman of a room in a car shop, who works with the men under his charge, is a fellow servant with them as to all acts which it is not the duty of the master to perform; and one injured by his negligence while working with him cannot recover from the master on the ground that the foreman was vice principal.—*Findlay v. Russel Wheel & Foundry Co.* (Mich.) 66 N. W. 50.

[b] (Wis.; 1895.)

Where a superintendent goes outside his duties, and as a volunteer assists an employé to do certain work, he is, as to such work, a fellow servant of the employé.—*Hartford v. Northern Pac. R. Co.*, 64 N. W. 1033, 91 Wis. 374.

§ 60. — Question for jury.

[a] (Minn.: 1896.)

In order to lower an iron tank weighing 4,000 pounds from the first floor of a building, in the course of construction, to the basement, skids were laid from the edge of a hole in the floor to the ground beneath, on which the tank was to slide down. Two foremen employed by defendant in the construction of the building then appeared, one of them ordering a chain to be placed around the tank, to be attached to a block and pulley, in order to control the tank while it was sliding, and one of the foremen retained hold of the snub rope by which the pulley was governed. When the tank was partly down, it was stopped by the order of the foreman, who handed the snub rope to one of the men, and went forward, ordering certain skids to be taken out of the way. Several men went to the basement to obey the order, and after the foreman saw that the skids were removed, but before he had ascertained whether any of the men had gotten out of danger, he ordered the tank to be lowered, as a result of which one of the men was injured. *Held*, that whether the accident was the result of negligence of the foreman was a question for the jury.—*Abel v. Butler-Ryan Co.* (Minn.) 68 N. W. 205.

[b] (Minn.: 1896.)

The general foreman of defendant's factory, noticing that the power was inadequate, threw out the elevator clutch so as to give more power to other departments, and after notifying the engineer of the trouble, threw the clutch in, thus turning the power on again, and as a result injuring an employé then working at the elevator. *Held*, that defendant could not complain that the court left to the jury the question whether the foreman in throwing on the power was in performance of his duty of superintendence or was acting as a fellow servant of the injured employé.—*Hess v. Adamant Manufg Co. of America* (Minn.) 68 N. W. 774.

[c] (Minn.: 1897.)

Whether the chief engineer of an electric company, having charge of all the men employed about the plant, was a vice principal in directing a "wiper" in the engine room, assisted by other laborers, in loading a boiler upon a truck, was a question for the jury.—*Johnson v. Minneapolis General Electric Co.* (Minn.) 69 N. W. 713.

[d] (Minn.: 1897.)

Defendant's foreman, having charge of all the men employed about the plant, while directing them in loading a large cylindrical boiler upon a truck, ordered the plaintiff, after the boiler had been rolled on the truck from the top of a pile of other boilers, to go between the truck and the other boilers and remove one of the skids, at the same time ordering another laborer to remove the other skid, the boiler not having been blocked or otherwise secured upon the truck. The weight of the boiler had caused the wheels of the truck next to the pile of boilers to sink into the ground, and when the skids were removed the boiler rolled off, and injured plaintiff. *Held*, that the question whether the accident was caused by the foreman's negligence was for the jury.—*Johnson v. Minneapolis General Electric Co.* (Minn.) 69 N. W. 713.

§ 61. Nature of common service—Railway employés.

[a] (Iowa: 1896.)

An employé operating a machine in defendant's shops is a fellow servant of a machinist engaged in placing shafting, though not under control of same foreman.—*Treka v. Burlington, C. R. & N. Ry. Co.* (Iowa) 69 N. W. 422.

[b] (Mich.: 1895.)

In an action against a railroad company for the death of a brakeman, resulting from defects in the track, where it appeared that the

road master knew of the defects before the accident, it was proper to refuse to charge that the neglect to repair the track was the neglect of the section foreman, and that, since the section foreman was the fellow servant of deceased, plaintiff could not recover.—*Anderson v. Michigan Cent. R. Co.* (Mich.) 65 N. W. 555.

[c] (Minn.: 1896.)

A track repairer employed by an electric street railway company is a fellow servant of a motorman employed by the company, and hence cannot recover for injuries resulting from the failure of the latter to give timely warning of the approach of a car, as required by the rules.—*Lundquist v. Duluth St. Ry. Co.* (Minn.) 67 N. W. 1006.

[d] (Neb.: 1895.)

Brakemen engaged in running the same train are fellow servants.—*Chicago, B. & Q. R. Co. v. Howard* (Neb.) 63 N. W. 572.
45 Neb. 570.

[e] (Neb.: 1896.)

The foreman of a section crew and an engineer in charge of a locomotive drawing a train not connected with the work of the section men are not fellow servants within the meaning of the rule forbidding a recovery for injuries caused by the negligence of a fellow servant.—*Railroad Co. v. Erickson* (1894) 59 N. W. 347, 41 Neb. 1, followed.—*Omaha & R. V. R. Co. v. Kraysenbuhl*, 67 N. W. 447, 48 Neb. 553.

[f] (Wis.: 1895.)

A car repairer and a switchman are fellow servants.—*Smith v. Chicago, M. & St. P. Ry. Co.*, 65 N. W. 183, 91 Wis. 503.

§ 62. — Miners.

[a] (Mich.: 1895.)

Plaintiff was employed to load onto cars and remove from a mine the ore as it was brought to the floor by the miners. It was the practice, as successive spaces were cleared of ore, to support the roof by timbers put in on notice from the miners or through the shift boss. Before a newly-opened space had been put in condition for the timber men, and before they were notified that their services were required, plaintiff was injured by ore falling from the roof. There was evidence that too large a space had been mined, and that just before the accident the foreman's attention had been called to the roof, and he said that it was all right. *Held* that, if there was any negligence, it was that of a fellow-servant.—*Petaja v. Aurora Iron Min. Co.* (Mich.) 64 N. W. 335.

[b] (Mich.: 1896.)

A shift boss of miners is a fellow servant of a trummer.—*Petaja v. Aurora Iron Min. Co.* (Mich.) 66 N. W. 951.

§ 63. Liability of master for negligence.

[a] (Iowa: 1896.)

Plaintiff, while working near a scaffold, was injured by the falling of a plank which a fellow servant, working on the scaffold, had not fastened, and the fall of which was caused by a crooked ladder, used in mounting the scaffold, being placed against it instead of a trestle. There were other ladders, in perfect condition, which might have been used. *Held*, that the master, having furnished suitable trestles and planking for the scaffold, was not liable.—*Treka v. Burlington, C. R. & N. Ry. Co.* (Iowa) 69 N. W. 422.

[b] (Mich.: 1894.)

Plaintiff was employed by defendant, a builder of steel vessels, to go over the work and supply omitted rivets after the riveters of the plates of a vessel were through, and was injured by the breaking of a scaffold. He and the carpenters who built the scaffold were continuously employed by defendant, and, through their respective foremen, were under the supervision of one superintendent, together with artisans of the various other trades among which

the work was apportioned. *Held*, that defendant was not liable for plaintiff's injury, it being occasioned by the negligence of a fellow servant.—*Beesley v. F. W. Wheeler & Co.* (Mich.) 61 N. W. 658.
103 Mich. 196.

[c] (Minn.: 1897.)

Because one is told by his employer to do whatever another employé tells him to do in completing certain work he does not necessarily cease to be a fellow servant of such other.—*Lundberg v. Shevlin-Carpenter Co.* (Minn.) 70 N. W. 1078.

[d] (Wis.: 1894.)

A master is not liable to an employé for an injury resulting solely from a coemployé's negligence.—*Craven v. Smith* (Wis.) 61 N. W. 317, 89 Wis. 119.

[e] (Wis.: 1895.)

When the negligence of a fellow servant of a deceased appears to have caused the accident, and there is no sufficient evidence of any negligence on the part of the employer, the employer is not liable.—*Peterson v. Sherry Lumber Co.* (Wis.) 62 N. W. 948.
90 Wis. 83.

§ 64. — Incompetency of fellow servants.

[a] (Iowa: 1897.)

A railroad company is not liable for the malpractice of its surgeons in treating injured employes where it exercises due care and diligence to select surgeons who are reasonably competent.—*Maine v. Chicago, B. & Q. R. Co.* (Iowa) 70 N. W. 630.

[b] (Mich.: 1895.)

H., a boy of 16, of average size and apparent strength, had been employed by the side of plaintiff as shifter to molders, and for six months had performed the work satisfactorily. His arm had been broken some years before, and was crooked, but this fact was not known to L., a vice principal of defendant corporation, who directed the shifters where to go to work. On the morning of the accident to plaintiff, H. told L. that he was not strong enough to do the work. H. testified that his arm was in its customary condition that morning, and that he was feeling as strong as usual. Boys of 16, of average size and strength, were admitted to be competent to do such work. *Held*, that L. had the right to assume that he was dealing with a boy of average strength, and that, notwithstanding H.'s statement, he was justified in instructing H. to go to work.—*Jungnitsch v. Michigan Malleable Iron Co.* (Mich.) 63 N. W. 296.
105 Mich. 270.

[c] (Mich.: 1895.)

Where the work to be done requires only sufficient strength and a moderate degree of intelligence, the employer must, in selecting servants, exercise only that reasonable care which an ordinarily careful man exercises under similar circumstances, and not such care as will reduce the danger of accident to a minimum.—*Jungnitsch v. Michigan Malleable Iron Co.* (Mich.) 63 N. W. 296.
105 Mich. 270.

[d] (Minn.: 1896.)

Where a master knowingly retained a careless and negligent servant, as a result of whose subsequent negligence a co-servant was injured, the master was liable for the injuries.—*Smith v. E. W. Backus Lumber Co.* (Minn.) 67 N. W. 358.
64 Minn. 447.

§ 65. Acts or omissions constituting negligence.

[a] (Minn.: 1896.)

In order to lower an iron tank weighing 4,000 pounds from the first floor of a building, in the course of construction, to the basement, skids were laid from the edge of a hole in the floor to the ground beneath, on which the tank

was to slide down. Two foremen employed by defendant in the construction of the building then appeared, one of them ordering a chain to be placed around the tank, to be attached to a block and pulley, in order to control the tank while it was sliding, and one of the foremen retained hold of the snub rope by which the pulley was governed. When the tank was partly down, it was stopped by the order of the foreman, who handed the snub rope to one of the men, and went forward, ordering certain skids to be taken out of the way. Several men went to the basement to obey the order, and after the foreman saw that the skids were removed, but before he had ascertained whether any of the men had gotten out of danger, he ordered the tank to be lowered, as a result of which one of the men was injured. *Held*, that whether the accident was the result of negligence of the foreman was a question for the jury.—*Abel v. Butler-Ryan Co.* (Minn.) 68 N. W. 205.

[b] (Wis.: 1895.)

Where a complaint by a brakeman for personal injuries is founded on the engineer's negligence, proof that, when plaintiff was ready to couple standing cars with others approaching, he signaled the engineer of the engine which had been attached to the approaching cars as to their speed, supposing that the engine was attached to the cars, and that, owing to the speed at which the car approached, he was injured, is not sufficient to sustain a finding that the injuries were due to the engineer's negligence, where, when the signal was given by plaintiff, the approaching cars had been detached from the engine, and it was then the head brakeman's duty to regulate their speed.—*Lagage v. Chicago & N. W. Ry. Co.* (Wis.) 65 N. W. 165, 91 Wis. 507.

§ 66. Statutory liability of railroad company.

[a] (Iowa: 1895.)

Code, § 1307, providing that railroad companies shall be liable to their employes for damages resulting from the negligence or willful wrongs of their agents and servants, renders them so liable to any employé engaged in work which exposes him to the dangers peculiar to the operation of a railroad.—*Keatley v. Illinois Cent. R. Co.* (Iowa) 63 N. W. 560.

[b] (Iowa: 1895.)

Under such statute, a railroad company is liable for the death of an employé who, while engaged in building a retaining wall along the embankment, was killed by the wreck of a freight train, resulting from the negligence of an engineer in running the train at a high rate of speed across an adjacent unfinished bridge.—*Keatley v. Illinois Cent. R. Co.* (Iowa) 63 N. W. 560.

[c] (Iowa: 1897.)

The applicability of Code, § 1307, to an employé, depends on the nature of the hazards to which he is actually exposed; not of those which may have been contemplated in his employment.—*Canon v. Chicago, M. & St. P. Ry. Co.* (Iowa) 70 N. W. 755.

[d] (Iowa: 1897.)

A car inspector required to go between and under cars is exposed to hazards peculiar to the operation of a railroad, within Code, § 1307, making railroad companies liable to their employes for the negligence of fellow servants; and recovery can be had for the death of an inspector killed by the negligent running of cars against the train under which he was working.—*Canon v. Chicago, M. & St. P. Ry. Co.* (Iowa) 70 N. W. 755.

[e] (Minn.: 1895.)

Where a wiper employed in a railroad roundhouse is injured while assisting in straightening a cable used to pull a plow in unloading gravel from cars in repairing the track, he is injured by exposure to hazards peculiar to the repair and operation of railroads, within Gen.

Laws 1887, c. 13, making railroad companies liable for the negligence of fellow servants in such cases.—*Nichols v. Chicago, M. & St. P. Ry. Co.* (Minn.) 62 N. W. 386.
60 Minn. 319.

[f] (Minn.; 1895.)

Gen. Laws 1887, c. 13, providing that every railroad corporation owning and operating a railroad in Minnesota shall be liable for damages sustained by an agent or servant through the negligence of any other agent or servant, does not apply to a street-railway corporation operating its line by cable.—*Funk v. St. Paul City Ry. Co.* (Minn.) 63 N. W. 1099.
61 Minn. 435.

[g] (Minn.; 1895.)

A wiper in a roundhouse, injured, while assisting in coaling an engine, by the engine's being negligently moved by a coemployé, was injured by reason of exposure to the hazards of railroading, within Gen. St. 1891, § 2701, relating to fellow servants.—*Mikkelsen v. Truesdale* (Minn.) 65 N. W. 260.
63 Minn. 137.

[h] (Minn.; 1895.)

A receiver operating a railroad under direction of a court of equity is within Gen. St. 1891, § 2701, relating to fellow servants, and is hence liable to an employé injured by the negligence of a coemployé.—*Mikkelsen v. Truesdale* (Minn.) 65 N. W. 260.
63 Minn. 137.

[i] (Minn.; 1895.)

One employed by a railroad company in stock yards, whose duty was to step from a high platform to the tops of cars as they came opposite, and pull bundles of hay on them from the platform, and who was injured through obeying the directions of the conductor of the train, under whose direction the hay was so loaded, to step from the platform to the top of a car passing at too great a rate of speed to enable him to step to it with safety, which fact was unknown to him, by reason of inexperience and of the darkness, was injured through exposure to the hazards of railroading, within Gen. St. 1894, § 2701, relating to fellow servants.—*Leier v. Minnesota Belt-Line Railway & Transfer Co.* (Minn.) 65 N. W. 269.
63 Minn. 203.

[j] (Minn.; 1896.)

Plaintiff, with others, was employed as a sectionman in repairing defendant's main track, by taking up rails, putting in new ties, and then replacing the rails. The work had to be done with great and extraordinary haste, in order to avoid danger to trains that were, or might be, approaching. While engaged in performing this work with this degree of haste, and while he and another sectionman were carrying a heavy iron rail, plaintiff was injured by his fellow servant's negligently releasing his hold on the rail and letting it fall. *Held*, that plaintiff's employment involved an element of hazard or danger which contributed to the injury, and which was peculiar to the "railroad business," and that, therefore, Gen. St. 1894, § 2701, making railway companies liable to their servants for the negligence of their fellow servants, applied.—*Blomquist v. Great Northern Ry. Co.* (Minn.) 67 N. W. 804.

[k] (Wis.; 1895.)

Under Sanb. & B. Ann. St. § 1816a, a railroad company is liable for injuries caused by fellow servants.—*Promer v. Milwaukee, L. S. & W. Ry. Co.* (Wis.) 63 N. W. 90.
90 Wis. 215.

[l] (Wis.; 1895.)

Under Laws 1893, c. 220, which makes a railroad company liable for injuries to any employé through the negligence of another employé, without contributory negligence on his part, while he is engaged "in operating, running, riding upon or switching, passenger or freight or other trains, engines or cars, and while engaged in the performance of his duties as such em-

ployé," a railroad company is not liable for injuries to one of its car repairers, caused by a switchman negligently running a train into the stationary car in which the repairer was at work.—*Smith v. Chicago, M. & St. P. Ry. Co.* 65 N. W. 183, 91 Wis. 503.

[m] (Wis.; 1896.)

In an action for injuries to a brakeman received in a collision between a switch engine and a train, there was testimony that the engineer on the engine told the yardmaster that he could make the station before the arrival of the train, and it appeared that he was in a position to see further down the track than the yardmaster could without going out on the main track. *Held*, that the engineer was negligent within Sanb. & B. Ann. St. § 1816a, which made defendant liable in case the injury was caused by the negligence of an engineer.—*Albrecht v. Milwaukee & S. Ry. Co.* (Wis.) 69 N. W. 63.

[n] (Wis.; 1897.)

Under Laws 1893, c. 220, making railroad companies liable for injuries to "any employé" through the negligence of another employé, without contributory negligence on his part, while he is engaged in "operating, running, riding upon, or switching" cars, such a company is liable to a freight handler who was negligently run into by an engine while he was pushing a car to the freight house by direction of his superior.—*Dan v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 997.

V. ASSUMPTION OF RISK BY SERVANT.

§ 67. Dangers incident to nature of work.

[a] (Neb.; 1895.)

A rivet heater employed by a bridge company at a forge placed on planks laid on the framework of the upper portion of a viaduct in course of construction, who was required, in his employment, to descend to the ground to get coal with which to supply the forge, assumed the risk attending his walking along a stringer between the forge and the point where the ladder was situated by which he descended.—*Dehning v. Detroit Bridge & Iron Works*, 65 N. W. 186, 46 Neb. 556.

[b] (Wis.; 1895.)

The risk consequent upon the failure of the master to properly discharge his duty to the servant is not a risk incident to his employment.—*Promer v. Milwaukee, L. S. & W. Ry. Co.* (Wis.) 63 N. W. 90.
90 Wis. 215.

[c] (Wis.; 1896.)

An employé cannot be deemed, as matter of law, to have assumed the risk of being injured from falling over piles of ashes four to eight inches high on the track in going between cars to make a coupling, where he did not know of their existence, and at the time they were partially covered with ice and snow, and the day was dark and sleety.—*Kennedy v. Lake Superior Terminal & Transfer Ry. Co.* (Wis.) 66 N. W. 1137.

93 Wis. 32.

§ 68. Request by servant to be kept at work.

(Wis.; 1895.)

The fact that a sawmill hand requested the manager, after he had been for some time employed as an oiler, to retain him in that capacity, does not show that he represented himself as competent for such work, and assumed all risk, there being no evidence that he was retained at such work on account of his request.—*Guinard v. Knapp, Stout & Co. Company* (Wis.) 62 N. W. 625.

90 Wis. 123.

§ 69. Dangerous methods of work.**[a] (Mich.: 1895.)**

While a farm laborer, being directed to take ensilage from a silo by working from the bottom, undermines the pile, and is injured by its falling upon him, he cannot recover, having assumed the risk.—*Welch v. Brainard* (Mich.) 65 N. W. 607.

[b] (Wis.: 1897.)

When an employer provides a safe way, which is known to the employé, for repairing a machine, the latter's choice of a different way is at his own risk.—*Rysdorp v. George Pankratz Lumber Co.* (Wis.) 70 N. W. 677.

§ 70. Risk outside scope of employment.**[a] (Mich.: 1896.)**

One employed in a car factory to do general work, such as carrying timbers, painting, and lifting, is within the line of his employment when assisting to hoist car bodies on their trucks by means of block and tackle machinery.—*Findlay v. Russel Wheel & Foundry Co.* (Mich.) 66 N. W. 50.

[b] (Minn.: 1895.)

Where plaintiff testified that he was employed by the foreman of the press room to assist in putting in a new press, and to work about the press room, and that while working about the new press the press-man of another press in the same room directed that plaintiff hand him an electric hand lamp under the latter press, and in doing so plaintiff was injured, whether plaintiff acted within the scope of his employment was for the jury.—*Voyer v. Dispatch Printing Co.* (Minn.) 64 N. W. 1138. 62 Minn. 393.

[c] (Minn.: 1895.)

A carpenter, working on a scaffold, with others, in attempting to place one end of a heavy beam in a mortise, could not recover for injuries received, through the slipping and falling of the beam on the scaffold, so as to break the latter down.—*Smith v. Tromanhauser* (Minn.) 65 N. W. 144. 63 Minn. 98.

§ 71. — Compliance with commands.**[a] (Mich.: 1896.)**

A laborer of a section gang, performing labor outside of his employment, the dangers of which are obvious, though such labor was performed under the fear of being discharged if he failed to do so, cannot recover for injuries due to the negligence of his foreman, on the ground that the section boss, in directing a service outside of the scope of the employment, represented the master, and the laborer, by consenting to perform the work, did not assume the risk.—*Gavigan v. Lake Shore & M. S. Ry. Co.* (Mich.) 67 N. W. 1097.

[b] (Wis.: 1895.)

One employed by the owner of a railroad to repair a bridge under which the road runs, knowing that trains would be operated during the work, and that it would be necessary to work on the track, and clear it of timber when a train approached, who, when a train running 18 miles an hour had approached to within 80 feet of him, undertook, at the call of the engineer, to remove a skid from the track, cannot recover for injuries from being struck by the train.—*Writt v. Girard Lumber Co.* (Wis.) 65 N. W. 173, 91 Wis. 496.

§ 72. Inexperienced or youthful employés.**(Wis.: 1896.)**

The fact that an employé, injured by the alleged negligence of his employer, is a minor, does not require the question of his assumption of risk to be submitted to the jury, where it plainly appears from undisputed evidence. *Casey v. Railway Co.* (1895) 62 N. W. 624, 90 Wis. 113, followed. *Luebke v. Machine Works* (1894) 60

N. W. 711, 88 Wis. 442, distinguished.—*Herold v. Pfister*, 66 N. W. 355, 92 Wis. 417.

§ 73. Defective or dangerous machinery, appliances, or places.**[a] (Minn.: 1897.)**

Plaintiff, who had been employed as a carpenter in putting up wires for defendant for a year, stepped on a box given him by defendant's superintendent to reach a wire, and was injured by the breaking of the box. *Held*, that he assumed the risk of using the box.—*Soutar v. Minneapolis International Electric Co.* (Minn.) 70 N. W. 796.

[b] (Wis.: 1894.)

The test as to the assumption of the risk by an employé who uses a dangerous machine is whether an ordinarily prudent person of his age and experience, under like circumstances, would have appreciated the danger.—*Craven v. Smith*, 61 N. W. 317, 89 Wis. 119.

[c] (Wis.: 1895.)

Where plaintiff had received instruction sufficient to put him on his guard, and enable him to comprehend the risk of being caught in a gearing, he must be presumed to have appreciated the risk of such injury.—*Thompson v. Edward P. Allis Co.*, 62 N. W. 527, 89 Wis. 523.

[d] (Wis.: 1895.)

Where a man, 35 years old, not shown to lack ordinary intelligence, is set to work at a machine with two circular saws projecting from its top, unguarded, and partly concealed by boards, he cannot recover for injury received by falling on the saws by reason of the poor footing, caused by the accumulation of sawdust on the floor, though he was inexperienced in the business, and was not instructed or warned as to the dangers, they being obvious, and assumed by him.—*Hazen v. West Superior Lumber Co.*, 64 N. W. 857, 91 Wis. 208.

[e] (Wis.: 1895.)

Plaintiff, a boy of 16 years, whose principal duty was to oil machinery, when not in motion, in defendant's sawmill, was injured by a revolving wheel, while attempting to remedy a hot box. It appeared that, though plaintiff was familiar with machinery in sawmills, the work was performed at night, that the box about which he was engaged was almost out of his reach, and that the unguarded wheel was near to the box. *Held*, that it could not be said, as a matter of law, that plaintiff assumed the risk.—*Kucera v. Merrill Lumber Co.* (Wis.) 65 N. W. 374, 91 Wis. 637.

[f] (Wis.: 1896.)

A servant girl, 10 years of age, of reasonable intelligence, cannot recover for an injury caused by tripping over steam pipes laid on the floor of her employer's kitchen, and covered with boards in the form of an inverted V, rising two inches above the floor, where she knew of the obstructions, and had passed over them for several months prior to the accident.—*Herold v. Pfister* (Wis.) 66 N. W. 355. 92 Wis. 417.

§ 74. — Operation of railroads.**[a] (Iowa: 1896.)**

Recovery for death of a brakeman, alleged to have been due to the negligence of defendants in permitting cobblestones to accumulate on the tracks in a switch yard, is not precluded on the ground that the brakeman assumed the risk therefrom, because he was aware that the gravel trains from which the stones fell were in the yard, where it appears that decedent went to work at midnight, and that the company was accustomed to clear off the stones that would fall from the cars from time to time.—*Fish v. Illinois Cent. R. Co.* (Iowa) 65 N. W. 995.

[1b] (Mich.: 1895.)

Where, in an action against a railroad company for death of an employé by being crushed beneath an engine overturned by made ground, on which one side of a newly-constructed track was placed, giving way, there is undisputed evidence that the superintendent warned the deceased of the danger before the engine started over the track, and that the deceased, when told by the engineer to take his proper place in the cab, said, on looking at the grade, "Oh, this is all right," a verdict should be directed for defendant.—*Niles v. Minneapolis, St. P. & S. S. M. Ry. Co. (Mich.) 65 N. W. 103.*

[1c] (Mich.: 1896.)

Cattle guards being required and used on all railroads, the danger of accidents to employés in operating trains over them is one of the assumed risks of the employment.—*Fuller v. Lake Shore & M. S. Ry. Co. (Mich.) 66 N. W. 593.*

[1d] (Minn.: 1895.)

In a cold climate, railroad employés assume the risks incident to the accumulation of snow and ice on the tracks.—*Lawson v. Truesdale (Minn.) 62 N. W. 546.*
60 Minn. 410.

[1e] (Wis.: 1896.)

A section hand, whose duties required him to ride over the road on a hand car, and who had been notified by the company, and of his own knowledge knew, that "wild" trains were frequently run over the road at a high rate of speed, assumed the risk of injury from being run into by one of these trains, running at a high rate of speed, on a foggy morning.—*Hinz v. Chicago, B. & N. R. Co. (Wis.) 66 N. W. 718.*
93 Wis. 16.

[1f] (Wis.: 1897.)

A railroad employé working in a yard does not assume any risk arising from the defective condition or insufficient blocking of a guard rail.—*Curtis v. Chicago & N. W. Ry. Co. (Wis.) 70 N. W. 665.*

§ 75. — Promise by master to remedy defect or remove danger.

[1a] (Minn.: 1896.)

Where a motorman, on discovering that a short piece of rail had been broken off at a curve, and was held in place only by spikes, the heads of which had become detached, notified his employer, who promised to have the defect repaired, he did not, by remaining in the employment, assume the risk.—*Harris v. Hewitt (Minn.) 65 N. W. 1085.*
64 Minn. 54.

[1b] (Minn.: 1896.)

Where an employé in a sawmill was injured because of defective lights, of which he had frequently complained, and the master had repeatedly promised that the defect should be remedied, the servant did not assume the risk, in continuing in the employment in expectation that the lights would be properly fixed.—*Smith v. E. W. Backus Lumber Co. (Minn.) 67 N. W. 358.*
64 Minn. 447.

§ 76. Knowledge by servant of defect or danger.

[1a] (Iowa: 1895.)

Plaintiff, an employé in defendant's brick yards, climbed up on a derrick used to support the shovel which took the clay from the banks, to remove with a pick a part of the bank which was left overhanging by the work of the shovel. He knew the condition of the bank, and had previously used a pick in the same manner. While in such a position that any portion of the bank loosened by his pick would necessarily fall on him, he was injured by a portion so loosened. *Held*, that he cannot recover.—*Michaelson v. Sergeant Bluffs & S. C. Brick Co. (Iowa) 62 N. W. 15.*

[1b] (Iowa: 1895.)

An employé is not bound, from the nature of his employment, to know, at his peril, that making a coupling of a pilot bar to a box car is unusually dangerous, and does not assume the risk unless, as a reasonably prudent and careful man, he should have known that it was unusually dangerous.—*Kerns v. Chicago, M. & St. P. Ry. Co. (Iowa) 62 N. W. 692.*

[1c] (Iowa: 1895.)

Where plaintiff, a brakeman acting under orders from his superior, attempted to couple cars, knowing that a passenger train was soon due, and that unless the coupling was made there would be danger of collision, his knowledge of defects in a pilot bar used in coupling will not preclude a recovery for injuries caused thereby.—*Strong v. Iowa Cent. Ry. Co. (Iowa) 62 N. W. 790.*

[1d] (Mich.: 1896.)

In an action against a railroad company for injuries received while coupling cars, the plaintiff alleged that, owing to the negligence of defendant in furnishing an inferior quality of oil for lanterns used by employés, he was unable to see clearly, and was injured. It appeared that the defendant had investigated the question as to the quality of the oil used, and that plaintiff, moreover, had been using the oil for over two months without complaint. *Held*, that the evidence did not warrant a verdict finding defendant guilty of negligence.—*Huffman v. Michigan Cent. R. Co. (Mich.) 67 N. W. 118.*

[1e] (Minn.: 1896.)

A cistern wall having become cracked while in the course of construction by reason of the faulty method of constructing it, it was braced with timbers, and thereafter masons were employed to finish the same. *Held* that, though the masons knew of the faulty method of construction, they did not, as a matter of law, assume the risk resulting from that method.—*Snedea v. Libera (Minn.) 65 N. W. 36; Kulas v. Same, Id.*

[1f] (Neb.: 1895.)

In an action for death by wrongful act, it was proper to instruct that if the danger was unusual, and the employé had no knowledge thereof, and could not, with ordinary care, have discovered it, he did not assume the risk.—*Kearney Electric Co. v. Laughlin (Neb.) 63 N. W. 941.*
45 Neb. 390.

[1g] (Wis.: 1895.)

A railroad company is not liable to a brakeman for injuries sustained by running into a clearance post, after jumping off a train, in the nighttime, to adjust a switch, where the post was a necessary appliance to the road, and was placed in the position it should occupy, and the brakeman knew that such posts were used along the company's road.—*Seidmore v. Milwaukee, L. S. & W. Ry. Co. (Wis.) 61 N. W. 765, 89 Wis. 188.*

[1h] (Wis.: 1895.)

Plaintiff, a minor of average intelligence, 18 years of age, while employed in loading dirt on a flat by means of a wheelbarrow which he was required to wheel over a narrow timber which bridged a deep cut, was injured by falling from the timber, on account of his barrow running off. The barrow did not run true on its axle, but plaintiff was aware of the fact. *Held*, that he assumed the risk of such injuries, and could not recover therefor.—*Casey v. Chicago, St. P., M. & O. Ry. Co. (Wis.) 62 N. W. 624.*
90 Wis. 113.

[1i] (Wis.: 1895.)

An instruction that, if deceased lost his life by a cause not usually or reasonably attendant upon his employment, plaintiff was entitled to recover, unless deceased knew of such danger and fully comprehended its nature, was erroneous, as making the knowledge and comprehension of deceased his standard of care.—

Suter v. Park & Nelson Lumber Co. (Wis.) 62 N. W. 927.

90 Wis. 118.

[1] (Wis.; 1896.)

An employé who, with knowledge that his master keeps deer and elk in an inclosure, voluntarily enters therein to work, assumes the risk of being injured by the animals, unless he was induced to enter by misrepresentations of his employer as to the character of the animals. — *Bormann v. City of Milwaukee (Wis.) 67 N. W. 924.*

93 Wis. 522.

[k] (Wis.; 1897.)

A machinist of 14 years' experience, who has worked several years at a four-foot circular saw, making 1,700 revolutions a minute, is presumed to know the danger of operating the saw when it has a three-inch crack in it, and this presumption is not rebutted by his evidence that he did not know the danger. — *Erdman v. Illinois Steel Co. (Wis.) 69 N. W. 993.*

[11] (Wis.; 1897.)

An experienced brakeman, having knowledge of a notice requiring extra care to be used to prevent being caught between lumber projecting beyond the end of a car, assumes the risk of injury if he attempts to make a coupling between the engine and a car loaded with lumber projecting beyond the end (which was not an unusual manner of loading cars), even where the drawhead of the tender was shorter by several inches than the drawhead of ordinary freight cars. — *Nash v. Chicago, M. & St. P. Ry. Co. (Wis.) 70 N. W. 293.*

§ 77. Continuing work with knowledge of danger.

[a] (Mich.; 1895.)

A brakeman who enters the employment of a railroad company to work on a construction train, and who can see that the road is not finished, and that trees border it on either side, assumes the risk of being struck by a tree growing close to the track, and in plain view. — *Montgomery, J., dissenting. — Manning v. Chicago & W. M. Ry. Co. (Mich.) 63 N. W. 312.*

105 Mich. 260.

[b] (Mich.; 1895.)

Plaintiff's intestate, who was a freight conductor, told a workman in defendant's repair shop to replace a hand railing, which had been removed from a way car, but continued to use the car, though cautioned by the assistant superintendent to have it fixed. The deceased again directed the workman to repair it, who promised, but neglected to do so. Deceased continued to use the car without protest, and was thrown off by reason of the absence of said railing, and killed. *Held*, that deceased assumed the risk. — *Shackelton v. Manistee & N. E. R. Co. (Mich.) 64 N. W. 728.*

[c] (Neb.; 1896.)

A brakeman assumed the risk of being knocked from the ladder on the side of a freight car by an oil shed standing at a station four feet and five inches from the spur upon which the car was being pushed, where he was well acquainted with the situation, and had not complained of the danger. — *Chicago, B. & Q. R. Co. v. McGinnis (Neb.) 68 N. W. 1057.*

§ 78. Obvious dangers and defects.

[a] (Mich.; 1895.)

A railroad employé, having been ordered by a superior to cut a trolley wire crossing defendant's tracks, mounted a stepladder placed on top of a car, and, throwing his arm over the wire, drew it down, and cut it with a pair of nippers, the recoil hurling him to the ground, and killing him. It appeared that trolley wires were new in the locality, and that deceased was wholly unskilled in the work; that the nippers were insufficient alone for the safe performance of the duty; and that deceased was given no warning, except that he must hold the nip-

pers loosely. *Held*, that it was for the jury to determine whether the danger was apparent to deceased. — *Walker v. Lake Shore & M. S. Ry. Co. (Mich.) 62 N. W. 1032.*

104 Mich. 606.

[b] (Mich.; 1895.)

Sawdust on the top of a boiler in a saw-mill ignited during the night, and the watchman told plaintiff, who had been engaged for a month firing the boiler, to take a broom, and hurry up the ladder and sweep it off. The ladder consisted of strips of wood nailed to wooden posts which extended a foot or 18 inches above the brickwork. Plaintiff testified that he thought the posts extended further up, that he could not see, that he knew he had reached the last slat, and that when feeling for the post he fell. The ladder was used frequently, and it was obvious that the post was short, and the employer had every reason to suppose that this was known to plaintiff. *Held*, that the employer was not liable. — *Lamotte v. Boyce (Mich.) 63 N. W. 517.*

105 Mich. 545.

[c] (Minn.; 1897.)

A servant engaged in digging gravel from a pit assumes the danger of the loosening of the material caused by the excavation. — *Swanson v. Great Northern Ry. Co. (Minn.) 70 N. W. 978.*

[d] (Wis.; 1895.)

When the condition of a sawmill and the relative situations of the deceased and his fellow servants would suggest, to a person of common intelligence, menacing and obvious perils from the use and operation of the machinery, an employé who continues to work in it assumes the risk, though it arises from the negligence of the employer. — *Peterson v. Sherry Lumber Co. (Wis.) 62 N. W. 948.*

90 Wis. 83.

[e] (Wis.; 1897.)

An employé who, after protest, continues to work with defective machinery, relying on his employer's promise to repair the same within a reasonable time, assumes the risk of injury, if the risk is obvious and immediate. — *Erdman v. Illinois Steel Co. (Wis.) 69 N. W. 993.*

[f] (Wis.; 1897.)

A laborer in a gravel pit, engaged in blasting the bank and shoveling gravel on cars, assumes the risk of injury by the caving in of the embankment at the place where he and other laborers are at work. — *Larsson v. McClure (Wis.) 70 N. W. 662.*

§ 79. Question for jury.

[a] (Mich.; 1897.)

Whether one employed in excavating for a sewer was bound to know that several years before an excavation had been made in adjacent ground for laying water mains, thereby loosening the earth, and increasing the danger of the caving in of the sides of the excavation, was for the jury. — *Ostrander v. City of Lansing (Mich.) 70 N. W. 352.*

[b] (Minn.; 1896.)

Whether plaintiff, a boy 17 years of age, having but little experience in a sawmill, assumed the risks of operating a bolting or cut-off saw without a carriage, was a question for the jury. — *Olmscheid v. Nelson-Tenney Lumber Co. (Minn.) 68 N. W. 605.*

[c] (Minn.; 1896.)

Whether an elevator boy whose duty it was after turning off the motive power, to remove sand from the boot of an elevator used for raising sand, assumed the risk of some one's turning on the power and thereby setting the elevator in motion while he was performing that duty, was a question for the jury. — *Hess v. Adamant Manuf'g Co. of America (Minn.) 68 N. W. 774.*

[d] (Neb.; 1895.)

Plaintiff, an employé of defendant, was ordered to deliver lumber at a place, the road to which, for part of the distance, was on a

down grade. There was evidence that the wagon was overloaded, and there was no brake on the wagon, defendant having informed plaintiff that a brake was not necessary, and plaintiff was unacquainted with the road. *Held*, that whether plaintiff assumed the risk of driving the wagon so loaded down grade without a brake was for the jury.—*Lee v. Smart* (Neb.) 63 N. W. 910.

45 Neb. 318.

VI. CONTRIBUTORY NEGLIGENCE OF SERVANTS.

Weight of evidence as to contributory negligence, see ante, § 50.

§ 80. In general.

[a] (Iowa; 1894.)

Where a section hand directed to go with a coal car to unload it was injured by the starting thereof while he was getting on it, he will not be held bound to have known that it had a hand hold and stirrup, and therefore negligent for not using them, where most of defendant's coal cars were not furnished with hand holds and stirrups.—*Light v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 380.

93 Iowa, 83.

[b] (Minn.; 1896.)

Plaintiff was injured by falling from a rapidly moving hand car and being struck by another hand car, which was following. The second car was much nearer the first than the rules of the company permitted, and plaintiff's foreman was on the second car, signaling the first to go faster. *Held*, that plaintiff's failure to try to check the speed of the first car was not contributory negligence.—*Christianson v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 610.

§ 81. Care required of servant.

[a] (Iowa; 1897.)

One whose duty it is to ride a "trip" through the main "entry" of a coal mine, for the purpose of signaling the engineer to cut off power in case any of the cars run off the track, is not bound to look after the safety of the entry, since it is an instrumentality furnished for the doing of his work, and the furnishing of it is not a part of such work.—*Corson v. Coal Hill Coal Co.* (Iowa) 70 N. W. 185.

[b] (Minn.; 1896.)

A servant cannot neglect to use ordinary care, as respects open dangers, on the assumption that the master has done his duty.—*Anderson v. C. N. Nelson Lumber Co.* (Minn.) 69 N. W. 630.

[c] (Wis.; 1896.)

In an action against a railway company for death of employe, deceased, an engineer, had seen an engine standing on a side track at a coal chute, some distance from his own engine, which was on main track. A few minutes later he left his own engine, and started across the side track leading to coal chute, was struck by the engine coming down from the coal chute, and killed. It appeared that the engine was running faster than usual for that part of the yards, and that the bell was not rung. *Held*, that deceased, by failure to look up and down the track before crossing, his view being unobstructed, and nothing to divert his attention, was guilty of contributory negligence, precluding recovery.—*McCadden v. Abbot* (Wis.) 66 N. W. 694.

92 Wis. 551.

§ 82. Inexperienced or youthful employe.

[a] (Minn.; 1896.)

A boy 15 years of age, having but an hour's experience in working around machinery, attempted under orders to remove a pile of refuse from beneath a rapidly revolving circular

saw, and his fingers came in contact with the saw and were cut off. He testified that there appeared to be about five inches of space between the pile of refuse and the saw, but that the saw came further down than it appeared to come. *Held*, that he was not guilty of contributory negligence as matter of law.—*Barg v. Bousfield* (Minn.) 68 N. W. 45.

[b] (Minn.; 1896.)

Plaintiff, a boy 17 years of age, having but little experience in a sawmill, was injured in operating the bolting or cut-off saw without a carriage attachment, by reason of the stick of timber catching in the saw and clogging, causing his hand to slip over against the saw. *Held*, whether he was guilty of contributory negligence was a question for the jury.—*Omscheid v. Nelson-Tenney Lumber Co.* (Minn.) 68 N. W. 695.

§ 83. Knowledge of defects or dangers.

[a] (Iowa; 1895.)

The fact that a brakeman injured while coupling cars at night, by slipping on ice formed by water leaking from a tank in defendant's yards, was familiar with the surroundings, does not conclusively show contributory negligence; there being evidence that no ice had formed there until within a few days of the accident, and that for some time prior thereto the brakeman's duties had not called him to that part of the yard.—*McFall v. Iowa Cent. Ry. Co.* (Iowa) 65 N. W. 321.

[b] (Iowa; 1896.)

In an action for personal injuries, it appeared that it was plaintiff's duty to keep defendant's machinery in running order; that a certain bearing became heated; that plaintiff poured water on the bearing, and laid folded cloths over it; that, this not sufficiently reducing the heat, he took a wrench, and, while the machinery was in motion, undertook to loosen the nuts on the bearing; that the wrench slipped, and his hand was injured by a cog-wheel; and that he so used the wrench that, if it slipped, his hand would certainly go into the cogwheel. Plaintiff testified that he knew such fact. *Held*, that plaintiff was guilty of contributory negligence, though the heating of the bearing was caused by defects in the machinery.—*Gorman v. Des Moines Brick Manufg Co.* (Iowa) 68 N. W. 674.

[c] (Iowa; 1897.)

Deceased was employed as an engine wiper at defendant's roundhouse, and, on a dark night, was ordered to assist the clinker-pit gang at a turntable. On his way to the turntable, he fell into a pit of boiling water discharged from the engines. The pit was caused by a break in a sewer used for carrying off such water, and a ditch had been dug along such sewer up to the pit. Deceased knew of the ditch, but did not know of the pit. There were no guards around it, but a red light was burning about five feet from the place where deceased fell in. *Held*, that he was not negligent, as a matter of law.—*Grimmelman v. Union Pac. Ry. Co.* (Iowa) 70 N. W. 90.

[d] (Mich.; 1895.)

A brakeman cannot recover for injuries to his hand in coupling cars while holding up the drawbar, through defects in the coupling, where he had been in the employ of the defendant for some time, and had daily adjusted such drawbars, which were in common use on defendant's road.—*Secord v. Chicago & M. L. S. R. Co.* (Mich.) 65 N. W. 550.

[e] (Mich.; 1895.)

An experienced brakeman cannot recover for injuries caused by defects in the coupling, where he discovered the defects when the cars were three car lengths apart, and by stopping the train and adjusting it, or by adjusting it in another way, he might have avoided the injury.—*Secord v. Chicago & M. L. S. R. Co.* (Mich.) 65 N. W. 550.

[f] (Minn.: 1896.)

Plaintiff, 22 years old, having been employed 8 or 10 years in shingle mills, and as a sawyer in defendant's mill more than a month, was injured by striking his hand against the lower part of a running saw, while reaching under it to release the sawdust carrier. That the saw was unguarded was known to plaintiff, and could be clearly seen without stooping to look under the frame. *Held*, that plaintiff was negligent.—*Anderson v. C. N. Nelson Lumber Co. (Minn.)* 69 N. W. 630.

[g] (Minn.: 1897.)

Plaintiff, an adult, experienced in the use of similar machinery, was injured while starting a circular saw by means of a short block, the usual method of starting it being to press upon the teeth with a stick. He had used the saw several times prior to the accident, and had been taught by a fellow servant how to start it with the stick. It appeared that had he used a stick, or had kept his hand out of the line of the saw, or had even used the block in a careful manner, he would have avoided the injury. *Held*, that he could not recover.—*Wulff v. Walter A. Wood Harvester Co. (Minn.)* 70 N. W. 156.

[h] (Neb.: 1897.)

A section hand while working on a track was struck by a train making a blind switch. The train had been in plain sight, and the foreman of the gang gave notice that the switch was about to be made, and the other members of the gang stepped off the track so as to avoid injury. *Held*, that the man injured was negligent.—*Union Pac. Ry. Co. v. Clark (Neb.)* 70 N. W. 923.

[i] (S. D.: 1895.)

One digging in a trench in a filled-in street assumed the risk of the filled-in dirt sliding from that on which it rested into the trench, where it was plainly observable from the appearance of strata through which the trench was dug that the street had been filled in.—*Carlson v. Sioux Falls Water Co. (S. D.)* 65 N. W. 419.

[j] (Wis.: 1895.)

Where an employé has worked for 12 years in saw-mills, and is injured by reaching through a hole to get the end of a chain lying within three inches of a revolving saw, where the danger is obvious, he is guilty of contributory negligence, and cannot recover for injuries received.—*Schultz v. C. C. Thompson Lumber Co.,* 65 N. W. 498, 91 Wis. 626.

[k] (Wis.: 1896.)

Plaintiff was injured by the slipping of a pinch bar with which he was attempting to move an engine. He was a machinist of 20 years' experience, and knew that a bar would slip unless the heel was sharp, but did not examine the bar before using it, though the fact that it was defective was easily seen. *Held*, that his negligence precluded recovery.—*Holt v. Chicago, M. & St. P. Ry. Co. (Wis.)* 69 N. W. 352.

§ 84. Methods of work.**[a] (Iowa: 1897.)**

A switchman who stepped in the center of the track, in front of a moving engine, for the purpose of climbing on the footboard, is negligent if both the footboard and handrail extended a foot beyond each rail, and could have been reached from the side, and there was another footboard on the rear of the engine.—*Ferguson v. Chicago, M. & St. P. Ry. Co. (Iowa)* 69 N. W. 1026.

[b] (Minn.: 1896.)

Plaintiff operated a jointer in a sash and door factory. The machine consisted of a heavy table frame about two feet wide, at the back of which, and rising above the top, was situated a head block holding knives, which, revolving, operated to shave off the edge of sash passing in front of them. Resting on the top of the frame was a movable top or carriage made to accommodate various sizes of sashes,

and, running in grooves, was so adjusted as to bring the cheek rail of the sash, when put in position, and moved upon it, to the face of the knives. A sash being run on the carriage having raised up, plaintiff attempted to put it down with his hands, which were drawn to the knives and cut. *Held*, that it appearing that he could easily have stopped the machine to readjust the sash, he was guilty of contributory negligence precluding a recovery.—*Moody v. Smith (Minn.)* 67 N. W. 633.

64 Minn. 524.

[c] (Wis.: 1895.)

In an action by a servant against his master for personal injuries, it appeared that plaintiff, a man of full age, who had been employed for years around sawmills, was directed by the foreman to go down into the box which surrounded the lower wheel, which was nine feet in diameter, on which the band saw ran, to oil the shaft of the wheel. The box was constructed with a slanting bottom, so that the sawdust would pass from the box to a conveyor. Plaintiff passed down into the box by tramping on the spokes of the wheel, as he had seen the man do whose place he was ordered to take; but, when he reached the bottom of the wheel, he stepped off backward, and, on account of the sloping bottom of the box, was thrown against the band saw, and injured. *Held*, that plaintiff, as a matter of law, was guilty of contributory negligence. *Winslow, J., dissenting.*—*Jones v. Sutherland (Wis.)* 65 N. W. 496, 91 Wis. 587.

§ 85. — Coupling and uncoupling cars.**[a] (Iowa: 1896.)**

It appeared that deceased was an experienced brakeman; that his foot caught in a frog in defendant's yard; that the frog had been left unblocked, and the roadbed unsurfaced near it; but that intestate did not know this fact. *Held*, that there was no presumption of negligence because he was uncoupling the cars while they were in motion, but it was a question for the jury to decide whether, under the circumstances, he was negligent.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co. (Iowa)* 67 N. W. 227.

[b] (Mich.: 1895.)

That a brakeman injured by the breaking of a pushbar on an engine when he attempted to make a coupling, while standing on the crossbar of the engine, had ridden on the pilot for two miles before reaching the car to which the coupling was to be made, was not contributory negligence; it being necessary, in any event, that he should get on the crossbar to make the coupling.—*McDonald v. Michigan Cent. R. Co. (Mich.)* 65 N. W. 597.

[c] (Wis.: 1896.)

The yard foreman of a terminal switching company operating over 40 miles of track and 70 switches, whose duty required him to aid in and superintend the switching, seeing none of the crew on the approaching switch train, went between the cars to make a coupling when they were three feet apart, and still in motion, and fell over a pile of ashes on the track. The ashes were partially covered by snow and ice, and the day was dark and sleet was falling. *Held*, that the foreman was not, as a matter of law, guilty of contributory negligence.—*Kennedy v. Lake Superior Terminal & Transfer Ry. Co. (Wis.)* 66 N. W. 1137.

93 Wis. 32.

[d] (Wis.: 1897.)

It is not negligence, per se, for a switchman to go between cars to uncouple them while in slow motion, using a stone, as he walks along, to loosen the coupling pin, when he can signal the engineer to stop and take the pin out without danger, where there is evidence of a custom in such yard, with the consent of the yard master, to so uncouple cars.—*Curtis v.*

Chicago & N. W. Ry. Co. (Wis.) 70 N. W. 665.

§ 86. Obeying orders of master or superiors.

[a] (Iowa; 1891.)

Where plaintiff and other section hands were ordered by their foreman to get on a coal car, for the purpose of unloading it after it had been switched some distance, he cannot be held negligent for attempting to get on the car, instead of standing on the footboard of the engine, though the footboard was a safe and proper place to stand.—*Light v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 380.

93 Iowa, 83.

[b] (Iowa; 1897.)

A car inspector killed by the negligent running of cars against the train under which he was working was not guilty of contributory negligence, as a matter of law, in not complying with a rule requiring him to put a red flag on the train, as a notice of his presence, where he had the express promise of the yard foreman, who controlled the movement of trains in the yard, that no cars should be sent back on that track.—*Canon v. Chicago, M. & St. P. Ry. Co.* (Iowa) 70 N. W. 755.

[c] (Neb.; 1896.)

In an action for injuries received by a servant in attempting to board a moving train upon a sudden command of the master, an instruction that the servant was not negligent unless no one but a reckless man would have obeyed the order was erroneous.—*Chicago, R. I. & P. R. Co. v. McCarty* (Neb.) 68 N. W. 633.

[d] (Neb.; 1896.)

Where a laborer on a railroad attempted to board a construction train which he had been assisting in loading, and which it was not his duty to accompany after the train was in motion, upon a sudden command of the master to do so, he was not guilty of contributory negligence as a matter of law, though there was danger apparent to him in the attempt to obey the order.—*Chicago, R. I. & P. R. Co. v. McCarty* (Neb.) 68 N. W. 633.

[e] (Neb.; 1897.)

Evidence that plaintiff, an employé on a gravel train, who had stepped from the flat car on which he had been working to the platform of the caboose, preparatory to alighting in obedience to the foreman's orders, stood on the platform while the train, which at that moment was ordered ahead a car length, was moved, does not show that he was guilty of negligence contributing to an injury resulting from the sudden stopping of the train.—*Union Pac. Ry. Co. v. Doyle* (Neb.) 70 N. W. 43.

§ 87. Disobedience of rules or orders.

[a] (Iowa; 1896.)

A rule of a railroad being that the conductor will have control of and be responsible for movements of the train "except when his directions conflict with these rules, or involve risk or hazard, in either of which cases the engineer will be held alike accountable," an engineer will be held guilty of negligence, contributory to a collision in which he was fatally injured, where, in obedience to the order of the conductor, he left a station behind time, knowing that the first section of a train coming in the opposite direction, if running on time and according to rules, would be met between that and the next station, that a telegram received there stated that the second section of the other train would be met at the next station, and that the clearance card received there from the operator stated, "I have no further orders for your train;" he having no right to assume that the conductor had information relating to the first section of the other train which justified their running on its time.—*York v. Chicago, M. & St. P. Ry. Co.* (Iowa) 67 N. W. 574.

[b] (Mich.; 1895.)

Where a brakeman, in violation of his contract and the company's rules, ran in front of an engine tender moving on a track which the brakeman had just passed over, in order to straighten a coupling link thereon, and in stepping sideways in front of the tender, to keep out of its way, stumbled over a pile of ashes between the rails, which he could have seen had he looked, and was injured, he was guilty of contributory negligence, though it was the custom for brakemen to perform such an act in a similar manner.—*Loranger v. Lake Shore & M. S. Ry. Co.* (Mich.) 62 N. W. 137.

104 Mich. 80.

§ 88. Disregarding warnings or signals.

[a] (Mich.; 1895.)

An employé engaged in loading and unloading dirt from a construction train, who had been cautioned by the foreman against running backward and forward on the flat cars while the train was in motion, is, as a matter of law, guilty of such contributory negligence in going at a run from the front end of the train to the rear, while the train is going at the rate of 18 miles an hour,—though directed by the conductor to pass to the rear of the train, so that he could drop off as the train slowed up at a point a mile and a half ahead, and though the train was 20 cars in length, and his fellow employés were also running,—as will prevent a recovery by his administrator for his death caused by his falling between the cars. —*McGrath, C. J.*, dissenting.—*Sauer v. Lake Shore & M. S. Ry. Co.* (Mich.) 65 N. W. 624.

[b] (Minn.; 1896.)

On an issue whether a freight brakeman, who was on top of the car next the locomotive, exercised reasonable care in watching the rear of the train for a break, and in keeping a lookout in that direction for signals from the conductor, there was evidence that the train broke in two, and moved a distance of 800 feet after the break was discovered by the conductor, and before a collision between the parts, by which plaintiff was injured, during which time the brakeman did not watch the rear of the train or keep a lookout for signals; that within such time the parts of the train separated 200 feet; and that the conductor gave the brakeman signals several times, which, however, he did not appear to notice, though he was facing the rear of the train when they were given. *Held*, that the determination of the issue was for the jury.—*Wood v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 68 N. W. 462.

§ 89. Acts in emergencies.

[a] (Iowa; 1895.)

Deceased, with two other section men, was returning from work, on a hand car, all three facing the direction in which they were going. An extra freight train was coming from behind, but, owing to a high wind, the men on the hand car were not aware of it until it was quite near, though, had they looked, they could have seen it in ample time. The companions of deceased jumped off, and were uninjured, but the latter, in stopping to remove the car from the track, was killed. Deceased, who was in charge of the men, had been specifically instructed that extra trains were liable to pass at any time. *Held*, that deceased was guilty of contributory negligence.—*Nelling v. Chicago, St. P. & K. C. R. Co.* (Iowa) 63 N. W. 568.

[b] (Neb.; 1896.)

A section man cannot be charged with contributory negligence because he remained upon the track for the purpose of removing an obstruction endangering an approaching train, when he might have saved himself by abandoning the track, and leaving the train to its fate.—*Omaha & R. V. R. Co. v. Kraysenbuhl* (Neb.) 67 N. W. 447.

48 Neb. 553.

§ 90. Proximate cause of injury.**[a] (Iowa; 1896.)**

Where deceased, with other sectionmen, was riding on a hand car when a train approached from behind, and his companions jumped from the car, and avoided injury, and deceased, after having seen the train, could have jumped from the car in time to avoid injury, but remained, and was killed while attempting to take the car from the tracks, his own action was the proximate cause of his death.—*Nelling v. Chicago, St. P. & K. C. Ry. Co. (Iowa)* 67 N. W. 404.

[b] (Wis.; 1896.)

Where it was an established custom on a railroad, between the engineers and firemen, that either, on going under the engine for any purpose, should notify the other, and a fireman went under his engine without notifying the engineer, and without his knowledge, and, while there, was injured by reason of the opening of the blow-off cock by the engineer, the negligence was that of the fireman, and he cannot recover for the injury, though the act of the engineer was negligent; his own negligence being the proximate cause of his injury.—*Crane v. Chicago, M. & St. P. Ry. Co. (Wis.)* 67 N. W. 1132.

93 Wis. 487.

§ 91. Burden of proof.**(Iowa; 1895.)**

Absence of contributory negligence must be proved by plaintiff, and any presumption of its absence arising from the assumption that one's instincts of self-preservation will make him diligent is overcome by evidence that a railroad employé off duty, while walking along a track on his way home, was struck by a train which he had reason to expect, and which he could have heard when 400 feet away.—*Baker v. Chicago, R. I. & P. Ry. Co. (Iowa)* 63 N. W. 667.

§ 92. Question for court or jury.**[a] (Iowa; 1895.)**

Whether a track repairer who was struck by cars negligently kicked, without warning, on a parallel track, just after he had stepped off the track on which he was working to let an engine pass, was guilty of contributory negligence in stepping too far over, and in not observing the approach of the cars, is a question of fact for the jury, where he was inexperienced, and had looked in their direction only a moment before, and his attention was momentarily diverted by an attempt by another employé to get a tool off the track ahead of the engine, and only from two to five seconds elapsed before he was struck by the cars. *Rothrock and Granger, JJs., dissenting.*—*Tobey v. Burlington, C. R. & N. Ry. Co. (Iowa)* 62 N. W. 761.

[b] (Minn.; 1895.)

Whether a switchman, injured while attempting to board a moving car from a place near the track which was covered with snow and ice, was guilty of contributory negligence, is a question for the jury.—*Lawson v. Truesdale (Minn.)* 62 N. W. 546.

60 Minn. 410.

[c] (Minn.; 1896.)

Deceased, a brakeman, after coupling a flat car loaded with rails which projected over the deck of the car, was killed through his head being caught and crushed between the flat and a forward car, as he attempted to withdraw from between the cars while stooping so as to avoid the rails. *Held*, that the question of his contributory negligence was for the jury.—*Corbin v. Winona & St. P. Ry. Co. (Minn.)* 66 N. W. 271.

64 Minn. 185.

§ 93. Instructions.**(Wis.; 1894.)**

In an action for injuries received by the running away of the horse plaintiff was em-

ployed to ride, a charge that, if the injury resulted from defendant's failure to furnish proper appliances for riding the horse, plaintiff could recover, unless he assumed the risk, was erroneous in leaving out the question of plaintiff's care.—*Craven v. Smith (Wis.)* 61 N. W. 317, 89 Wis. 119.

§ 94. Effect—Violation of statute by master.**[a] (Minn.; 1896.)**

That a duty is imposed on the master by statute does not change the rules of law as to contributory negligence or assumption of risks by the servant, unless such an intention clearly appears from the statute.—*Anderson v. C. N. Nelson Lumber Co. (Minn.)* 69 N. W. 630.

[b] (Wis.; 1895.)

The fact that the gearing of a machine was of such a character as to be required by statute to be covered for the protection of employes does not deprive the employer of the defense of contributory negligence.—*Thompson v. Edward P. Allis Co.,* 62 N. W. 527, 89 Wis. 523.

MATERIALITY.

Of evidence, see "Evidence," § 109.

MATERIAL MEN.

See "Mechanics' Liens."

MAXIMS.

"Falsus in uno, falsus in omnibus," see "Witness," § 52.

MAYOR.

See "Municipal Corporations."

MEANDER LINES.

As boundaries, see "Boundaries," § 2.

MEASURE OF DAMAGES.

For breach of contract, see "Damages," §§ 10-22.

For torts, see "Damages," §§ 23-32.

MECHANICS' LIENS.**I. IN GENERAL, § 1.****II. PROPERTY SUBJECT TO AND WHO AUTHORIZED TO IMPOSE LIEN, §§ 2-8.****1. In General, § 2.****2. Agreement or Consent to Improvements—Authority to Impose Lien, §§ 3-6.****3. Extent of Property Affected, §§ 7, 8.****III. FOR WHAT OBTAINED, §§ 9-12.****IV. WHO MAY CLAIM—RIGHTS OF SUBCONTRACTORS, §§ 13-20.****V. PROCEEDINGS TO PERFECT, §§ 21-38.**

- VI. PRIORITIES, §§ 39-43.
 VII. WAIVER, RELEASE, AND EXTIN-
 GUISHMENT, §§ 41-47.
 VIII. CONTRACTORS' BONDS, § 48.
 IX. ENFORCEMENT—ACTIONS, §§ 49-
 59.

Subjection of homestead to lien, see "Home-
 stead," § 12.

I. IN GENERAL.

§ 1. Indemnity against liens.

(Minn., 1897.)

Plaintiff made a contract with M. where-
 by the latter was to build for plaintiff a house
 for a sum to be paid as the work progressed,
 not exceeding 85 per cent. of the materials and
 labor furnished, the balance to be withheld un-
 til completion of the contract. M. gave the
 plaintiff a bond, with E. as surety, indemnifying
 him against liens. *Held*, in an action against
 E. for a breach of the bond, that the fact that
 the plaintiff, during the work, made payments
 to the contractor exceeding 85 per cent. of the
 contract price, without proof that such pay-
 ments exceeded 85 per cent. of the total amount
 of the materials and labor already furnished,
 did not constitute a defense.—*Graves v. Merrill*
 (Minn.) 70 N. W. 562.

II. PROPERTY SUBJECT TO AND WHO AUTHORIZED TO IM- POSE LIEN.

1. IN GENERAL.

§ 2. Public building.

(Minn., 1897.)

A public building, such as a courthouse
 and city hall, is not subject to a mechanic's
 lien.—*Burlington Manuf'g Co. v. Board of*
Courthouse & City Hall Com'rs (Minn.) 69 N.
 W. 1091.

2. AGREEMENT OR CONSENT TO IM- PROVEMENTS—AUTHORITY TO IMPOSE LIEN.

§ 3. Statutory provisions.

[a] (Minn., 1896.)

R. was building a house on his own land,
 and contracted with H. for the furnishing of
 glass at a fixed price. H. purchased the glass
 of a wholesale dealer on credit in the regular
 course of business, and it was delivered for
 H. to R., who used the same, and paid H. the
 agreed price. *Held*, that the wholesaler was
 not entitled to a lien on the house, under Gen.
 St. 1894, § 6229, as one furnishing material "by
 virtue of a contract with, or at the instance of,
 the owner thereof, or his agent, trustee, contract-
 or, or subcontractor."—*Ryan Drug Co. v. Rowe*
 (Minn.) 69 N. W. 468.

[b] (S. D., 1896.)

Under Comp. Laws, § 5469, giving a lien
 to "every mechanic or other person who shall
 do any work upon or furnish material" for any
 building, one who, under a contract with the
 owner or contractor, hauls material furnished
 by another for a building, which is used in the
 erection of the same, is entitled to a lien there-
 for.—*Kehoe v. Hansen* (S. D.) 65 N. W. 1075.

[c] (Wis., 1896.)

Laws 1887, c. 466, declaring that Rev.
 St. § 3314, which provides for a mechanic's lien
 on the real property of any person on whose
 premises the improvements are made, shall not
 give a lien when the relation of landlord and ten-
 ant exists, does not apply to a case where land-
 owners contract with a person to construct a

building for them on their land, though coupled
 with an agreement that such person shall occupy
 the premises as a tenant for a definite term.—
Bentley v. Adams (Wis.) 66 N. W. 505.
 92 Wis. 356.

§ 4. Promoting improvements.

(Neb., 1896.)

The fact that a loan company, as a condi-
 tion on which it would make a loan for the erec-
 tion of buildings on land offered as security, re-
 quired that the contemplated improvements should
 conform to plans submitted with the application
 for the loan, did not make the company a pro-
 moter of such improvements, so as to subject it
 to a direct liability, to the amount paid by it
 out of the loan for a mortgage which was a par-
 amount lien on the land, to holders of mechanics'
 liens created by reason of the improvements.—
Rogers v. Central Loan & Trust Co. (Neb.) 68
 N. W. 1048.

§ 5. Property transferred by promoters to corporation.

(Neb., 1896.)

Where the liability of subscribers on
 a contract for the erection for them of a plant
 which they were to operate on incorporation
 was several, and not joint, and the corporation
 was not liable on the contract, the contractors
 were not entitled to a mechanic's lien on the
 joint property for the unpaid contract price.—
Davis v. Ravenna Creamery Co. (Neb.) 67 N.
 W. 436.

48 Neb. 471.

§ 6. Improvements by vendees—Liabil- ity of vendor.

[a] (Iowa, 1896.)

Where one enters into possession of land
 under a contract of sale which provides for
 forfeiture in case of nonpayment of the install-
 ments of the purchase price, he is, nevertheless,
 an owner, within the meaning of Code, § 2130,
 and Miller's Code, § 2136, providing for a
 lien for labor and materials furnished for the
 erection of a building by virtue of a contract
 with the owner, and defining an owner as one
 for whose use and benefit the building is erect-
 ed.—*Jameson v. Gile* (Iowa) 67 N. W. 396.

[b] (Neb., 1896.)

One who furnishes materials for use in
 the erection of buildings, to one in possession
 of land under a contract of sale, cannot, in the
 absence of an agreement between the vendor
 and vendee that the improvements shall be
 made, acquire a lien which shall attach to any
 interest other than that of the vendee, or which
 shall be superior to the lien of the vendor for
 any balance of the purchase price.—*Fuller v.*
Pauley (Neb.) 66 N. W. 1115.

48 Neb. 138.

3. EXTENT OF PROPERTY AFFECTED.

§ 7. Several parcels and single contract.

[a] (Neb., 1895.)

Where a subcontractor paints two houses
 under one contract, to recover on a lien against
 one of the houses he must show the value of the
 labor performed and material furnished for such
 house. *Byrd v. Cochran* (1894) 58 N. W. 127,
 followed.—*Hines v. Cochran*, 62 N. W. 299, 44
 Neb. 12.

[b] (Neb., 1895.)

Where material is delivered for the erec-
 tion of six buildings on six adjoining lots, and
 the evidence does not show what proportion
 thereof was used in the separate buildings, the
 whole debt may be charged to all the lots, but all
 the debt cannot be charged to a part of the lots.
 —*Badger Lumber Co. v. Holmes* (Neb.) 62 N.
 W. 446.

44 Neb. 244.

[c] (Neb.; 1895.)

Where it is sought to charge separate parts of certain real estate for the value of material furnished for the erection of improvements on all, the value of the material must be apportioned so that each part shall bear no greater amount of the expense than the value of the material actually used thereon. *Byrd v. Cochran* (1894) 58 N. W. 127, 39 Neb. 109, followed and reaffirmed.—*Badger Lumber Co. v. Holmes*, 62 N. W. 446, 44 Neb. 244.

§ 8. Two houses on one lot.**(Iowa; 1896.)**

Under the provision of the mechanic's lien law (Acts 16th Gen. Assem. c. 100, § 4) that the "entire land upon which any such building, erection or other improvement is situated, including that portion not covered therewith," shall be subject to the lien thereby given, a lien for materials furnished for the erection of a house does not cover a separate house standing on the same undivided lot, but is confined to the house for which the materials were furnished, and so much of the lot as is properly appurtenant thereto.—*Ewing v. Allen* (Iowa) 68 N. W. 702.

III. FOR WHAT OBTAINED.**§ 9. Material furnished in ignorance of destination.****[a] (Mich.; 1896.)**

A manufacturer, selling, in the usual course of trade, glass to a merchant, without any knowledge or understanding that it is to be used in the construction of any particular building, cannot enforce a material man's lien therefor against the building for which the glass was ordered by the merchant, by whom it was sold to the owner.—*Van Cleve Glass Co. v. Erratt* (Mich.) 68 N. W. 978.

[b] (Minn.; 1895.)

One who makes granite columns for a building contractor is entitled to a lien on the building in which they were used, though he did not know for what particular building the columns were intended when the labor was performed.—*Emery v. Hertig* (Minn.) 61 N. W. 830.

60 Minn. 54.

§ 10. Materials not used as intended.**(Iowa; 1897.)**

A lien for materials sold and delivered for use in a particular building is not affected by the fact that the materials were not used in such building.—*Lee v. Hoyt* (Iowa) 70 N. W. 95.

§ 11. Excavations.**(Minn.; 1896.)**

Gen. St. 1894, § 6230, provides that whoever performs labor "for grading, filling in, or excavating any land," shall have a lien on the land for the price of his labor. *Held*, that a hole drilled in the ground solely to ascertain whether there is ore underneath, and, if so, whether it exists in paying quantities, is not an excavation, within the statute.—*Colvin v. Weimer* (Minn.) 65 N. W. 1079.

64 Minn. 37.

§ 12. Sinking well.**(Neb.; 1896.)**

Under Comp. St. c. 54, § 1, giving a mechanic's lien to persons who "perform labor or furnish any materials or machinery or fixtures for the erection * * * of any * * * building or appurtenance," an account for labor performed and material furnished in sinking a tubular well cannot found a claim for a mechanic's lien.—*Omaha Consol. Vinegar Co. v. Burns* (Neb.) 68 N. W. 492.

IV. WHO MAY CLAIM—RIGHTS OF SUBCONTRACTORS.

Assignability of rights of subcontractor, see "Assignment," § 3.

Liability of school district to subcontractor, see "Schools and School Districts," § 1.

§ 13. In general.**(Wis.; 1896.)**

Where a building contract provides that the work shall be done to the satisfaction of the superintendent as a condition precedent to payment, and the record fails to show the performance of such condition, the contractors are not entitled to any liens for balance due.—*Forster Lumber Co. v. Atkinson* (Wis.) 69 N. W. 347.

§ 14. Who are contractors.**(Mich.; 1896.)**

One whose lien statement shows the furnishing of a large number of articles and materials entering into the construction of parts of a building, and the construction of such parts by his skilled workmen, is a contractor.—*Sterner v. Haas* (Mich.) 66 N. W. 348.

§ 15. Rights of architect.**[a] (Iowa; 1896.)**

An architect who prepared plans and specifications for improvements on a building, which are made in accordance with such plans, is entitled to a mechanic's lien on the property.—*Parsons v. Brown* (Iowa) 66 N. W. 880.

[b] (Minn.; 1895.)

Defendant bought an uncompleted house, on the agreement that the heating apparatus should be put in under the supervision of the architect who supervised the construction of the house. *Held*, that the services subsequently performed by the architect in supervising the putting in of the apparatus were under the original contract for the supervision of the house, and that he could claim a mechanic's lien for such services as rendered under said contract.—*Wangenstein v. Jones* (Minn.) 63 N. W. 717.

61 Minn. 262.

§ 16. Foreign corporations.**(Neb.; 1895.)**

A foreign corporation may claim a mechanic's lien, being within the term "any person."—*Chapman v. Brewer* (Neb.) 62 N. W. 320.

43 Neb. 390.

§ 17. Estoppel to acquire lien by assignment.**(Neb.; 1895.)**

The agreement of a material man not to file a lien for materials furnished for a building does not prevent him from acquiring by assignment, and enforcing, a claim perfected by another.—*Hines v. Cochran* (Neb.) 62 N. W. 299.

44 Neb. 12.

§ 18. Rights of subcontractors and material men.**[a] (Iowa; 1896.)**

A building contract provided that the owner should retain 10 per cent. from payments on partial estimates until completion of the building, and also that a certain part of the contract price should be paid in an order on another. *Held* that, as affecting claims of subcontractors to mechanics' liens, the 10 per cent. should be retained from the amount of the order, as well as the cash payments.—*Merritt v. Hopkins* (Iowa) 65 N. W. 1015.

[b] (Iowa; 1896.)

A subcontractor is bound by the terms of the contract between his principal contractor and the owner.—*Epeneter v. Montgomery County* (Iowa) 67 N. W. 93.

[c] (Minn.; 1897.)

To entitle a subcontractor to a lien, his contract and performance thereof need not

conform to the contract between the contractor and owner.—*Wisconsin Red Pressed Brick Co. v. Hood* (Minn.) 69 N. W. 1091.

[a] (Minn.; 1897.)

Where bricks furnished by a subcontractor and used in the building are inferior to those called for by either his contract or that between the owner and the contractor, the owner has no defense against the subcontractor's lien except such as the contractor could interpose against the claim for personal judgment against him.—*Wisconsin Red Pressed Brick Co. v. Hood* (Minn.) 69 N. W. 1091.

[c] (Wis.; 1897.)

Where one who has individually contracted for the construction of a house takes in a partner, and, though the owner refuses to allow the firm name to be substituted as contractor, the firm contract for the necessary materials and labor, and fully perform the contract, with the knowledge of the owner, and the material men and laborers deal with the firm as principal contractors, the firm are principal contractors, within Saub. & B. Ann. St. § 3315, entitling a subcontractor of a principal contractor to a lien.—*Van Horn v. Van Dyke* (Wis.) 70 N. W. 1067.

§ 19. — Payment to contractor.

[a] (Iowa; 1896.)

The indorsement by the owner of property of notes of a building contractor, it not being shown that they were given in discharge of claims for liens on the property, does not authorize the owner to claim the amount of the notes as payment on the contract, as against liens of subcontractors thereafter duly established.—*Merritt v. Hopkins* (Iowa) 65 N. W. 1015.

[b] (Iowa; 1896.)

Where the owner of a building knows, or has opportunity to know, that there are subcontractors, he cannot, as against liens they may thereafter establish, legally make final payment to the contractor until the expiration of the 30 days allowed them by statute within which to file and serve notice of their claims.—*Merritt v. Hopkins* (Iowa) 65 N. W. 1015.

[c] (Iowa; 1896.)

Subcontractors who furnished labor and materials with the knowledge of the owner cannot complain that he paid the contractor in advance of the estimates, under a contract providing for payment of a certain per cent. monthly on estimates of the superintending architect, where it appears that the contractor was not paid more than such percentage for the work actually done, and that, on his default in completing the work, the owner finished it at a total cost greater than the contract price.—*Epeneter v. Montgomery County* (Iowa) 67 N. W. 93.

[d] (Iowa; 1896.)

The owner of a building whose contract with the principal contractor for its erection provides for payments at stated intervals and does not reserve the right to discharge claims of subcontractors from the fund otherwise due the principal contractor, is entitled to make payments according to the contract, without liability to subcontractors, though he knew that they had been furnishing labor and materials, and had not been paid therefor by the contractor.—*Epeneter v. Montgomery County* (Iowa) 67 N. W. 93.

[e] (Wis.; 1896.)

Where several principal contractors "jointly and severally" agree to erect a building as prescribed by a certain contract, and to receive in payment 85 per cent. of the value monthly, and the balance on completion of the work, and "upon its being satisfactorily done, with all claims" which will become liens paid, where outstanding subcontractors' claims which have been proven exceed the difference between the contract price and the amount paid to the principal contractors, it is error to allow any such contractors to have

judgment in their favor for liens.—*Forster Lumber Co. v. Atkinson* (Wis.) 69 N. W. 347.

§ 20. — Liability of county.

[a] (Iowa; 1896.)

Where a subcontractor furnishing labor and material for a county building filed with the proper officer an itemized and sworn statement of his demand therefor, within 30 days of the time the last material and labor was furnished (Acts 20th Gen. Assm. c. 179), the validity of his claim is not affected by the fact that he also included in such statement a claim for a lien on the building, and on the funds set apart for its erection.—*Epeneter v. Montgomery County* (Iowa) 67 N. W. 93.

[b] (Iowa; 1896.)

Acts 20th Gen. Assm. c. 179, provides that subcontractors furnishing labor or materials for a public building shall have a claim for the value thereof, "in an amount not in excess of the contract price" of the building; and a contract for the erection of a county building provided for payments on the price at stated times of 90 per cent., on estimates of the superintending architect, and for payment of the remaining 10 per cent. on the completion and acceptance of the entire work, "and as soon thereafter as the party of the second part [the county] is assured against the existence of any mechanics' liens on said buildings," and provided that, if the contractors failed to complete the building within the contract time, the county should complete it at their expense, and deduct from any sums due on the contract the value of work or materials furnished thereafter. *Held*, that the county, after having finished the work on default of the contractors at a cost, including prior payments properly made on the contract, greater than the contract price, was not liable to subcontractors on the theory that it had contracted to reserve the fund of 10 per cent. for their benefit.—*Epeneter v. Montgomery County* (Iowa) 67 N. W. 93.

V. PROCEEDINGS TO PERFECT.

Effect on lien of failure to file statement, see post, § 40.

§ 21. Compliance with statute.

(Neb.; 1897.)

If the account of the claimant and the affidavit thereto substantially comply with the statute when construed together, it is sufficient.—*Drexel v. Richards* (Neb.) 79 N. W. 23.

§ 22. Service of notice on owner.

[a] (Iowa; 1895.)

Where a statement of lien was filed against a society, and the sheriff was a member of its building committee, the delivery to the sheriff, for service, of a notice of the lienor's claim, and the filing thereof, addressed to the society, is not sufficient service of the notice on the society, it not appearing what the duties of the building committee were, or that it was then in existence.—*Steele v. McBurney* (Iowa) 65 N. W. 332.

[b] (Mich.; 1895.)

Under Pub. Acts 1893, No. 199, § 6, providing that a notice of the lien filed shall within 10 days be served on the owner or lessee if he can be found in the county, or, in case of his absence from the county, then a copy on his agent within the county, and, if neither can be found within the county, a copy of such notice shall be posted on the building, service of notice by mailing a copy to the general manager of the owner at a place outside the county is insufficient.—*Hannah & Lay Mercantile Co. v. Mosser* (Mich.) 62 N. W. 1120.

105 Mich. 18.

[c] (Mich.; 1895.)

Under Pub. Acts 1893, No. 199, § 6, if the notice of lien required to be served on the

owner or agent is not served within the county, the claim must fail.—*Hannah & Lay Mercantile Co. v. Mosser* (Mich.) 62 N. W. 1120.
105 Mich. 18.

§ 23. — By contractor.

[a] (Mich.; 1895.)

In a proceeding by the original contractor to enforce a mechanic's lien against the owner of the land, no rights of a subsequent purchaser intervening, the owner, by accepting service of a copy of the statement in lieu of the statutory service, before the time had elapsed within which the statutory service could have been made, is estopped to assert that the service was not made in the statutory manner.—*Mouat v. Fisher* (Mich.) 62 N. W. 338.
104 Mich. 262.

[b] (Mich.; 1896.)

The requirements of Pub. Acts 1891, No. 179, § 4, providing that a contractor shall furnish the owner a statement of laborers and material men under his contract, with the amounts due each, before he shall have a right of action to enforce a mechanic's lien therefor, cannot be considered waived in favor of a contractor unless under circumstances amounting to an estoppel.—*Sterner v. Haas* (Mich.) 66 N. W. 348.

[c] (Mich.; 1896.)

Pub. Acts 1891, No. 179, § 4, requiring the contractor to furnish the owner a statement of the laborers and material men under his contract, before he may sue to enforce a mechanic's lien, requires the contractor to furnish such statement, though in fact the time within which liens may be perfected by material men, subcontractors, or laborers has expired by reason of the lapse of 60 days after the completion of the building.—*Martin v. Warren* (Mich.) 67 N. W. 897.

§ 24. — By subcontractor.

(Iowa; 1896.)

To preserve a mechanic's lien by a subcontractor, as against other lien holders, he must serve on the owner the written notice that he has filed his claim for a lien with the clerk, required by Laws 16th Gen. Assem. c. 100, § 7, within the 30 days allowed by that statute from the date when the last material was furnished or the last work done; and the service within that time of an original notice which states that a lien is claimed, but not that the claim has been filed, is insufficient.—*Merritt v. Hopkins* (Iowa) 65 N. W. 1015.

§ 25. Notice of lien or statement of claim filed—Sufficiency.

[a] (Wis.; 1896.)

A notice of subcontractor's lien, which states that "it claims said lien under and by virtue of the laws of the state of Wisconsin in such case made and provided," is sufficient, without specifically naming the section of the statute.—*Hausmann Bros. Manufg Co. v. Kempfert* (Wis.) 67 N. W. 1136.
93 Wis. 587.

[b] (Wis.; 1896.)

A notice of subcontractor's lien which, after reciting what the claim was for and upon, states "that the work, labor, and services done and performed upon said building, and sash, doors, blinds, mouldings, and other building materials sold and delivered to be used, and which were actually used, * * * under said agreement with said principal contractors, * * * was done and performed, and material furnished, on and between" the dates named, at the agreed prices named; that the last date of the performance of such work and furnishing such materials under said contracts was on a certain date; and that 60 days had not since elapsed,—is a substantial compliance with the statute.—*Hausmann Bros. Manufg Co. v. Kempfert* (Wis.) 67 N. W. 1136.
93 Wis. 587.

§ 26. — Description of premises.

[a] (Iowa; 1896.)

After vacation of a recorded plat, a lien statement describing a portion of the land formerly covered thereby as lots and blocks of such plat, and giving their number, is sufficient, as to the land formerly included in the designated lots and blocks, within Acts 16th Gen. Assem. c. 100, § 6, requiring a statement of lien to contain a correct description of the land.—*Chicago Lumber Co. v. Des Moines Driving Park* (Iowa) 65 N. W. 1017.

[b] (Iowa; 1896.)

Where a recorded plat of an addition is vacated, and the land inclosed for a race ground, a statement of lien reciting that it is claimed on the improvements "on the following described land, on which the same are situated," and then describing the land as lots and blocks (giving their numbers) of the vacated plat, is insufficient to create a lien on the land formerly platted as streets and alleys.—*Chicago Lumber Co. v. Des Moines Driving Park* (Iowa) 65 N. W. 1017.

[c] (Mich.; 1895.)

Under Pub. Acts 1893, No. 199, § 9, subd. 4, providing for a decree against the building alone, the lien will be good against the building when the notice accurately describes the building, but not the land.—*Hannah & Lay Mercantile Co. v. Mosser* (Mich.) 62 N. W. 1120.
105 Mich. 18.

[d] (Minn.; 1896.)

Where a house was erected on the west half of lot 7 and the east half of lot 6, which were contiguous, a description in a lien statement of the premises on which the house was situate as the east half of lot 7 and the west half of lot 6 was sufficient, under Gen. St. 1894, § 6237, providing that the validity of a lien shall not be affected by any inaccuracy in the statement relating to the property to be charged if the property can be reasonably recognized by the description.—*Evans v. Sanford* (Minn.) 68 N. W. 21.

[e] (Minn.; 1896.)

The fact that in the statement the description of the land on which the building was erected covered a tract exceeding the statutory limit, but all of which was owned by the lien debtor, did not vitiate the lien, as the court has the right to carve out of such tract a tract within the limit.—*Evans v. Sanford* (Minn.) 68 N. W. 21.

[f] (Neb.; 1896.)

In the affidavit filed by a subcontractor claiming a lien under Comp. St. 1895, c. 54, § 2, the real estate of the owner was described as the "Bartlett & Downing Block in Kearney, Buffalo county, Nebraska." The correct description of the real estate was "Lot 338 in the town of Kearney, Nebraska." *Held*, that said description alone would not charge a party dealing with lot 338 with notice that the lien was claimed against it.—*Drexel v. Richards* (Neb.) 67 N. W. 742.
48 Neb. 732.

[g] (Neb.; 1896.)

Under Comp. St. 1895, c. 54, § 2, the description of the real estate on which materials furnished by a subcontractor have been used in erecting an improvement is a necessary part of the affidavit required to be filed by such subcontractor in order to entitle him to a lien.—*Holmes v. Hutchins* (1894) 57 N. W. 514, 38 Neb. 601, followed.—*Drexel v. Richards*, 67 N. W. 742, 48 Neb. 732.

[h] (Neb.; 1897.)

A description in the statement for lien is sufficient if the property can be ascertained therefrom by the aid of extrinsic evidence.—*Drexel v. Richards* (Neb.) 70 N. W. 23.

[i] (Neb.; 1897.)

A subcontractor's statement for lien must describe the premises on which the improvement was erected.—*Drexel v. Richards* (Neb.) 70 N. W. 23.

[1] (Neb.; 1897.)

A description of property in a statement for a mechanic's lien as the "Bartlett & Downing Block, Kearney, Buffalo county, Neb.," is a sufficient description of the premises, especially when rights of third parties are not involved.—*Drexel v. Richards* (Neb.) 70 N. W. 23.

§ 27. Effect of mistake or surplusage.

[a] (Iowa.)

Under Code, § 2133, providing that, to create a lien for labor and material furnished, there must be filed "a just and true statement or account of the demand," a statement made and verified in good faith is sufficient, though unintentional errors be found.—(1895) *Green Bay Lumber Co. v. Miller*, 62 N. W. 742; (1896) *Id.*, 67 N. W. 383.

[b] (Iowa; 1897.)

Plaintiffs having sold S. materials for a building on land to which M. held the legal title as security, their right to a lien was not defeated because they claimed it against both S. and M., in the absence of intentional wrong.—*Lee v. Hoyt* (Iowa) 70 N. W. 95.

[c] (Minn.; 1895.)

A statement for a mechanic's lien is not necessarily defective because it states more facts than the statute requires.—*John Paul Lumber Co. v. Hornel* (Minn.) 63 N. W. 718.

61 Minn. 303.

§ 28. Effect of claiming more than is due.

[a] (Mich.; 1894.)

Filing a claim for mechanic's lien for too large a sum does not invalidate the lien unless the mistake is intentional.—*McMonagle v. Wilson* (Mich.) 61 N. W. 495.

103 Mich. 264.

[b] (Mich.; 1895.)

A contractor purchased from G. materials worth \$60, which were used elsewhere, in addition to materials used in defendant's building, and on the day he received \$1,500 from defendant paid G. \$75 on account out of it. G. credited the \$75 on the \$60 account, and the balance, \$15, on the building account, and in this form swore to the latter as correct, with the intention of collecting the whole amount from defendant company. *Held*, that the action of G. was such an attempted fraud on defendant as to defeat his lien.—*Hannah & Lay Mercantile Co. v. Mosser* (Mich.) 62 N. W. 1120.

105 Mich. 18.

[c] (Mich.; 1895.)

Under the provision of the mechanic's lien law that claimant make a just and true statement of the demand due him, his lien will not be defeated, though he claims too much in his statement, it being the result of an honest mistake, and not an effort on his part to place a lien on the premises for a greater amount than he honestly believed his due. *Grant, J., dissenting*.—*Scheibner v. Cohnen* (Mich.) 65 N. W. 760.

§ 29. Verification.

[a] (Mich.; 1894.)

An affidavit for a mechanic's lien, sworn to before a proper person, is not rendered invalid because also sworn to before a person who afterwards became deponent's attorney in the suit, even if void so far as the latter oath is concerned.—*McMonagle v. Wilson* (Mich.) 61 N. W. 495.

103 Mich. 264.

[b] (Mich.; 1894.)

An affidavit for a mechanic's lien, asserting that deponent furnished material for building a house on a lot in pursuance of a contract with W., the owner of the lot, and there is due deponent therefor, from W., a certain amount on the contract, and a certain amount for extras done on the house under

the contract, and damages suffered by deponent because W. failed to comply with the contract, purports to be the affidavit of a principal contractor.—*McMonagle v. Wilson* (Mich.) 61 N. W. 495.

103 Mich. 264.

[c] (Minn.; 1895.)

The verification of a lien statement by the claimant, "that he had knowledge of the facts therein stated, and that the same were true," was sufficient.—*Nordine v. Knutson* (Minn.) 64 N. W. 565.

62 Minn. 264.

[d] (Neb.; 1895.)

The claim of a mechanic's lien may be verified on information and belief.—*Chapman v. Brewer*, 62 N. W. 320, 43 Neb. 890.

§ 30. Amendments.

[a] (Iowa; 1896.)

Acts 16th Gen. Assem. c. 100, provides that failure to file a claim of lien shall not defeat the lien, "except as against purchasers and incumbrancers in good faith without notice," after the time limited has expired, and before any claim for lien is filed. *Held*, that on foreclosure of a lien the claim of lien cannot be amended to include land omitted, as against a "purchaser in good faith without notice," after the time for filing liens has expired, and before any claims for lien were filed.—*Chicago Lumber Co. v. Des Moines Driving Park* (Iowa) 65 N. W. 1017.

[b] (Wis.; 1896.)

Under Sanb. & B. Ann. St. § 3315, which provides that a subcontractor may be entitled to a lien if, within 60 days after furnishing materials to the principal contractor, "he shall give notice in writing to the owner, or his agent, of the property to be affected by the lien," etc., the notice cannot be amended after the expiration of the 60 days.—*Mark Paine Lumber Co. v. Douglas County Imp. Co.* (Wis.) 68 N. W. 1013.

[c] (Wis.; 1896.)

Under Sanb. & B. Ann. St. § 3320, which provides that a claim for a lien shall contain, among other things, "a description of the property affected," and that it may be amended the same "as pleadings," where a claim is not so defective as to be an absolute nullity, and the rights of third persons have not intervened, it may be amended as to the description, even after the expiration of the 6 months from the date of the last charge for work or material, within which (section 3318) the claim must be filed.—*Mark Paine Lumber Co. v. Douglas County Imp. Co.* (Wis.) 68 N. W. 1013.

§ 31. Necessity of filing lien statement.

(Iowa; 1896.)

Where a recorded plat of an addition is vacated, and the land inclosed for a race ground, and claims for liens for improvements thereon, through insufficiency of description, fail to include the land formerly platted as streets and alleys, a purchaser at execution sale on a judgment obtained against the owners of the ground after the time for filing such liens had expired, and before a sufficient claim of lien was filed, is a purchaser "in good faith without notice," within Acts 16th Gen. Assem. c. 100, providing that failure to file a claim of lien shall not defeat the lien, "except as against purchasers or incumbrancers in good faith without notice," after the time limited has expired, and before any claim for lien is filed, though he knew that the materials and labor for which liens were claimed had been furnished, and the character and extent of the property.—*Chicago Lumber Co. v. Des Moines Driving Park* (Iowa) 65 N. W. 1017.

§ 32. Filing contract.

(Neb.; 1896.)

The submission of a written bid for the performance of work on a building, and an oral

acceptance thereof, do not constitute a written contract, within Comp. St. c. 54, § 3, relating to mechanics' liens, and providing that, when any labor has been done or materials furnished under a written contract, the same or a copy thereof shall be filed with the account.—*Specht v. Stevens*, 65 N. W. 879, 46 Neb. 874.

§ 33. Time of filing lien.

[a] (Mich.; 1896.)

Complainant contracted to build a mill for defendants, but, the work not proving satisfactory, he agreed to furnish a pair of larger rolls, and to get a millwright to set them up. Subsequently a settlement was had wherein a deduction from the contract price was made in order to pay the millwright, who was to be engaged by defendants to place additional machinery, and complainant took a paper reciting the receipt of certain notes in full settlement, and that, in consideration of such settlement, complainant agreed to furnish 9x24 rolls in exchange for 9x18 rolls then in the mill. A few days later defendants wrote asking for 9x30 rolls, stating that they would pay the difference, and the proposition was accepted by complainant, and the rolls furnished. *Held*, that the last rolls furnished and the work done by the millwright in setting them up was pursuant to a new and independent contract, which could not keep alive any right of lien under the original agreement.—*John T. Noye Manufg Co. v. Thread Flouring-Mills Co.* (Mich.) 67 N. W. 1108.

[b] (Minn.; 1895.)

The fact that the last items of material furnished by the claimant of a mechanic's lien were not used in the erection of the buildings in which the material previously furnished was used did not render a statement for the lien against that building filed 90 days after the date of the last item unseasonably filed.—*John Paul Lumber Co. v. Hormel* (Minn.) 63 N. W. 718.

61 Minn. 303.

[c] (Minn.; 1895.)

Over 3½ months after the apparent completion of a contract, the performance of which occupied three months, two hours' work was done in fitting doors. *Held*, that the completion of the contract was not thereby extended.—*Dayton v. Minneapolis Radiator & Iron Co.* (Minn.) 65 N. W. 133.

63 Minn. 48.

[d] (Minn.; 1896.)

After performance of a contract for the placing of furnaces in a house, it was found that a warranty was not complied with, and a new agreement was made, whereby, in satisfaction of all damages for the breach of warranty, the contractor was to substitute other furnaces. *Held*, that a lien statement filed within 90 days after completion of the new agreement for the contract price was filed in time.—*Scheible v. Schickler* (Minn.) 65 N. W. 920.

63 Minn. 471.

[e] (Neb.; 1895.)

To be entitled to a mechanic's lien for material furnished, a subcontractor must show that he filed a sworn statement under Comp. St. c. 54, art. 1, § 2, within 60 days from the furnishing of the last material.—*Wells v. David City Imp. Ass'n*, 61 N. W. 623, 43 Neb. 366.

[f] (Neb.; 1895.)

Material for which a lien on land is claimed, *held* to have been "furnished" on the date of its arrival at the station of destination, and the payment of freight, though, at the request of the consignee, it remained at the station several days thereafter.—*Buchanan v. Selden*, 61 N. W. 732, 43 Neb. 559.

[g] (Neb.; 1895.)

Where, in the itemized account attached to a statement filed by a subcontractor for a lien for material furnished a contractor for an

improvement on land, more than 60 days intervene between two items of the account, the presumption is that all the items were furnished under a separate contract.—*Buchanan v. Selden*, 61 N. W. 732, 43 Neb. 559.

[h] (Neb.; 1895.)

Where labor was performed for a contractor in improving real estate at two different periods of time, between which more than 60 days intervened, the presumption is that the labor was performed under two contracts, so that, to entitle the laborer to a lien under Comp. St. 1895, § 3667, for the labor performed during the first period, he should have filed the statement within 60 days of the date of performing the last labor during such period.—*Hansen v. Kinney*, 64 N. W. 710, 46 Neb. 207.

[i] (Neb.; 1896.)

To entitle a subcontractor to a lien, he must file in the office of the county clerk, within 60 days from the date of the last item of material furnished or labor performed, the sworn statement required by Comp. St. c. 54, art. 1, § 2.—*Drexel v. Richards* (Neb.) 67 N. W. 169.

48 Neb. 322.

[j] (Wis.; 1896.)

A building contract provided that all payments to the contractor should be made on certified statements of the architects, who were employed to supervise the construction of the building at a compensation of 5 per cent. of its cost, and that final settlement should be made on their certificate, showing completion of the contract according to specifications. *Held* that, as the last act required of the architects was to give a final certificate of satisfactory construction, their time for filing a lien for services did not begin to run until the performance of such act.—*Bentley v. Adams* (Wis.) 66 N. W. 505.

92 Wis. 386.

§ 34. — Original contractors.

(Iowa; 1895.)

The fact that the owner of a lot, who had a building erected thereon by a contractor, agreed to pay plaintiff for lumber previously furnished the contractor for the building, and gave his note therefor, does not, as against one who, without notice of such agreement, took a mortgage of said premises after the 30 days allowed by Code, § 2133, within which subcontractors shall file statements for mechanics' liens, render plaintiff a principal contractor, so as to extend the time within which to file his statement for lien to the 90 days allowed principal contractors.—*Missouri River Lumber Co. v. Finance Co. of Iowa* (Iowa) 61 N. W. 913.

93 Iowa, 640.

§ 35. Effect of failure to file in time limited.

(Iowa; 1895.)

Acts 16th Gen. Assem. c. 100, § 6, providing that the failure of a subcontractor to file his lien within 30 days "shall not defeat the lien," except as to purchasers without notice, is limited by section 8, which declares that a subcontractor's lien filed after the expiration of 30 days shall be enforced only to the extent of the balance due from the owner to the contractor at the time the notice is served.—*Thompson v. Spencer* (Iowa) 63 N. W. 695.

§ 36. When more than one lien necessary.

(Neb.; 1895.)

A material man cannot tack one contract to another so as to procure a lien for all the materials furnished under separate contracts by filing his claim within the required time from the date of furnishing material pursuant to one contract.—*Central Loan & Trust Co. v. O'Sullivan* (Neb.) 63 N. W. 5.

44 Neb. 834.

§ 37. Single lien filed against separate houses.

(Iowa; 1891.)

A mechanic's lien for a balance due on material furnished in the construction of several distinct buildings, upon as many different lots, owned by different persons, cannot be established on all of the properties, on the ground that one of the owners acted as the agent of all of them in contracting therefor.—*Bartlett v. Bilger* (Iowa) 61 N. W. 233.
92 Iowa, 732.

§ 38. Proceedings against municipal corporations.

[a] (Iowa; 1896.)

In an action to enforce a claim for furnishing materials for a public building, a refusal to allow an amendment of the notice of claim after the time for filing the notice has expired, so as to make it comply with the statute, is proper.—*McGillivray v. District Tp. of Barton* (Iowa) 65 N. W. 974.

[b] (Iowa; 1896.)

Under Acts 20th Gen. Assem. c. 179, providing that one furnishing material for the construction of a public building shall have "a valid claim" against the public corporation constructing it, if, as provided by section 2, he file within a certain time "an itemized and sworn statement of the demand" with proper officers, a statement without any jurat is insufficient, though it was in fact sworn to.—*McGillivray v. District Tp. of Barton* (Iowa) 65 N. W. 974.

VI. PRIORITIES.

§ 39. Statutory provisions.

(Iowa; 1896.)

Defendant sold certain land to G., under a contract that G. should build a house thereon, and that, in case of forfeiture for non-payment of the installments on the contract, the improvements should pass to the defendant. G. obtained the materials from plaintiff, and erected his house. On defaulted payments, defendant declared the contract forfeited. *Held*, that under Miller's Code, § 2135, subsec. 4, providing that mechanics' liens shall attach in preference to any prior lien, plaintiff's lien upon the house for material was superior to the lien of defendant under the contract.—*Jameson v. Gile* (Iowa) 67 N. W. 396.

§ 40. — Effect of failure to file statement.

[a] (Iowa; 1896.)

Under Acts 16th Gen. Assem. c. 100, providing that failure to file a statement of mechanic's lien within the time limited shall not defeat the lien, except as against purchasers or incumbrancers in good faith, whose rights accrued after such time, and before any claim for lien was filed, a lienor cannot acquire priority over lienors, whose lien statements fail to describe the property, by filing a statement containing a description thereof.—*Chicago Lumber Co. v. Des Moines Driving Park* (Iowa) 65 N. W. 1017.

[b] (Iowa; 1897.)

McClain's Code, § 3314, provides that the failure of a material man to file a statement of his account within the prescribed 90 days from the date of the last item does not defeat his right to a lien, except as against incumbrancers, etc., whose rights accrued after the 90 days, and before any claim of lien is filed. *Held* that, where one loaned money to the owner of the improvement before the expiration of the 90 days, taking deeds of the premises as security, the fact that, after the expiration of said time, further deeds of the premises were executed to him as additional security did not give him priority over a mechanic's lien claimant subsequently filing a statement.—*Lee v. Hoyt* (Iowa) 70 N. W. 95.

§ 41. Mortgages.

[a] (Iowa; 1891.)

A mortgage recorded before the beginning of the improvements, upon property sought to be charged with a mechanic's lien for a balance due on them, takes precedence thereof.—*Bartlett v. Bilger* (Iowa) 61 N. W. 233.
92 Iowa, 732.

[b] (Iowa; 1896.)

One who acquires a mechanic's lien on property does not thereby become a purchaser, and he is charged with notice of all liens or conveyances affecting it, whether recorded or not; and where the holder of an unrecorded assignment of a bond and mortgage was not made a party to an action to foreclose a mechanic's lien on the property, though his assignor was made a party, he is not concluded by a decree in such action, entered after the recording of his assignment.—*Nashua Trust Co. v. W. S. Edwards Manuf'g Co.* (Iowa) 68 N. W. 587.

[c] (Iowa; 1897.)

The holder of a mortgage could not object, on foreclosure of a mechanic's lien, that the sale was decreed subject to the lien of the mortgage merely, without providing for an apportionment of the proceeds, pursuant to McClain's Code, § 3317, which enables a mechanic's lien claimant to secure the advantage of the increase in value of the realty resulting from the improvement.—*Eagle Iron Works v. Des Moines Suburban Ry. Co.* (Iowa) 70 N. W. 193.

[d] (Neb.; 1895.)

The lien of a mortgage on land, taken while a building is being erected thereon, is subject to a mechanic's lien for material already or thereafter furnished.—*Chapman v. Brewer* 62 N. W. 320, 43 Neb. 890.

[e] (Neb.; 1895.)

One taking a mortgage on land is bound to know whether material has been furnished or labor performed for improvements on the premises within the four prior months.—*Chapman v. Brewer*, 62 N. W. 320, 43 Neb. 890.

[f] (Neb.; 1896.)

A mortgagee who encourages the improvement of the mortgaged property by an agreement to subordinate his lien to the cost thereof is, as to persons furnishing labor and material for use thereon upon the faith of his promise, a promoter of such improvement, and their liens for labor and material are entitled to priority over his mortgage. *Manufacturing Co. v. Kountze* (1890) 46 N. W. 1123, 30 Neb. 719, followed.—*Cummings v. Emslie*, 68 N. W. 621.

[g] (Wis.; 1895.)

Rev. St. § 3314, provides that every person who, as principal contractor, furnishes any materials for a building, or any machinery so constructed as to become a part of the freehold, shall have a lien thereon, and on the interest of the owner of such building and machinery in the land; and that such lien shall be prior to any other lien which originates subsequent to the commencement of the construction of such building and machinery. *Held*, that the lien for the machinery for a mill is prior to the lien of a mortgage given after the erection of the building was commenced, the machinery being contracted for before the mortgage was made, but furnished afterwards. *Cassoday, C. J.*, dissenting.—*Vilas v. McDonough Manuf'g Co.* 65 N. W. 488, 91 Wis. 607.

§ 42. Right to remove building as against mortgagee.

(S. D.; 1895.)

Under Comp. Laws, § 5480, making the lien on land for material or labor in the erection of improvements thereon superior to existing incumbrances, on the foreclosure of a material man's lien the purchaser of the building for which the material was furnished may remove the same within a reasonable time, though the land on which it was erected was mortgaged

before the lien thereof attached.—Laird-Norton Co. v. Herker (S. D.) 62 N. W. 104.
6 S. D. 509.

§ 43. Effect of unrecorded conveyance. (Mich.: 1895.)

A deed recorded after the bill to enforce a mechanic's lien has been filed, though it purports to have been executed previously, cannot affect plaintiff's rights.—Mouat v. Fisher (Mich.) 62 N. W. 338.
104 Mich. 262.

VII. WAIVER, RELEASE, AND EXTINGUISHMENT.

§ 44. Stipulation in contract. (Wis.: 1896.)

A contract for grading land provided that 85 per cent. of the price should be paid upon monthly estimates, and the balance upon completion of the work, and that the contractor waived all right of lien upon the land graded which he had under the statute, and that the waiver was of the essence of the contract, and a part of the consideration of the same. *Held*, that the waiver was an independent covenant, and did not depend for its validity on the payment of the 85 per cent. of the contract price, so that the contractor was not entitled to a lien, whether or not that per cent. of the price had been paid.—Brzezinski v. Neeves (Wis.) 67 N. W. 1125.
93 Wis. 567.

§ 45. Acceptance of note.

[a] (Minn.: 1896.)

A mechanic's lien is waived or discharged when the laborer or material man extends credit to the owner beyond the statutory period for bringing an action to foreclose the lien, though the time is so extended by the taking of a note not payable until after the expiration of that period, and Gen. St. 1894, § 6243, provides that the taking of a note for labor or material shall not discharge the lien.—Flenniken v. Liscoe (Minn.) 66 N. W. 979.
64 Minn. 269.

[b] (Neb.: 1896.)

The mere fact that the owner of real property has given his note for a portion of the amount due for materials furnished for making erections on his property does not relieve such property from a mechanic's lien filed against the same for the entire amount of the material so furnished.—Livesey v. Hamilton (Neb.) 66 N. W. 644.
47 Neb. 644.

§ 46. Taking other security.

[a] (Iowa: 1896.)

A railroad company agreed by letter to build a spur from its track to defendant's coal mine, taking defendant's note for the cost thereof. In the letter the railroad company stated: "We may require the president of the coal company to indorse the note personally." Upon the completion of the spur, the note was given, and, on the request of the railroad company, it was signed by the president of the coal company. *Held*, that it was not a taking of collateral security which would defeat the railroad company's lien for work and material furnished, under McClain's Code, § 3310, providing that no person shall be entitled to a mechanic's lien who during the progress of the work shall take any collateral security, but that the taking of security after the completion of the work shall not affect such right.—Atlantic Trust Co. v. Carbondale Coal Co. (Iowa) 68 N. W. 697.

[b] (Neb.: 1894.)

The right to a mechanic's lien is not waived by the acceptance of collateral security for the payment of the account for material furnished or labor performed, unless such

was the intention of both parties.—Baker v. Abrams, 61 N. W. 91, 42 Neb. 880.

[c] (Neb.: 1895.)

The acceptance of a mortgage by a mechanic's lien holder, covering the property to which the lien has attached, does not operate as a waiver of the lien, where such was not the intention of the parties.—Chapman v. Brewer 62 N. W. 320, 43 Neb. 890.

[d] (Neb.: 1895.)

An agreement that one furnishing machinery, etc., shall have a lien on the same, and "on the building and real estate where said machinery is placed, to secure all claims" therefor, *held* not a waiver of the statutory lien for such claim.—Chapman v. Brewer (Neb.) 62 N. W. 320, 43 Neb. 890.

[e] (S. D.: 1897.)

Notes of a third person are "collateral security," within Comp. Laws, § 5468, providing that no person is entitled to a mechanic's lien who takes collateral security in the same contract.—Edward P. Allis Co. v. Madison Electric Light, Heat & Power Co. (S. D.) 70 N. W. 650.

§ 47. Effect of foreclosure of mortgage. (S. D.: 1895.)

A material man's lien for improvements on mortgaged premises, which is superior to that of a prior mortgage (Comp. St. § 5480), is not divested by a foreclosure of the mortgage under the power of sale therein.—Laird-Norton Co. v. Herker (S. D.) 62 N. W. 104.
6 S. D. 509.

VIII. CONTRACTORS' BONDS.

§ 48. Liability of sureties.

[a] (Iowa: 1896.)

The sureties on a bond to secure the performance of contract for the erection of a building for a county, which provided that the contractor should obtain a certificate to the effect that no mechanics' liens or other claims are chargeable to the county, are not liable for claims against the contractor for materials furnished for which the material men have no claim or lien against the county.—Hunt v. King (Iowa) 66 N. W. 71.

[b] (Mich.: 1896.)

Where a bond collateral to a building contract is conditioned that the principal will pay for all labor and material used in the construction of the building, so as to deliver the same free from any liens, and hold plaintiff free from any obligations therefor, the sureties cannot be charged with payments made by plaintiff on the debts of the principal for labor and materials after such demands had ceased to be liens on the property.—Marquette Opera-House Bldg. Co. v. Wilson (Mich.) 67 N. W. 123.

IX. ENFORCEMENT—ACTIONS.

§ 49. Right of action and defenses.

[a] (Neb.: 1896.)

Where a party has furnished materials for the improvement of real property, and in all respects has complied with the mechanic's lien law in respect thereto, his rights will not be destroyed, merely because, in taking a note for the amount due, he has described himself by the fanciful designation of the "Western Cornice Works," when there is no claim that, thereby, any one was misled or injured.—Livesey v. Hamilton (Neb.) 66 N. W. 644.
47 Neb. 644.

[b] (S. D.: 1897.)

The purchaser of property from a corporation has the right to defend against a mechanic's lien claimed thereon by showing that the contract upon which the right to a lien is based

was not made by nor legally binding on, the corporation. *Des Moines Manufacturing & Supply Co. v. Telford Milling Co.* (S. D.) 70 N. W. 829.

§ 50. Objections to service of notice.

(Mich.; 1895.)

In a suit to foreclose a mechanic's lien, the objection that "the affidavit does not show a legal service of the papers" sufficiently raises the question whether the notice of lien was properly served.—*Hannah & Lay Mercantile Co. v. Mosser* (Mich.) 62 N. W. 1120.
105 Mich. 18.

§ 51. Limitation of action.

[a] (Mich.; 1895.)

Under Pub. Acts 1893, No. 199, § 9, providing that a mechanic's lien shall continue for six months after the statement is filed, and no longer, unless proceedings are begun to enforce it, the time must be computed from the filing of the claim to the date of filing the bill or cross bill, and not to the time of service of process.—*Hannah & Lay Mercantile Co. v. Mosser* (Mich.) 62 N. W. 1120.
105 Mich. 18.

[b] (Neb.; 1896.)

An action in which it is sought, as the relief demanded by the plaintiff or a cross petitioner, to foreclose a mechanic's lien against the rights or interest of any person in the property covered thereby, must have been commenced within two years from the date of filing the lien, or it is barred, so far as the right to foreclose the lien is concerned, by limitation.—*Monroe v. Hanson* (Neb.) 66 N. W. 12.
47 Neb. 30.

§ 52. Notice of lis pendens.

[a] (Minn.; 1895.)

The omission to file a notice of lis pendens in an action to enforce a mechanic's lien cannot be raised for the first time as an objection to the rendition of judgment.—*Julius v. Callahan* (Minn.) 65 N. W. 267.
63 Minn. 154.

[b] (Minn.; 1895.)

The filing of a notice of lis pendens is not a condition precedent to an action to enforce a mechanic's lien, and does not go to the jurisdiction of the court.—*Julius v. Callahan* (Minn.) 65 N. W. 267.
63 Minn. 154.

§ 53. Parties.

[a] (Neb.; 1896.)

When one in actual possession under an unrecorded deed at the beginning of an action to enforce a mechanic's lien is not made a party thereto, he is not affected by the decree rendered therein.—*Monroe v. Hanson* (Neb.) 66 N. W. 12.
47 Neb. 30.

[b] (Wis.; 1896.)

Under Sank. & B. Ann. St. § 2271, specifying that the homestead shall descend, free of all judgments, etc., "except * * * mechanics' liens," the wife's interest in the homestead may be divested by decree and sale in a mechanic's lien suit against the husband, and she is therefore a proper party, though she did not join in the contract under which the lien is claimed.—*Hausmann Bros. Manuf'g Co. v. Kempfert* (Wis.) 67 N. W. 1136.
93 Wis. 587.

[c] (Wis.; 1896.)

Under Rev. St. § 2603, declaring that any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff, the wife is a proper party defendant in a suit against the husband to foreclose a subcontractor's lien, though the property is not a homestead.—*Hausmann Bros. Manuf'g Co. v. Kempfert* (Wis.) 67 N. W. 1136.
93 Wis. 587.

§ 54. Bill or complaint.

[a] (Mich.; 1896.)

Under Acts 1893, No. 199, § 1, providing that one furnishing material for any structure under a contract with the owner of the real estate shall have a lien thereon for the value of the materials furnished, a complaint in an action to enforce such lien which fails to allege that the defendant was owner of the land on which the lien was sought to be enforced, or to set out that defendant had any interest therein, is fatally defective.—*Knapp Electrical Works v. Meosta Electric Co.* (Mich.) 68 N. W. 215.

[b] (Minn.; 1894.)

A complaint to enforce a mechanic's lien, which merely alleges that the labor was performed "during the years of 1892 and 1893," and "that the statement of lien was filed 'Nov. 6, 1893,'" is insufficient to show that the statement was filed within 90 days after the labor was performed.—*J. D. Moran Manuf'g Co. v. Clarke* (Minn.) 61 N. W. 556.
59 Minn. 456.

[c] (Minn.; 1895.)

It is not necessary to allege in a complaint to enforce a mechanic's lien that a notice of lis pendens has been filed with the register of deeds, as proof of that fact may be shown without pleading it.—*John Paul Lumber Co. v. Horrel* (Minn.) 63 N. W. 718.
61 Minn. 303.

[d] (Wis.; 1896.)

Under Sank. & B. Ann. St. § 3324, which expressly authorizes a recovery for materials sold and delivered by a subcontractor to a principal contractor, notwithstanding a failure to establish the statutory lien, in an action for a lien a complaint which states a good cause of action against defendant contractor personally is good against a general demurrer, though it fail to state a cause of action for a lien.—*Mark Paine Lumber Co. v. Douglas County Imp. Co.* (Wis.) 68 N. W. 1013.

§ 55. Cross bill—Foreclosure of mortgage.

(Minn.; 1896.)

The provisions of the mechanic's lien law for filing pleadings, instead of serving them, apply only to issues tendered by the complaint, or expressly authorized by the statute, so that a defendant mortgagee, in an action to enforce a mechanic's lien, cannot have a decree against the defendant mortgagor upon a cross bill demanding foreclosure of the mortgage, which covers other land besides that described in the complaint, without proper notice to the mortgagor.—*Jewett v. Iowa Land Co.* (Minn.) 67 N. W. 639.
64 Minn. 531.

§ 56. Variance between proof and findings.

(Minn.; 1896.)

In an action to foreclose a mechanic's lien, the proof showed that the original contract was modified, and, as modified, performed, and a statement filed in time, while the court found only the fact of making the first contract, and of performance of the same, and the subsequent modification thereof, without finding what the modification was, or that the contract as modified was performed. *Held*, that an order granting a new trial was proper because of the variance between the proof and the findings.—*Scheible v. Schickler* (Minn.) 65 N. W. 920.
63 Minn. 471.

§ 57. Dismissal.

(Wis.; 1896.)

In an action to enforce a mechanic's lien, where a defendant admitted that he was the owner of the property and that plaintiff did the work, but set up a counterclaim as to which the evidence was conflicting, it was not error to

refuse to dismiss the action as to such defendant.
—*Bartlett v. Clough* (Wis.) 68 N. W. 875.

§ 58. Judgment—Enforcement.

(S. D.; 1896.)

Mortgaged property having been sold to satisfy mechanics' liens, the mortgagor, after acquiring the certificate of purchase, sued the mortgagee and his sureties on a bond indemnifying him against such liens, and judgment was rendered therein for defendants on the ground that the property was previously taken by plaintiff in satisfaction of the mortgage, subject to all liens. *Held*, that it was not an excess of equity jurisdiction for the court to permit the holders of adjudicated mechanics' liens, which had not been satisfied by the sale of the premises, to subsequently issue execution for the collection of their claims out of the property.—*American Savings & Loan Ass'n v. Campbell* (S. D.) 65 N. W. 815.

§ 59. Province of court and jury.

(Wis.; 1896.)

Under Rev. St. § 3323, providing that in actions to enforce mechanics' liens any issue of fact shall, on demand of either party, be tried by a jury, whose verdict shall be conclusive as in other cases, where a jury is demanded in such an action, but neither party designates what issue he desires to have tried by the jury, the court has the right, of its own motion, to submit such questions to the jury as it deems advisable, the verdict thereon being advisory merely, and the remaining issues are to be determined by the court.—*Bartlett v. Clough* (Wis.) 68 N. W. 875.

MEETING.

Of county board, see "Counties," § 26.

Of directors, see "Corporations," § 13.

Of members and stockholders, see "Corporations," § 65.

Of school directors, see "Schools and School Districts," § 7.

MEMORANDA.

As evidence, see "Evidence," § 82.

To refresh memory of witness, see "Witness," §§ 30-32.

Under statute of frauds, see "Frauds, Statute of," §§ 3-6.

MENTAL ANGUISH.

See "Damages," § 26; "Telegraph Companies," § 12.

MERCANTILE AGENCIES.

Publishing names of debtors, privileged communications, see "Libel and Slander," § 16.

MERGER.

See "Contracts," § 54; "Mortgages," § 37.

Of cause of action, see "Judgment," § 37.

MESNE PROCESS.

See "Arrest"; "Attachment."

MESSAGES.

See "Telegraph Companies."

MILEAGE.

Of witness, see "Witness," § 76.

MILITIA.

Presentation of claims for services, see "Counties," § 49.

§ 1. Discipline.

[a] (Iowa; 1897.)

Under McClain's Code, § 1572, providing that the discipline of the State National Guard shall conform to the regulations for the government of the army of the United States, except as otherwise provided; and section 1585, providing that every soldier absent without leave from encampment shall be fined two dollars for each day of absence, suit for the collection of the fines to be brought in the name of the state for the use of his company,—the fine is not to be imposed by a militia officer, but by the court before which the action is brought; and the soldier may prove before the court that he had a sufficient excuse for not attending encampment.—*State v. Ryan* (Iowa) 69 N. W. 1123.

[b] (Minn.; 1896.)

A captain of a company of the National Guard, not acting as a military force, is not authorized to summarily punish by imprisonment a member of his company for a refusal to obey his orders.—*Nixon v. Reeves* (Minn.) 67 N. W. 989.

§ 2. Adjutant general—Expenses.

[a] (Iowa; 1894.)

Indebtedness incurred by the adjutant general, acting under orders issued to him by the governor within the power conferred upon him by Acts 18th Gen. Assem. c. 74, § 4, to call out troops to suppress breaches of the peace, is not payable out of the appropriation made in section 51 and subsequent acts for carrying out the purposes of chapter 74 and its amendments, because not within the scope of section 7, which fixes the rate of compensation for services "in time of insurrection, invasion, or immediate danger thereof" only, and makes it payable "by an appropriation especially made therefor."—*Prime v. McCarthy* (Iowa) 61 N. W. 220.

92 Iowa, 569.

[b] (Iowa; 1894.)

Whenever a part of the military force of the state is ordered into service by the governor, under Acts 18th Gen. Assem. c. 74, § 4, and from other counties than the one sought to be charged, section 5, authorizing "the sheriff of any county to call for aid," in case of breaches of the peace, etc., "upon the commandant of any military force within his county," and section 8, providing for the compensation of such services by the county where they are rendered "pursuant to the order of any sheriff," do not make a claim by the adjutant general for expenses connected with the services of such troops chargeable upon the county in which they may operate.—*Prime v. McCarthy* (Iowa) 61 N. W. 220.

92 Iowa, 569.

MILK.

License to sell, see "Municipal Corporations," § 31.

MINES AND MINING.

Liability of master for injuries to servant, see "Master and Servant," § 45.

§ 1. Rights and remedies of owners— Adverse claims.

(S. D.; 1895.)

Where, in an adverse proceeding under Rev. St. U. S. § 2326, to determine the right to possession of land for which a patent was applied for, though the adverse claimant placed the summons with the sheriff within 30 days after filing the claim, as required by that section, no service of summons was made for more than a year after the claim was filed, the proceeding was not commenced in time.—*Mars v. Oro Fino Min. Co.* (S. D.) 65 N. W. 19.

§ 2. — Improvements and expenditures.

[a] (S. D.; 1897.)

Rev. St. U. S. § 2324, provides that not less than \$100 annually shall be put upon a mining claim, and that, on failure of a co-owner to contribute his share, those who have made the improvements may at the end of the year give the delinquent personal notice in writing, or notice by publication, and if, after 90 days, he fails to contribute, his interest in the claim shall become the property of said co-owners. *Held*, that where a delinquent owner was dead, and there was no administrator, a published notice addressed to the delinquent, "his heirs, administrators, and to all whom it may concern," was effectual to cut off the interests of the heirs, whether minors or not, on their failure to contribute within the time specified, and vest title in the other owners.—*Elder v. Horseshoe Mining & Milling Co.* (S. D.) 70 N. W. 1060.

[b] (S. D.; 1897.)

Under said statute it is optional with the co-owner who makes the improvements, to serve personal notice or publish the same.—*Elder v. Horseshoe Mining & Milling Co.* (S. D.) 70 N. W. 1060.

[c] (S. D.; 1897.)

The fact that the heirs were not individually named was immaterial.—*Elder v. Horseshoe Mining & Milling Co.* (S. D.) 70 N. W. 1060.

[d] (S. D.; 1897.)

Where a co-owner has failed to contribute his share of the expenditures for several years, the delinquencies for said years may be grouped in one notice.—*Elder v. Horseshoe Mining & Milling Co.* (S. D.) 70 N. W. 1060.

§ 3. Leases.

[a] (Iowa; 1896.)

A lease of land for mining recited it was on the conditions: (1) That if coal be found under the premises in quantities to justify mining, the lessee shall at once proceed to mine and remove it, and so continue during the term of the lease so long as coal in paying quantities is found; the lessee to remove the coal through its shaft adjoining the premises, or to have the right to sink a shaft on the premises. (2) That the lessee shall pay as royalty a certain amount per bushel. (3) That the lessee agrees to mine not less than 2,400 tons each year, commencing with the second year, the lessee to be under no obligation to mine or pay royalty the first year; and that, if 2,400 tons is not mined in any one year after the first, this shall not forfeit the lessor's right to receive full royalty for that amount. And (6) that the royalty on coal mined shall be payable monthly. *Held*, that the lessee, not having mined the land for several years, but having at the end of each year after the first paid the lessor \$300, could not, on thereafter sinking a shaft on the land, and finding that there was no coal there, recover the amount paid, though it had been unable to reach the land through the shaft which it had on adjoining land, and though both parties supposed there was coal in the leased land; the payments being merely to avoid a forfeiture of the lease.—*Bloomfield Coal & Mining Co. v. Tidrick* (Iowa) 68 N. W. 570.

[b] (Mich.; 1896.)

A lease of land "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore which is or which hereafter may be found on, in, or under said land," at a specified annual rent, presupposes the existence of ore, and if, after reasonable efforts on the part of the lessee, no ore is found, the lease fails, and no rent can be collected. *Gribben v. Atkinson* (1887) 31 N. W. 570, 64 Mich. 651, followed.—*Blake v. Lobb's Estate*, 68 N. W. 427.

§ 4. — Reservations.

[a] (Mich.; 1897.)

Reservation in a mining lease of a lien, on "all ore mined," for royalties, is not waived by provision of the lease contemplating that the ore will be shipped to market before payment of royalty, which is to be made every three months, and based on the weights as determined by the railroad transporting the ore from the land.—*Iron Duke Mine v. Braastad* (Mich.) 70 N. W. 414.

[b] (Mich.; 1897.)

A lessor of a mine who reserves a lien, on "all ore mined," for royalties, may recover, in an action of tort, of the lessee who not only fails to pay royalties, but sells the ore without preserving the lien.—*Iron Duke Mine v. Braastad* (Mich.) 70 N. W. 414.

§ 5. — Surrender.

(Iowa; 1897.)

Under a written lease granting for 10 years the right to mine coal, the lessee entered, but within a year ceased to operate the mine, removed all of the apparatus which was necessary to its operation, took out the curbing, and said he would do nothing more under the lease. Three months later the lessee attempted to re-enter. *Held*, that the abandonment operated as a surrender of the lease.—*Worrall v. Wilson* (Iowa) 70 N. W. 619.

§ 6. Forfeiture of claim.

[a] (S. D.; 1897.)

A person who makes a relocation of a mining claim, on the ground that the owner, after a due location, incurred a forfeiture by failure to comply with Rev. St. U. S. § 2324, requiring that "not less than \$100 worth of labor shall be performed or improvements made during each year," till the claim is patented, must establish the forfeiture by a preponderance of the evidence.—*Dibble v. Castle Chief Gold-Min. Co.* (S. D.) 70 N. W. 1055.

[b] (S. D.; 1897.)

Where it appeared that the owner had operated a claim for several consecutive years; that three men undertook to do the necessary work during the year in controversy; and that four disinterested witnesses, three of whom had been mine superintendents, and all engaged in mining from 20 to 40 years, testified that the work done was worth at least \$100,—no failure to do the necessary annual work was shown.—*Dibble v. Castle Chief Gold-Min. Co.* (S. D.) 70 N. W. 1055.

[c] (S. D.; 1897.)

In an action to quiet title to a mining claim, on the ground that defendant had incurred a forfeiture by failure to do the necessary annual work, the fact that the trial court, by consent of parties, inspected the claim and the work done, can be given no weight by the supreme court, on appeal.—*Dibble v. Castle Chief Gold-Min. Co.* (S. D.) 70 N. W. 1055.

MINISTERS.

Privileged communications to clergyman, see "Witness," § 13.

MINOR.

See "Guardian and Ward"; "Infancy"; "Parent and Child."

Sale of liquor to, see "Intoxicating Liquors," § 63.

MINORITY REPRESENTATION.

In management of corporation, vested rights of corporation, see "Constitutional Law," § 36.

Rights of minority stockholders, see "Corporations," § 66.

MISCHIEF.

See "Malicious Mischief."

MISCONDUCT.

Of attorney in offering or introducing evidence, see "Trial," § 36.

Of juror, see "Criminal Law," §§ 173-177; "New Trial," § 23.

Of party as ground for new trial, see "New Trial," § 24.

Of prosecuting attorney as ground for new trial, see "Criminal Law," § 195.

MISDEMEANOR.

Aiding and abetting, see "Criminal Law," § 14.

MISJOINDER.

Of causes of action, see "Action," §§ 5-7.

MISREPRESENTATION.

See "Deceit"; "False Pretenses"; "Fraud."

MISTAKE.

As ground for equitable relief from judgment, see "Judgment," § 109.

— reformation of instrument, see "Equity," §§ 8, 9.

— relief of settlers on public land, see "Public Lands," § 18.

— rescission of contract, see "Equity," §§ 22, 23.

— rescission of contract to convey, see "Vendor and Purchaser," § 31.

— rescission of release, see "Release and Discharge," § 5.

— setting aside award, see "Arbitration and Award," § 7.

— setting aside judgment by default, see "Judgment," § 15.

— vacating execution sale, see "Execution," § 25.

Correction of mistakes in judgment, see "Judgment," § 91.

Effect on running of limitations, see "Limitation of Actions," § 25.

In location of highway, see "Highways," § 10.

In sale, see "Sale," § 16.

Parol evidence of, see "Evidence," § 100.

Payment under, see "Payment," § 12.

MITIGATION.

Of damages for libel, see "Libel and Slander," § 31.

— trespass, see "Trespass," § 9.

MODIFICATION.

Of award of arbitrators, see "Arbitration and Award," § 7.

Of contract, see "Contracts," § 52.

Of judgment on appeal, see "Appeal," §§ 289, 290; "Criminal Law," § 238.

Of sentence, see "Criminal Law," § 189.

MONEY.

Conversion of, see "Trove and Conversion," § 6.

MONEY HAD AND RECEIVED.

See "Assumpsit," § 3.

Liability of public officer, see "Office and Officer," § 20.

Right to interest, see "Interest," § 2.

MONOPOLIES.

See "Constitutional Law," § 26.

Grant by city of exclusive privileges, see "Municipal Corporations," § 57.

MONUMENTS.

Control over courses and distances, see "Boundaries," § 4.

Right to erect, see "Cemeteries."

MORTALITY TABLES.

Admissibility in evidence, see "Evidence," § 70.

MORTGAGES.

I. WHAT CONSTITUTES, §§ 1-8.

II. REQUISITES AND VALIDITY, §§ 9-14.

III. CONSTRUCTION AND EFFECT, §§ 15, 16.

IV. LIEN, §§ 17-23.

V. RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE, §§ 24-28.

VI. ASSIGNMENT OF DEBT AND MORTGAGE, §§ 29-33.

VII. TRANSFER OF PROPERTY MORTGAGED, §§ 34-36.

VIII. MERGER, § 37.

IX. PAYMENT AND RELEASE, §§ 38-45.

X. FORECLOSURE, §§ 46-81.

1. In General, §§ 46-49.

2. Right to Foreclose, §§ 50-55.

3. Parties, §§ 56-58.

4. Pleading and Practice, §§ 59-61.

5. Decree—Execution and Judgment for Deficiency, §§ 62-66.

6. Attorney's Fees and Costs, § 67.

7. Sale, §§ 68-81.

XI. POWER OF SALE—FORECLOSURE BY ADVERTISEMENT, §§ 82-93.

XII. REDEMPTION, §§ 94-100.

See, also, "Acknowledgment"; "Chattel Mortgages"; "Usury."

Adverse possession by mortgagee, rights of remaindermen, see "Adverse Possession," § 22.

Alteration, see "Alteration of Instruments," §§ 2, 3.

As evidence, see "Evidence," §§ 75, 76.

As preferences, see "Assignment for Benefit of Creditors," § 14.

Covenants against incumbrances, see "Covenants,"

Effect of discharge of mortgagor in insolvency, see "Assignment for Benefit of Creditors," § 39.

—of usury, see "Usury," § 12.

Limitation of action to have deed declared a mortgage, see "Limitation of Actions," § 3.

Loans to members of building associations, see "Building and Loan Associations," § 3.

Marshaling mortgage liens, see "Marshaling Assets and Securities," § 3.

Of railroad companies, see "Railroad Companies," § 15.

On homestead, see "Homestead," § 22.

On land held in entirety, see "Husband and Wife," § 6.

On wife's separate estate, see "Husband and Wife," § 19.

Policy payable to mortgagee, see "Insurance," § 93.

Power of corporate officers to execute, see "Corporations," § 31.

Reformation, see "Equity," § 9.

Right of lienor to remove building as against mortgagee, see "Mechanics' Liens," § 42.

—of mortgagee to compensation for land taken for public use, see "Eminent Domain," § 32.

—to fixtures, as between mortgagor and mortgagee, see "Fixtures," § 2.

Subrogation to rights of mortgagee, see "Subrogation," § 2.

To building association, see "Building and Loan Associations," § 10.

What law governs, see "Conflict of Laws," § 10.

When mortgage operates as assignment, see "Assignment for Benefit of Creditors," § 4.

I. WHAT CONSTITUTES.

§ 1. In general.

[a] (Mich.; 1895.)

Execution was levied against a leasehold owned by defendants as copartners with another, and defendants assigned their interest to plaintiff, under agreement that he should purchase at the sale, with money partly furnished by defendants, and reconvey to them on payment by them of additional sums, in default of which, defendants, who were left in possession, should become plaintiff's tenants, holding over without permission and subject to removal. *Held*, that the relation between plaintiff and defendants was that of mortgagors and mortgagee, and that, on default made, plaintiff cannot recover in summary proceedings to obtain possession.—*Anderson v. Smith* (Mich.) 61 N. W. 778.

103 Mich. 446.

[b] (S. D.; 1895.)

A conveyance of land to a third person in trust, as security, by deed which provides that the trust is to be executed by the creditor, and in which the trustee, in case of default, is not authorized to perform any act in relation to the property, operates as a mortgage.—*Merrill v. Hurley* (S. D.) 62 N. W. 958.

6 S. D. 592.

§ 2. Mortgage or condition subsequent.

(Minn.; 1895.)

A clause in a deed stating that the grant is made on express condition that the grantee pay to the grantors a certain sum annually for the rest of their lives is not a condition subsequent, but creates a lien in the nature of a purchase-price mortgage.—*Doescher v. Doescher* (Minn.) 63 N. W. 736.

61 Minn. 326.

§ 3. Equitable mortgage.

[a] (Iowa; 1896.)

It appeared that the land in question once belonged to defendant; that it was sold to

plaintiff under a mortgage foreclosure sale; that plaintiff agreed that if no redemption were made the land might be sold on such terms as would reimburse it for all claims,—the balance, if any, to go to defendant; that defendant abandoned a design to redeem, and permitted the premises to go to a deed; that defendant remained in possession of the land as a tenant; and that written leases were entered into by the parties for several successive years. *Held*, that the evidence failed to show an equitable mortgage as claimed by defendant.—*Iowa State Sav. Bank v. Coonrod* (Iowa) 66 N. W. 78.

[b] (Minn.; 1895.)

A debenture bond recited that "the company hereby charges with such payment [of the debentures] its undertaking all its property whatsoever and wheresoever, both present and future." *Held* that, as between the parties, an equitable mortgage was thereby created.—*Howard v. Iron & Land Co.* (Minn.) 64 N. W. 896.

62 Minn. 298.

§ 4. Deed absolute in form.

[a] (Iowa; 1895.)

A deed absolute in terms, given as security for the payment of money, is a mortgage.—*Dunton v. McCook* (Iowa) 61 N. W. 977.

93 Iowa, 258.

[b] (Iowa; 1895.)

The fact that a deed absolute in terms contains a covenant by the grantee to pay a mortgage on the land will not prevent proof that the instrument was in fact a mortgage.—*Dunton v. McCook* (Iowa) 61 N. W. 977.

93 Iowa, 258.

[c] (Iowa; 1896.)

Plaintiff, being indebted to defendants on book account to the amount of \$160, offered to convey a house and lot for \$400, less the amount of the debt. After the deed was executed, defendants decided not to make the purchase, but agreed to take and hold the deed as security for the debt. Defendants took and held possession of the premises for four years under the deed, leasing the property, and collecting the rents. At the end of that time, plaintiff took possession and made improvements without objection on the part of defendants. *Held*, that the evidence justified the finding that the transaction was a mortgage.—*Froud v. Merritt* (Iowa) 68 N. W. 728.

[d] (Mich.; 1895.)

Defendant loaned her son money, and he, without her knowledge, executed a deed of all his real estate to defendant. After the execution of the deed the son gave it to defendant, saying, "I have some papers, mother, and I want to put them in your hands"; and, on her asking him what they were, said, "You need not worry any more." *Held*, that the deed was a mortgage.—*Sanborn v. Sanborn* (Mich.) 62 N. W. 371.

104 Mich. 180.

[e] (Mich.; 1897.)

Equity will not declare a deed a mortgage, though it was given as security only, where it was fraudulent as to creditors, in that it was intended to gain time by putting the property in the hands of the grantee.—*Patnode v. Darveau* (Mich.) 70 N. W. 439.

[f] (Minn.; 1896.)

S., having paid no part of the price of land purchased by him from D. three years before, being in default for one year's interest, and having given D. a mortgage on his crops for an installment of the principal and interest, executed to D. a quitclaim deed to the land, whereupon D. released the mortgage, canceled the year's interest, surrendered to S. the notes he had given, and conveyed the land to plaintiff by an absolute deed, receiving a cash payment and a mortgage on the property for the balance. *Held*, that the transaction amounted to an absolute sale of the land by S. to plaintiff.—*Shultes v. Stivers* (Minn.) 69 N. W. 639.

[g] (Neb.; 1896.)

While a preponderance of the evidence is sufficient to establish an issue in any civil action, and while the supreme court will not weigh conflicting evidence, still, in order to sustain a finding for the plaintiff in an action to have a deed absolute in form declared a mortgage, the evidence on behalf of plaintiff, when taken together, and without regard to the contradicting evidence, should present a state of facts consonant with reason, and consistent in its different parts.—*Stall v. Jones* (Neb.) 66 N. W. 653.
47 Neb. 706.

[h] (Neb.; 1896.)

The true test, in determining whether a conveyance absolute in form should be treated as a sale or as a mortgage, is whether the relation of the parties towards each other, as debtor and creditor, continues. If it does so continue, the transaction will be treated as a mortgage, and the conveyance as a security only.—*Riley v. Starr* (Neb.) 67 N. W. 187.
48 Neb. 243.

[i] (Wis.; 1895.)

Where the title to land purchased is taken in the name of a person advancing the price, as security to him, the transaction is a mortgage, and conveyance of the land by such person, after the debt has been paid, conveys merely the legal title.—*Jourdain v. Fox* (Wis.) 62 N. W. 936.
90 Wis. 99.

§ 5. — Parol evidence.

[a] (Mich.; 1895.)

Parol evidence is admissible to show that a deed absolute in form was intended as a mortgage.—*McArthur v. Robinson* (Mich.) 62 N. W. 713.
104 Mich. 540.

[b] (Minn.; 1895.)

Parol evidence is admissible to show, in a collateral proceeding, that a deed absolute on its face was in fact a mortgage.—*Backus v. Burke* (Minn.) 65 N. W. 459.
63 Minn. 272.

§ 6. — Sufficiency of evidence.

[a] (Iowa; 1895.)

There was found among a decedent's papers an unrecorded deed in an envelope on which was indorsed a memorandum: "D. E. P. [the grantor's name], Sec. 1 and 2, 94 N., 41 W. \$3,500.00. To be reconveyed upon payment of the above sum, with ten per cent. interest, at any time after one month and within one year. Have given him a contract to the above effect." The grantor's note for the amount was also found. The note was paid, and the administratrix made a quitclaim deed of the property to the maker. There was no evidence that decedent ever exercised any ownership over the land, and it was not referred to in his will. His books failed to show that any money was given for the land other than that evidenced by the note. *Held*, that a finding that the deed was meant to operate as a mortgage was proper.—*Caldwell v. Melvedt* (Iowa) 61 N. W. 1090, 93 Iowa 730; *Same v. Tow*, *id*.

[b] (Iowa; 1895.)

In a suit to have an absolute deed declared a mortgage, it appeared that in 1878 plaintiff was largely indebted, and owed defendant, his brother, \$1,000, which was secured by mortgage on his farm; that in that year he made the deeds in question to his brother, covering his farm; that in 1879 defendant removed from Ohio, and took undisputed possession of the farm, and thereafter lived on it, paid the taxes, collected the rents, made extensive improvements, and claimed ownership. Defendant testified that he bought the farm for \$7,000, which was paid, and that the deeds were absolute, and the correspondence between the parties supported this testimony. Plaintiff testified that the correspondence was fictitious, and carried on with intent to deceive his creditors. There was much evidence that the value of the

farm greatly exceeded the consideration paid, but it appeared that similar land brought a like price at the time of the transfer. At that time plaintiff told various persons that he had sold the farm to defendant, and he never claimed any different till 1892. Long after the transfer, defendant made loose, random statements to disinterested persons that the farm was conveyed to him in trust merely. *Held*, that the evidence did not show that the deeds were intended to operate as a mortgage.—*England v. England* (Iowa) 61 N. W. 920.

[c] (Iowa; 1895.)

In an action to set aside a conveyance of real estate, the evidence showed that the deed, though absolute in form, was given for a consideration much less than the value of the premises. Both the grantor and his wife testified that they signed it with the understanding that it was only a security for a loan, and statements made by the grantee prior to the trial showed that he so regarded it. The grantor, while occupying the premises under a lease, during the existence of the alleged deed, had added substantial improvements. *Held*, that the conveyance was, in effect, a mortgage.—*Conlee v. Heying* (Iowa) 62 N. W. 678.

§ 7. Mortgage or conditional sale.

(Minn.; 1896.)

An owner of premises on which there were three mortgages desired to get the first two mortgages into the hands of some one who could allow him time to make the money out of the premises. At his request, plaintiffs, who were ready to aid him, bought such mortgages, and foreclosed them, so as to relieve the premises from the third mortgage, and enable the owner to sell if opportunity offered. Plaintiffs purchased at the foreclosure sales, agreeing to convey title to the owner on repayment of the amount expended by them, and agreed that the owner might have the money as long as he paid the interest thereon promptly. There was no promise or covenant on the part of the owner, however, to repay the money. After expiration of the time for redemption, the owner, at various times, paid money to plaintiffs, taking receipts as for rent of the premises. *Held*, that the interest of plaintiffs in the premises after expiration of the time to redeem was that of mortgagees, and not of vendors in a contract of conditional sale.—*Heaton v. Darling* (Minn.) 68 N. W. 1087.

§ 8. Assignment of land contract.

(Wis.; 1896.)

Defendant's daughter, having a contract with plaintiff for purchase of land, borrowed of defendant \$1,500 to make the first payment, and, to secure her, gave her own judgment note for \$1,500 to defendant, and had the land contract made in the name of defendant as vendee. By such contract, signed by defendant as well as plaintiff, defendant promised to make remaining payments, and agreed that, in case of default, all money paid should be forfeited; and plaintiff agreed to make conveyance to her when all payments were made. *Held*, that a finding that the instrument was a mortgage from plaintiff to defendant to secure repayment of the \$1,500 could not stand.—*Forest Lawn Co. v. Hanley* (Wis.) 68 N. W. 413.

II. REQUISITES AND VALIDITY.

§ 9. What recitals unnecessary.

[a] (Mich.; 1896.)

The fact that a mortgage does not state that it was given to secure future advances does not render it void as to creditors of the mortgagor.—*Dummer v. Smedley* (Mich.) 68 N. W. 260.

[b] (Mich.; 1897.)

A deed may be enforced as a mortgage without a declaration of trust.—*McDonald v. Preston Nat. Bank* (Mich.) 70 N. W. 143.

§ 10. Signature and attestation.

(Neb.; 1897.)

A mortgage, duly witnessed and acknowledged, is prima facie evidence that it was signed by the mortgagor.—*Greeley State Bank v. Line* (Neb.) 69 N. W. 966.

(Neb.; 1897.)

A mortgage on realty other than the homestead, executed and delivered by the mortgagors, is valid between the parties and those knowing its existence, though not lawfully acknowledged or witnessed.—*Holmes v. Hull* (Neb.) 70 N. W. 241; *Prout v. Burke* (Neb.) 70 N. W. 512.

§ 11. Description of property.

(Neb.; 1897.)

A mortgage of real estate will not be invalidated by error in the description of the property if, rejecting the erroneous part, the remainder of the description is sufficiently definite to enable the land to be located.—*Carpenter Paper Co. v. Wilcox* (Neb.) 70 N. W. 228.

§ 12. Consideration.

(Neb.; 1897.)

A mortgage given to secure the guarantor of the mortgagor's note is not void for want of consideration, though given after the debt accrued, without new consideration, and before the surety paid the debt.—*Steen v. Stretch* (Neb.) 70 N. W. 48.

(N. D.; 1896.)

A mortgage executed by the wife of a debtor jointly with him upon their homestead, to secure the payment of new notes given by him as collateral to old notes on which he was liable as maker, was sustained by a valid consideration, though it would not have been binding upon the homestead interest of the wife, and would therefore have been void in toto, if it had been given to secure the old notes without any new consideration.—*First Nat. Bank v. Lamont* (N. D.) 67 N. W. 145. 5 N. D. 393.

§ 13. Fraud.

(Iowa; 1896.)

It having been agreed that an illiterate son should execute a lease to the father, the father's attorney procured the son to sign a mortgage to a third party by falsely representing that it was the lease. *Held* that, since the attorney had no interest in the matter, the son was not chargeable with negligence in not having the instrument read to him before he signed it.—*Green v. Wilkie* (Iowa) 66 N. W. 1046.

§ 14. Provision as to payment of taxes.

(Mich.; 1897.)

A provision of a mortgage that, on a failure of the mortgagor to pay the taxes on the mortgaged property, they may be paid by the mortgagee and added to the amount of the mortgage lien is valid.—*Farwell v. Bigelow* (Mich.) 70 N. W. 579.

III. CONSTRUCTION AND EFFECT.

Deed absolute in form, see ante, §§ 4-6.

Mortgage or condition subsequent, see ante, § 2.

§ 15. Title and rights acquired.

(Mich.; 1897.)

A mortgagee cannot assert against one in possession of land, holding adversely, a right that could not be asserted by the mortgagor if the mortgage had not been made.—*Schafer v. Hauser* (Mich.) 70 N. W. 136.

(Neb.; 1896.)

The legal title to realty is vested in the grantee in an absolute deed, though the instrument be in fact a mortgage.—*First Nat. Bank v. Tighe* (Neb.) 68 N. W. 490.

§ 16. Estate of parties—Joint mortgage.

(Mich.; 1896.)

A mortgage executed to the mortgagees in lieu of their heirship interests in the mortgagor's estate, which provided simply that \$200 should be paid to C. on a certain date, and \$200 to L. at a later date, was not a joint mortgage; and, on the death of C. before the mortgage matured as to her, L. was not, as survivor, entitled to foreclose for the whole amount, \$400.—*Cooley v. Kinney* (Mich.) 66 N. W. 674.

(Mich.; 1896.)

Iowa. Ann. St. § 5560, providing that grants to two or more persons shall be construed to create estates in common, is subject to the exception of section 5561, which excludes mortgages; but this does not prevent the execution of a mortgage with covenants which are several, but leaves the rule as at common law.—*Cooley v. Kinney* (Mich.) 66 N. W. 674.

IV. LIEN.

Priorities on transfer of mortgaged property, see post, § 34.

—of mechanics' liens, see "Mechanics' Liens," § 41.

§ 17. Relying on abstract of title.

(Neb.; 1897.)

An intending mortgagee of real estate relies upon a recital in an abstract of title to the land at his peril.—*Rice v. Winters* (Neb.) 63 N. W. 830.

45 Neb. 517.

§ 18. Property covered.

(Mich.; 1896.)

A real-estate mortgage on a lot, and the "tenements, hereditaments, and appurtenances," covers a wooden opera house thereon, which rests on sills on the ground, the roof being supported by the sides, and by iron columns on stone and wood foundations, the base of the stage and furnace of which are in excavations made for the purpose.—*Miles v. McNaughton* (Mich.) 69 N. W. 481.

§ 19. After-acquired property.

(Iowa; 1895.)

Code, § 1931, providing that, where a deed purports to convey a greater interest than the grantor had, any after-acquired interest of such grantor inures to the grantee's benefit, does not apply where defendants, who owned an undivided four-sevenths of a tract of land, gave a mortgage to plaintiffs' intestate, which was intended to cover only their interest, and so understood by the grantee, the consideration being for that interest alone, but, by mistake, the mortgage described the entire tract, and one of the mortgagors subsequently acquired the other three-sevenths thereof.—*Cook v. Prindle* (Iowa) 63 N. W. 187.

§ 20. Priorities.

(Mich.; 1897.)

After execution sale, the execution debtor filed a bill to set it aside, and executed a mortgage on the premises. A decree was entered by stipulation, giving the purchaser at execution sale a lien for his improvements and disbursements, and ordering a sale in default of payment of the lien. The sale was made, and the property bid in by a third person for the benefit of the judgment debtor. *Held* insufficient to destroy the lien of the mortgage given by such debtor.—*Seeley v. Sharrer* (Mich.) 70 N. W. 551.

(Neb.; 1896.)

Where a mortgagee whose mortgage was a paramount lien agreed, in consideration of the property being placed in the hands of his agent, by whom the rents and profits were to be collected, that such moneys should be paid out by the agent to certain holders of liens on the property,

including the mortgagee, the priority of his mortgage as to such moneys was thereby lost.—*Rogers v. Central Loan & Trust Co. (Neb.)* 68 N. W. 1048.

[c] (Neb.; 1897.)

Where a prior mortgagee released his mortgage at the request of the mortgagor, who desired to improve the premises, the prior mortgage, when again executed and recorded, is subsequent to a valid second lien on the premises for the purchase of materials delivered before the release of the original mortgage.—*Chicago Lumber Co. v. Anderson (Neb.)* 70 N. W. 919.

[d] (Wis.; 1896.)

The rules of the law merchant governing the transfer of negotiable paper do not affect the question of priority between a mortgage by which such paper is secured and other liens.—*Butler v. Bank of Mazeppa (Wis.)* 68 N. W. 998.

§ 21. — Other mortgages.

[a] (Iowa; 1895.)

In the absence of controlling equities, a second mortgagee must take notice of whether a cause of action on the prior mortgage debt, overdue for more than 10 years, has been revived, when such prior mortgage is uncanceled of record.—*First Nat. Bank v. Woodman (Iowa)* 62 N. W. 28.

93 Iowa, 608.

[b] (Mich.; 1897.)

A release of a mortgage on a vacant lot was forged, and plaintiff loaned the owner of the lot money for the purpose of erecting a building. In an action to foreclose the second mortgage, it was shown that the amount of the first mortgage was about \$600, and that the value of the unimproved lot at the date of the foreclosure, with the improvements that were on it at the time of making the first loan, was about \$450. *Held* that, on entry of a decree finding the first mortgage a prior lien, it was not error to give the first mortgagee a lien on the lot for \$452.83.—*Saginaw Building & Loan Ass'n v. Tennant (Mich.)* 69 N. W. 1118.

[c] (Mich.; 1897.)

Where a building so attached to the freehold as to make it a part of mortgaged premises is removed by a subsequent grantee, who executes a mortgage on it to a mortgagee without notice, the original mortgage is the prior equity, and the house is subject to its lien, unless it is satisfied in full from the premises from which the house was removed.—*Johnson v. Bratton (Mich.)* 70 N. W. 1021.

§ 22. — Judgment liens.

[a] (Minn.; 1896.)

Certain lots by mistake were described in the plaintiff's mortgage as being in block 13 in the First addition to the village of Ada, but in fact the lots intended to be mortgaged were located in the original plat of the village. There was no block 13 in the First addition. The first one therein was number 21, and the last one in the original plat was number 20. The defendant had no actual notice of the mortgage, and, before it was corrected and re-recorded, he duly recovered, and docketed, a judgment against the mortgagor. *Held*, that the lien of the mortgage was subject to that of the judgment.—*Bank of Ada v. Gullikson (Minn.)* 66 N. W. 131.

64 Minn. 91.

[b] (Neb.; 1896.)

A party purchased real estate, and caused the title to be conveyed to his wife. It was subsequently conveyed to another party, and by this, by direction of the first party purchaser, to a third person, who obtained a loan thereon, the proceeds of which were used in discharging liens and incumbrances existing against the property. Prior to the date the loan and the mortgage on the property evidencing it were made, creditors of the first party purchaser, who had obtained judgment against him, procured the issuance of an execution and its levy

on the real estate in question, which was returned before the loan was made. *Held*, that the facts of the existence of the judgment against a party who had not, so far as the record disclosed, been an owner of the real estate or interested therein, and the issuance of an execution on such judgment, and its levy on the property, were not notice to the mortgagee of the rights or interests of the first party purchaser in the property, or any lien of his judgment creditors against it, the mortgagee being shown in all other respects to be an innocent or bona fide mortgagee.—*Reed v. Rice (Neb.)* 67 N. W. 459.

48 Neb. 586.

See, also, "Judgment," § 67.

§ 23. Record as notice.

(Neb.; 1897.)

The record of a mortgage to indemnify the mortgagee as guarantor of the mortgagor's note is constructive notice thereof, though the mortgage was conditioned to pay the note absolutely, and did not disclose the relation of the parties as principal and surety.—*Steen v. Stretch (Neb.)* 70 N. W. 48.

V. RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE.

§ 24. Rights of mortgagor.

[a] (Iowa; 1896.)

Where a mortgagee, before maturity of the debt, entered the premises, and leased the same to third parties, he cannot escape liability for the rents due under the lease by showing that the tenants defrauded him thereof.—*Froud v. Merriitt (Iowa)* 68 N. W. 728.

[b] (Mich.; 1894.)

A mortgagor cannot be divested of possession until foreclosure and expiration of the period of redemption, without his consent.—*Michigan Trust Co. v. Lansing Lumber Co. (Mich.)* 61 N. W. 668.

103 Mich. 392.

§ 25. Rights of mortgagee.

[a] (Mich.; 1894.)

Under a stipulation in a mortgage, executed to a trustee for the benefit of the creditors of the mortgagor, which provided that if, at any time, the business was unprofitable, the trustee should, upon written request of a majority of the cestui que trustee, take possession of the property, the trustee endeavored to take possession. *Held* that, in determining the profits, heavy expenses incurred in arranging all the details as to the mortgage, insurance premiums for a period beyond the time when the inventory was taken, and depreciation in value of the property, were improperly included in operating expenses.—*Michigan Trust Co. v. Lansing Lumber Co. (Mich.)* 61 N. W. 668.

103 Mich. 392.

[b] (Neb.; 1897.)

One who takes a real-estate mortgage to secure a pre-existing debt actually and justly owing to him, without notice, actual or constructive, of the existence of an outstanding unrecorded mortgage against such real estate, is a subsequent purchaser in good faith, within the protection of section 16, c. 73, Comp. St.—*Dorr v. Meyer (Neb.)* 70 N. W. 543.

§ 26. Mortgagee in possession.

[a] (Minn.; 1895.)

A mortgage provided that on default in the payment of interest, taxes, or insurance, the mortgagee might collect the rents accruing from the mortgaged premises, and apply them in payment of the same. After making the mortgage, the grantee of the mortgagor leased the premises. *Held*, that the mortgagee cannot acquire the benefits of the possession by collecting the rent due from such tenant to pay the

mortgage debt, since Gen. St. 1894, § 5861, provides that a mortgage shall not enable the mortgagee to take possession without a foreclosure.—*Cullen v. Foote* (Minn.) 61 N. W. 818.
60 Minn. 6.

[b] (Neb., 1896.)

A mortgagee of real estate in possession before foreclosure, in the absence of agreement, is not entitled to credit for permanent improvements made by himself. *Higginbottom v. Benson* (1888) 39 N. W. 418, 24 Neb. 461, distinguished.—*White v. Atlas Lumber Co.*, 68 N. W. 359.

[c] (Neb., 1896.)

A mortgagee in possession before foreclosure, in the absence of agreement, is liable for the net rents and profits which he might have received by the exercise of reasonable diligence.—*White v. Atlas Lumber Co.* (Neb.) 68 N. W. 359.

§ 27. Payment of taxes, insurance, assessments, etc.

[a] (Mich., 1896.)

A stipulation in a mortgage requiring the mortgagor to pay all taxes that shall by any lawful authority be levied upon the mortgaged premises does not require the mortgagor to pay the taxes directed by a subsequent statute to be levied against the mortgagee's interest in the land.—*Fuller v. Kane* (Mich.) 68 N. W. 267.

[b] (Minn., 1895.)

A mortgagee who, before the day of sale, but after the commencement of publication of notice of foreclosure, which stated that the premises would be sold to pay the debt, interest, and taxes, paid taxes which became due before the first publication, was entitled to be reimbursed therefor out of the proceeds of the sale.—*Gorham v. National Life Ins. Co.* of Montpelier, Vt. (Minn.) 64 N. W. 906.
62 Minn. 327.

[c] (Minn., 1896.)

A mortgagor, who covenanted to pay all taxes, having defaulted in the covenant, the premises were sold for taxes, and purchased by defendant. Subsequently, but before the time of redemption from the tax sale expired, defendant obtained a quitclaim deed from the mortgagor, under which he went into possession; and thereafter he took steps to perfect his tax title by causing notice to be given of the expiration of the time of redemption. No redemption having been made, he interposed his tax title in an action to foreclose the mortgage. Held that, after purchasing from the mortgagor, defendant was estopped from acquiring, as against the mortgagee, any additional rights under his inchoate tax title.—*Washington Loan & Trust Co. v. McKenzie* (Minn.) 66 N. W. 976.
64 Minn. 273.

[d] (Neb., 1896.)

A mortgagee is entitled to be reimbursed for insurance premiums and taxes paid, with interest thereon.—*White v. Atlas Lumber Co.* (Neb.) 68 N. W. 359.

§ 28. Accounting by mortgagee.

[a] (Mich., 1896.)

The fact that it was agreed that a mortgage given to secure a present loan should also secure the payment of any indebtedness which might then exist in favor of the mortgagee was not equivalent to an agreement that, if it was found that the mortgagee was indebted to the mortgagor, the indebtedness might be applied on the amount of the loan secured.—*Pinch v. Willard* (Mich.) 66 N. W. 42.

[b] (Neb., 1896.)

Where the grantee under a deed, absolute in form, but in fact a mortgage, is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right

to an accounting.—*Stall v. Jones* (Neb.) 66 N. W. 653.

47 Neb. 706.

VI. ASSIGNMENT OF DEBT AND MORTGAGE.

§ 29. What constitutes and what passes by assignment.

[a] (Mich., 1896.)

The right of a mortgage may be transferred either by a legal or an equitable assignment.—*Densmore v. Savage* (Mich.) 67 N. W. 1103.

[b] (Mich., 1896.)

Where a father holding a mortgage made his will bequeathing the same to his son, informing the latter of what he had done, and thereafter died, leaving the will in force, by which the son was appointed executor, it constituted an equitable assignment of the mortgage, so that the son properly filed his bill to set aside a satisfaction of the mortgage individually, and not as executor.—*Densmore v. Savage* (Mich.) 67 N. W. 1103.

[c] (Minn., 1895.)

The assignment of a mortgage and the debt passed a bond given by the mortgagor to the mortgagee, conditioned to rebuild a house on the mortgaged premises.—*Longfellow v. McGregor* (Minn.) 63 N. W. 1632.
61 Minn. 494.

[d] (Neb., 1895.)

In an action of foreclosure it appeared that defendant borrowed money of D., and executed a note therefor to D.'s wife, secured by a mortgage or trust deed, in which D. was named as trustee, with power to recover on payment of the note at maturity. On the day of its execution D. indorsed said note in the name of his wife, and forwarded it to his correspondent, by whom it was, on the day of its receipt, sold and indorsed for value, accompanied by the mortgage, to S., through whom, by will, plaintiff claims title. It was the custom of D. to take securities payable to his wife's order, and dispose of them through brokers by indorsement in her name with her knowledge and consent. Held sufficient evidence of title as against the mortgagor.—*Stark v. Olsen* (Neb.) 63 N. W. 37.
44 Neb. 646.

[e] (Neb., 1895.)

Where the grantee in an absolute deed, given to secure a note, executed a mortgage on the land described in the deed to secure the same note, which was then assigned to the grantee in the mortgage, such mortgage operated as an assignment of the mortgage evidenced by the absolute deed.—*State Bank v. Mathews* (Neb.) 63 N. W. 930.
45 Neb. 659.

[f] (Neb., 1897.)

An equitable assignment of a note secured by a mortgage may be made by a sale and delivery thereof, without indorsement of the note or a formal assignment of the note or the mortgage.—*Greeley State Bank v. Line* (Neb.) 69 N. W. 966.

§ 30. Rights of assignees.

[a] (Mich., 1896.)

Where a mortgagee, after assigning his mortgage and secured notes, forges a like mortgage and notes, and assigns them, one taking them in good faith acquires no rights as against the assignee of the genuine instruments, though the assignment of the genuine mortgage was not recorded till after the assignment of the forged instruments.—*Lee v. Kellogg* (Mich.) 66 N. W. 380.

[b] (Minn., 1896.)

The negotiable character of a note secured by mortgage is not imparted to the mortgage so as to free the latter from the equities

in the hands of an innocent purchaser.—*Watkins v. Goessler* (Minn.) 67 N. W. 796.

[c] (Neb.; 1895.)

One of several notes indorsed generally by the maker, and secured by a mortgage, and assigned to a person other than the mortgagee, was entitled to share pro rata in the distribution of the fund realized from the foreclosure of the mortgage, though it was transferred subsequent to the transfer to the mortgagor of the other notes.—*State Bank v. Mathews* (Neb.) 63 N. W. 930.

45 Neb. 659.

[d] (Neb.; 1896.)

The assignee of notes secured by mortgage, even though the assignment be without consideration, succeeds to the right of the mortgagee to have redemption made as a condition of canceling the mortgage.—*Hall v. Hooper* (Neb.) 66 N. W. 33.

47 Neb. 111.

[e] (Neb.; 1897.)

The fraudulent release of a mortgage by the mortgagee after the indorsement, without recourse, of the bond and coupons thereby secured, in favor of a third party having notice of the holder's rights, does not of itself render the mortgagee liable in an action ex contractu for the debt.—*Smith v. Long* (Neb.) 70 N. W. 401.

[f] (S. D.; 1895.)

Where a note and mortgage were given without consideration, and the mortgagor, with knowledge that the mortgage was recorded and the note transferred, accepted, in settlement of an action to procure a redelivery and cancellation of such instruments, a bond as indemnity against loss because of such note and mortgage, and at the same time procured a reconveyance of the land from the mortgagee, he cannot defeat a foreclosure of such mortgage by a bona fide holder thereof, though no assignment of the mortgage was recorded at the time of the reconveyance of the property.—*Merrill v. Hurley* (S. D.) 62 N. W. 958.

6 S. D. 592.

§ 31. Record and notice.

[a] (Iowa; 1896.)

A written assignment of a bond and mortgage is an instrument conveying real estate, within the meaning of the recording act, and, although unrecorded, is effective as against all persons except subsequent purchasers for value without notice.—*Nashua Trust Co. v. W. S. Edwards Manufg Co.* (Iowa) 68 N. W. 587.

[b] (Iowa; 1896.)

Though the transfer of a note to a bona fide purchaser for value, before maturity, carries with it the mortgage security, without an assignment of such security, the purchaser must record the transfer in order to be entitled to foreclose the mortgage as against one who subsequently acquires title to the land by a warranty deed in which the mortgagee joins.—*Jenks v. Shaw* (Iowa) 68 N. W. 900.

[c] (Mich.; 1896.)

Where a mortgage has been transferred by the mortgagee, though no assignment has been placed on record, the purchaser of a subsequent mortgage on the property, although buying it from the mortgagee in the original mortgage, is charged by the record with notice of such prior mortgage, and takes subject to it.—*Wilson v. Campbell* (Mich.) 68 N. W. 278.

[d] (Mich.; 1896.)

At maturity of a note and mortgage security, assignment of which was not recorded, the assignee authorized the mortgagee to collect. The mortgagor, not knowing such note and mortgage had been assigned and were in the hands of the assignee, executed in renewal to the mortgagee a nonnegotiable note and mortgage, which he assigned to another person for a pre-existing debt, without the knowledge of the first assignee, and without accounting to him. *Held*,

that the first note and mortgage remained in force in the hands of the assignee thereof, and the second note and mortgage were subject to the defense of no consideration.—*Brooke v. Struthers* (Mich.) 68 N. W. 272.

[e] (Minn.; 1896.)

Where a mortgage was assigned, but the assignment was not recorded, and the mortgagor had no notice thereof, payment by the mortgagor to the mortgagee before maturity of the note, with accrued interest to day of payment, without a production of the mortgage, did not show bad faith on the part of the mortgagor, as against the assignee of the mortgage.—*Olson v. Northwestern Guaranty Loan Co.* (Minn.) 68 N. W. 100.

[f] (Neb.; 1896.)

Where parties, before buying real estate, examine the records, and find the property to be incumbered by a mortgage, and apply to the mortgagee for information, and are by him told that he has received a conveyance of the title, and a deed from the mortgagor to the mortgagee conveying the property is exhibited to them, and such deed contains a clause by which the grantee assumes and agrees to pay the indebtedness secured by the mortgage, and they subsequently buy the property, at a time when, to their knowledge, the mortgage debt had not matured, they are chargeable with such notice as required them to make further inquiry, and are not innocent purchasers. and a bona fide purchaser of the mortgage notes, at a date prior to the time of the purchase of the property by such parties, may enforce the mortgage as against their rights, notwithstanding, at the time they purchased the premises, the mortgagee released the lien of the mortgage of record.—*Mathews v. Jones* (Neb.) 66 N. W. 622.

47 Neb. 616.

[g] (S. D.; 1894.)

An assignment of a real-estate mortgage is a "conveyance" within Comp. Laws, § 3293, providing that "every conveyance of real property * * * is void as against any subsequent purchaser or incumbrancer * * * of the same property or any part thereof, * * * whose conveyance is first duly recorded."—*Merrill v. Luce* (S. D.) 61 N. W. 43.

6 S. D. 354.

[h] (S. D.; 1894.)

Where a real-estate mortgage, given to secure a nonnegotiable note, is assigned to one who fails to put the assignment on record, and the mortgagee, notwithstanding such assignment, sells, on foreclosure, the mortgaged premises, and the subsequent grantee of the mortgagor redeems the same within the statutory time, without notice of such assignment, such grantee and redemptioner takes the title free from the lien of such mortgage.—*Merrill v. Luce* (S. D.) 61 N. W. 43.

6 S. D. 354.

[i] (S. D.; 1895.)

Where the purchaser of a note secured by a trust deed fails to take and record an assignment of the deed, he cannot enforce his lien as against an innocent purchaser from the maker of the note.—*Pickford v. Peebles* (S. D.) 63 N. W. 779.

[j] (Wis.; 1896.)

Under Rev. St. 1878, §§ 2241, 2242, providing that every conveyance of land which shall not be recorded as provided by law shall be void as against a bona fide purchaser, whose conveyance shall be first duly recorded; that the term "conveyance" shall embrace every instrument by which an interest is created, mortgaged, or assigned; and that the term "purchaser" shall include the assignee of a mortgage,—the purchaser of a mortgage, who takes an assignment thereof, is given a preference by the record only over conveyances recorded after his assignment; and as to a mortgage recorded prior thereto, but after the one assigned, which was in fact, and as against his assignor, a prior lien,

he derives no advantage from the fact of the prior recording of his mortgage, but succeeds only to the rights of his assignor.—*Butler v. Bank of Mazepa* (Wis.) 68 N. W. 998.

§ 32. — Payment to and release by mortgagee after assignment.

[a] (Iowa; 1895.)

A mortgagor, who pays the mortgage to the mortgagee after the latter has assigned it, without the production of the mortgage or collateral note, does so at his peril, and must again pay the assignee if the mortgagee fails to turn the payment over to him.—*Baumgartner v. Peterson* (Iowa) 62 N. W. 27.

93 Iowa, 572.

[b] (Minn.; 1896.)

Payment of the amount due upon a mortgage to the mortgagee by the mortgagor after the mortgage has been assigned, but without notice of the assignment by the mortgagor, will extinguish the mortgage, the assignment never having been recorded. *Johnson v. Carpenter* (1862) 7 Minn. 176 (Gil. 120), followed.—*Olson v. Northwestern Guaranty Loan Co.*, 68 N. W. 100.

[c] (Neb.; 1895.)

Comp. St. 1893, c. 73, § 39, providing that the recording of an assignment of a mortgage shall not be deemed notice of such assignment to the mortgagor, so as to invalidate any payment by him to the mortgagee, does not apply to a subsequent purchaser of the mortgaged premises, so as to protect him in the payment of the debt to the mortgagee after assignment by him, and recordination thereof.—*Eggert v. Beyer*, 62 N. W. 57, 43 Neb. 711.

[d] (Neb.; 1895.)

Where the mortgage secures a negotiable note, a subsequent purchaser of the mortgaged premises, who pays the mortgagee after assignment of the debt, without the production of the note, is liable to the assignee.—*Eggert v. Beyer*, 62 N. W. 57, 43 Neb. 711.

[e] (Neb.; 1895.)

A bona fide purchaser and holder of a negotiable note secured by mortgage cannot be deprived of his security by a payment of the debt to the mortgagee, whether his assignment of the mortgage is recorded or not.—*Eggert v. Beyer*, 62 N. W. 57, 43 Neb. 711; *Stark v. Olsen*, 63 N. W. 37, 44 Neb. 646.

§ 33. Rescission for fraud.

(Minn.; 1897.)

A verdict rescinding the purchase of a note and mortgage on the ground that defendant had falsely represented that there was a house on the mortgaged land was sustained by evidence that, to induce the purchase, defendant showed plaintiff's agent, who acted for her, the mortgagor's application for a loan with which to build, dated some time before, together with a policy dated two months later, purporting to insure a house on the land; there being also evidence, though contradicted, that one of defendants had expressly stated to the plaintiff that there was a house on the land.—*Riggs v. Thorpe* (Minn.) 69 N. W. 891.

VII. TRANSFER OF PROPERTY MORTGAGED.

§ 34. Rights and liabilities on transfer of property.

[a] (Iowa; 1895.)

Defendants mortgaged land to plaintiffs' intestate to secure a note, and, before the note was barred by limitations, indorsed thereon a renewal of both instruments. Previous to such renewal, defendants sold the land to L., who took with notice of the mortgage, and subsequently conveyed to S.; the mortgage at the time of the last sale being, on its face, barred. S. had no

notice of the indorsement which extended the statutory period beyond the date of his deed. *Holt* that S. was bound by the indorsement.—*Cook v. Prindle* (Iowa) 63 N. W. 187.

[b] (Iowa; 1896.)

A stipulation in a mortgage for the appointment of a receiver, in case of foreclosure, to receive the rents and profits during the period for redemption, to be applied on the mortgage debt, is binding on a subsequent grantee of the mortgaged premises.—*Hubbell v. Avenue Inv. Co.* (Iowa) 66 N. W. 85.

[c] (Minn.; 1895.)

Where a part of the mortgaged property was conveyed, and then leased, the mortgagee, who is authorized, after default, to collect rents and apply same in payment of interest, taxes, and insurance can be compelled to exhaust the rents on the property not conveyed, to pay the taxes and insurance on that property, before resorting to the rents accruing on the property conveyed to pay the same.—*Cullen v. Foote* (Minn.) 61 N. W. 818.

60 Minn. 6.

[d] (Minn.; 1897.)

The grantee of a mortgagor, who had purchased the tax certificates on the mortgaged property, took possession, and collected rents and profits amounting to much more than the amount paid for the certificates, paying no interest on the mortgage nor taxes on the premises for more than a year prior to surrendering possession. *Held*, that he was not entitled to reimbursement from the mortgagee for the amount paid for the tax certificates.—*American Baptist Missionary Union v. Hastings* (Minn.) 69 N. W. 1078.

[e] (Neb.; 1897.)

The rights and priorities of a mortgagee as such are not affected by the fact that he is the purchaser of the property, pending litigation between him and other lienors, under a stipulation between all the parties in interest allowing such sale, without prejudice, and in order to substitute the proceeds of sale for the property.—*Chappell v. Smith* (Neb.) 69 N. W. 748.

[f] (S. D.; 1896.)

Two mortgages on the same property, to different persons, stipulated that the mortgagor should pay taxes, in default of which the same might be paid by the mortgagees, and thereupon become a part of the mortgage indebtedness. While these incumbrances were in force the property was sold for taxes, the purchaser thereafter receiving a tax deed from the county treasurer, who happened to be the junior mortgagee; and on the following day the latter, in his individual capacity, accepted from such purchaser a quitclaim deed of the premises, the arrangement for such transfer being made after the execution and delivery of the tax deed. *Held*, that the junior mortgagee, in the absence of any collusion between him and his grantor, acquired a good title, free from the lien of the senior mortgage.—*Safe-Deposit & Trust Co. v. Wickhem* (S. D.) 69 N. W. 14.

§ 35. Assumption of mortgage.

[a] (Iowa; 1896.)

A deed of land, reciting that it is given subject to the payment of a mortgage thereon "to secure the debt of \$2,800, which the party of the second part assumes and agrees to pay off," cannot be construed to embrace another and distinct mortgage for \$280.—*Moore v. Graves* (Iowa) 65 N. W. 1008.

[b] (Iowa; 1897.)

A covenant by a purchaser of mortgaged premises to pay the mortgage debt may be enforced by the mortgagee, whether such purchaser's immediate grantor was personally liable for the debt or not.—*Marble Sav. Bank v. Mesarvey* (Iowa) 70 N. W. 198.

[c] (Mich.; 1894.)

A personal judgment may be entered against a mortgagor's grantee, who, in his deed,

has agreed to pay the mortgage; and a deed by him to a third person, in which the latter assumes the incumbrance in turn, will not relieve him from liability.—*Corning v. Burton* (Mich.) 62 N. W. 1040.
102 Mich. 86, 96.

[d] (Mich.: 1897.)

Where a deed, after the warranty clause, recited, "Except a mortgage of \$2,600, given by P. to J., which second party assumes," the grantee was personally liable for the mortgage debt.—*Jehle v. Brooks* (Mich.) 70 N. W. 440.

[e] (Minn.: 1895.)

A covenant by the grantee of mortgaged premises to pay the "mortgage" is a covenant to pay the debt secured by it.—*Hine v. Myrick* (Minn.) 62 N. W. 1125.
60 Minn. 518.

[f] (Minn.: 1895.)

The purchaser of mortgaged property from the mortgagor took the deed in defendant's name without his knowledge. The deed contained a covenant to assume the mortgage, and defendant, on learning the facts, procured a release of such covenant by the vendor. *Held*, that defendant was not liable on the covenant to the mortgagee, who had not accepted it before its release, and in whose favor no equities had in the meantime arisen.—*Gold v. Ogden* (Minn.) 63 N. W. 266.
61 Minn. 88.

[g] (Minn.: 1895.)

A grantee of part of mortgaged premises assumed part of the mortgage, and in an action by the mortgagee against him to recover such part on his agreement to pay alleged that the premises conveyed to him were worth and would sell on foreclosure for much more than the part of the mortgage assumed by him; that the mortgagor was insolvent, and the remaining part of the mortgage unpaid; and that, if the part assumed by him was recovered, it would shift the burden of the other part, or a portion of it, on his land; and prayed that plaintiff be compelled first to exhaust his mortgage security before resorting to the personal liability of defendant. *Held* that, in the absence of an allegation of the value of the part of the land not conveyed to defendant, the answer was insufficient on demurrer.—*Connecticut Mt. Life Ins. Co. v. Knapp* (Minn.) 64 N. W. 1137.
62 Minn. 405.

[h] (Minn.: 1897.)

Plaintiff was the assignee of a mortgage made to "M." The mortgaged premises were conveyed to defendant, who assumed a mortgage given by the same mortgagor to "M. and wife," securing a like sum. The complaint alleged that the words "and wife" were inserted by mistake. *Held* that, in the absence of allegations that there was no mortgage to which these words would apply, the complaint did not show that defendant had assumed plaintiff's mortgage.—*Clifford v. Minor* (Minn.) 70 N. W. 798.

[i] (Neb.: 1895.)

Where the deed of mortgaged premises merely recites the existence of the mortgage, an agreement of the grantee to pay the mortgage is not established by a subsequent oral promise without consideration to pay the mortgage.—*Green v. Hall* (Neb.) 63 N. W. 119, 45 Neb. 89.

[j] (Neb.: 1895.)

The assumption of a mortgage by the subsequent grantee is not established by recitations in the deed that such deed is subject to the mortgage, and that the mortgage is a part of the purchase price.—*Green v. Hall* (Neb.) 63 N. W. 119.
45 Neb. 89.

[k] (Neb.: 1895.)

To entitle a mortgagee to a deficiency judgment against a subsequent purchaser, there must be such an agreement by such purchaser to

pay the mortgage as would enable the mortgagee to maintain against him an action for the amount of the mortgage.—*Green v. Hall* (Neb.) 63 N. W. 119.

45 Neb. 89.

[l] (Neb.: 1895.)

Where a deed recites that the grantee assumes the mortgage debt, and is accepted by the grantee with knowledge of the recital, or where the grantee agrees, as part of the consideration, to assume the debt, he becomes personally liable therefor, though his immediate grantor was not so liable.—*Hare v. Murphy* 64 N. W. 211, 45 Neb. 809.

[m] (N. D.: 1894.)

An agreement by the grantee of real property to assume an incumbrance thereon is an original undertaking, distinct from the contract of purchase, and may be contained in the conveyance, or it may be by a separate writing or by parol.—*Moore v. Booker* (N. D.) 62 N. W. 607.

4 N. D. 543.

[n] (S. D.: 1895.)

To render the grantee of mortgaged premises personally liable for the payment of the debt, he must have assumed and agreed to pay the same; merely retaining the amount of the mortgage from the purchase price not being sufficient.—*Granger v. Roll* (S. D.) 62 N. W. 970.
6 S. D. 611.

[o] (S. D.: 1895.)

Where mortgaged land was conveyed absolutely, with a verbal trust in favor of a third party, and the grantee assumed the mortgage by the terms of the deed, and the third party took possession and collected the rents, and on foreclosure it appeared that the grantee knew nothing of the conveyance or its terms, except that his name was being used by the third party as trustee to take the title, as between him and such party the latter was equitably liable for the deficiency.—*Connor v. National Bank* (S. D.) 64 N. W. 519.

[p] (S. D.: 1895.)

An action on a breach of covenant by a grantee to pay, at a specified time, a mortgage of the premises conveyed, previously executed by the grantor, may be maintained by the grantor against the grantee, though he neither paid the money nor sustained actual injury because of the breach.—*Callender v. Edmison* (S. D.) 65 N. W. 425.

[q] (Wis.: 1897.)

Where a subsequent grantee of mortgaged premises, in the conveyance to him, assumes the mortgage as part of the consideration, his liability rests solely on such consideration and promise, and no other consideration need pass from the mortgagee to the grantee, though his immediate grantor was not personally liable to the mortgagee.—*Enos v. Sanger* (Wis.) 70 N. W. 1009.

Limitation of action on assumed liability, see "Limitation of Actions," § 11.

§ 36. Extending time of payment to grantee—Release of mortgageor.

(Minn.: 1895.)

Where a mortgagee, after a sale of the mortgaged land by the mortgagor, extends the time of payment to the grantee without consent of the mortgagor, the latter is released to the value of the land.—*Travers v. Dorr* (Minn.) 62 N. W. 269.
60 Minn. 173.

VIII. MERGER.

See, also, post, § 49.

§ 37. When effected.

[a] (Mich.: 1895.)

Where a mortgagee purchases the mortgagor's equity of redemption, and, by consent

of the mortgagor, retains the mortgage in order to cut out by foreclosure liens arising after its execution, the mortgage interest is not merged in the title acquired by the purchase.—*Gibbs v. Johnson* (Mich.) 62 N. W. 145.
104 Mich. 120.

[b] (Neb.: 1896.)

A mortgagee acquired the title to the mortgaged property, and, in the deed by which it was conveyed to him, it was stated that the title was passed "subject to a mortgage of three hundred dollars, which grantee hereby assumes and agrees to pay." *Held*, that no merger ensued as between the parties, or as against a bona fide purchaser of the notes secured by the mortgage.—*Mathews v. Jones* (Neb.) 66 N. W. 622.
47 Neb. 616.

[c] (Wis.: 1897.)

For breach of a condition subsequent in a deed, the grantor re-entered. A mortgagee of the grantee subsequently purchased the title of the grantor. *Held*, that by a subsequent foreclosure of his mortgage, with intent to protect his title of record, his right under the mortgage did not become merged in the title acquired from the grantor.—*Gilchrist v. Foxen* (Wis.) 70 N. W. 585.

IX. PAYMENT AND RELEASE.

Payment by mortgagor after assignment of debt or mortgage, see ante, § 32.

Release of mortgagor by extending time of payment to grantee of premises, see ante, § 36.

Authority of agent to receive payment, see "Principal and Agent," § 8.

§ 38. What constitutes payment.

[a] (Iowa: 1896.)

The purchaser of land subject to a mortgage, the payment of which his grantor had assumed, cannot, on purchase of the mortgage and note secured thereby, after maturity, to protect his equity, either by himself or through his assignee, compel the mortgagor to answer back as an obligor on the mortgage, as such purchase, as against the mortgagor, is a payment of the mortgage.—*Northwestern Nat. Bank v. Sloan* (Iowa) 66 N. W. 91.

[b] (Mich.: 1896.)

The maker of negotiable paper secured by mortgage is justified in paying only to the holder, and cannot assume that the paper has not been transferred. As to him, a transferee is not required to place an assignment of the mortgage on record.—*Wilson v. Campbell* (Mich.) 68 N. W. 278.

[c] (Minn.: 1896.)

A finding that notes given by a mortgagor for about one-third of the mortgage debt were given and accepted in payment of the debt is justified by evidence that, at the time, two-thirds of the debt was barred; that the mortgage had, for years, been regarded as worthless; and that the giving of the notes was probably prompted by the belief that the repurchase of the land by the mortgagor from a prior mortgagee who had foreclosed might give new life to the mortgage.—*Wiley v. Dean* (Minn.) 69 N. W. 629.

[d] (Neb.: 1896.)

Where payment of a negotiable note secured by mortgage was made to an investment company of which the mortgagee was manager, and was never forwarded to the party to whom such note had been transferred, the mere fact that antecedent payments, made in like manner, had been made to be forwarded to the transferee and had been so forwarded, did not bind the holder of the note as to the payment not forwarded, it being shown that such holder had never in any way held out or recognized the mortgagee as his agent.—*Bull v. Mitchell* (Neb.) 66 N. W. 632.
47 Neb. 617.

[e] (S. D.: 1895.)

Where a mortgage note was taken up by a third party at the instance of the mortgagor, and assigned with the mortgage to the third party as security for the loan, it did not constitute a payment of the mortgage note.—*Smith v. Commercial Nat. Bank* (S. D.) 64 N. W. 529.

§ 39. Extending time of payment.

(Minn.: 1895.)

The performance of an agreement by a homestead claimant, who had mortgaged his claim before acquiring title, to prove up the claim and execute a new mortgage, was a sufficient consideration for an agreement to extend the time of payment.—*McKinnon v. Palen* (Minn.) 64 N. W. 387.
62 Minn. 188.

§ 40. Refusal of tender before maturity.

(Neb.: 1895.)

The refusal by the mortgagee of a tender of the amount of the mortgage before it is due does not affect the mortgage lien.—*Moore v. Kime*, 61 N. W. 736, 43 Neb. 517.

§ 41. Release and discharge.

[a] (Iowa: 1896.)

A release of a mortgage is prima facie evidence of the payment of the debt secured thereby.—*Kuen v. Upmire* (Iowa) 67 N. W. 374.

[b] (Mich.: 1895.)

Defendant purchased a farm in 1872, a part of the price being paid by his wife, a part by defendant, and the balance with money obtained by mortgaging the property; and on the same day, after the mortgage was given, defendant conveyed the farm to his wife by warranty deed, and subsequently both moved upon the land, and occupied it till the wife's death, in 1892. Something was paid on the mortgage by the wife, and the balance by defendant, but, at the latter's request, the mortgage was not discharged; and, in an action by the wife's heirs brought solely to cancel the mortgage, defendant alleged that the deed to his wife was made to protect her for her part of the purchase money, and was not intended as a gift, and asked that the respective rights of the parties be adjusted in accordance with the amounts paid on the premises by each. It appeared that in 1879 defendant knew that his wife denied that he had any interest in the land. *Held*, that the mortgage should be discharged, and that defendant's claim, if any, could only be adjudicated by an independent suit in chancery.—*McCarn v. Wilcox* (Mich.) 63 N. W. 978.

[c] (Mich.: 1895.)

A mortgage given by complainant, without consideration to herself, to defendant, as collateral security for a bond given by complainant's husband to defendant to hold him harmless on accommodation indorsements he should make for the husband and a firm in which he was a partner, is discharged; a chattel mortgage on the stock in trade of the firm having thereafter been given defendant, as trustee, to secure certain debts, including those for which he was liable as indorser, and he having, as such trustee, received, under the chattel mortgage, enough to satisfy all such debts, and having, instead, applied part of it on debts of a firm in which he and complainant's husband were partners.—*Carpenter v. Osborn* (Mich.) 65 N. W. 222; *Osborn v. Carpenter*, *Id.*

[d] (Mich.: 1897.)

In foreclosure against a mortgagor and subsequent grantees, it appeared that there was due on the mortgage \$1,200, for which the mortgagor was personally liable. The mortgagor paid \$500, which was credited on the mortgage, and was released from personal liability, under an agreement which reserved the indebtedness and security, and provided that the mortgagee was to "look solely to the property covered by said mort-

gage for the remainder of such indebtedness," and was to have the right to prosecute the foreclosure suit to conclusion. *Held*, that there was not a sufficient consideration to release the mortgagor from his debt.—*Johnson v. Bratton* (Mich.) 70 N. W. 1021.

[*l*] (Mich.; 1897.)

The payment and the agreement did not release the lien created by the mortgage.—*Johnson v. Bratton* (Mich.) 70 N. W. 1021.

[*m*] (Minn.; 1897.)

Upon a foreclosure sale by advertisement or action, the mortgage debt, as a personal obligation, is extinguished to the amount for which the property is sold.—*Evans v. Rhode Island Hospital Trust Co.* (Minn.) 69 N. W. 715.

[*n*] (Neb.; 1896.)

Where the mortgage debt has been assigned, a purchaser in good faith, without notice of the assignment, will be protected by a release of the mortgage executed by the original mortgagee. *Whipple v. Fowler* (1894) 60 N. W. 15, 41 Neb. 675, followed.—*Cram v. Cottrell*, 67 N. W. 452, 48 Neb. 646.

[*o*] (S. D.; 1895.)

Where, in a certificate of discharge of a mortgage, the acknowledgment is left blank, it will be presumed that, when properly signed by the mortgagee, the blank will be properly filled by the officer taking the acknowledgment.—*Jones v. Fidelity Loan & Trust Co.* (S. D.) 63 N. W. 553.

§ 42. Partial release.

[*a*] (Mich.; 1895.)

Under a stipulation in a mortgage on several lots that the mortgagee will, without consideration, release from the mortgage a certain number of lots "as fast as they are sold or contracted to be sold, at such time and times as" the mortgagor may request, the mortgagor is entitled on demand to have such lots released from the mortgage when sold or contracted to be sold at any time before foreclosure.—*Commercial Bank v. Hiller* (Mich.) 63 N. W. 1012.

[*b*] (Mich.; 1895.)

A mortgage covering several lots provided for the release from the mortgage, "on demand" of the mortgagor, of a certain number of the lots, "upon the payment" of \$150 for every lot so released; such sum, when paid, to be credited as a payment on the mortgage. Two notes were paid at maturity, and the last reduced by partial payment of the principal, and the interest thereon paid at its maturity. A year and a half after the maturity of this last note, and before foreclosure, the mortgagor demanded the release of one lot for each \$150 of principal paid. *Held*, that the mortgagor was not entitled to have them released.—*Commercial Bank v. Hiller* (Mich.) 63 N. W. 1012.

[*c*] (Minn.; 1895.)

Where a mortgage provided that, on payment of a certain sum, part of the premises might be released, and the mortgagor, after interest became due, paid that sum, without direction as to its application, the payment was properly first applied to extinguish the interest, and the mortgagor was hence not entitled to a partial release.—*Bay View Land Co. v. Myers* (Minn.) 64 N. W. 816.

62 Minn. 265.

§ 43. Duty to discharge on payment.

[*a*] (S. D.; 1895.)

The term "mortgagor," as used in Comp. Laws, § 4365, providing for the discharge of a mortgage when paid, on request of the mortgagor, includes the mortgagor's grantees and heirs.—*Jones v. Fidelity Loan & Trust Co.* (S. D.) 63 N. W. 555.

[*b*] (S. D.; 1895.)

A mortgagee cannot relieve himself from the liability imposed by Comp. Laws, § 4365, to discharge the mortgage on payment thereof, and request by the mortgagor, by an assignment,

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unless it is duly recorded, and the assignee has power to discharge the mortgage. *Kellam, J.*, dissenting.—*Jones v. Fidelity Loan & Trust Co.* (S. D.) 63 N. W. 553.

§ 44. Cancellation of discharge.

(S. D.; 1895.)

A court of equity will restore the record and give a first mortgage priority, as between a senior and a junior incumbrancer, where it appears that the junior mortgage was taken subject to the prior mortgage, and the latter was subsequently discharged of record in ignorance of the junior incumbrance, and solely to substitute a new mortgage for the amount due on the first mortgage note.—*Upton v. Hugos* (S. D.) 64 N. W. 523.

§ 45. Penalty for failure to enter satisfaction on record.

[*a*] (Neb.; 1895.)

A mortgagee who, in response to the mortgagor's demand for a satisfaction of record, delivered an order to the county clerk to release the mortgage, which was not attested as required by Comp. St. c. 32, § 15, in consequence of which the clerk refused to satisfy the mortgage of record, was liable for the statutory penalty to the mortgagor, though his failure to have the order attested did not occur through bad faith.—*Boyes v. Summers* (Neb.) 64 N. W. 1066, 46 Neb. 308.

[*b*] (S. D.; 1895.)

A mortgagee is not subject to the penalty provided in Comp. Laws, § 4365, for refusal to discharge a mortgage on payment thereof, and on demand by the mortgagor, where the demand is made in another state, but is still liable in damages to the mortgagor, his grantees or heirs.—*Jones v. Fidelity Loan & Trust Co.* (S. D.) 63 N. W. 553.

X. FORECLOSURE.

Binding effect on grantee of stipulation for appointment of receiver, see ante, § 34.

Election of remedies, see "Election of Remedies," § 4.

Estoppel by acquiescence in foreclosure proceedings, see "Estoppel," § 21.

Foreclosure as divesting lien, see "Mechanics' Liens," § 47.

—pending partition, see "Abatement and Revival," § 5.

1. IN GENERAL.

§ 46. Limitation.

[*a*] (Iowa; 1896.)

An action was commenced September 2, 1891, to recover on a note due September 2, 1881, and to foreclose a mortgage securing the same. Several months later one H. was made a party defendant, as claiming an interest in the mortgaged land. *Held* that, though the action was not commenced as to H. till more than 10 years after maturity of the note, she could not plead limitations in bar of the foreclosure, since the mortgage debt was still enforceable.—*Jenks v. Shaw* (Iowa) 68 N. W. 900.

[*b*] (Minn.; 1895.)

While a purchaser at void foreclosure sale was in possession under the mortgage, the statute did not run against him, so as to bar a foreclosure by action.—*Backus v. Burke* (Minn.) 65 N. W. 459.

63 Minn. 272.

§ 47. Personal action on debt.

[*a*] (Mich.; 1896.)

How. Ann. St. § 6703, providing that, while a bill to foreclose is pending, and after decree, no proceedings shall be had at law for the recovery of the debt secured by the mortgage,

or any part thereof, unless authorized by the court, was intended merely to avoid unnecessary litigation, and not to limit the remedy of the creditor; and, a suit at law brought without leave first obtained, being a mere irregularity, will not be restrained unless substantial rights are affected.—*Steele v. Grove* (Mich.) 67 N. W. 963.

[1b] (Mich.; 1896.)

Where the surety on a note secured by mortgage is not made a party to the foreclosure proceedings, and the maker of the note is insolvent, so that execution for a deficiency judgment would be of no avail, permission to sue the surety at law was properly granted.—*Steele v. Grove* (Mich.) 67 N. W. 963.

[1c] (Mich.; 1896.)

Where, under an order granting leave to bring action at law against the maker and sureties on a mortgage note pending foreclosure, action is brought in one county and afterwards discontinued as to one of the defendants, it is within the right granted by the permissive order to bring a second action against such defendant in another county, there being no limitation upon the right to bring suit.—*Steele v. Grove* (Mich.) 67 N. W. 963.

[1d] (Neb.; 1895.)

Under Code Civ. Proc. §§ 817-851, forbidding the concurrent prosecution of separate actions for the same debt, where a mortgage is secured by the obligation of any person other than the mortgagor, the mortgagee cannot, during the pendency or after decree rendered in the action to foreclose, enforce such obligation in an action at law, unless authorized by the court having jurisdiction of the suit of foreclosure.—*Meehan v. First Nat. Bank* (Neb.) 62 N. W. 490, 44 Neb. 213.

[1e] (Neb.; 1895.)

To prevent foreclosure, under Code, §§ 848, 851, which, in effect, prohibit the prosecution at the same time of an action at law for the mortgage debt, and a foreclosure proceeding, it was not necessary that proceedings at law should have been taken on the notes secured by the mortgage, where the notes were given to secure the debt on which the proceeding at law was based.—*Hargreaves v. Menken* (Neb.) 63 N. W. 951.

45 Neb. 668.

[1f] (Neb.; 1895.)

Under Code, § 848, providing that, pending foreclosure proceedings, no proceeding at law to collect the debt shall be taken without leave of court, the pendency of proceedings against garnishees on a judgment for the debt stays foreclosure.—*Hargreaves v. Menken* (Neb.) 63 N. W. 951.

45 Neb. 668.

[1g] (Neb.; 1895.)

It is not a sufficient compliance with Code, § 851, providing that no foreclosure proceedings shall be had where a judgment in any suit at law has been obtained, unless an execution shall have been returned unsatisfied, to show the issuing of an attachment, and its return unsatisfied, before the commencement of proceedings in foreclosure.—*Hargreaves v. Menken* (Neb.) 63 N. W. 951.

45 Neb. 668.

§ 48. Appointment and discharge of receivers.

[1a] (Iowa; 1896.)

A stipulation in a mortgage for the appointment of a receiver, in case of foreclosure, to receive the rents and profits during the period for redemption, to be applied on the mortgage debt, is valid.—*Hubbell v. Avenue Inv. Co.* (Iowa) 66 N. W. 85.

[1b] (Iowa; 1896.)

Code, § 2903, providing for the appointment of a receiver, under certain conditions, in foreclosure actions, during the pendency of the

action, does not prevent the appointment of a receiver under stipulation of the parties, during the period for redemption.—*Hubbell v. Avenue Inv. Co.* (Iowa) 66 N. W. 85.

[1c] (Iowa; 1897.)

In foreclosure the petition alleged that the rents of the property were pledged for the payment of the debt, that they were not being applied, that the defendant was a foreign corporation and insolvent, that the property was insufficient to pay the mortgages and past-due taxes, and other facts showing that the rents were in danger of being lost to the mortgagee. Held sufficient to authorize the appointment of a receiver.—*Stetson v. Northern Inv. Co.* (Iowa) 70 N. W. 595.

[1d] (Iowa; 1897.)

A mortgage provided that in case of default the mortgagee might foreclose, and be entitled to have a receiver appointed in vacation to take charge of the property and collect rents, to be applied on the mortgage debt. Held, that rents accruing after the appointment of the receiver were not subject to garnishment by other creditors.—*Stetson v. Northern Inv. Co.* (Iowa) 70 N. W. 595.

[1e] (Minn.; 1895.)

It is discretionary with the trial court whether it will hear oral evidence on a motion to appoint a receiver pending foreclosure proceedings.—*State v. Egan* (Minn.) 64 N. W. 813, 62 Minn. 280.

[1f] (Minn.; 1896.)

In an action to foreclose a second mortgage, the insolvency of the mortgagor, the inadequacy of the security, and the failure to apply the rents of the mortgaged premises in keeping up the security, by paying delinquent taxes and interest past due on the prior mortgage, form sufficient ground for the appointment of a receiver pendente lite to collect the rents and so apply them.—*Farmers' Nat. Bank v. Backus* (Minn.) 66 N. W. 5.

64 Minn. 43.

[1g] (Minn.; 1896.)

That the mortgagor, at the time of making the first mortgage, gave the mortgagee therein named a written assignment of these rents cannot be urged by the mortgagor as a reason why a receiver should not be appointed.—*Farmers' Nat. Bank v. Backus* (Minn.) 66 N. W. 5.

64 Minn. 43.

[1h] (Minn.; 1896.)

That, pending an action to foreclose a second mortgage, the first mortgagee has paid delinquent taxes, foreclosed, and bid in the property, is no ground for discharging a receiver pendente lite, appointed to collect the rents and profits, and apply them on the delinquent taxes and the interest on the first mortgage.—*Farmers' Nat. Bank v. Backus* (Minn.) 66 N. W. 638.

[1i] (Neb.; 1896.)

After a confirmation of sale of mortgaged premises, and an appeal from such order by the defendant, the trial court may, in a proper case, when necessary to protect the mortgagee's interest, appoint a receiver to collect the rents pending the determination of such appeal.—*Philadelphia Mortgage & Trust Co. v. Goos* (Neb.) 66 N. W. 843.

47 Neb. 804.

[1j] (Neb.; 1896.)

In an action to foreclose a mortgage, the plaintiff is entitled to the appointment of a receiver to take charge of the property and collect the rents, when it is disclosed that the mortgaged property is "probably insufficient to discharge the mortgage debt."—*Philadelphia Mortgage & Trust Co. v. Goos* (Neb.) 66 N. W. 843.

47 Neb. 804.

[1k] (Neb.; 1896.)

Although Comp. St. c. 73, § 55, provides that, "in the absence of stipulations to the contrary, the mortgagor of real estate re-

tains the legal title and right of possession thereof," yet it does not abrogate the power of the court to appoint a receiver, in a proper case, to collect the rents and profits from mortgaged premises, notwithstanding the mortgage contains no stipulation as to the right of possession.—*Philadelphia Mortgage & Trust Co. v. Goos* (Neb.) 66 N. W. 843.

47 Neb. 804.

§ 49. Operation and effect.

[a] (Iowa: 1896.)

Where the holder of both a first and second mortgage on land forecloses the second mortgage and buys in the land, the senior mortgage is merged in the fee, and the debt secured thereby is extinguished.—*McDonald v. Magirl* (Iowa) 66 N. W. 904.

[b] (Minn.: 1896.)

Where, pending a suit to foreclose a second mortgage, the first mortgagee pays the delinquent taxes, forecloses, and bids in the property for the full amount due him, such purchase discharges the interest and taxes as between him and the mortgagor, but not as between the mortgagor and the second mortgagee.—*Farmers' Nat. Bank v. Backus* (Minn.) 69 N. W. 638.

[c] (Neb.: 1896.)

The pendency of a proceeding for foreclosure does not terminate with the entry of an order for the sale of the property bound by the lien, but continues as a rule for the purpose of the enforcement of the decree until confirmation of the sale and disposition of the proceeds thereof.—*Link v. Connell* (Neb.) 67 N. W. 475.

48 Neb. 574.

2. RIGHT TO FORECLOSE.

Seeking foreclosure by cross bill in suit to enforce lien, see "Mechanics' Liens," § 55.

§ 50. Ownership of mortgage.

(Wis.: 1896.)

There being sufficient evidence on which to base the findings that plaintiff was not the owner of the mortgage which he sought to foreclose, and that the true owner had received payment in full, judgment dismissing the complaint will be affirmed.—*Lace v. Schoenhals* (Wis.) 68 N. W. 395.

93 Wis. 665.

§ 51. Condition precedent to foreclosure.

[a] (Mich.: 1895.)

A mortgagee may, on breach thereof, foreclose a mortgage executed to secure the payment of a mortgage incumbrance on land conveyed to him, without first paying off the incumbrance.—*Raffel v. Epworth* (Mich.) 64 N. W. 1052.

[b] (Minn.: 1895.)

It was no defense to foreclosure of a purchase-money mortgage providing that the mortgagee should pay a prior incumbrance, and that if he failed to pay the same the mortgagor might pay it, and apply the amount thereof on the mortgage, that the mortgagee had not paid the incumbrance.—*Bay View Land Co. v. Myers* (Minn.) 64 N. W. 816.

62 Minn. 265.

§ 52. Default in conditions.

[a] (Iowa: 1894.)

The commencement of an action to foreclose a mortgage for nonpayment of interest is sufficient notice of an election to exercise an option given in the instruments to declare interest and principal due 30 days after default in payment of interest.—*Swearingen v. Lahner* (Iowa) 61 N. W. 431.

93 Iowa, 147.

[b] (Neb.: 1895.)

The payment of past-due interest on a mortgage debt was not a sufficient consideration for the waiver of the mortgagee's right, on the mortgagor's failure to pay other interest as it fell due, to foreclose for the entire amount secured.—*Baldwin Inv. Co. v. Bailey* (Neb.) 63 N. W. 847.

45 Neb. 580.

[c] (Wis.: 1896.)

A mortgage contained a covenant by the mortgagor to pay taxes, and a power of sale on default in payment of principal or interest when due, or "in case of nonpayment of taxes," and provided that in case of such sale the mortgagee should retain "the principal and interest which may then be due, together with costs and charges," etc.; but there was no stipulation that the mortgagee might pay taxes, and recover the amount as part of the mortgage debt, or that the debt should become due on default in payment of taxes. *Held*, that a mere breach of the covenant to pay taxes gave no right to foreclose.—*Heller v. Neeves* (Wis.) 67 N. W. 923.

93 Wis. 637.

§ 53. — Payment of interest.

[a] (Iowa: 1894.)

The tender of unpaid interest six months after the note matured and the right to foreclose the mortgage accrued, through the nonpayment of interest, is not a bar to an action to foreclose for such nonpayment.—*Swearingen v. Lahner* (Iowa) 61 N. W. 431.

93 Iowa, 147.

[b] (S. D.: 1896.)

An extension of a note secured by a mortgage does not preclude the right to foreclose for nonpayment of interest given by the mortgage.—*Germond v. Hermosa Ice Co.* (S. D.) 69 N. W. 578.

§ 54. — Election to declare debt due.

[a] (Iowa: 1894.)

Stipulations in a note giving the holder the option to declare principal and interest due on default in interest, and, in the mortgage securing the note, making the note due and payable 30 days after such default, and providing for immediate foreclosure, are not provisions for a penalty or forfeiture, but merely agreements for bringing the note to maturity before the time provided therein, and should be enforced according to the intention of the parties.—*Swearingen v. Lahner* (Iowa) 61 N. W. 431.

93 Iowa, 147.

[b] (Iowa: 1894.)

In the absence of a plea of waiver or estoppel, the question whether the election to declare a mortgage due for nonpayment of interest was made within a reasonable time will not be considered.—*Swearingen v. Lahner* (Iowa) 61 N. W. 431.

93 Iowa, 147.

[c] (Mich.: 1896.)

Where a mortgage authorizes the mortgagee, at his election, to treat the principal sum as due, in case of default in the payment of interest, the institution of foreclosure proceedings sufficiently indicates his election, and previous notice thereof is not necessary.—*Hawes v. Detroit Fire & Marine Ins. Co.* (Mich.) 67 N. W. 329.

§ 55. Defenses.

[a] (Mich.: 1896.)

In an action to foreclose a mortgage given to secure a nonnegotiable note, brought by the assignee thereof, the mortgagor is not precluded from asserting that said mortgage was given to the payee of said note to raise money to pay a prior mortgage and a debt to said payee, who agreed to discharge the prior mortgage, which, without defendant's knowledge, had been assigned to another, and that it was afterwards discovered that said prior mortgage was never

paid, and was still a first lien on the premises.—*Wulker v. Thompson* (Mich.) 66 N. W. 584.

[b] (Minn.; 1895.)

It was no defense to foreclosure that the mortgagees induced the mortgagor to purchase the land by representing that they had organized a railway company which would run a road to the land, and that the company, in which the principal stockholders were the mortgagees, contracted with the mortgagor to furnish transportation to and from the land, and that the contract had not been performed.—*Bay View Land Co. v. Myers* (Minn.) 64 N. W. 816.
62 Minn. 265.

3. PARTIES.

To bill to redeem, see post, § 99.

§ 56. Necessary parties.

[a] (Mich.; 1896.)

How. Ann. St. § 6704, providing that, when a mortgage debt is secured by the obligation of any person other than the mortgagor, such person may be made a party to an action to foreclose the mortgage, is permissive only, and it is not mandatory upon the plaintiff to make an indorser of the note a party defendant in foreclosure.—*Steele v. Grove* (Mich.) 67 N. W. 963.

[b] (S. D.; 1896.)

On the death of a wife intestate, the husband individually, and as guardian of the minor children, mortgaged land in which she had a dower interest. *Held*, that the wife's administrator was a necessary party to an action to foreclose the mortgage, her estate not having been settled.—*Kelsey v. Welch* (S. D.) 66 N. W. 390.

§ 57. Proper parties.

[a] (N. D.; 1896.)

Where a husband, after mortgaging land, moved thereon, and with his wife acquired a homestead right therein, the wife became possessed of no such right as to entitle her to be made a party defendant in an action to foreclose the mortgage.—*Kuhnert v. Conrad* (N. D.) 69 N. W. 185.

[b] (S. D.; 1896.)

In an action to foreclose a mortgage on land of a decedent, the heirs of such deceased person are proper parties defendant.—*Kelsey v. Welch* (S. D.) 66 N. W. 390.

§ 58. Substitution.

(Mich.; 1896.)

Chancery rule 125 (54 N. W. 17), providing for the substitution of the assignee of a chose in action as complainant in place of his assignor, in a suit thereon commenced by the assignor prior to the assignment, authorizes the substitution of a second mortgagee, paying to the senior mortgagee the amount of the decree recovered by him in a suit to foreclose his mortgage, as complainant in the foreclosure suit.—*Codd v. Carpenter* (Mich.) 67 N. W. 819.

4. PLEADING AND PRACTICE.

§ 59. Complaint and cross petition.

[a] (Minn.; 1895.)

Where the complaint in an action to foreclose a mortgage alleged, as to defendants' interests, merely that they "claimed" some interest in or lien on the mortgaged premises, the validity of the mortgage as against creditors of the mortgagor could not be raised by demurrer, since it did not appear that defendants really had an interest in the premises.—*Howard v. Iron & Land Co.* (Minn.) 64 N. W. 896.
62 Minn. 298.

[b] (Neb.; 1896.)

In an action to foreclose a mortgage, a cross petition by one claiming as grantee in a deed from the mortgagor executed subsequent to execution of the mortgage, but recorded before that instrument was recorded, which failed to aver that there was a valuable consideration for the deed, did not show cross petitioner to be a bona fide purchaser.—*American Exch. Nat. Bank v. Fockler* (Neb.) 68 N. W. 1039.

§ 60. Plea and answer.

[a] (Mich.; 1896.)

A bill against the mortgagors and one S. to foreclose the mortgage alleged that S. claimed some interest in the mortgaged premises. *Held*, that a plea by S. that he was in possession as owner in fee simple by virtue of a tax deed, described, was proper, and that he was not limited to a disclaimer.—*Shafer v. Thompson* (Mich.) 67 N. W. 511.

[b] (Neb.; 1895.)

An answer to a petition for foreclosure, denying "that there is anything due on the note and mortgage," tenders no issue.—*Baldwin v. Burt*, 61 N. W. 691, 43 Neb. 245.

[c] (Neb.; 1895.)

In a mortgage foreclosure, the defense, by the grantee of a married woman, that the mortgage was given by her as surety for her husband, to be available, must be specially pleaded.—*Chadron Banking Co. v. Mahoney* 61 N. W. 594, 43 Neb. 214.

[d] (S. D.; 1896.)

In an action to foreclose a real-estate mortgage on property on which a county has a junior lien, by virtue of taxes assessed upon the personal property of the mortgagor, defendant county's answer, alleging payment and cancellation of the note, and that the mortgage has been kept outstanding in order to defeat the lien of the county for its personal property tax, states a good defense; and a further allegation that the mortgage was kept outstanding in order to defraud the minor heirs of the intestate mortgagor may be treated as surplusage.—*McGillivray v. McGillivray* (S. D.) 68 N. W. 316.

[e] (Wis.; 1896.)

Where a complaint in foreclosure alleges a failure of the mortgagor to pay taxes and insurance as covenanted, and a payment of the same by plaintiff, an answer by parties made defendants as subsequent purchasers or incumbrancers, denying all knowledge, or information sufficient to form a belief, in respect to such allegations, raises a material issue.—*Pearson v. Neeves* (Wis.) 66 N. W. 357.
92 Wis. 319.

§ 61. Evidence.

(Wis.; 1896.)

Transfer of a note and mortgage is sufficiently proved, in an action to foreclose, by plaintiff giving in evidence the note and a duly-executed assignment from the mortgagee to plaintiff of the mortgage.—*Reichert v. Nenser* (Wis.) 67 N. W. 939.
93 Wis. 513.

5. DECREE—EXECUTION AND JUDGMENT FOR DEFICIENCY.

Right to interest on decree, see "Interest," § 8.

§ 62. Judgment or decree.

[a] (Iowa; 1897.)

A defendant in a suit to foreclose a mortgage against him as a grantee of the premises was allowed to file a cross petition, without objection, seeking damages for breach by his grantor, who was also a party, of a covenant against incumbrances, and such petition offered to pay the amount ascertained by the court to be due on the mortgage, and the costs of foreclosure,

and sought a judgment against the grantor for such amount. *Held*, that the relief sought could be properly granted.—*Duroe v. Stephens* (Iowa) 70 N. W. 610.

[b] (Mich.: 1894.)

The validity of a foreclosure decree cannot be questioned upon petition for a writ of execution for a deficiency arising from the sale.—*Cornin v. Burton* (Mich.) 62 N. W. 1040.

102 Mich. 86, 96.

[c] (Mich.: 1895.)

When the record is not sufficiently full to justify the entry of a decree as to the amount due on a loan, there must be an accounting.—*McArthur v. Robison* (Mich.) 62 N. W. 713.

104 Mich. 540.

[d] (Mich.: 1897.)

In foreclosure of a mortgage which provides for the payment of taxes and insurance, and that the same shall be a lien, amounts paid thereafter after the bill is filed and before decree may be included in the decree.—*Jehle v. Brooks* (Mich.) 70 N. W. 440.

[e] (Mich.: 1897.)

After decree in mortgage foreclosure suit, one of the mortgagors applied to B. for \$3,000 to purchase the decree. B. paid that amount to the mortgagee, and one of the mortgagors paid the necessary balance, and B. took from the mortgagee an assignment of the mortgage and decree. There was no agreement as to when the \$3,000 should be repaid, or extending time before which sale should be made, or limiting the right of B. in any way to enforce the decree. *Held*, that this did not amount to the making of a new mortgage, so as to require a new decree before sale.—*Walker v. Lillibridge* (Mich.) 70 N. W. 1031.

[f] (Minn.: 1895.)

Where the mortgagee agreed in the mortgage to pay a prior incumbrance, but foreclosed before paying it, the mortgagor was entitled to an order directing that the premises be sold clear of the prior incumbrance, and that the proceeds of the sale be first applied in payment of that incumbrance.—*Bay View Land Co. v. Myers* (Minn.) 64 N. W. 816.

62 Minn. 265.

[g] (Wis.: 1896.)

A judgment rendered in an action to foreclose a mortgage, in which a lis pendens was not filed within the time required by *Sanb. & B. Ann. St. § 3187*, though irregular, is good on collateral attack.—*Huntington v. Meyer* (Wis.) 66 N. W. 500.

92 Wis. 557.

[h] (Wis.: 1896.)

Under *Rev. St. § 3187*, providing that, in an action affecting title to real estate, plaintiff, at the time of filing the complaint, or any time thereafter before judgment, may file a notice of the pendency of the action, and that in a foreclosure of a mortgage such notice must be filed 20 days before judgment, the notice of pendency does not become operative until the complaint is filed, and a judgment of foreclosure rendered on the same day the complaint is filed, though more than 20 days after the filing of notice, is premature.—*Gile v. Colby* (Wis.) 66 N. W. 802.

92 Wis. 619.

[i] (Wis.: 1897.)

On foreclosure of a mortgage, any right in the mortgaged premises of the grantor of the mortgagor cannot be determined, though such grantor is made a party thereto.—*Gilchrist v. Foxen* (Wis.) 70 N. W. 585.

[j] (Wis.: 1897.)

Rev. St. § 3162, declaring that a judgment for plaintiff in foreclosure shall adjudge that the premises be sold for the amount due, etc., is mandatory; and an adjudication that plaintiff is entitled to foreclosure unless defendant within a certain time pays into court the

amount due, in which case the complaint shall be dismissed, is erroneous.—*Spengler v. Hahn* (Wis.) 70 N. W. 466.

§ 63. Execution.

(Iowa: 1896.)

The fact that neither a special execution for the sale of property under foreclosure, nor the sheriff's return thereon, refers to the decree against the owner of the equity of redemption, who purchased subsequent to the mortgage, and against whom a supplemental decree was entered, will not invalidate the title of the purchaser.—*Flickinger v. Omaha Bridge & Terminal Ry. Co.* (Iowa) 67 N. W. 372.

§ 64. Personal liability.

(Neb.: 1897.)

A mortgage referred to in the note secured by it, after authorizing foreclosure in case of nonpayment of interest or taxes, provided that "no general execution shall issue herein against the maker or indorser of said note, but the mortgagee or his assigns shall be entitled to immediate possession of the premises, * * * and shall take the same in full satisfaction of his debt." *Held* to exempt the makers and indorsers of the note from personal liability thereon, and to restrict the remedy of the holder of the mortgage security.—*Seieroe v. First Nat. Bank* (Neb.) 70 N. W. 220.

§ 65. — Judgment for deficiency.

[a] (Mich.: 1896.)

After complainant, without his wife's joinder therein, executed a mortgage to a certain person, he conveyed the premises to his children, covenanting that the premises were free from incumbrances except said mortgage, and that he would warrant and defend the same against all lawful claims whatsoever. Complainant's wife secured a divorce, and he subsequently paid off the mortgage, and took an assignment thereof. In a suit by complainant against his former wife and children a decree was rendered foreclosing the mortgage. *Held*, that defendants were not personally liable for the debt secured by the mortgage, and it was therefore error to enter a decree against them for any deficiency.—*Welbon v. Welbon* (Mich.) 67 N. W. 338.

[b] (Mich.: 1897.)

In foreclosure of a mortgage, in which a grantee of the premises is made a defendant, where the bill states his interest as required by rule 99, and prays a personal decree against him for deficiency, and the subpoena advises him, as required by rule 122, that such decree is prayed, and he does not appear, he cannot, on a petition by complainant, after sale of the land, for an execution for a deficiency, contest the validity of the decree.—*Jehle v. Brooks* (Mich.) 70 N. W. 440.

[c] (Neb.: 1895.)

A district court may, in a suit brought therein to foreclose a mortgage, render a personal judgment for a deficiency remaining unpaid on the decree.—*Fleutham v. Steward* (Neb.) 63 N. W. 924.

45 Neb. 640.

[d] (Neb.: 1895.)

Where several persons purchased land and caused the title to be taken in the name of one only, who gave his notes, signed "Trustee," for the price, secured by mortgage, but neither notes nor mortgage disclosed the nature of the trust or the names of the cestuis que trustent, on foreclosure of the mortgage the holder was entitled to a deficiency judgment against the trustee, but not against the cestuis que trustent.—*Farrel v. Reed*, 64 N. W. 959, 46 Neb. 258.

[e] (Wis.: 1896.)

Rev. St. § 3156, providing that in foreclosure actions plaintiff may enter a demand for judgment for any deficiency against every person liable for the mortgage debt, does not enable the

mortgagee to recover in the foreclosure action a deficiency judgment against the guarantor of the mortgage note.—*Cottrell v. New London Furniture Co.* (Wis.) 68 N. W. 871.

[11] (Wis.: 1897.)

Where the entire mortgaged premises have been sold to satisfy a decree for a part of the debt, which has matured, and after its payment from the proceeds there remains less than the amount of the mortgage yet to mature, a personal judgment for the deficiency cannot be rendered before the deficiency becomes due by the terms of the mortgage.—*Packard v. Kinzie Ave. Heights Co.* (Wis.) 70 N. W. 1066.

§ 66. Action for deficiency—Limitation.

(Mich.: 1896.)

Under How. Ann. St. § 8736, providing that an action on a decree shall be brought within 10 years "after the entry" thereof, the 10 years begins to run against the right to recover a deficiency after a sale under a foreclosure decree from the date of the decree of sale, and not from the filing of the report of sale, or the order affirming such report (How. Ann. St. § 6702) and directing the payment of any deficiency.—*Smith v. Pegg* (Mich.) 69 N. W. 488.

6. ATTORNEY'S FEES AND COSTS.

§ 67. Allowance.

[a] (Mich.: 1895.)

A provision in a mortgage stipulating for attorney's fees, other than those expressly sanctioned by statute, is void.—*Kittermaster v. Brossard* (Mich.) 63 N. W. 75.
105 Mich. 219.

[b] (Minn.: 1895.)

Where a mortgage of several lots was so drawn as to constitute a separate mortgage on each lot, and stipulated that, in case of foreclosure on any one lot, an attorney's fee of \$25 would be retained, only that amount can be taken in case a single foreclosure embraces several of the lots.—*Eliason v. Sidle* (Minn.) 63 N. W. 730.
61 Minn. 285.

[c] (Minn.: 1896.)

Where the complaint in an action to foreclose a mortgage alleged, and the answer admitted, and the court found, that the mortgage provided for a certain lawful attorney's fee, and defendant consented to the entry of a decree providing for payment thereof, a formal application for the fixing of the amount of the fee was unnecessary, though the complaint did not allege the value of the attorney's services.—*Murray v. Chamberlain* (Minn.) 69 N. W. 474.

[d] (Wis.: 1894.)

An allowance of \$100 solicitor's fee, on foreclosure of a mortgage for \$5,500 and \$364 interest, as stipulated in the mortgage, is not unreasonable.—*Gibson v. Southwestern Land Co.*, 61 N. W. 282, 89 Wis. 49.

[e] (Wis.: 1897.)

Attorney's fees stipulated for in the mortgage sought to be foreclosed are "costs," within Rev. St. § 2918, providing that in all equitable actions costs may be allowed any party, or not, in the discretion of the court.—*Spengler v. Hahn* (Wis.) 70 N. W. 166.

7. SALE.

Extinguishment of debt by sale, see ante, § 41. Laches in suing to set aside sale, see "Equity," § 50.

Liability of purchaser at foreclosure sale for injuries sustained at crossing, see "Railroad Companies," § 21.

Recovery of premises sold under mortgage, see "Foreclosure and Detainer," § 4.

Right of purchaser to writ of assistance, see "Assistance, Writ of."
Setting aside foreclosure sale, appealable order, see "Appeal," § 15.

§ 68. Notice.

(Neb.: 1896.)

One who purchases property bound by a decree of foreclosure is, in the absence of equitable considerations resulting from the circumstances of the particular case, charged with such notice as the record imports, and is not entitled to personal notice of sale and confirmation subsequently made in the enforcement of such decree.—*Lusk v. Connell* (Neb.) 67 N. W. 475.

48 Neb. 574.

§ 69. Appraisement.

[a] (Neb.: 1895.)

Objection that the appraisal of property, sold on mortgage foreclosure, was too high should be made with a motion to vacate the appraisement, prior to the sale.—*Ecklund v. Willis* (Neb.) 62 N. W. 493.

44 Neb. 129.

[b] (Neb.: 1895.)

The appraised value of property made under an order of sale on mortgage foreclosure can be assailed only for fraud.—*Ecklund v. Willis* (Neb.) 62 N. W. 493.

44 Neb. 129.

[c] (Neb.: 1896.)

The fact that there was a clerical error in the description in the appraisal of property sold under a decree of foreclosure, in the number of one of the blocks in which the property lay, did not require that the sale be set aside, where the appraisers viewed the mortgaged property itself, and valued it, and no one was misled by the error, and the property sold for more than two-thirds of its value as appraised.—*American Inv. Co. v. McGregor* (Neb.) 67 N. W. 785.

48 Neb. 779.

[d] (Neb.: 1896.)

The fact that the appraisers of several pieces of property sold under one decree of foreclosure added the valuations of the several pieces, and from the aggregate sum deducted the incumbrances, was no ground for setting aside the sale, where each piece sold for more than two-thirds of its appraised value.—*American Inv. Co. v. McGregor* (Neb.) 67 N. W. 785.

48 Neb. 779.

[e] (Neb.: 1896.)

The provisions of the statute requiring the sheriff to deduct from the real value of lands levied upon the amount of the liens and incumbrances prior to that of the mortgage which the property is ordered sold to satisfy, being for the sole benefit of the plaintiff, the defendant, owner of the equity, cannot be heard to object to the confirmation of the sale because such liens and incumbrances were not deducted in making the appraisement. *Smith v. Foxworthy* (1894) 57 N. W. 994, 39 Neb. 214, followed.—*American Inv. Co. v. McGregor*, 67 N. W. 785, 48 Neb. 779.

[f] (Neb.: 1896.)

Compliance by appraisers in mortgage foreclosure proceedings with Code Civ. Proc. § 491b, requiring paramount liens to be deducted from the amount of the appraisement, is presumed.—*Brown v. Fitzpatrick* (Neb.) 68 N. W. 937.

[g] (Neb.: 1897.)

The date of the appraisement and of the copy, the clerk's filing mark, and the return of the sheriff, showed that the appraisement was made and filed before the advertisement of sale. Held, that this evidence that the appraisement was filed before the advertisement of sale was not overcome by the fact that the certificates of incumbrances bore a later date.—*Nebraska*

Loan & Trust Co. v. Barnes (Neb.) 69 N. W. 761.

§ 70. By what officer made.

(Neb.; 1896.)

Where a decree of foreclosure directs that the mortgaged property be sold by a master therein named, a sale by the sheriff to satisfy said decree under an order subsequently issued by the clerk is voidable at most, and such irregularity is cured by an order of confirmation regularly made.—Link v. Connell (Neb.) 67 N. W. 475.

48 Neb. 574.

§ 71. Sale en masse or in parcels.

[a] (Mich.; 1895.)

Where a mortgage described the premises as lots 3 and 10 and the north half of lots 2 and 11, it was proper to sell the half lots in one parcel, unless it be shown that they were not adjoining.—Gage v. Sanborn (Mich.) 64 N. W. 32.

[b] (Mich.; 1896.)

Where a part of the farm mortgaged was not used in connection with the other portions, but was held for sale in parcels, as platted,—such plat, though not recorded, being recognized by the mortgagee, and referred to in describing the property,—the sale, on foreclosure, should be in parcels.—Hawes v. Detroit Fire & Marine Ins. Co. (Mich.) 67 N. W. 329.

[c] (Minn.; 1895.)

Where premises described in a mortgage by government subdivisions were platted into city blocks and lots, and the mortgagee, pursuant to a stipulation in the mortgage, joined in dedicating the streets and alleys to the public, and released the same from the mortgage, the sale as one parcel, in foreclosure proceedings, of any two or more of the tracts constituting blocks, would be enjoined.—Bay View Land Co. v. Myers (Minn.) 64 N. W. 816.

62 Minn. 265.

§ 72. Sale for cash or on credit.

(Neb.; 1895.)

An officer selling property under a decree in equity has no authority to sell on credit, or to accept in payment of the bid anything other than lawful money, unless otherwise expressly authorized by the terms of the decree or the law in force governing such sale.—Hooper v. Castetter (Neb.) 63 N. W. 135.

45 Neb. 67.

§ 73. Separate sale of realty and personalty.

(Mich.; 1895.)

On foreclosure of a mortgage on an hotel and furniture, the court may decree the sale of the personal property separate from that of the realty.—Anderson v. Smith (Mich.) 65 N. W. 615.

§ 74. Rights and title of purchaser.

[a] (Iowa; 1896.)

The highest bidder at a sale under a decree in an action to foreclose a mortgage has, before confirmation of sale, no right to resist a resale, the commissioner conducting the sale having authority only to receive and report the highest bid for consideration and action of the court.—Central Trust Co. v. Gate City Electric St. Ry. Co. (Iowa) 65 N. W. 982.

[b] (Mich.; 1895.)

An assignment of a mortgage and a quit claim deed by the mortgagee, purchaser at a foreclosure sale, executed before the time for redemption had expired, do not annul the foreclosure.—Gage v. Sanborn (Mich.) 64 N. W. 32.

[c] (Neb.; 1896.)

Where a lien junior to that foreclosed was erroneously by the appraisers treated as a senior lien, and its amount deducted from the value

of the property in making the appraisement (the purchaser bidding only two-thirds of the appraised value after deducting such lien, and the holder of the junior lien not being a party to the suit), the former owner of the equity, being personally liable for both debts, has such an interest that he may insist on the subjection of the property, as against the purchaser, to the payment of what was the junior lien.—Nye & Schneider Co. v. Fahrenholz (Neb.) 68 N. W. 498.

[d] (S. D.; 1895.)

Since Comp. Laws, § 5159, providing that the purchaser is entitled to receive from the tenant in possession the rents of the property sold, does not apply to purchasers at mortgage foreclosure sales, a mortgagee who, having purchased at the sale under his mortgage, collected, without the mortgagor's consent, rents from the tenants in possession of the property, was liable to the mortgagor for the same.—Siems v. Pierre Sav. Bank (S. D.) 64 N. W. 167.

[e] (Wis.; 1897.)

Under Rev. St. § 3169, providing that, on foreclosure of the mortgage, the sheriff's deed shall vest all rights and interests of the mortgagor therein, purchasers under a mortgage executed by grantees in a deed take subject to all the reservations contained in such deed.—Gilchrist v. Foxen (Wis.) 70 N. W. 585.

§ 75. — To crops.

(Mich.; 1894.)

A mortgagee of land, who, just prior to the foreclosure sale, makes an agreement with the mortgagor, upon a distinct consideration, that the latter shall have the annual crop on the land, is bound thereby, though he thereafter purchases the property at the sale.—Dayton v. Dakin's Estate (Mich.) 61 N. W. 349.

103 Mich. 65.

§ 76. — Relief from bid.

[a] (Neb.; 1895.)

A purchaser at a mortgage sale, who, after confirmation, accepts a conveyance, and applies to the court for a writ of possession, thereby waives all irregularities occurring before confirmation.—Hooper v. Castetter (Neb.) 63 N. W. 135.

45 Neb. 67.

[b] (Neb.; 1895.)

A purchaser at a mortgage foreclosure will not be relieved from completing his purchase because of prior incumbrances, where the true condition of the title appears in the record of the case of which he is chargeable with notice.—Hooper v. Castetter (Neb.) 63 N. W. 135.

45 Neb. 67.

§ 77. Confirmation.

[a] (Neb.; 1895.)

Objections to the confirmation of a sale of real estate on mortgage foreclosure must be specifically assigned in the motion below to vacate the sale.—Ecklund v. Willis (Neb.) 62 N. W. 493.

44 Neb. 129.

[b] (Neb.; 1896.)

No objections to the confirmation of a mortgage foreclosure sale that were not raised below, will be considered on appeal.—Creighton University v. Mulvihill (Neb.) 68 N. W. 931.

[c] (S. D.; 1896.)

A rule of court providing that a sale under a decree of foreclosure shall not be confirmed until 10 days have elapsed from the filing of the sheriff's return, when, if no exceptions are filed, it may be confirmed without notice, does not prevent the court, in its discretion, from setting aside an order of confirmation after it has been entered without objection, upon grounds not appearing on the face of the record.—Kirby v. Ramsey (S. D.) 68 N. W. 328.

§ 78. Distribution of proceeds and surplus.

[a] (Mich.; 1896.)

The terms of a trust declared in writing, on which real estate is conveyed to a trustee, cannot be changed by subsequent directions of the grantor; and where the declaration provided that the land should be sold, and the proceeds devoted to the payment of two notes, such proceeds, if insufficient to pay the notes in full, should be applied pro rata.—*Wales v. Gray* (Mich.) 67 N. W. 234.

[b] (Minn.; 1896.)

H. and M. severally arranged with defendant for loans on land which they had purchased from plaintiff, on which they owed part of the purchase price. It was agreed that defendant should take from H. and M. mortgages large enough to include their loan, and also plaintiff's claims, for which she was to take paid-up stock of the defendant; the stock not to be issued until H. and M. had paid on the mortgage amounts equal to the stock, which were \$100 against H. and \$100 against M.—the money first paid by them on the mortgages to be applied in payment of the stock. Certificates of stock were made out in plaintiff's name, but not delivered. On H.'s default, defendant foreclosed its mortgage, and bid in the premises for less than the loan to him. After M.'s default, defendant accepted deeds of the mortgaged premises in satisfaction of the debt, and released M. Plaintiff was not a party to this settlement. Thereafter she demanded the stock, which defendant refused to deliver, claiming that it had not been paid for. *Held* that, while plaintiff was entitled to have payments first applied in payment of the stock, yet, as to what was realized out of the mortgages, she occupied the position of second mortgagee, and was only entitled to have applied in payment of the stock the surplus, if any, after reimbursing defendant for the money advanced; that, by accepting from M. conveyances of the premises in satisfaction of the debt, defendant occupied the same position as if it had received payment in money, and it was immaterial whether the premises were or were not worth the full amount due on the mortgage. Hence plaintiff was not entitled to the \$100 of stock for her claim against H., but was entitled to the \$400 for her claim against M.—*Milnor v. Heme Savings & Loan Ass'n* (Minn.) 67 N. W. 346.

64 Minn. 500.

[c] (Minn.; 1897.)

A purchaser at a foreclosure sale, bidding more than the amount of the debt and expenses, must answer to the mortgagor for the surplus, whether the property be worth more or less than the amount bid.—*Babcock v. American Savings & Loan Ass'n* (Minn.) 69 N. W. 718.

[d] (Neb.; 1895.)

The holder of the second mortgage on land brought suit to foreclose, obtained a decree, and at a sale thereunder purchased the property. The holder of the first mortgage was not made a party to the foreclosure suit. After obtaining his decree, but before the sale, the holder of the second mortgage purchased and took an assignment to himself of the first mortgage. *Held*, that his ownership of the first mortgage did not of itself entitle him, as against the mortgagor, to a decree applying the surplus proceeds of the sale towards the liquidation of the first mortgage.—*Hooper v. Castetter* (Neb.) 63 N. W. 135.

45 Neb. 67.

[e] (Neb.; 1896.)

A junior mortgagee who, being a party to a proceeding to foreclose a prior mortgage, does not pray a foreclosure of his mortgage, is entitled to a decree fixing his priority only, and directing a distribution in case of sale accordingly.—*Seeley v. Wickstrom* (Neb.) 68 N. W. 1017.

[f] (S. D.; 1895.)

The several holders of promissory notes secured by the same mortgage, though such notes mature at different times, in the absence of an express agreement to the contrary, are entitled to share pro rata the proceeds arising from a sale of the mortgaged premises.—*Commercial Bank v. Jackson* (S. D.) 63 N. W. 518.

§ 79. Setting aside and resale.

[a] (Iowa; 1896.)

Where a sale under a decree, in an action to foreclose a mortgage securing bonds, is made without the bondholders, other than the plaintiff, having actual notice thereof, and the decree provides against redemption, a resale should, on their application, be ordered, no one opposing it except the highest bidder, and it appearing probable that an advance on the bid will be obtained.—*Central Trust Co. v. Gate City Electric St. Ry. Co.* (Iowa) 65 N. W. 982.

[b] (Mich.; 1896.)

In the absence of an abuse of discretion, an order by the court below setting aside a mortgage foreclosure sale previously decreed by it, on the ground that notice of the sale was published in a paper which had no circulation in the mortgagor's neighborhood, that she had no actual notice of the sale or its confirmation, or of an assignment of the decree of foreclosure, and that the land was sold at a sacrifice, will not be disturbed.—*Brewer v. Landis* (Mich.) 69 N. W. 493.

[c] (Mich.; 1896.)

A bill by a mortgagee to set aside the foreclosure of her mortgage alleged that the mortgage covered two lots, on one of which were valuable buildings; that she had believed that the buildings stood on both lots, and that, consequently, when the property was sold under the foreclosure, the lots had been bid in each for one-half the debt; that the error was due to the mistake of her attorney. It appeared that the lot on which the building stood had been redeemed and sold to a third person. *Held* that, in the absence of anything to show fraud on the part of defendants, or lack of good faith on the part of the purchaser, the bill was properly dismissed.—*Marx v. Smith* (Mich.) 69 N. W. 150.

[d] (S. D.; 1895.)

The fact that at a foreclosure sale the mortgagee's agent bought the premises for less than he was instructed to bid was no ground for setting the sale aside, where it was not shown that the premises were worth more than the amount for which they were sold, nor that the person liable for the deficiency was unable to pay the same.—*Middlesex Banking Co. v. Lester* (S. D.) 64 N. W. 168.

[e] (S. D.; 1895.)

Where, at foreclosure sale, the mortgagee's agent bought the premises for less than he was instructed to bid, but it did not appear that the premises were worth more than the amount for which they were sold, nor that the person liable for the deficiency was unable to pay the same, a resale would not be ordered on the mortgagee's offer of an increased price.—*Middlesex Banking Co. v. Lester* (S. D.) 64 N. W. 168.

[f] (Wis.; 1896.)

In an action against a mortgagor and second and third mortgagees to foreclose the first mortgage, plaintiff, being informed by the second mortgagee that it did not desire to purchase at the foreclosure sale, purchased for the amount of its mortgage, interest, and costs. *Held*, that a motion by the second mortgagee to set aside the sale, alleging that the property could be sold for enough to satisfy both the first and the second mortgages, and that plaintiff promised, but failed, to notify its attorney of the date of sale, was properly denied; it appearing that, when the attorney asked for notice, plaintiff did not know that he was acting for the

second mortgagee, and had contracted to sell to the third mortgagee for the amount at which it should purchase.—*Homestead Land Co. v. Joseph Schlitz Brewing Co. (Wis.)* 69 N. W. 346.

§ 80. — Inadequacy of price.

[a] (Iowa; 1896.)

The rule against resale for inadequacy of price, except such as to shock the conscience, does not obtain in case of sale under decree in an action to foreclose a mortgage.—*Central Trust Co. v. Gate City Electric St. Ry. Co. (Iowa)* 65 N. W. 982.

[b] (S. D.; 1896.)

Where it was shown that land was sold at a foreclosure sale for one-tenth of its actual value, and that the defendant lived in another county, and had no actual knowledge of the sale until after it had been confirmed, but had reason to suppose that plaintiff would bid the amount of his decree, such facts will justify the court in ordering a resale, where a motion therefor is promptly made, and security given that a bid will be made sufficient to pay plaintiff's claim.—*Kirby v. Ramsey (S. D.)* 68 N. W. 328.

§ 81. — Revival of mortgage.

(Mich.; 1894.)

Where a mortgagee took a new mortgage from the purchaser at a foreclosure sale for part of the purchase price, the balance being paid by one of the heirs of the original mortgagor, who allowed title to be taken by such purchaser, equity will not set aside the sale at the instance of the heirs, without reviving the original mortgage.—*De Mey v. Defer (Mich.)* 61 N. W. 524.

103 Mich. 239.

XI. POWER OF SALE—FORECLOSURE BY ADVERTISEMENT.

§ 82. Requisites and scope of power.

[a] (Mich.; 1897.)

A foreclosure by advertisement is invalid, where the essential words, "in case of nonpayment" of the debt, are omitted from the power of sale.—*Lariverre v. Rains (Mich.)* 70 N. W. 583.

[b] (S. D.; 1896.)

A mortgage, which recites: "It is further agreed that this mortgage or trust deed may be foreclosed by action or by advertisement, as provided by chapter 28 of the Code of Civil Procedure of the Compiled Laws of Dakota, 1887, and this paragraph shall be deemed as authorizing and constituting a power of sale as provided in said chapter,"—may be foreclosed by advertisement, under Comp. Laws, § 5411, which authorizes such foreclosure of "every mortgage containing therein a power of sale."—*Male v. Longstaff (S. D.)* 69 N. W. 571.

[c] (Wis.; 1896.)

Under a second mortgage containing a covenant by the mortgagor to pay taxes when due, and a power of sale "in case of nonpayment of any taxes," such mortgagee cannot foreclose merely because the taxes were unpaid for two years, and he then paid them; the first mortgagee having before the trial repaid him the amount so paid.—*Heller v. Neeres (Wis.)* 68 N. W. 412.

93 Wis. 637.

§ 83. Who may execute power.

(S. D.; 1895.)

Where a mortgage note was taken up by a third party at the mortgagor's request, and assigned, with the mortgage, to the third party as security for the loan, the lender could, on the mortgagor's failure to repay the loan when due, foreclose the mortgage in his own name.—*Smith v. Commercial Nat. Bank (S. D.)* 64 N. W. 529.

§ 84. Notice.

[a] (Mich.; 1894.)

Where a notice of sale on foreclosure of a mortgage by advertisement gives the date, time, and place of the record of the original mortgage, the date of an assignment, and the date of its record in the register's office, the omission to give the book and page of the registry is not fatal.—*McCammon v. Detroit, L. & N. R. Co. (Mich.)* 61 N. W. 273.

103 Mich. 104.

[b] (Mich.; 1894.)

A notice of sale on foreclosure by advertisement, which states that the sale will take place at the courthouse in the village of M., I. county, sufficiently describes the place of sale.—*McCammon v. Detroit, L. & N. R. Co. (Mich.)* 61 N. W. 273.

103 Mich. 104.

[c] (Minn.; 1895.)

Notice of foreclosure sale by advertisement, which fails to state the date of the mortgage, is insufficient, and the sale thereunder void.—*Clifford v. Tomlinson (Minn.)* 64 N. W. 281.

62 Minn. 195.

[d] (Minn.; 1895.)

A notice of mortgage foreclosure on default in the payment of interest need not state that the amount claimed to be due is for interest.—*Trafton v. Coruell (Minn.)* 64 N. W. 1148.

62 Minn. 442.

[e] (N. D.; 1896.)

Under a statute requiring publication of notice of sale on foreclosure of mortgage by advertisement to be made "for six successive weeks at least once in each week," the first publication must be made at least 42 days before the day of sale, or the foreclosure proceedings will be void.—*Finlayson v. Peterson (N. D.)* 67 N. W. 953.

5 N. D. 587.

[f] (S. D.; 1896.)

Mere inaccuracies in a notice of a mortgage foreclosure under a power of sale, not calculated to be misleading, are insufficient to invalidate a title acquired thereunder, when the recitals of said notice readily convey to the mind all that the statute requires to be published.—*Iowa Inv. Co. v. Shepard (S. D.)* 66 N. W. 451.

§ 85. Collateral attack on proceedings.

[a] (S. D.; 1897.)

In a suit to recover land, the validity of foreclosure proceedings under which plaintiff claims cannot be attacked on the ground of usury.—*Northwestern Mortgage Trust Co. v. Bradley (S. D.)* 70 N. W. 648.

[b] (S. D.; 1897.)

Nor can such defense be indirectly pleaded by alleging that the foreclosure was for an amount in excess of that due, the notice of sale having stated the amount due according to the terms of the note secured.—*Northwestern Mortgage Trust Co. v. Bradley (S. D.)* 70 N. W. 648.

§ 86. Sale.

[a] (Mich.; 1894.)

An auction sale implies a sale to the highest bidder, and it will be presumed that a sale on foreclosure of a mortgage by advertisement was made to the highest bidder, though the notice of sale did not state that it would be made to the highest bidder.—*McCammon v. Detroit, L. & N. R. Co. (Mich.)* 61 N. W. 273.

103 Mich. 104.

[b] (Minn.; 1896.)

Where a mortgagor is in position to waive an irregularity in foreclosure proceedings under a power of sale, and to confirm and validate a sale of the mortgaged premises to the mortgagee for the full amount of the debt, with interest and all costs,—there being no other person except the mortgagor who could at any time question the regularity of the sale,—and he has, within a

reasonable time, caused a deed to be tendered conveying perfect title to the mortgagee, the latter cannot insist upon the invalidity in the foreclosure proceedings, repudiate the sale, and maintain an action to recover upon the mortgage note. —Saxe v. Rice (Minn.) 66 N. W. 268.
64 Minn. 190.

§ 87. Sale in parcels or en masse.

[a] (S. D.; 1895.)

A statute requiring a mortgaged quarter section of land to be sold en masse, instead of in 40's, at a foreclosure sale, in proceedings by advertisement, does not render a sale made in the latter manner void, the defect being only an irregularity, to be taken advantage of by one interested and injured thereby. —Middlesex Banking Co. v. Lester (S. D.) 64 N. W. 168.

[b] (S. D.; 1895.)

The fact that a whole tract irregularly sold in 40's, instead of in solido, in foreclosure proceedings, would not bring as much when so sold as though sold in the latter manner, is no ground of complaint by a mortgagee who was represented at the sale, made no objection to the manner of selling, bid all he desired to bid, and himself became the purchaser. —Middlesex Banking Co. v. Lester (S. D.) 64 N. W. 168.

§ 88. Selling more than necessary to satisfy debt.

[a] (S. D.; 1897.)

Under Comp. Laws, § 5418, prohibiting a separate sale, under a power contained in a mortgage, of any more tracts "than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law," where the mortgaged land consists of distinct tracts, and a sufficient number have been sold to satisfy the debt and costs, the power to sell thereunder ceases, and the mortgagee can acquire no title to a tract thereafter exposed for sale under such power. —Kirby v. Howie (S. D.) 70 N. W. 640.

[b] (S. D.; 1897.)

In an action to recover land bought at a mortgage sale, the mortgagor can show that payments made reduced the sum collectible so that money realized from a sale of portions of the mortgaged property was in excess of the amount due. —Kirby v. Howie (S. D.) 70 N. W. 640.

[c] (S. D.; 1897.)

In such case the assignee of the certificate of purchase issued to the mortgagee stands in no better position than the assignor, as against an absent mortgagor without actual notice of the foreclosure or assignment of the certificate. —Kirby v. Howie (S. D.) 70 N. W. 640.

§ 89. Sheriff's deed.

[a] (Mich.; 1894.)

The validity of a sheriff's deed executed pursuant to a foreclosure sale is not affected by the fact that no showing was furnished the sheriff prior to or at the time of the sale that the notice of sale had been published, as required by statute. —McCammon v. Detroit, L. & N. R. Co. (Mich.) 61 N. W. 273.
103 Mich. 104.

[b] (Mich.; 1894.)

The fact that a deed on a mortgage foreclosure is not acknowledged by the sheriff until five days after it is filed in the register's office does not affect the rights of the grantee in such deed. —McCammon v. Detroit, L. & N. R. Co. (Mich.) 61 N. W. 273.
103 Mich. 104.

§ 90. Rights of purchaser.

(Mich.; 1897.)

Where a foreclosure sale is invalid by reason of defects in the power of sale, the purchaser

or acquires the rights of the mortgagee. —Lariviere v. Rains (Mich.) 70 N. W. 553.

§ 91. Setting aside.

[a] (Minn.; 1896.)

Defendants foreclosed by advertisement mortgages on lots of plaintiff, and were the purchasers at the sale, including in their bid attorney's fees which they believed to be authorized under the mortgages, but which clearly were not. There was no redemption, and plaintiff sued to recover the attorney's fees as part of the surplus. The lots depreciated in value one-half between the sale and the bringing of the action. *Held*, that since equity will relieve from the consequences of a pure mistake of law only when the opposite party is blameless, and both parties can be placed in statu quo, defendants were not entitled to have the foreclosure sale set aside, and a resale ordered, or to defeat the action by tendering a deed of the lots on being paid the amount due on the mortgages. —Truesdale v. Sille (Minn.) 67 N. W. 1904.

[b] (S. D.; 1896.)

An agent of the holder of a mortgage, who was a nonresident, forwarded the mortgage, for foreclosure under a power of sale, to one of two claimants of the office of sheriff, under the mistaken belief that he was the legal sheriff. The other claimant, who was in fact the legal incumbent, without authority of the owner of the mortgage, and without possession of any of the papers in the matter, proceeded to sell the property in accordance with the published notice of foreclosure, and, while it was of the value of \$600, sold it for \$10.00, the amount of his costs and expenses. *Held*, that such sale would be set aside on the grounds of mistake and gross inadequacy of price. —Stacy v. Smith (S. D.) 68 N. W. 198.

[c] (S. D.; 1897.)

Application to vacate a foreclosure sale by advertisement on the ground of inadequacy of price, or that separate parcels were sold en masse, comes too late where made over four months after the period of redemption has expired, and no excuse is shown for the delay. —Northwestern Mortgage Trust Co. v. Bradley (S. D.) 70 N. W. 648.

§ 92. Costs and attorneys' fees.

[a] (Minn.; 1895.)

Gen. St. 1894, § 6075, provides that the attorney's fee stipulated for in a mortgage shall not be taxed or retained by the mortgagee on a foreclosure, unless he in fact employs and pays an attorney to foreclose a mortgage. *Held*, that where a corporation employed a firm of attorneys to foreclose a mortgage, and paid them for such services the amount stipulated therein as attorney's fees, it is entitled to retain the amount so paid from the proceeds of the sale, though one of the members of such firm was at the time a director of the corporation and its general attorney, receiving a salary under a contract which provided that, for foreclosing mortgages, he should receive the attorney's fees stipulated in the mortgages. —Morse v. Home Savings & Loan Ass'n of Minneapolis (Minn.) 62 N. W. 112.
60 Minn. 316.

[b] (Minn.; 1895.)

A party foreclosing a mortgage, who fails within 10 days after foreclosure to file an affidavit of costs and disbursements, as required by Gen. St. 1894, § 6051, cannot retain costs and disbursements out of the proceeds of the sale. —Johnson v. Northwestern Loan & Building Ass'n (Minn.) 62 N. W. 381, 60 Minn. 393; Brown v. Scandia Building & Loan Ass'n (Minn.) 63 N. W. 1040, 61 Minn. 527.

[c] (Minn.; 1896.)

Gen. St. 1894, § 6051, provides that one foreclosing a mortgage shall file an affidavit of costs and disbursements "within ten days after foreclosure." *Held*, that said time begins to

run from the time the foreclosure sale is completed by the execution and recording of the certificate of sale.—*Larocque v. Chapel* (Minn.) 65 N. W. 941.

63 Minn. 517.

[d] (Minn.: 1896.)

Though Gen. St. 1894, § 6038, providing that the certificate of foreclosure sale shall be filed within 20 days after sale, is merely directory as to time, yet, as section 6051, providing that one foreclosing a mortgage shall file an affidavit of costs and disbursements within 10 days after foreclosure, is mandatory, a party cannot extend the time for filing such affidavit by failing to file his certificate within the 20 days.—*Larocque v. Chapel* (Minn.) 65 N. W. 941. 63 Minn. 517.

[e] (Minn.: 1896.)

Gen. St. 1894, § 6051, which requires a party foreclosing a mortgage, or his attorney, to make and file, within 10 days thereafter, an affidavit of the amount paid or incurred for attorney's fees and disbursements, is mandatory.—*Brown v. Baker* (Minn.) 67 N. W. 793.

[f] (Minn.: 1896.)

The mortgagor is not limited to a time within one year in which he may bring an action to recover from the owner of the mortgage the costs, disbursements, and attorney's fees included in the mortgage foreclosure sale, where an affidavit, as provided in Gen. St. 1894, § 6051, is not filed; the one-year limitation, under section 6052, being applicable only when the mortgagor seeks, in his complaint, to recover the penalties embraced in said section.—*Brown v. Baker* (Minn.) 67 N. W. 793.

§ 93. Disposition of proceeds and surplus.

[a] (Minn.: 1896.)

Gen. Laws 1878, c. 53, gives a penalty on the mortgagee's failure to account for the proceeds of the foreclosure sale to the "mortgagor, his heirs, and assigns." *Held* that, preceding that the right to sue for the penalty is not alone assignable as a chose in action, the right to recover any surplus remaining in the mortgagee's hands after foreclosure sale, and wrongfully appropriated by him, is assignable, without an assignment of the equity of redemption.—*Lynott v. Dickerman* (Minn.) 67 N. W. 1143.

[b] (Minn.: 1896.)

The attorney foreclosing a mortgage by advertisement included in his affidavit of costs and disbursements filed under Gen. St. 1894, § 6051, a statement of the amount of taxes paid. *Held*, in an action by the mortgagor to recover an alleged surplus of the proceeds of the sale, that the affidavit was not admissible to show the fact and time of payment.—*Wyatt v. Quimby* (Minn.) 68 N. W. 109.

[c] (Minn.: 1896.)

A mortgagee, after a foreclosure of his mortgage by advertisement and sale of the premises, cannot pay taxes due thereon at the date of the sale, and reimburse himself for the amount so paid from the proceeds of the sale.—*Wyatt v. Quimby* (Minn.) 68 N. W. 109.

XII. REDEMPTION.

§ 94. Who may redeem.

[a] (Iowa: 1895.)

The owner of a judgment which has ceased to be a lien has no right, either in law or in equity, to redeem from a sale under a mortgage lien prior to his judgment.—*Long v. Mallet* (Iowa) 63 N. W. 190.

[b] (Iowa: 1895.)

Where a junior mortgagee, whose mortgage was recorded, was not made a party to an action to foreclose the senior mortgage, the fact that, after the foreclosure sale, and before

the expiration of the statutory time to redeem therefrom, he bought the land at a sale under foreclosure of his own mortgage, for the full amount of his foreclosure judgment, does not preclude him from suing in equity to redeem from the sale under the senior mortgage.—*McCormick Harvesting Co. v. Llewellyn* (Iowa) 65 N. W. 412.

[c] (Minn.: 1896.)

Prob. Code, §§ 102, 107 (Gen. St. 1894, §§ 4509, 4514), providing that the allowance or disallowance of any claim against a decedent's estate shall have the same force as a judgment for or against the estate, and that no claim against a decedent shall be a charge against the estate unless presented to the probate court within five years after decedent's death, did not change the rule that a general creditor of a decedent whose claim has been allowed against the estate has no lien upon the real estate of decedent which entitles him to redeem from the foreclosure of a mortgage executed by decedent in his lifetime. *Whitney v. Burd*, 12 N. W. 530, 29 Minn. 203, followed.—*Nelson v. Rodgers* (Minn.) 68 N. W. 18.

[d] (Neb.: 1896.)

A junior mortgagee who has not been made a party to a proceeding foreclosing a senior mortgage is entitled, as a matter of right, thereafter to redeem such senior mortgage from the purchaser at judicial sale. *Renard v. Brown* (1878) 7 Neb. 449, followed.—*Cram v. Cottrell*, 67 N. W. 452, 48 Neb. 646.

§ 95. By grantor in absolute deed.

(Mich.: 1895.)

Any balance found due defendant, to whom land has been conveyed as security by a deed absolute in form, must be paid as a condition of redemption.—*McArthur v. Robinson* (Mich.) 62 N. W. 713.
104 Mich. 540.

§ 96. Right barred by adverse possession—Mortgagee in possession.

(Minn.: 1895.)

When, after default, the mortgagee in apparent good faith makes a void foreclosure, and after the year to redeem the purchaser at foreclosure sale takes possession, the purchaser is a mortgagee in possession, though he took possession without consent of the mortgagor.—*Backus v. Burke* (Minn.) 65 N. W. 459.
63 Minn. 272.

§ 97. Time to redeem.

[a] (Minn.: 1895.)

After a sale of a lot to the mortgagee under a mortgage, the mortgagor, for the purpose of extending his time for redemption 500 days, procured his equity to be transferred to a third party, from whom he received 100 independent mortgages, which were recorded at different hours, and filed 100 independent notices of intention to redeem. *Held*, that the mortgages and notices were void as to the purchaser mortgage.—*New England Mut. Life Ins. Co. v. Capehart* (Minn.) 65 N. W. 258.
63 Minn. 120.

[b] (Minn.: 1895.)

The period allowed for redemption from a mortgage is the same as the statutory limitation on foreclosure by action.—*Bradley v. Norris* (Minn.) 65 N. W. 357.
63 Minn. 156.

[c] (Minn.: 1895.)

The time within which a mortgagor may bring an action to redeem from a mortgagee in possession begins to run from the time the mortgagee goes into possession.—*Bradley v. Norris* (Minn.) 65 N. W. 357.
63 Minn. 156.

[d] (Minn.: 1895.)

The time for bringing an action to redeem, as against a purchaser at void foreclosure sale who went into possession after the ex-

piration of the year for redemption, was the time limited for commencing foreclosure by action.—*Backus v. Burke* (Minn.) 65 N. W. 459. 63 Minn. 272.

[c] (Minn.; 1895.)

The statute commences to run against an action to redeem, in favor of a purchaser at a void foreclosure sale, who went into possession at the expiration of the year for redemption, from the time he took possession.—*Backus v. Burke* (Minn.) 65 N. W. 459. 63 Minn. 272.

[c] (Neb.; 1896.)

The statute of limitations begins to run against a bill to redeem from the time when, the mortgage having matured, the mortgagee enters into open and notorious possession of the premises under claim of ownership.—*Hall v. Hooper* (Neb.) 66 N. W. 33. 47 Neb. 111.

[a] (Neb.; 1896.)

A cause of action of an owner of a fee to redeem from a mortgage which has been foreclosed, in a proceeding in which he was not served with process, accrued when the mortgage matured.—*Dorsey v. Conrad* (Neb.) 68 N. W. 645.

[b] (Neb.; 1896.)

An action by an owner of a fee to redeem from a mortgage foreclosed by a proceeding in which he was not served with process may, under Code Civ. Proc. § 6, be brought at any time within 10 years after the cause of action accrued.—*Dorsey v. Conrad* (Neb.) 68 N. W. 645.

§ 98. Amount necessary to redeem.

[a] (Minn.; 1896.)

A tender of the amount required to redeem from a mortgage foreclosure sale must be kept good in order to be effectual as the basis of a subsequent action to compel the execution of a certificate of redemption brought after the time for redemption has expired, since the mere refusal of the purchaser to accept the tender does not divest his interest.—*Dunn v. Hunt* (Minn.) 65 N. W. 948. 63 Minn. 484.

[b] (Neb.; 1896.)

For the purpose of redemption, a purchaser in good faith at the judicial sale, believing he has a good title, will be entitled to credit for improvements made upon the property. But one who buys with notice of the facts is not a purchaser in good faith, within the meaning of the rule, and is not entitled to such credit.—*Higginbottom v. Benson* (1888) 39 N. W. 418, 24 Neb. 461, distinguished.—*Cram v. Cottrell*, 67 N. W. 452, 48 Neb. 646.

§ 99. — Rate of interest.

(Minn.; 1897.)

The sum for which property is sold at a foreclosure sale, and which, under Gen. St. 1894, § 6041, must be paid, together with interest from the sale, to redeem therefrom, is a legal indebtedness, within section 2212, which fixes the rate of interest on all legal indebtedness at 7 per cent.—*Evans v. Rhode Island Hospital Trust Co.* (Minn.) 69 N. W. 715.

§ 100. Action to redeem.

[a] (Mich.; 1895.)

Where an action to redeem from a mortgage is brought by a wife whose husband has abjured the realm, the husband should be made a party so as to foreclose his interest.—*Sanborn v. Sanborn* (Mich.) 62 N. W. 371. 104 Mich. 180.

[b] (Mich.; 1896.)

A bill to set aside a deed made on a statutory foreclosure of a mortgage, for irregularity in selling the property as a whole, instead of in parcels, is, in effect, a bill to redeem; and complainant must pay the mortgage debt, or submit to a sale of the premises for such payment.—*Hawes v. Detroit Fire & Marine Ins. Co.* (Mich.) 67 N. W. 329.

[c] (Mich.; 1896.)

A bill to set aside a deed made on a statutory foreclosure of a mortgage executed by complainant and his wife for failure to sell in parcels, is, in effect, a bill to redeem, and the wife is a necessary party.—*Hawes v. Detroit Fire & Marine Ins. Co.* (Mich.) 67 N. W. 329.

MOTION.

See "Pleading," §§ 46-55; "Practice in Civil Cases," §§ 14, 16, 17.

To dismiss appeal, see "Appeal," § 282.

To quash indictment, see "Criminal Law," § 23.

To strike out testimony in criminal cases, see "Criminal Law," § 75.

MOTIVE.

Evidence of, see "Criminal Law," § 91; "Homicide," §§ 25, 26.

MULCT LAW.

See "Intoxicating Liquors," § 1.

MULTIFARIOUSNESS.

See "Equity," § 52.

MUNICIPAL CORPORATIONS.

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Dedication of streets and highways, see "Dedication," § 2.

Effect of incorporating rural homestead into city, see "Homestead," § 2.

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— of situation of city in particular county, see "Evidence," § 1.

Municipal courts, see "Courts," § 18.

Power of county board to establish city precincts, see "Counties," § 29.

Public aid for erection of bridges, see "Bridges," § 2.

Regulating water supply, act impairing obligation of contracts, see "Constitutional Law," § 30.

Right to fund arising from liquor taxes, see "Intoxicating Liquors," § 17.

Special laws affecting, see "Constitutional Law," § 19.

Tax accounts between city and county, see "Taxation," § 4.

I. INCORPORATION, GOVERNMENT, AND POWERS.

Charter and statutory provisions as to taxation, see post, § 185.

Effect of amendment of charter on prior ordinances, see post, § 27.

Power to issue bonds, see post, §§ 179, 180.

— to make public improvements, see post, §§ 110-112.

Grant of franchise to street-car company, see "Horse and Street Railroads," § 1.

Judicial notice of incorporation under general law, see "Evidence," § 4.

Organization of town, see "Towns," § 1.

Prohibiting special proceedings for incorporation of village, see "Prohibition, Writ of."

§ 1. Incorporation in general.

[a] (Minn.: 1895.)

Laws 1885, c. 145, provides that any district which has been platted into lots and blocks, and the "lands adjacent thereto," if containing a population of not less than 175 inhabitants, may become incorporated as a village. *Held*, that the act contemplated a distinct center or nucleus of population on platted lands, and that the words "lands adjacent thereto" include only those essentially suburban in character, and having a community interest with the platted portion.—State v. Village of Fridley Park (Minn.) 63 N. W. 613.

61 Minn. 146.

[b] (Neb.: 1895.)

Comp. St. c. 14, § 40, providing for the incorporation of villages "whenever a majority of the taxable inhabitants of any town or village not heretofore incorporated under the laws of this state shall present a petition to the county board," applies to villages in the ordinary and popular sense of the term, and not to rural districts.—State v. Dimond (Neb.) 62 N. W. 498. 44 Neb. 154.

[c] (Neb.: 1896.)

Laws 1895, c. 71, provided for the appointment in counties, by district judges, of a board of trustees, which should be construed as a body corporate, and which might sue and be sued, contract and be contracted with, acquire

and hold property, adopt corporate seal, construct and operate a canal, for the purposes of commerce, and supplying power, heat, and light. *Held*, that this was not a municipal corporation.—State v. Board of Com'rs of Douglas County (Neb.) 66 N. W. 434.

47 Neb. 428.

§ 2. Conflict between charter and general law.

(S. D.: 1896.)

There is no conflict between the power conferred by a city charter to "prohibit and suppress tippling shops," and the prohibitory liquor law; and hence the provisions of the charter were not repealed by such law.—City of Yankton v. Douglass (S. D.) 66 N. W. 923.

§ 3. Residents of territory to be incorporated.

(Neb.: 1896.)

An actual resident of territory sought to be incorporated in a village, within the statute requiring that there must be 200 or more actual residents of such territory to authorize the incorporation, is one who is in the place with the intent to establish or who has already established his domicile there.—State v. Mote (Neb.) 67 N. W. 810.

48 Neb. 683.

§ 4. Including farming lands.

(Neb.: 1896.)

The law authorizing the incorporation of villages does not contemplate including in the corporate limits remote territory, or purely agricultural lands, not actually connected with the village, and not adapted to municipal purposes.—State v. Mote (Neb.) 67 N. W. 810. 48 Neb. 683.

§ 5. When villages become independent of town.

[a] (Wis.: 1896.)

Laws 1889, § 1, declaring that all villages which have elected an assessor pursuant to Laws 1887, c. 391, shall be separate from the town, and all that have not shall be deemed to be a part of the town, the same as though chapter 391 had not been enacted, fixed the status of villages at its passage, and those which thereafter elected an assessor did not thereby become independent municipalities.—State v. Weingarten (Wis.) 66 N. W. 716.

92 Wis. 599.

[b] (Wis.: 1896.)

Laws 1889, c. 341, provided a new and uniform rule to determine whether a village should be considered an independent municipality from the town in which it is situated; and all villages incorporated after its passage are within section 2, declaring that a village not already independent "shall not become an independent municipality until so determined by a majority vote of both town and village," as therein provided.—State v. Weingarten (Wis.) 66 N. W. 716.

92 Wis. 599.

[c] (Wis.: 1896.)

A village incorporated since the enactment of Laws 1889, c. 341, cannot be considered an independent municipality from the town from which it is separated until said village and town have so determined by a separate majority vote of each, as provided in said act; and until then no proceeding can be maintained under section 4 to compel an appraisal and division of the common property. State v. Weingarten (Wis.) 66 N. W. 716, 92 Wis. 599, followed.—State v. Taylor (Wis.) 68 N. W. 953.

§ 6. Powers conferred on boards.

(Mich.: 1895.)

Local Acts 1895, Act No. 366, amending the Detroit city charter, and providing that the board of estimates may strike from the yearly budget any item or items it may deem ad-

visible, is not a delegation of powers conferred by the constitution on the common council.—*Robinson v. City of Detroit* (Mich.) 65 N. W. 10.

§ 7. Power in regard to workhouses.

(Minn.; 1896.)

The only workhouses the city of St. Paul is authorized by its charter to establish and maintain for the imprisonment at hard labor therein of persons convicted of offenses subjecting them to imprisonment, under the charter and ordinances of the city, are such as are subject to the management and control of municipal authority, and whose superintendents or managers are public officers or agents. *Held*, accordingly, that an ordinance of the city establishing the House of the Good Shepherd as a workhouse for female prisoners is void, and that all contracts by the city with the corporation owning and controlling such house for the detention and board of prisoners therein are illegal.—*Farmer v. City of St. Paul* (Minn.) 67 N. W. 990.

§ 8. Power as to supplying water and light.

[a] (Minn.; 1896.)

The Duluth city charter authorizes the city to issue bonds for the erection of a water plant alone, though it designates the bonds as "water and light bonds."—*Janeway v. City of Duluth* (Minn.) 68 N. W. 24.

[b] (Minn.; 1896.)

The question of the necessity of erecting a water plant by the city of Duluth, as permitted by its charter, when the city is already adequately supplied by another plant owned by a private corporation, will not be inquired into by the courts.—*Janeway v. City of Duluth* (Minn.) 68 N. W. 24.

[c] (Neb.; 1895.)

The power conferred by Comp. St. c. 14, art. 2, § 52, subd. 51, on cities of the second class, having over 5,000 inhabitants, to provide for and regulate the lighting of the streets, implies the power to erect and maintain an electric lighting system for that purpose.—*Christensen v. City of Fremont* (Neb.) 63 N. W. 361. 45 Neb. 160.

[d] (Neb.; 1895.)

From the power to provide for the lighting of streets, conferred on a certain class of cities by Comp. St. c. 14, art. 2, § 52, subd. 51, no power can be implied to erect or maintain a lighting system for supplying light to private buildings.—*Christensen v. City of Fremont* (Neb.) 63 N. W. 364. 45 Neb. 160.

[e] (Wis.; 1895.)

A municipal corporation has inherent power to build waterworks and an electric light plant.—*Elmhurst v. City of Reedsburgh* (Wis.) 64 N. W. 885, 91 Wis. 131.

§ 9. Supplying water to public institutions.

(Mich.; 1896.)

The charter of the city of Detroit (Sess. Laws 1857, p. 106), as amended by How. St. c. 314, requires the city to pay the expenses of the Detroit house of correction to the extent that they exceed the earnings, but confides its management and its appropriations to a board of inspectors composed of the mayor, the chairman of the board of state prison inspectors, and three others appointed by the common council, on the nomination of the mayor, except that the assent and concurrence of the council is necessary to extraordinary appropriations. *Held*, that such house of correction is not a public institution of such city, entitled to be supplied with water free of charge by the board of water commissioners, a corporation created by Laws 1853, p. 180, to which is given the charge of the waterworks, with authority to regulate and collect water

rates.—*City of Detroit v. Board of Water Com'rs of City of Detroit* (Mich.) 66 N. W. 377.

§ 10. Conveyance of city's property.

[a] (S. D.; 1895.)

Where a city, under charter authority, constructs waterworks at the city's expense for protection against fire, and for furnishing the inhabitants with water, the city holds the property as a public trust, and cannot convey the same without special legislative authority.—*Huron Waterworks Co. v. City of Huron* (S. D.) 62 N. W. 975; *Myers v. Same*, *Id.*

[b] (S. D.; 1896.)

Where a city, under its charter, constructs waterworks at its own expense for protection against fire and for furnishing its inhabitants with water, it holds the property as a public trust, and cannot convey the same without legislative authority.—*Huron Waterworks Co. v. City of Huron* (S. D.) 65 N. W. 816.

§ 11. Acting as trustee for religious society.

(Iowa; 1891.)

The prohibition of Code, § 552, against appropriation by cities of public money for institutions under ecclesiastical or sectarian management, does not prevent a city taking a devise in trust for the religious societies thereof, without regard to denomination, cities having power (section 482) to do what will tend to promote the prosperity, and improve the morals, comfort, and convenience, of their inhabitants.—*Philips v. Harrow* (Iowa) 61 N. W. 434. 93 Iowa. 92.

§ 12. Accepting devise for library.

(Wis.; 1897.)

Under Rev. St. § 931, conferring on cities the power to establish a public library, and section 1490, charging cities with the relief of the resident poor, a city whose charter provides that the council may acquire lands by devise for public purposes has the power to accept lands devised to the city for establishing and maintaining a public library, and for establishing a home for the aged and poor.—*Bourhaus v. City of Watertown* (Wis.) 69 N. W. 986.

§ 13. Action by city to abate nuisance.

(S. D.; 1896.)

A city, in the exercise of a granted power to "restrain, prohibit, or suppress" a public nuisance, may invoke the aid of a court of equity.—*City of Huron v. Bank of Volga* (S. D.) 66 N. W. 815.

§ 14. Subdivision of wards.

(Minn.; 1896.)

The subdivision of the wards of a city is a legislative act, which should be done by ordinance or resolution.—*State v. Darrow* (Minn.) 67 N. W. 1012.

§ 15. Discrimination as between wards.

(Mich.; 1895.)

Act May 27, 1895, amending the charter of Grand Rapids, provides for one alderman, instead of two, from each ward; that at the next spring election an alderman shall be elected from each even-numbered ward for two years; that in each odd-numbered ward the alderman whose term is unexpired shall hold till it does expire; that at the next and each succeeding election one shall be elected from each ward for two years; and that after the election in 1896 the alderman in each ward shall represent it on the county board of supervisors, and perform the duties of ward supervisors, whose offices are abolished. *Held*, that such amendment is not open to the objection that it unjustly discriminates in favor of the odd-numbered wards.—*State v. Cogshall* (Mich.) 65 N. W. 2.

§ 16. Mode of testing legal existence.

(Neb.; 1896.)

An information in the nature of quo warranto, and not a bill for injunction, is the appropriate remedy to test the legal existence of a municipal corporation.—*Osborne v. Village of Oakland* (Neb.) 68 N. W. 506.

§ 17. Dissolution.

(Mich.; 1897.)

A municipal corporation can be dissolved only by consent of the legislature, or in pursuance of legislative provisions; the fact that it ceases for a time to exercise its powers not effecting a dissolution.—*Cain v. Brown* (Mich.) 70 N. W. 337.

II. CHANGE OF BOUNDARIES—ANNEXATION OR EXCLUSION OF TERRITORY.

See, also, "Schools and School Districts," § 4.

Extending corporate limits, special legislation, see "Constitutional Law," § 19.

§ 18. Annexation of territory—What may be annexed.

[a] (Neb.; 1895.)

Under Comp. St. c. 14, § 40, providing for the incorporation of villages, whenever a majority of their taxable inhabitants present a petition for that purpose to the county board, lands adjacent to a town or village may be incorporated therewith, provided they are in such close proximity as to be suburban in character, and have some unity of interest with the platted portion in the maintenance of municipal government.—*State v. Dimond* (Neb.) 62 N. W. 498. 44 Neb. 154.

[b] (Neb.; 1895.)

Under Comp. St. c. 14, § 99, relating to the extension of municipal boundaries, the boundaries of a town may be extended so as to include lands in such proximity to the town as to have some unity of interest therewith in the maintenance of municipal government.—*City of Wahoo v. Tharp* (Neb.) 63 N. W. 840. 45 Neb. 563.

§ 19. Testing validity of proceedings—Who may sue.

(Iowa; 1896.)

Under Code, § 3348, providing that, on the refusal of the county attorney to bring proceedings to test the validity of the annexation of territory to a city, any person interested may apply to the district court for leave to do so, and, on obtaining such leave, may prosecute the action to final judgment, the authority of an owner of land annexed, to bring such action, cannot be questioned, after leave granted by the court, on the ground that his interest in the proceeding is trifling.—*State v. City of Des Moines* (Iowa) 65 N. W. 818.

§ 20. Estoppel to resist annexation.

(Iowa; 1896.)

Where the annexation resulted in the abandonment of municipal corporation in the territory annexed, and the city for four years levied taxes and made improvements, for which warrants were issued, and assumed jurisdiction over the territory, without objection, in quo warranto to attack its validity the annexation will be sustained, though the act annexing the territory was unconstitutional, as special legislation.—*State v. City of Des Moines* (Iowa) 65 N. W. 818.

§ 21. Detachment of territory.

[a] (Neb.; 1895.)

The provision of Comp. St. c. 14, § 101, for the disconnecting of territory from a city or village by petition, is available only to legal

voters of the territory sought to be detached.—*State v. Dimond* (Neb.) 62 N. W. 498.

44 Neb. 154.

[b] (Neb.; 1895.)

Comp. St. 1893, c. 14, § 101, relating to the change of municipal limits, and detaching territory included therein, by proceedings in the district court, does not apply to cities of the first class having less than 25,000 inhabitants.—*City of Hastings v. Hansen* (Neb.) 63 N. W. 34.

44 Neb. 704.

[c] (Neb.; 1896.)

Under Comp. St. c. 14, §§ 114–117, providing a method whereby plats may be vacated, the vacation by the owner of a plat of an addition to a city within the corporate limits does not ipso facto disconnect the platted land from the corporation.—*Kershaw v. Jansen* (Neb.) 63 N. W. 616.

III. ORDINANCES AND RESOLUTIONS.

Providing for public improvements, see post, § 121.

1. IN GENERAL.**§ 22. Enactment.**

[a] (Iowa; 1895.)

Code 1873, § 493, requiring the yeas and nays to be called and reported on the passage and adoption of an ordinance by a city council, does not affect cities having special charters.—*Preston v. City of Cedar Rapids* (Iowa) 63 N. W. 577.

[b] (Iowa; 1895.)

Where the only provision regulating the voting on the passage of an ordinance by the council of a city under a special charter is a rule, adopted by the city, that "all votes taken on the adoption of ordinances shall be taken by the yeas and nays," it is sufficient for the record to show that all the aldermen voted for the ordinance.—*Preston v. City of Cedar Rapids* (Iowa) 63 N. W. 577.

[c] (Mich.; 1895.)

An ordinance otherwise regularly passed, approved, recorded, and published is not invalidated by the clerk's failure to certify thereon the time when it was presented to and returned by the mayor, as he is directed to do by How. Ann. St. § 2532.—*Boehme v. City of Monroe* (Mich.) 64 N. W. 204.

[d] (N. D.; 1896.)

The yeas and nays are not required to be taken on the passage, by a city council, of a resolution levying a general city tax, by Comp. Laws, § 880, declaring that they shall be taken "on all propositions to create any liability against the city, or for the expenditure or appropriation of its money."—*Shattuck v. Smith* (N. D.) 69 N. W. 5.

§ 23. — Approval by mayor.

(Minn.; 1896.)

Under Moorhead City Charter (Sp. Laws 1881, c. 28, as amended), all ordinances, resolutions, and by-laws of its city council, of a legislative nature, must, before they take effect, be approved by the mayor (or passed over his disapproval by a two-thirds vote, taken by yeas and nays, of the members of the council present and voting), and published in the official paper of the city.—*State v. Darrow* (Minn.) 67 N. W. 1012.

§ 24. Publication.

[a] (Iowa; 1895.)

Under a city charter requiring publication of ordinances, and the recorder to certify of record to the publication, "when the same shall have been published," the certificate of the recorder

need not show dates of publication.—*Preston v. City of Cedar Rapids (Iowa) 63 N. W. 577.*

[b] (*Neb.*; 1896.)

An ordinance hunting, in section 1, the rate of speed of railroad trains running through the city, and, in section 2, prescribing a penalty for a violation of section 1, is invalid as to both sections, unless published, as Comp. St. c. 14, § 51, requires penal ordinances to be published.—*Union Pac. Ry. Co. v. Montgomery (Neb.) 68 N. W. 619.*

[c] (*Neb.*; 1896.)

Under Comp. St. c. 14, § 51, requiring an ordinance carrying a penalty for a violation of its provisions to be published for at least one week in a newspaper, one publication of such an ordinance in the "Daily Stockman" is insufficient, in the absence of a showing that that paper was published but once a week.—*Union Pac. Ry. Co. v. Montgomery (Neb.) 68 N. W. 619.*

§ 25. Construction.

(*Mich.*; 1891.)

A village ordinance in one section provided that every assemblage of persons in any street or public place of said village, engaged in boisterous language or conduct, should be deemed a disorderly assemblage, and in the next section provided that any such assemblage in "any" place in said city should be deemed a disorderly assemblage. *Held*, that the scope of the latter section was not limited to the places enumerated in the former section.—*Village of Vicksburg v. Briggs (Mich.) 61 N. W. 1. 102 Mich. 551.*

§ 26. Ordinance partly invalid.

(*Wis.*; 1895.)

An ordinance attempting to amend the city charter so as to allow salaries to be paid to the mayor and aldermen, and to change the time for fixing salaries of officers for the ensuing year from March to the first meeting of the council in February, is void in all its parts, there having been no authority for the provision for salaries for mayor and aldermen, and it being clear that, but for such part, the provision for change of time for fixing salaries would not have been enacted.—*Gilbert-Arnold Land Co. v. City of Superior, 64 N. W. 999, 91 Wis. 333.*

§ 27. Effect of subsequent amendment of charter.

(*Mich.*; 1896.)

A city ordinance provided for the appointment of officers in the police department, and fixed their salaries. Afterwards, by an amendment of the city charter, control of the police department was transferred to a board of police commissioners, but the power to fix salaries still remained in the city council. *Held*, that the provisions of the ordinance as to salaries remained in force, and applied to officers appointed by the police commissioners.—*Ruell v. City of Alpena (Mich.) 66 N. W. 49.*

§ 28. Repeal.

(*Mich.*; 1896.)

An ordinance which covers the entire subject, and is passed "to revise an ordinance * * * as from time to time heretofore amended," repeals all prior ordinances and amendments upon the same subject not merged therein.—*City of Grand Rapids v. Norman (Mich.) 68 N. W. 269.*

2. SCOPE OF POWER TO LEGISLATE—
EXERCISE OF POLICE POWER.

§ 29. Exaction of license tax.

[a] (*Iowa*; 1895.)

A statute imposing a license on itinerant vendors of drugs and similar articles, applicable alike to articles produced within the state and those brought in original packages from an-

other state, is a valid exercise of the police power. *State v. Wheelock (Iowa) 61 N. W. 620.*

[b] (*Iowa*; 1895.)

An ordinance requiring transient merchants selling within the city to pay a license does not discriminate in favor of residents.—*City of Ottumwa v. Zekind (Iowa) 61 N. W. 616.*

[c] (*Iowa*; 1895.)

An ordinance requiring of transient merchants a license fee of \$250 per month, or \$45 per day, enacted under McClain's Code, § 621 (Code 1873, § 462), authorizing cities to "regulate and license" sales by transient merchants, is void, as exacting an unreasonable fee.—*City of Ottumwa v. Zekind (Iowa) 61 N. W. 646.*

[d] (*Iowa*; 1895.)

An ordinance requiring transient merchants to pay a license is not open to the objection of not being uniform in its operation, or of being class legislation.—*City of Ottumwa v. Zekind (Iowa) 61 N. W. 616.*

[e] (*Iowa*; 1896.)

An ordinance imposing annual license fees on the owners of conveyances run for hire, "for each two-horse wagon \$8; for each one-horse wagon, \$5; * * * for each omnibus, \$8; and for each hack or carriage, \$10;" and which exempts from its operation vehicles bringing produce to market, and those owned by livery men, but not kept on the street or other public place for hire,—is a reasonable exercise of the power conferred on cities by Code, § 463, to regulate, license, and tax every description of conveyances for hire.—*City of Burlington v. Unterkircher (Iowa) 68 N. W. 795.*

[f] (*Iowa*; 1896.)

Under Code, § 463, authorizing cities to regulate, license, and tax all conveyances for hire, an ordinance imposing an annual license fee "for each two-horse wagon or team, \$6; for each one-horse wagon, dray, or cart, \$4; for each hack, carriage, coach or omnibus, \$10;" and providing that "each vehicle used for passengers, not having an annual hack license, shall pay a license of \$1 per day,"—is reasonable and valid.—*City of Burlington v. Unterkircher (Iowa) 68 N. W. 795.*

[g] (*Iowa*; 1896.)

The reasonableness of an ordinance imposing license fees on a particular occupation is usually, if not always, a question for the court.—*City of Burlington v. Unterkircher (Iowa) 68 N. W. 795.*

[h] (*Iowa*; 1896.)

An ordinance imposing a license for "every vehicle or conveyance" which is "run" for hire or profit does not apply to a conveyance which is let without a driver, and is under the personal control of the hirer or his representative.—*City of Burlington v. Unterkircher (Iowa) 68 N. W. 795.*

[i] (*Iowa*; 1896.)

An ordinance imposing a license on "each vehicle used for passengers, not having an annual hack license," does not include hearses.—*City of Burlington v. Unterkircher (Iowa) 68 N. W. 795.*

[j] (*Iowa*; 1896.)

The word "carriage," as used in said ordinance, includes single-horse buggies; and annual licenses may therefore be charged for them, not the per diem license provided in the last clause.—*City of Burlington v. Unterkircher (Iowa) 68 N. W. 795.*

[k] (*Mich.*; 1895.)

Under a city charter providing that "the common council may require transient dealers to take out license before engaging in business," an ordinance providing that any person, not a resident, who shall bring into the city any goods to be sold by auction, without any intention of remaining permanently in the business, shall be deemed a transient trader, and shall pay a

license, is invalid, as it applies only to nonresidents.—*City of Saginaw v. McKnight* (Mich.) 63 N. W. 985.

[1] (Mich.; 1895.)

Requirements of an ordinance that a pawnbroker pay a yearly license of \$50, and give a bond for \$5,000, and that junk dealers and dealers in second-hand goods pay a \$25 license and give a \$2,000 bond, are not unreasonable.—*City of Grand Rapids v. Brady* (Mich.) 64 N. W. 29.

105 Mich. 670.

[m] (Mich.; 1895.)

Under a charter giving the city power to license and regulate hawkers and peddlers, an ordinance requiring peddlers to take out licenses may exempt from its operation mechanics of the state selling their own manufactured articles, and farmers selling the product of their own farms.—*People v. Sawyer* (Mich.) 64 N. W. 333.

[n] (Mich.; 1896.)

An ordinance relative to peddling and hawking in the streets, which authorizes the city council to fix the license therefor, in no case to exceed \$15 a day, is not unreasonable.—*City of Grand Rapids v. Normau* (Mich.) 68 N. W. 269.

[o] (Mich.; 1896.)

The amount to be paid for a license under the ordinance is not a tax.—*City of Grand Rapids v. Norman* (Mich.) 68 N. W. 269.

[p] (Minn.; 1895.)

A city ordinance providing for licensing "dealers in second-hand goods" includes dealers in second-hand furniture.—*State v. Segel* (Minn.) 62 N. W. 1134.

60 Minn. 507.

[q] (Minn.; 1895.)

Ordinance No. 766 of the city of St. Paul, which requires payment of \$150 for a license to conduct an intelligence or employment office "until the 1st day of January next following the date of the application," is void in toto, regardless of the time the license is issued, the fee charged being neither uniform nor equal.—*Moore v. City of St. Paul* (Minn.) 63 N. W. 1087.

61 Minn. 427.

[r] (Minn.; 1895.)

Ordinance No. 1799 of the city of St. Paul, providing for the licensing of retail dealers in fresh or butchers' meat and dressed poultry, and prohibiting all sales thereof, except in the public market, without a license, is valid.—*State v. McMahon* (Minn.) 64 N. W. 92.

62 Minn. 110.

§ 30. Conditions and limitations of license.

[a] (Mich.; 1895.)

A city authorized to license and regulate pawnbrokers, junk dealers, and dealers in second-hand goods, though not expressly authorized to revoke licenses, may provide as a condition precedent to the issue of a license that applicant shall agree that his license may be revoked at the will of the council.—*City of Grand Rapids v. Brady* (Mich.) 64 N. W. 29.

105 Mich. 670.

[b] (Mich.; 1895.)

Neither is it unreasonable to require them to keep a record of their purchases and sales, and to furnish a statement thereof to the police department.—*City of Grand Rapids v. Brady* (Mich.) 64 N. W. 29.

105 Mich. 670.

[c] (Mich.; 1895.)

Nor is it unreasonable to require that their applications for license be signed by 12 freeholders certifying to the good character and reputation of the applicant.—*City of Grand Rapids v. Brady* (Mich.) 64 N. W. 29.

105 Mich. 670.

4 N.W.DIG.—42

[d] (Mich.; 1895.)

So, too, it is not unreasonable to prohibit the licensee from purchasing from boys, intoxicated persons, or habitual drunkards.—*City of Grand Rapids v. Brady* (Mich.) 64 N. W. 29.

105 Mich. 670.

[e] (Minn.; 1895.)

Ordinance No. 759 of the city of St. Paul, providing that persons running employment or intelligence offices shall annually pay a certain license tax, is not rendered void by the fact that the city charter provides that all licenses shall expire on December 31st of each year.—*Moore v. City of St. Paul* (Minn.) 63 N. W. 1087.

61 Minn. 427.

§ 31. — To sell milk.

[a] (Minn.; 1896.)

Gen. Laws 1895, c. 203, authorizing cities to provide for the licensing and regulation of the sale of milk within their limits, authorizes a city to require that an applicant for license shall consent that the dairy herd from which he obtains milk may be inspected by the health commissioner of the city, although it is kept outside the city limits.—*State v. Nelson* (Minn.) 68 N. W. 1066.

[b] (Minn.; 1896.)

The requirement of an ordinance passed by a city under Gen. Laws 1895, c. 203, that an applicant for license to sell milk within the city shall consent, as a condition precedent to obtaining a license, that the animals from which he obtains milk shall be subjected to the "tuberculin test," is not unreasonable.—*State v. Nelson* (Minn.) 68 N. W. 1066.

§ 32. Prevention of disturbances.

[a] (Mich.; 1895.)

The city council of Detroit, authorized by its charter, § 35, to provide for the prevention of any disorderly noise or disturbance in the streets, is empowered to pass ordinances punishing the making of any disturbance by which the peace of the neighborhood is disturbed.—*In re Bushey* (Mich.) 62 N. W. 1036.

105 Mich. 64.

[b] (Mich.; 1896.)

A city ordinance providing that no person shall allow or permit any indecent, loud, or boisterous noise, or any fighting or other disturbance, in or about his house or tavern, inn, saloon, cellar, shop, office, or other residence or place of business, or permit drunkards or persons having the reputation or name of being prostitutes to congregate, visit, or remain therein, is unreasonable, as not limited in its application to such assemblages or to such places of business as are properly within police control, and consequently void.—*City of Grand Rapids v. Newton* (Mich.) 69 N. W. 84.

[c] (Wis.; 1897.)

Under an ordinance authorizing officers to arrest persons engaged in a breach of the peace without warrant, police officers can arrest without a warrant persons in a house who are making a disturbance, if the officers can hear the same from the outside.—*Hawkins v. Lutton* (Wis.) 70 N. W. 483.

§ 33. Regulating assemblages.

(Mich.; 1894.)

A city ordinance prohibiting boisterous assemblages in "any" place in the city is constitutional.—*Village of Vicksburg v. Briggs* (Mich.) 61 N. W. 1.

102 Mich. 551.

§ 34. Building regulations.

[a] (Wis.; 1895.)

Under Laws 1874, c. 184, subc. 4, § 3, authorizing the council of Milwaukee "to control and regulate the construction of buildings," "to prevent and prohibit the erection or maintenance of any insecure and unsafe buildings," "to

control and regulate streets," "to prevent the encumbering of streets and alleys," that body can provide that any person constructing a building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building, on the sidewalk.—*Smith v. Milwaukee Builders' & Traders' Exchange*, 61 N. W. 1041, 91 Wis. 360.

[b] (Wis., 1895.)

An ordinance requiring that "any owner or contractor who shall build or cause to be built" any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building, on the sidewalk, is reasonable.—*Smith v. Milwaukee Builders' & Traders' Exchange*, 61 N. W. 1041, 91 Wis. 360.

3. ENFORCEMENT.

§ 35. How prosecution instituted.

(Minn., 1895.)

A city may provide that no prosecution for violation of an ordinance shall be commenced except on complaint of a police officer of the city.—*State v. Rolditshek* (Minn.) 61 N. W. 1023, 60 Minn. 123.

§ 36. Sufficiency of complaint.

[a] (Mich., 1895.)

A complaint, under an ordinance providing for the punishment of any person who shall make any disturbance by which the peace of the neighborhood is disturbed, alleging that defendant is a "disorderly person, for that said defendant was disturbing the peace, contrary to the form of the ordinance," etc., is sufficient, as the words "disorderly person" will be treated as surplusage.—*In re Bushey* (Mich.) 62 N. W. 1036.

105 Mich. 64.

[b] (S. D., 1896.)

A complaint for violation of a city ordinance making it a criminal offense "to keep" for sale at retail specified articles, including "light drinks of various kinds to be drank upon the premises," without a license, which sufficiently lays the venue, and charges that defendant, on the 1st day of a certain month, and "on divers and sundry other days during said month," kept the articles specified in the ordinance for sale within the city, "county, and state aforesaid," without first having obtained a license, is sufficient, the averment "on divers and sundry other days during said month" being rejected as surplusage; and it was unnecessary to aver specific sales of the articles, or that the light drinks were drank upon the premises.—*City of Deadwood v. Allen* (S. D.) 67 N. W. 835.

§ 37. Punishment.

(S. D., 1896.)

Where the city charter conferred power to impose fines and penalties for breach of ordinances, and, in default of payment thereof, to provide for confinement in the city prison, the council could pass an ordinance imposing a penalty of fine and imprisonment for violation of an ordinance prohibiting tippling shops.—*City of Yankton v. Douglass* (S. D.) 66 N. W. 923.

IV. OFFICERS AND AGENTS.

Duty of treasurer to pay warrants, see post, § 177.

Liability of city for acts of officers, see post, §§ 72, 73.

Power to alter contracts of city, see post, § 67.

—make contracts, see post, §§ 64, 65.

Constitutionality of act affecting, see "Constitutional Law," § 68.

Contest of city election, see "Elections and Voters," §§ 26, 28.

Delegation of legislative power to park commissioners, see "Constitutional Law," § 13.

Mandamus to municipal boards and officers, see "Mandamus," §§ 15–20.

1. IN GENERAL.

§ 38. Power to elect or appoint.

[a] (Mich., 1895.)

Act Feb. 27, 1895, creating a board of health for the city of Detroit, is not in conflict with Const. art. 15, § 11, providing that "judicial officers of cities and villages shall be appointed at such time and in such manner as the legislature may direct," in that it vests the appointment of the members of the board in the governor; as, by the terms of the act, allowing it to prohibit intercourse between the city and any town declared by the state board of health to be infected with contagious disease, the legislature makes the city its agent to prevent disease.—*Davock v. Moore* (Mich.) 63 N. W. 424.

105 Mich. 120.

[b] (Mich., 1896.)

The general act for the incorporation of cities (Laws 1895, Act No. 215), c. 5, § 2, provides that "in each ward a supervisor * * * shall be elected." Chapter 7, § 26, provides that such officers shall represent their several wards on the board of supervisors of the county. Chapter 31, § 1, under the title "Assessment and Collection of Taxes," requires the supervisors to make a complete assessment, etc., and provides that any incorporated city, which shall become reincorporated under the act, having an assessor, "may retain its present method of assessing property and levying taxes," and such assessor shall remain in office until the expiration of his term. *Held*, that the proviso of chapter 31, § 1, is merely permissive, and that a city reincorporated under Act No. 215 is entitled to elect supervisors in its various wards.—*Ostrand v. Board of Sup'rs of Gratiot County* (Mich.) 63 N. W. 91.

§ 39. Appointment of officers by mayor and council.

[a] (Mich., 1895.)

How, Anr. St. § 2643, provides that there shall be a board of assessors in every city, to be appointed by the council. *Held*, that the council could properly appoint the assessors by ballot, instead of a vote by ayes and nays.—*Boehme v. City of Monroe* (Mich.) 64 N. W. 204.

[b] (Mich., 1895.)

An amended city charter, approved July 2, 1891, and ordered to take effect immediately, provided for a board of police commissioners to be appointed after the election in April, 1892, before May 1st, to which should be committed the appointment of a marshal and the control of the police department. *Held* that, till the board was appointed, the council had power, as before the amendment, to appoint and remove a marshal.—*Grant v. City of Alpena* (Mich.) 65 N. W. 230.

[c] (Minn., 1896.)

Under Duluth Charter, c. 9, § 103, providing for the appointment of a city assessor by the mayor, with the consent of the common council, who shall hold office for two years, the confirmation by the council of the mayor's appointment of the assessor exhausts its power in the matter, and hence it cannot reconsider its action therein.—*State v. Wadhams* (Minn.) 67 N. W. 64.

64 Minn. 318.

§ 40. Appointment of committee.

[a] (Iowa, 1897.)

The judiciary committee of a city council without authority employed assistant counsel in an action against the city. The employment was reported to the city council and dis-

approved. The attorney then made out his bill against the city for retainer and services under such employment, for \$150. The bill was approved by the committee on claims, and reported. At the next meeting of the council a motion was passed to allow all bills, "except the bill of C. [the attorney], and that C. be allowed \$25 in full payment of claim." *Held*, that there was not a ratification of C.'s employment.—*Caswell v. City of Marshalltown (Iowa)* 70 N. W. 717.

[b] (Iowa; 1897.)

The fact that acts of the judiciary committee of a city council, in employing assistant counsel for the city, have been several times approved and ratified by the council, does not establish a custom binding on the city, where an ordinance expressly provides that such employment shall be "at the discretion of the mayor or city council."—*Caswell v. City of Marshalltown (Iowa)* 70 N. W. 717.

[c] (Minn.; 1895.)

Since the word "charter," as used in Sp. Laws 1891, c. 6, § 1, includes all laws relating to municipal affairs, the president of the assembly of the city of St. Paul may, under that act, annually appoint the three members of the common council authorized on such appointment to serve as members of the courthouse and city hall committee created by Sp. Laws 1889, c. 64.—*State v. Ermentraut (Minn.)* 63 N. W. 251.

§ 41. Appointment by board of public works.

(Iowa; 1896.)

Acts 22d Gen. Assem. c. 1, §§ 9, 13, declaring that the board of public works shall take charge of the construction, repairing, and superintendence of streets and public places, and shall have power to appoint agents and employes absolutely necessary for the doing of the work of said board, "but such agents or employes shall be actually engaged in the construction of the public works of such city, and shall not include any assistants, superintendents, bookkeepers or secretaries, but said last named offices shall be filled and duties performed by said board," do not prohibit the board's appointing one with power to hire and discharge men, and to direct the prosecution of the work.—*Hathaway v. City of Des Moines (Iowa)* 66 N. W. 188.

§ 42. Election of constables.

(Mich.; 1895.)

Const. art. 11, § 1, providing that constables shall be elected in organized townships, does not apply to cities.—*White v. Board of Suprs of Manistee County (Mich.)* 63 N. W. 653.

105 Mich. 608.

§ 43. Qualifying for office.

(Minn.; 1896.)

The provision of the Duluth charter that every officer elected thereunder shall, before entering upon the duties of his office, subscribe an oath, and file the same with the city clerk, within 10 days after his election, must be construed in subordination to the provision of the charter providing that the city assessor shall qualify in the manner and discharge the duties prescribed by the general law; so that the city assessor of Duluth, complying with the state law in regard to his qualification, need not file his oath with the city clerk.—*State v. Wadhams (Minn.)* 67 N. W. 64.

64 Minn. 318.

§ 44. Tenure.

[a] (Iowa; 1896.)

Code, § 509, provides that a town, on becoming a city of the second class, shall, at the regular annual election of municipal officers, elect the officers to which its new grade entitles

it, and that, on their election and qualification, the term of any former officer shall expire. Prior to 1886 mayors of second-class cities were elected annually. Acts 21st Gen. Assem. c. 141, provides that the terms of mayors, etc., of second-class cities, should thereafter be two years, and that the first election under the act should be held on the first Monday in March, 1887. *Held*, that on a town becoming a city of the second class in an even-numbered year, subsequent to Acts 21st Gen. Assem. c. 141, and prior to the annual election in such year, it was entitled to elect at such annual election a mayor for a term of two years.—*State v. Wymen (Iowa)* 66 N. W. 786.

[b] (Iowa; 1896.)

Acts 22d Gen. Assem. c. 1, provides that in every city containing 30,000 inhabitants a board of public works shall be established, consisting of two members, to be appointed by the mayor, one for a term of two and the other for a term of three years, to hold office until their successors are duly appointed and qualified; that their successors shall be appointed for three years; and that the mayor shall fill all "vacancies" in said board by appointment. *Held*, that the terms of office began when the first appointments were made, and ended, one in three, and the other in two, years, and the terms of office of subsequent incumbents terminated every three years, dating, respectively, from the termination of the term of office of the original incumbents.—*Sherman v. City of Des Moines (Iowa)* 69 N. W. 410.

[c] (Iowa; 1896.)

Act 23d Gen. Assem. (March 13, 1890), for the extension of the limits of certain cities provides (section 5), for elections biennially of "all elective officers for terms and in manner provided by law for cities of the first class," that "said officers" shall qualify as provided by law, and that the terms of office of "all officers in office prior to said election shall cease and determine upon the organization of the new city council so elected"; and by section 6 all acts and parts of acts inconsistent with it are repealed. *Held*, that all these provisions apply only to elective officers.—*Sherman v. City of Des Moines (Iowa)* 69 N. W. 410.

[d] (Wis.; 1897.)

The charter of Oshkosh (Laws 1891, c. 59, subc. 4, § 9) provides for the election by the common council of a constable, who shall hold office for two years. Section 19 declares that any alderman, when elected by the council, may become a constable, but "when such person shall cease to be an * * * alderman he shall cease to be a constable." *Held* that, when an alderman is elected constable, his term extends for two years only, and expires within that time if he ceases to be an alderman.—*State v. McKone (Wis.)* 70 N. W. 161.

§ 45. Removal and discharge.

[a] (Mich.; 1896.)

Under an ordinance providing that, when assistance is necessary in the office of the receiver of taxes, he shall apply to the common council, and such assistants shall receive such compensation as the common council shall prescribe, an assistant, appointed by the receiver and confirmed by the council, is not an employé by the year, and the receiver has power to discharge him.—*Osborne v. Common Council of City of Detroit (Mich.)* 69 N. W. 644.

[b] (Wis.; 1895.)

Superior City Charter (Laws 1891, c. 124) § 21, providing that "every officer elected or appointed to any office, except watchmen, policemen and firemen," may be removed by a vote of three-fourths of all the members of the council, when charges are preferred against him, includes the mayor, notwithstanding the seeming inconsistency of another clause, which declares that "the mayor may suspend any officer against whom charges have been preferred, until the disposition of the same."—

State v. Common Council of City of Superior 64 N. W. 301, 90 Wis. 612.

§ 46. — By council.

[a] (Neb.; 1897.)

Comp. St. 1895, c. 13a, §§ 21, 28, providing that the mayor and council of a city of a designated class can provide for removing officers of such city for misconduct, does not clothe the council with power to remove the mayor.—*Stahlhut v. Bauer* (Neb.) 70 N. W. 496.

[b] (Wis.; 1895.)

Under the power given to the Superior city council by its charter (Laws 1891, c. 124) § 21, to hear and determine charges against a city official, and remove him for cause, the fact that one alderman signed the charges on which the mayor is to be tried, and that another will discharge the mayor's duties in case the latter is removed, does not disqualify such members from sitting in the case, nor render the proceedings void.—*State v. Common Council of City of Superior*, 64 N. W. 301, 90 Wis. 612.

[c] (Wis.; 1895.)

The proceedings before the council for the removal of a city official, under Superior City Charter (Laws 1891, c. 124) § 21, are not invalid because the witnesses were sworn by the chairman of the committee of the whole, sitting under the authority of the council for the purpose of taking evidence on the charges, nor because the aldermen did not take a special oath.—*State v. Common Council of City of Superior*, 64 N. W. 301, 90 Wis. 612.

[d] (Wis.; 1895.)

An investigation by a city council into the official conduct of a city officer is not governed by the strict rules of criminal trials at law, and, though the charge is not drawn with the precision of an indictment, it is sufficient if it acquaints defendant with the substance of the accusation against him.—*State v. Common Council of City of Superior* (Wis.) 64 N. W. 304, 90 Wis. 612.

[e] (Wis.; 1895.)

On the trial of a mayor before the city council for official misconduct, it was shown that the chiefs of the fire and police departments, with the approval of the mayor, who was, under the charter, head of such departments, solicited the firemen and policemen for contributions to reimburse the mayor for campaign expenses, and collected large sums, which were turned over to that official. Held to justify the removal of the mayor from office.—*State v. Common Council of City of Superior* (Wis.) 64 N. W. 304, 90 Wis. 612.

§ 47. Compensation.

[a] (Minn.; 1895.)

One whose appointment as policeman was invalid because of his ineligibility could not collect his salary as policeman for a period during which he was not actually in the office and was performing none of its duties.—*Yorks v. City of St. Paul* (Minn.) 64 N. W. 565. 62 Minn. 250.

[b] (Minn.; 1896.)

Sp. Laws 1883, c. 2, § 13, relating to the salary of the city engineer of St. Paul, repealed all prior laws giving the common council of that city power to reduce the salary of such officer, and a resolution subsequently made by that body purporting to reduce the engineer's salary was consequently void.—*Rundlett v. City of St. Paul* (Minn.) 66 N. W. 967. 64 Minn. 223.

§ 48. — Town marshal.

[a] (Wis.; 1895.)

Rev. St. § 843, providing that a town marshal shall receive from the county "all necessary disbursements actually made," does not entitle him to recover for the use of his own vehicle in conveying prisoners.—*McCumber v. Waukesha County*, 65 N. W. 51, 91 Wis. 412.

[b] (Wis.; 1895.)

As no specific fee is provided for the written return of service by a town marshal on warrants, subpoenas, and venires, he is entitled to no compensation therefor.—*McCumber v. Waukesha County*, 65 N. W. 51, 91 Wis. 412.

[c] (Wis.; 1895.)

Rev. St. § 4188, making it compulsory on persons to render assistance to town marshals making arrests when called on, does not make a marshal personally liable for such assistance, and therefore he cannot recover from the county for expenditures to persons for assisting him in making arrests.—*McCumber v. Waukesha County*, 65 N. W. 51, 91 Wis. 412.

§ 49. — Recovery from county.

(Mich.; 1895.)

Under a city charter providing that police officers when employed in the service of process shall receive the same fees as constables, a policeman who arrests persons charged with offenses against the state, under warrants issued by a justice of the peace, is entitled to compensation therefor from the county, though a city ordinance fixes the pay of police officers, and he has received his full pay from the city.—*White v. Board of Sup'rs of Manistee County* (Mich.) 63 N. W. 653. 105 Mich. 608.

§ 50. Change of compensation.

(Mich.; 1895.)

A council empowered to fix the compensation of municipal officers, provided only that the salary of no officer shall be diminished during the term for which he is elected or appointed, may, after appointment of an officer, but before commencement of his term, fix his salary at less than the amount received by the incumbent for the preceding term.—*Wesch v. Common Council of City of Detroit* (Mich.) 64 N. W. 1051.

2. POLICE DEPARTMENT.

§ 51. Dismissal of policeman.

(Mich.; 1895.)

A city police board, authorized to dismiss policemen summarily and on conviction of misconduct, on complaint for certain misconduct, cannot, on acquittal thereof, adjudge the policeman guilty of other misconduct, and direct his dismissal. *Grant and Hooker, J.L., dissenting.*—*Wilkinson v. Board of Police Com'rs of City of Saginaw* (Mich.) 65 N. W. 668.

§ 52. Reinstatement.

[a] (Mich.; 1897.)

A police officer who is improperly removed is not entitled to be reinstated, where he is regularly removed before he commences proceedings for reinstatement.—*Michelson v. Police Com'rs, etc., of City of Saginaw* (Mich.) 70 N. W. 142.

[b] (Mich.; 1897.)

Under the charter of a city providing that police officers "for the time engaged in active service" shall be paid, etc., a police officer who is improperly removed, and afterwards reinstated, is not entitled to compensation pending reinstatement.—*Wilkinson v. City of Saginaw* (Mich.) 70 N. W. 142.

V. MARKETS.

As nuisance, see "Nuisance," § 4.

Exemption from taxation, see "Taxation," § 20.

§ 53. Necessity.

(Iowa; 1895.)

The action of the city council in establishing a market and weighing place under the authority conferred by Code, § 456, cannot be

questioned upon the ground that there is no necessity therefor.—*Miller v. City of Webster City* (Iowa) 62 N. W. 648.

VI. CONTROL OF STREETS AND ALLEYS.

§ 54. Prohibition of fast driving.

(Minn.; 1896.)

An ordinance prohibiting driving on the streets at a greater rate of speed than six miles an hour is, as to members of a salvage corps, organized under Gen. Laws 1895, c. 178, § 1, for the purpose of responding to an alarm of fire sent to their station from the headquarters of the fire department, unreasonable and invalid.—*State v. Sheppard* (Minn.) 67 N. W. 62.

64 Minn. 287.

§ 55. Use of streets for railway purposes and grants to railroads.

[a] (Minn.; 1896.)

The "care, supervision, and control" of public highways within the city limits given the common council of St. Paul by the city charter did not authorize the council to grant a railway company the right to construct and maintain a freight house on a public levee for its own use exclusively.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.* (Minn.) 65 N. W. 649. 63 Minn. 330.

[b] (Minn.; 1896.)

The provision of the St. Paul charter that the common council shall have authority to grant the right of way upon any of the public levees of the city to any railway company, on such conditions as it may prescribe, did not authorize the grant of the right to use such grounds as a site for freight houses or other buildings.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.* (Minn.) 65 N. W. 649.

63 Minn. 330.

[c] (Minn.; 1896.)

Gen. St. 1878, c. 34, § 47, providing that if it becomes necessary, in the location of any part of a railroad, to occupy any public way, it shall be competent for the municipal authorities and the railroad company to agree on the manner and conditions on which the same may be used, does not authorize such authorities to grant to a railroad company the right to use streets or public ways as sites for depots, freight houses, or other like structures.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.* (Minn.) 65 N. W. 649.

63 Minn. 330.

VII. CONTRACTS.

Bonds, see post, §§ 179-184.

Disregarding vote of people, see post, § 194.

For public improvements, see post, §§ 124-126.

Limitation of indebtedness, see post, §§ 170, 171.

Power to convey city property, see ante, § 10.

With water company, see "Water Companies," § 1.

Interest on claim for work under sewer contract, see "Interest," § 5.

§ 56. Validity in general.

[a] (Mich.; 1895.)

An order remanding a convicted felon to the city lockup to await sentence, being void, cannot form the basis of a contract to furnish the convict board while confined in that place.—*Tucker v. Common Council of City of Grand Rapids* (Mich.) 62 N. W. 1013.

104 Mich. 621.

[b] (Minn.; 1895.)

A contract made by the joint committee created by Sp. Laws 1889, c. 64, to take charge

of the city hall and courthouse of the city of St. Paul and county of Ramsey, for lighting that building for three years, was valid so far as executed by the furnishing of light.—*State v. McCurdy* (Minn.) 64 N. W. 1135.

62 Minn. 509.

§ 57. Grant of special or exclusive privileges.

(Neb.; 1895.)

The doctrine that monopolies are odious, and therefore illegal, has reference to such franchises and agreements as tend to restrict trade, and has no application to mere police regulations by a city in the interest of public health.—*Coombs v. MacDonald*, 62 N. W. 41, 43 Neb. 632.

§ 58. Powers with regard to construction of building.

(Wis.; 1895.)

Under Laws 1891, c. 93, § 10, giving the board of public works power, "by and under the direction of the common council," to enter into contracts for the work of constructing a library and museum building, the common council should determine the kind of building to be constructed, and procure plans therefor.—*Koch v. City of Milwaukee*, 62 N. W. 918, 89 Wis. 220.

§ 59. Furnishing water to inhabitants—Repair of pipes.

(N. D.; 1894.)

Where the system of city waterworks does not include the lateral service pipes, such pipes are owned and must be kept in repair by the persons who make connections, and the city is justified in severing the connection on such owner's refusal to pay the expenses of repairing a break in a service pipe in the street near the main pipe, though his water tax has been paid for a longer period.—*Jackson v. City of Ellendale* (N. D.) 61 N. W. 1030.

4 N. D. 478.

§ 60. Bond taken from public contractor—Right of third person to sue.

[a] (Mich.; 1895.)

One who supplies a contractor with brick for a public building is not a subcontractor, but a material man, and hence entitled to the benefit of Pub. Acts 1885, No. 45, requiring a contractor on a public building to furnish a bond for payment for materials.—*Staffon v. Lyon* (Mich.) 62 N. W. 354.

104 Mich. 249.

[b] (Mich.; 1896.)

That curbstone was furnished a contractor having a contract for the improvement of a street for a "lump sum," does not render the person furnishing the material a subcontractor instead of material man, and thereby prevent his recovery on the contractor's bond, conditioned for payment of claims of material men.—*People v. Powers* (Mich.) 66 N. W. 215.

§ 61. Construction of contract—For sewer.

[a] (Mich.; 1895.)

In a contract for a sewer, according to certain plans, "from river to north line of S. street," the city agreed to pay for labor and materials "the sum of \$14.49 per lineal foot." The plans showed transverse sections through the sewer, and such sections showed two cylinders, each 6' 8" in diameter, with concrete between. A portion of the sewer was a single cylinder, 9 feet in diameter. At the foot of the plans was noted, "Length of sewer and dock, 2,568 feet," giving different sizes of several cylinders. *Held*, that the contract provided for payment of \$14.49 per lineal foot, and that each cylinder could not be treated as a distinct sewer.—*Campau v. City of Detroit* (Mich.) 64 N. W. 336.

[b] (Mich.; 1895.)

The contract and specifications for a sewer provided that the work should be prosecuted in such order and at such places as the board of public works might direct; that the excavations be made to depths shown on profile and plans on file, of such widths and in such directions as might be necessary; that any work required to be done that was not specified should be done in accordance with the directions of such board; and that the contractor should make any alterations in the form, dimensions, or materials directed in writing by such board. *Held*, that such contract did not authorize any substantial change in the plans as to the course or location of the sewer by such board or the superintendent without the approval of the council.—*Campau v. City of Detroit* (Mich.) 64 N. W. 336.

§ 62. — With gas company.**[a] (Iowa; 1895.)**

A city by ordinance contracted to use gas furnished by plaintiff for 10 years, provided that at any time after 3 years from adoption of the ordinance the city council might order the discontinuance of all or any street lamps within the "business section" of the city, and substitute electric lights therefor without liability for lamps so discontinued. *Held*, that the words "business section" meant that part of the city which was chiefly devoted to business purposes and in which stores, factories, offices, shops, and the like predominated, in contradistinction to those parts chiefly used for resident and dwelling purposes, or which were vacant or unoccupied.—*Capital City Gaslight Co. v. City of Des Moines* (Iowa) 61 N. W. 1066.
93 Iowa, 547.

[b] (Iowa; 1895.)

A city ordinance bound the city to use for 10 years gas furnished by plaintiff for public buildings and street lamps, and provided that, if at any time after 3 years the city council shall deem it expedient or economical to light the public buildings or any portion of the business section of the city by electric light, it "may order the discontinuance of all or any of the lamps along the streets in said business section or in the public buildings." A further clause provided that the council, if it saw fit to discontinue "a portion of the public lamps now in existence, may order the same discontinued temporarily or permanently," without liability therefor. *Held*, that after the three years had expired the city could discontinue any gas lamps in the business section, and substitute electric lights therefor, and that it could discontinue lamps situated in any part of the city, but could not discontinue those outside of the business section, for the purpose of substituting electric lights or any other kind of street lights.—*Capital City Gaslight Co. v. City of Des Moines* (Iowa) 61 N. W. 1066.
93 Iowa, 547.

§ 63. Authority of city hall and courthouse committee.**(Minn.; 1895.)**

The joint committee created by Sp. Laws 1889, c. 64, has entire charge of the city hall and courthouse of the city of St. Paul and county of Ramsey, and has authority to contract for heating and lighting the same.—*State v. McCarty* (Minn.) 64 N. W. 1133.
62 Minn. 509.

§ 64. Power of police commissioners.**(Mich.; 1895.)**

A city charter authorized the police commissioners to provide for the preservation of the public peace, prevention of crime, and arrest of all offenders against the city, but provided that they should not incur any indebtedness, nor enter into any contract not included in the estimate for the fiscal year, unless specially authorized by the council. It also provided that

the board should certify claims against the city. *Held*, that the council could not be compelled to pay an indebtedness not included in the estimated yearly expenses, and arising out of an unauthorized agreement by the commissioners to pay the board of one who was waiting to testify in a murder case, and of a convicted felon remanded to the city lockup under suspended sentence to await said trial, so as to testify thereat.—*Thacker v. Common Council of City of Grand Rapids* (Mich.) 62 N. W. 1013.
104 Mich. 621.

§ 65. Ratification and estoppel.**[a] (S. D.; 1895.)**

Where a city has not appropriated the money paid to its treasurer as the purchase price of an unauthorized sale by the city of its waterworks, *held*, that the receipt of the money by the treasurer does not estop the city from recovering the property without repayment of such money.—*Huron Waterworks Co. v. City of Huron* (S. D.) 62 N. W. 975; *Myers v. Same*, *Id.*

[b] (S. D.; 1896.)

When a city has not appropriated money paid its treasurer as the price of an unauthorized sale of its waterworks, the receipt thereof by the treasurer does not estop the city from recovering the property without repayment of the money.—*Huron Waterworks Co. v. City of Huron* (S. D.) 65 N. W. 816.

[c] (Wis.; 1895.)

Where the common council had the original authority to provide for the procurement of plans and specifications for a building, it may ratify the unauthorized act of another in procuring such plans, and provide for paying the reasonable cost of their procurement.—*Koch v. City of Milwaukee*, 62 N. W. 918, 89 Wis. 220.

§ 66. Bids and letting contracts—Advertising for bids and letting to lowest bidder.**[a] (Mich.; 1895.)**

The Saginaw city charter (title 13, § 3) provides that the board of public works "shall advertise for proposals for the furnishing of material," etc. *Held*, that where the advertisement did not appear until two days after the time fixed for the first publication, but the board received the proposals, there was a sufficient compliance with the charter.—*Duffy v. City of Saginaw* (Mich.) 64 N. W. 581.

[b] (Mich.; 1896.)

Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under a contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city, to recover the profits which might have been made had his bid been accepted.—*Talbot Pav. Co. v. City of Detroit* (Mich.) 67 N. W. 979.

[c] (S. D.; 1896.)

The duty of county commissioners intrusted with the letting of contracts for county supplies to the lowest responsible bidder is not merely a ministerial one, but they must carefully consider the terms of each bid, and their judgment in letting a contract cannot be controlled by mandamus.—*In re McCain* (S. D.) 68 N. W. 163.

§ 67. Power to alter contracts.**(Mich.; 1895.)**

The Detroit city charter provides that no contract shall be made for any public work, unless approved by the council, and all contracts for public works, where the expense exceeds \$200, shall be let to the lowest bidder, and authorizes the board of public works to contract with such bidder for sewers, and to supervise the construction. *Held*, that such board, or the superintendent, has no authority, without the approval of the council, to make any material change in the plans of a sewer

contract made with such city.—*Campau v. City of Detroit* (Mich.) 64 N. W. 336.

§ 68. Recovery of money paid under mistake.

(Minn.; 1895.)

Where a contract for city paving provided that no charge should be made for extra work except on the order of the engineer approved by the council, and extra work was performed without such formality, and paid for by the city through mistake of the engineer in including it in the number of yards of paving laid under the contract proper, the city may recover the excess so paid.—*City of Duluth v. McDonnell* (Minn.) 63 N. W. 727.
61 Minn. 288.

§ 69. Recovery for part performance.

(Minn.; 1895.)

Where a city receives the benefit of a part performance of a contract by a water company to furnish water, with knowledge of non-performance of the residue, it cannot insist on full performance as a condition precedent to liability for benefits received.—*Sykes v. City of St. Cloud* (Minn.) 62 N. W. 613.
60 Minn. 442.

§ 70. Injunction against enforcement.

(Neb.; 1895.)

Where a strip of ground surrounding a public park was conveyed to the city by owners of land outside of and abutting on the strip, on condition that the grantee should improve the strip as a street, and forever keep it in repair at its own expense, an injunction would issue at the instance of the abutting owners and those claiming under them to restrain the city from enforcing against the abutting property or the owners thereof the cost of improving or keeping in repair any part of the street.—*City of Omaha v. Mcgeath*, 64 N. W. 1091, 46 Neb. 502.

VIII. LIABILITY FOR TORTS AND NEGLIGENCE OF DUTY.

Presentment of claim as condition precedent to right to sue, see post, §§ 197, 198.

Liability for defects in bridges, see "Bridges," § 4.

1. IN GENERAL.

§ 71. Performance of governmental functions.

[a] (Mich.; 1896.)

The council of a city, in which a sewer was needed to protect the public health, granted to plaintiff, in writing, the right to lay a sewer in certain streets, and to connect the same with the premises of lot owners who might contract with him for such connections; the work to be done under the supervision of the city, but at the grantee's expense, and for his private gain. After the sewer was constructed, an ordinance was passed prohibiting persons from connecting with any private sewer laid in the streets without first obtaining permission from the council, and plaintiff was arrested for subsequent violation of the ordinance. *Held*, that an action at law to recover damages would not lie, the ordinance having been passed and enforced by the council, in the exercise of its governmental power, but that plaintiff's remedy was by some proceeding to restrain interference with his vested rights.—*Stevens v. City of Muskegon* (Mich.) 69 N. W. 227.

[b] (Wis.; 1896.)

A city is not liable for injuries caused by the board of public works in disposing of the garbage from the city.—*Kuehn v. City of Milwaukee* (Wis.) 65 N. W. 1030.
92 Wis. 263.

§ 72. Acts of officers.

(Minn.; 1897.)

A county which authorizes or ratifies an unlawful official act of its commissioners is liable for damages caused by the act.—*Schuessler v. Board of Com'rs of Hennepin County* (Minn.) 70 N. W. 6.

§ 73. Wrongful arrest or imprisonment.

(Minn.; 1895.)

A municipal corporation is not liable for the wrongful acts of its police officers in making arrests and detaining prisoners.—*Gullikson v. McDonald* (Minn.) 64 N. W. 812.
62 Minn. 278.

§ 74. Management of drawbridge.

[a] (Wis.; 1895.)

Where a city maintains a drawbridge as part of a street, and it fails to make the bridge reasonably safe by providing barriers or lights to prevent accidents when the draw is open, it is liable for injuries to one using the street who, through the want of such lights or barriers, walks into the river while the draw is open.—*Stephani v. City of Manitowoc* (Wis.) 62 N. W. 176, 89 Wis. 467.

[b] (Wis.; 1895.)

It is no defense to an action for injuries to one by falling into the river while a drawbridge was open that the city employed a competent bridge tender.—*Stephani v. City of Manitowoc*, 62 N. W. 176, 89 Wis. 467.

§ 75. Defective jail.

(Minn.; 1895.)

A municipal corporation is not liable for negligently maintaining its lockup in a defective condition, whereby a prisoner was injured.—*Gullikson v. McDonald* (Minn.) 64 N. W. 812.
62 Minn. 278.

§ 76. Tort committed in making improvements.

(Mich.; 1895.)

Where a contractor, in paving a street, unnecessarily deposits earth upon an abutting lot, the contractor, and not the city, is liable to the owner of the lot.—*Fuller v. City of Grand Rapids* (Mich.) 63 N. W. 539.
105 Mich. 529.

2. DEFECTIVE STREETS AND SIDEWALKS.

Notice of claim on account of defective street, condition precedent to right to sue, see post, § 198.

§ 77. Degree of care required.

[a] (Mich.; 1896.)

In an action against a city for injuries due to a defective sidewalk it was not error to refuse to charge that a city with 300 miles of sidewalk would not be held to as great diligence in caring for its walks as a small village would be.—*Moore v. City of Kalamazoo* (Mich.) 66 N. W. 1089.

[b] (Minn.; 1897.)

A city is under no obligation to light its streets, where they are safe for travel the whole width, unless the duty to do so is imposed by its charter.—*McHugh v. City of St. Paul* (Minn.) 70 N. W. 5.

[c] (Neb.; 1897.)

An instruction that a city must keep its streets reasonably safe for travel by "all" persons is not objectionable as excluding the question of contributory negligence.—*City of Ord v. Nash* (Neb.) 69 N. W. 964.

[d] (Neb.; 1897.)

A city must keep its sidewalks in a reasonably safe condition for travel by night as well as by day.—*City of Ord v. Nash* (Neb.) 69 N. W. 964.

[*Id.* (Neb.: 1897.)]

A city, by grading or improving a portion of a street to induce public travel thereon assumes the duty of keeping it in proper repair.—*City of Ord v. Nash* (Neb.) 69 N. W. 964.

[*Id.* (Neb.: 1897.)]

A city must exercise reasonable care and diligence in keeping a street in a safe condition for travel, though the street is not frequently used by the public.—*City of South Omaha v. Powell* (Neb.) 70 N. W. 391.

§ 78. Children playing in street.

(Mich.: 1895.)

A city is not liable for injuries to a minor of five years, who, after climbing upon a platform and playing with an appliance, fell into an excavation made by a contractor for the purpose of constructing a sewer, where that part of the street was closed against travel and guarded against accident to persons in the ordinary use of the street.—*Hamilton v. City of Detroit* (Mich.) 63 N. W. 511.

105 Mich. 514.

§ 79. Negligence of abutting owner.

[*a*] (Neb.: 1896.)

A city notified a lot owner to construct a sidewalk within a time specified, and that in default of his so doing it would build the walk and assess the cost to the lot. The owner did nothing within the time specified, but afterwards without the knowledge of the city, proceeded to build the walk, and for that purpose deposited flagstones in the street, and left them there without signals. The night following, plaintiff was injured by coming in contact with the obstruction. *Held*, that the notice given the owner to build the walk was merely a license to do so in the time specified; that the owner, in the construction of the walk after the license had expired, was not acting as agent, or licensee, but was a mere trespasser in the streets; and that, as the city had no knowledge that he had done anything towards constructing the walk before the injury, it was not liable.—*Davis v. City of Omaha* (Neb.) 66 N. W. 859.

47 Neb. 836.

[*b*] (Wis.: 1895.)

The mere fact that the charter made it the duty of the aldermen of a city to keep the sidewalk in repair, and free from obstructions, at the expense of the abutting owner, in case the owner failed to do so, did not make such owner primarily liable.—*Fife v. City of Oshkosh* (Wis.) 62 N. W. 541, 89 Wis. 510.

[*c*] (Wis.: 1895.)

Laws 1891, c. 160, sube. 12, providing that the council may order the construction of sidewalks by abutting owners (section 1), and making it the duty of such owners to keep sidewalks free from obstructions (section 2), and Laws 1889, c. 471, providing that, where a city is liable for injuries from defective sidewalks, any person whose negligence causes the defect shall be primarily liable, do not make a lot owner primarily liable for injury caused by defective sidewalks, and he is not a proper party in such action.—*Sommers v. City of Marshfield* (Wis.) 62 N. W. 937.

90 Wis. 59.

§ 80. What places required to be kept in repair.

[*a*] (Mich.: 1896.)

Where a city assumes control and care of a walk, that the fee of the soil over which the walk is constructed is in another will not prevent the city from being liable for personal injuries caused by a defect in the walk.—*Will v. Village of Mendon* (Mich.) 66 N. W. 58.

[*b*] (Mich.: 1896.)

To show that a city has assumed control of a walk on private ground, evidence that a witness repaired the walk for the city is admissible.—*Will v. Village of Mendon* (Mich.) 66 N. W. 58.

[*Id.* (Neb.: 1895.)]

Where a city permits a sidewalk to be maintained beyond the sidewalk line as fixed by ordinance, and exercises control thereover, its duty is to keep the whole walk in repair.—*City of Chadron v. Glover*, 62 N. W. 62, 43 Neb. 732.

§ 81. Unusual object in street.

(N. D.: 1895.)

Whether a steam threshing engine standing on a street of a city is calculated to frighten horses of ordinary gentleness is for the jury.—*Ouverson v. City of Grafton* (N. D.) 65 N. W. 676.

5 N. D. 281.

§ 82. Ice and snow.

(Mich.: 1894.)

A city is not liable for personal injuries caused by an obstruction in the street formed by snow thrown from the sidewalk, together with that thrown from the street-car tracks. *McKeller v. City of Detroit* (1885) 23 N. W. 621, 57 Mich. 158, followed.—*Hutchinson v. City of Ypsilanti*, 61 N. W. 279, 103 Mich. 12.

See, also, post, § 84.

§ 83. Sidewalks.

[*a*] (Iowa: 1895.)

In an action against a city for injuries caused by a defective sidewalk, it appeared that the sidewalk had been built several years before over a disused cellar stairway; that the stringer adjoining the building was decayed and split off; and that the sidewalk inclined towards the street, which caused planks becoming loose to slide from the building, and leave the upper end without support. Several witnesses testified that the plank on which plaintiff stepped had been loose for from several days to a month before the accident; that the nails in it were rusted off; and that it moved perceptibly when stepped upon. It also appeared that the street commissioner had been repairing the walk just previous to the accident. *Held*, that a finding that the city was negligent was proper.—*Ledgerwood v. City of Webster City* (Iowa) 61 N. W. 1089.

93 Iowa, 726.

[*b*] (Mich.: 1896.)

A municipality is not responsible for personal injuries resulting solely from a property holder's failure to construct a walk in front of his premises as ordered. *Montgomery, J., dissenting.*—*Shietart v. City of Detroit* (Mich.) 66 N. W. 221.

[*c*] (Mich.: 1896.)

A city is not liable for an injury received by a person in passing over a sidewalk in process of construction, because it did not place barriers or warning lights in the street, where such barriers or lights were properly placed by the property owner or contractor.—*Walker v. City of Ann Arbor* (Mich.) 69 N. W. 87.

[*d*] (Mich.: 1897.)

A barricade consisting of a plank laid upon barrels, completely fencing in a shallow excavation made in a sidewalk for temporary purposes, is a reasonable one.—*Welsh v. City of Lansing* (Mich.) 70 N. W. 129.

[*e*] (Minn.: 1895.)

Where the stringers of the sidewalk on which plaintiff was injured were rotten, and one of them rested on higher ground than the remaining three, which caused the sidewalk to be unsteady, and the sidewalk was in that condition for over a year, the town was liable for injuries received by reason of the defects.—*Burrows v. Village of Lake Crystal* (Minn.) 63 N. W. 745.

61 Minn. 357.

[*f*] (Neb.: 1897.)

The term "sidewalk," in its broadest sense, denotes that portion of the public highway set

apart for use of pedestrians.—City of Ord v. Nash (Neb.) 69 N. W. 964.

[g] (N. D.; 1895.)

One injured by stepping into a hole in the sidewalk, made by the sudden displacement of a loose plank by a vehicle which passed as he was about to step on the plank, could recover.—Chace v. City of Fargo (N. D.) 64 N. W. 932.

5 N. D. 173.

§ 84. — Ice and snow.

[a] (Iowa; 1897.)

Where snow, accumulated on a walk from natural causes, becomes uneven, by travel, or where the walk is so constructed as to dam up melted snow flowing from adjoining land, and it freezes into ridges, a person injured thereon while using ordinary care may recover from the city, if it permitted such condition to exist for an unreasonable time after the same became known to the authorities, or might have been known by reasonable care.—Huston v. City of Council Bluffs (Iowa) 69 N. W. 1130.

[b] (Mich.; 1894.)

A city is not liable for injuries caused by a fall on a sidewalk, occasioned by a ridge of ice formed by the tramping, freezing, and melting of snow until the surface was uneven.—Holf v. City of Greenville (Mich.) 61 N. W. 3, 102 Mich. 544.

[c] (Mich.; 1896.)

A city is not liable for personal injuries caused by ice on a sidewalk, formed by water flowing to the ground about two feet from the walk, through a pipe extending from a sag in an eaves trough. Montgomery and Moore, J.J., dissenting.—Gavett v. City of Jackson (Mich.) 67 N. W. 517.

[d] (Wis.; 1895.)

A city was guilty of negligence, in permitting ice and snow to remain on a sidewalk, thereby causing injury to plaintiff, who was without contributory negligence, when the aldermen, whose duty it was to keep the walk clear, had knowledge of the defect before the jury.—Fife v. City of Oshkosh (Wis.) 62 N. W. 541, 89 Wis. 540.

§ 85. Cross walks.

[a] (Iowa; 1896.)

A town may be charged with negligence to a pedestrian who in the dark steps from a sidewalk crossing into an excavation for water mains, though the surface of the crossing is not defective, the excavation being close to the crossing, and there being no guard.—Hall v. Incorporated Town of Manson (Iowa) 68 N. W. 922.

[b] (Mich.; 1895.)

A cross walk containing a loose plank, the end of which is raised about two inches above the level of the walk, is "reasonably safe," within the meaning of 3 How. Ann. St. § 1446e (Pub. Acts 1887, p. 346, § 3), which makes it the duty of municipal corporations to keep cross walks in reasonably safe condition for public travel; and a person injured by stumbling against such plank cannot recover. Montgomery, J., dissenting.—Weisse v. City of Detroit (Mich.) 63 N. W. 423, 105 Mich. 482.

[c] (Mich.; 1895.)

A gutter 7 to 12 inches wide, and from 5 to 7 inches deep, with abrupt, vertical sides, ran between the curb and a cross walk at the same level as the curb. Such gutters at the cross walks in the city were sometimes covered, and sometimes uncovered, it being necessary to uncover them to clean them when clogged. Held, in an action by plaintiff for injuries sustained from stepping into the gutter while uncovered, that it was for the jury to say whether the cross walk was reasonably safe for travel.—Schrader v. City of Port Huron (Mich.) 63 N. W. 964.

[d] (Mich.; 1895.)

A sidewalk, on which have been laid lengthwise two-inch planks, to permit teams being driven into a lot, the ends of the planks being raised two inches above the walk, "is reasonably safe," within 3 How. Ann. St. § 1446e (Pub. Acts 1887, p. 346, § 3), which makes it the duty of cities to keep cross walks in such condition. Weisse v. City of Detroit (Mich.) 63 N. W. 423, 105 Mich. 482, followed.—Yotter v. City of Detroit (Mich.) 64 N. W. 743.

See, also, ante, § 82.

§ 86. Notice.

[a] (Iowa; 1896.)

Notice to a member of the city council of a defective crossing is notice to the city.—Owen v. City of Ft. Dodge (Iowa) 67 N. W. 281.

[b] (Iowa; 1896.)

Where a plumber employed by a lot owner to repair a water pipe makes an excavation in the street, without any permit from the city, the officers of the city having no actual notice of the excavation, and a person, about twilight, drives into the excavation, while the laborer is necessarily absent for a few minutes, the city is not liable.—Jones v. City of Clinton (Iowa) 69 N. W. 418.

[c] (Mich.; 1896.)

A recovery cannot be had for injuries resulting from a defective walk unless the municipal authorities had actual or constructive notice of the defect, and neglected for a reasonable time thereafter to repair the walk.—Burleson v. Village of Reading (Mich.) 68 N. W. 294.

§ 87. — Constructive notice.

[a] (Iowa; 1895.)

Where the petition alleged that defendant "had notice" of the defective condition of the sidewalk, plaintiff need not prove actual notice to defendant of the defect if it had existed for such a length of time before the accident that defendant should have known of it.—Hunt v. City of Dubuque (Iowa) 65 N. W. 319.

[b] (Mich.; 1895.)

The court, after stating the rule of presumptive notice, charged that, if the sidewalk inspectors used reasonable diligence, and did not discover any defects, then defendant had no knowledge, and plaintiff could not recover, but that if the inspectors neglected their duties they would be liable for the defect. Held proper, as bearing on the question of notice, though neglect to inspect the sidewalk was not alleged in the complaint.—Germaine v. City of Muskegon (Mich.) 63 N. W. 78, 105 Mich. 213.

[c] (Wis.; 1894.)

The existence of a hole in a sidewalk for six months affects the city with notice thereof.—West v. City of Eau Claire (Wis.) 61 N. W. 313, 89 Wis. 31.

§ 88. — Question for jury.

(Mich.; 1895.)

In an action for injuries from a defective sidewalk, where evidence of notice to the village authorities of the defective condition of a walk between certain points which includes the defects causing the accident is admissible to show notice to the village authorities, the question whether, if they had acted on such notice, they would have discovered the defects causing the accident, is for the jury.—Strudgeon v. Village of Sand Beach (Mich.) 65 N. W. 616.

§ 89. Negligence of traveler.

[a] (Iowa; 1896.)

Though a pedestrian must use, in passing along sidewalks, his senses and the care and precaution common to persons of ordinary prudence, he is not bound, at his peril, to discover every

defect, though it may be an open one.—*Barnes v. Town of Marcus (Iowa)* 65 N. W. 981.

[b] (*Iowa*; 1896.)

One who started to cross a street after dark, and who was not shown to be familiar with the condition of the crossing, or with the dangers attending an attempt to cross it, was not bound, at her peril, to discover defects in the planks, but was held only to ordinary care; and, unless she knew that it was imprudent to pass over the walk, was not required to take another route.—*Owen v. City of Ft. Dodge (Iowa)* 67 N. W. 281.

[c] (*Iowa*; 1896.)

An instruction, in an action for injury from slipping on a sidewalk, that if the place was necessarily more dangerous than ordinary streets and sidewalks, and by the exercise of ordinary care plaintiff could have known this condition, she was required to use "more than ordinary care" to avoid the accident, is erroneous.—*Langhammer v. City of Manchester (Iowa)* 68 N. W. 688.

[d] (*Iowa*; 1896.)

Knowledge that a town is laying water mains does not charge one stepping in the dark into an unguarded excavation therefore, close to a sidewalk crossing, on which he has undertaken to cross the street, with negligence in not discovering and avoiding the excavation.—*Hall v. Incorporated Town of Manson (Iowa)* 68 N. W. 922.

[e] (*Mich.*; 1895.)

Defendant city had dug a trench in the middle of a street, at which a lighted red lantern was placed. Plaintiff was driving on a dark night at a jog trot, and saw the light directly ahead of him, when four or five rods therefrom, but kept on at the same gait until within a few feet of the light, when, on attempting to turn, the wheel of his buggy fell into the trench, and plaintiff was injured. *Held*, that he was guilty of contributory negligence.—*Smith v. City of Jackson (Mich.)* 63 N. W. 982.

[f] (*Mich.*; 1897.)

A pedestrian who attempts to cross a street on a dark night elsewhere than at a public crossing is not negligent per se.—*Baker v. City of Grand Rapids (Mich.)* 69 N. W. 746.

[g] (*Minn.*; 1897.)

A city is not liable for an injury to a traveler going outside of an unfenced street, the whole of the street being safe.—*McIlugh v. City of St. Paul (Minn.)* 70 N. W. 5.

[h] (*N. D.*; 1895.)

The fact that a traveler noticed an obstruction in the street in time to have turned off on another street, and that he knew that his horse sometimes shied at unusual objects, did not render him guilty of contributory negligence in attempting to pass by the obstruction.—*Overson v. City of Grafton (N. D.)* 65 N. W. 676.

5 N. D. 281.

[i] (*Wis.*; 1894.)

The momentary diversion of a person's attention, while walking on a sidewalk, does not, as matter of law, constitute contributory negligence, so as to prevent a recovery for injuries due to defects in the sidewalk.—*West v. City of Eau Claire*, 61 N. W. 313, 89 Wis. 31.

[j] (*Wis.*; 1896.)

It appearing that, though plaintiff had previously seen the defect in the street which caused his injuries, and had temporarily forgotten its existence at the time of the accident, the defect was on a main street in a city of considerable size, it was proper to charge that a traveler on a highway has a right to assume that the highway is in a safe condition.—*Simonds v. City of Baraboo (Wis.)* 67 N. W. 40.

93 Wis. 40.

§ 90. — Knowledge of danger.

[a] (*Iowa*; 1895.)

Though one use a street crossing knowing that a plank is out of it, and having another convenient route, he is not guilty of contributory negligence if he believes, and as a reasonably prudent man has the right to believe, that he will pass in safety by the exercise of ordinary care, and uses such care.—*Nichols v. Incorporated Town of Laurens (Iowa)* 65 N. W. 335.

[b] (*Iowa*; 1896.)

To render a pedestrian guilty, as a matter of law, of contributory negligence in passing over a defective sidewalk, it must appear, not only that he had knowledge of the condition of the walk and the impropriety of passing over the same, but also that there was another walk he might have taken in going in the direction he desired to go.—*Barnes v. Town of Marcus (Iowa)* 65 N. W. 981.

[c] (*Mich.*; 1894.)

In an action for injuries caused by a defective sidewalk, where plaintiff knew of the defect, and was watching for it when injured, but came to it sooner than she expected, and could not see it on account of the night being dark and stormy, she was not, as a matter of law, guilty of contributory negligence.—*Sias v. Village of Reed City (Mich.)* 61 N. W. 502.

103 Mich. 312.

[d] (*Mich.*; 1895.)

The fact that a person injured by a defective sidewalk knew of the defect does not show contributory negligence, unless the place was so dangerous that a prudent man would not have traveled thereon.—*Germaine v. City of Muskegon (Mich.)* 63 N. W. 78.

105 Mich. 213.

[e] (*Mich.*; 1895.)

One who goes on an icy sidewalk in the daytime, knowing it to be dangerous, cannot recover for injuries resulting from a fall thereon.—*Black v. City of Manistee (Mich.)* 64 N. W. 868.

[f] (*Mich.*; 1896.)

One who, on a dark night, goes upon an elevated sidewalk, which he knows is guarded on one side only, and, instead of guiding himself by the railing on that side, directs his course, as he has been accustomed, by what he supposes is a light in a neighboring house, but which proves to be another light, and consequently falls off, cannot hold the city liable.—*Church v. Village of Howard City (Mich.)* 69 N. W. 651.

[g] (*Wis.*; 1896.)

That plaintiff had seen the defect in the street from which he was injured a week before, but temporarily forgot its existence at the time of the accident, did not constitute contributory negligence as a matter of law, it appearing that at the time of the injury the defect was not in view of plaintiff until it was too late to stop his horses, and was on a main street in a city of considerable size.—*Simonds v. City of Baraboo (Wis.)* 67 N. W. 40.

93 Wis. 40.

§ 91. — Question for jury.

[a] (*Iowa*; 1896.)

Plaintiff stood on a sidewalk eight feet wide in front of an open cellarway, extending half across the walk. While talking and watching his shop, on the opposite side of the street, he stepped back, to let a person pass, and fell into the cellar. *Held*, that whether plaintiff, knowing of the opening, was negligent, was for the jury.—*Lichtenberger v. Incorporated Town of Meriden (Iowa)* 69 N. W. 424.

[b] (*Iowa*; 1897.)

Contributory negligence is a question for the jury, where plaintiff came out of a lighted store, and, in trying to cross a dark alley by its side, stepped from the curb upon a slanting and ice-covered apron with worn and broken cleats

thereon, the top of which commenced six inches below the curb, which facts were not known to plaintiff, though he had for a long time worked within a short distance of the defect, and knew that the walk was above grade.—*Robinson v. City of Cedar Rapids* (Iowa) 69 N. W. 1064.

[c] (Mich.: 1895.)

In an action for injuries from a defective sidewalk, plaintiff testified that, when the accident occurred, she was exercising ordinary care; that she passed the place every Sunday, but had never noticed the defect; and by other witnesses proved that the defect was an old one. There was evidence that it was daylight when the accident occurred. *Held*, that the question of contributory negligence was for the jury.—*Mackie v. City of West Bay City* (Mich.) 64 N. W. 25.

§§ 92, 93. Pleading.

[a] (Mich.: 1896.)

In an action against a city for injuries due to a defective sidewalk, a complaint which alleged that while the plaintiff was in exercise of due care her foot slipped into a hole in the sidewalk, and in attempting to extricate it the other foot slipped, resulting in injury, sufficiently alleges due care in attempting to extricate herself.—*McKormick v. City of West Bay City* (Mich.) 68 N. W. 148.

[b] (Neb.: 1895.)

A petition sufficiently charges negligence against a city where it alleges that, in the construction of a brick and stone cross walk at one of its most frequently traveled intersections, some of the stones were placed so that they projected to a height of two inches above the general surface of the walk.—*City of Aurora v. Cox*, 62 N. W. 66, 43 Neb. 727.

[c] (N. D.: 1895.)

In an action against a city to recover damages for injuries caused by the negligence of the city in permitting a steam threshing engine to stand on a street, on seeing which plaintiff's horse became momentarily unmanageable, it was not necessary to allege actual contact with the obstruction.—*Onverson v. City of Grafton* (N. D.) 65 N. W. 676.
5 N. D. 281.

§ 94. — Averments as to notice.

[a] (Mich.: 1895.)

In a complaint against a city for injuries caused by a defective sidewalk, an averment that defendant well knew, or by the exercise of reasonable care ought to have known, the existence of the defect, is, in the absence of a demurrer, a sufficient allegation that defendant had notice, actual or presumptive, of the defect.—*Germaine v. City of Muskegon* (Mich.) 63 N. W. 78.

105 Mich. 213.

[b] (Mich.: 1895.)

Where the declaration in an action for injuries due to a defective sidewalk avers the defective condition of the walk of the entire block in which the accident occurred, the defective condition of the entire walk is admissible to show notice to the village authorities.—*Strudgeon v. Village of Sand Beach* (Mich.) 65 N. W. 616.

§ 95. Evidence.

[a] (Iowa: 1895.)

Where, in an action for injuries caused by a defective sidewalk, the construction of the sidewalk was involved, testimony as to loose boards in the walk other than the one which caused the injury, but which were in the same part of the walk, was properly admitted.—*Ledgerwood v. City of Webster City* (Iowa) 61 N. W. 1089.

93 Iowa, 726.

[b] (Iowa: 1895.)

It was proper to allow a witness who had lived in the house next to the defective sidewalk to testify that she had seen persons stumble on the sidewalk, and had seen a person push down a board thereon.—*Hunt v. City of Dubuque* (Iowa) 65 N. W. 319.

[c] (Mich.: 1897.)

One injured by falling into a sewer opening while crossing a street where there was no walk can show that it was customary for persons to cross at that place, and that a path had been worn there.—*Baker v. City of Grand Rapids* (Mich.) 69 N. W. 740.

[d] (Mich.: 1897.)

Plaintiff may show the condition of the sidewalk in the vicinity of the accident at and prior to the time it occurred.—*Canfield v. City of Jackson* (Mich.) 70 N. W. 444.

§ 96. — Admissible as showing notice.

[a] (Iowa: 1895.)

It was proper to allow a witness who had lived in the house next to the defective sidewalk to describe its defective condition the year before the accident, and to state that it was substantially unchanged about the time of the accident, to show notice.—*Hunt v. City of Dubuque* (Iowa) 65 N. W. 319.

[b] (Iowa: 1896.)

In an action for personal injuries caused by a defective walk it is competent to show that the walk was old, and in bad condition, as tending to show that the officers of defendant charged with the duty of keeping the sidewalks in good condition would have known of the defect in question by the exercise of ordinary diligence.—*Lorig v. City of Davenport* (Iowa) 68 N. W. 717.

[c] (Mich.: 1895.)

In an action for injuries from a defective sidewalk, notice to the village authorities that the walk from the schoolhouse to the village, which included the walk on which the accident occurred, was defective, is admissible to show notice.—*Strudgeon v. Village of Sand Beach* (Mich.) 65 N. W. 616.

[d] (Mich.: 1896.)

In an action against a city for personal injuries caused by a fall due to the tipping of a plank in a sidewalk, evidence of the general bad condition of the walk near to the plank by which plaintiff was thrown is admissible to show notice to the city of the defect.—*Will v. Village of Mendon* (Mich.) 66 N. W. 58.

[e] (Mich.: 1896.)

In an action against a city for injuries due to a defective sidewalk, evidence of other defects in the immediate vicinity is admissible to show notice to the defendant.—*Moore v. City of Kalamazoo* (Mich.) 66 N. W. 1089.

[f] (Mich.: 1896.)

Evidence that others slipped into the same or other holes in the sidewalk in the vicinity was admissible as bearing on the question of notice.—*Moore v. City of Kalamazoo* (Mich.) 66 N. W. 1089.

[g] (Minn.: 1895.)

In an action against a city for injuries received on a defective sidewalk, evidence of other accidents caused by the same defect prior to the time of plaintiff's injury is competent on the question of notice to defendant of the defect.—*Burrows v. Village of Lake Crystal* (Minn.) 63 N. W. 745.

61 Minn. 357.

[h] (Minn.: 1895.)

In an action for injuries resulting from a defective sidewalk, where it appears that plaintiff had knowledge of the defect, to rebut the inference of contributory negligence in not going to his destination in some other way, evidence that plaintiff knew that the sidewalk was on the opposite side of the street was dangerous is ad-

missible.—*Burrows v. Village of Lake Crystal* (Minn.) 63 N. W. 745.

61 Minn. 357.

[1] (N. D.; 1895.)

It was competent to show that the sidewalk at the place where plaintiff was injured had been in a dilapidated condition for a long time, as bearing on constructive notice of the defect by the city.—*Chacey v. City of Fargo* (N. D.) 61 N. W. 932.

5 N. D. 173.

§ 97. — Sufficiency.

(Wis.; 1891.)

Evidence that plaintiff's foot, after slipping on ice on the sidewalk, was held fast until she had fallen and her ankle was broken, and that at the place of the accident, near a ridge of ice, there was a hole in the sidewalk, warrants a finding that plaintiff's injuries were caused by reason of her foot catching in the hole.—*West v. City of Eau Claire* (Wis.) 61 N. W. 313, 89 Wis. 31.

§ 98. Limit of recovery.

(Wis.; 1895.)

Under Laws 1885, c. 454, providing that damages in an action against a city for injuries resulting from defective highways shall in no case exceed \$5,000, and Laws 1889, c. 471, providing that a city may be joined with the person primarily liable for an injury resulting from a defective street, and, if found liable, but not primarily liable, judgment may be entered "for the amount stated in the verdict or finding against all the defendants against whom the verdict shall be found or the finding shall be made," when construed together, recovery in an action where the city is joined with the defendant primarily liable cannot exceed \$5,000.—*Raymond v. Kieseberg* (Wis.) 64 N. W. 861, 91 Wis. 191.

§ 99. Instructions.

[1] (Iowa; 1896.)

Error cannot be predicated of an instruction in action for injury from slipping on a sidewalk: "If you find that the injury * * * was produced by two causes, namely, the slant of the step. * * * and a coating of ice thereon, the result of the storm of the night before, the latter being a cause for which no one was responsible, * * * plaintiff cannot recover, unless she has shown * * * that the slant of the step was the real cause of the injury, and but for which it would not have happened; neither can a recovery be had if it is equally as probable that the injury came from the one cause as from the other."—*Langhammer v. City of Manchester* (Iowa) 68 N. W. 688.

[1] (Iowa; 1897.)

An objection to an instruction that it fixed a liability on the defendant city for injury caused by snow on a sidewalk without reference to whether the city had had a reasonable time within which to remove the snow, was cured by an instruction that the city was not negligent if snow had fallen so short a time before the accident that with ordinary care it could not have been removed in time to have avoided the injury.—*Robinson v. City of Cedar Rapids* (Iowa) 69 N. W. 1064.

[1] (Mich.; 1896.)

In an action against a city for injuries due to a defective sidewalk, where it appeared that a member of the street committee of the city learned of the defect the afternoon before the accident, and that evening notified the street commissioner to repair it, an instruction that, while it was not his duty to repair it himself, it was his duty to give notice to the proper city authorities, whose duty it was to repair with reasonable promptness, was misleading, as tending to give the jury to understand that it was his duty to drop his own business, and notify the city at once.—*McKormick v. City of West Bay City* (Mich.) 68 N. W. 148.

[1] (Neb.; 1896.)

In an action against a city to recover damages for injuries caused by its leaving a manhole open at night without guards, it was proper to refuse to instruct that, if the employees of the city placed a proper barricade around the manhole, the burden of proof would be on plaintiff to show that some employé of the city removed the barricade, where there was no evidence that a barricade had ever been removed.—*City of Omaha v. Coombe* (Neb.) 67 N. W. 885.

48 Neb. 879.

[1] (Wis.; 1895.)

A charge that the duty of defendant city to discover the defect in its sidewalk was greater than that of an ordinary observer was proper where it was also charged that defendant was not liable for latent defects unless it knew of them or by reasonable diligence could have known of them.—*Lyman v. City of Green Bay* 65 N. W. 167, 91 Wis. 488.

§ 100. — As to notice.

(Mich.; 1896.)

In an action for personal injuries caused by a defective sidewalk, an instruction that if there was a hole in the sidewalk that rendered it out of reasonable repair for from one to six months prior to the injury, and the hole was such as would naturally arrest the attention of a person passing by, then the city would be presumed to have had notice, is not ground for reversal, as determining, as a matter of law, what was reasonable notice, where the instruction that, before plaintiff can recover, she must show that the defendant, after constructive notice of said hole, has had sufficient time to put the same in repair, and neglected to do so, is also given.—*Mulliken v. City of Corunna* (Mich.) 68 N. W. 141.

§ 101. Sufficiency of findings to support judgment.

(Wis.; 1895.)

In an action against a city for injuries from a defective sidewalk, a verdict for plaintiff will not be set aside because the jury failed to find that defendant had notice of the defect a sufficient time to repair the same, where defendant did not request such a finding and the facts would have justified it.—*Lyman v. City of Green Bay*, 65 N. W. 167, 91 Wis. 488.

3. DUTIES WITH REFERENCE TO SEWERS AND DRAINS.

§ 102. Duties with regard to surface water.

[1] (Neb.; 1896.)

A city is not liable to an abutting property owner for damages done through deflecting surface water by erecting an embankment in a street, in the absence of negligence in the manner of erecting the same.—*City of Kearney v. Themanson* (Neb.) 66 N. W. 996.

48 Neb. 74.

[1] (Neb.; 1896.)

A city is liable for the death of a child drowned through falling from a section of sidewalk which he was using as a raft on a pond of water which accumulated over a street as a result of the city's negligence in grading the street and constructing a storm sewer.—*City of Omaha v. Richards* (Neb.) 68 N. W. 528.

[1] (Neb.; 1896.)

The liability of a city for the death of a boy who was drowned through falling from a section of sidewalk which he was using as a raft on a pond of water which accumulated over a street and adjacent private property, is not affected by the fact that the drowning took place over the private property.—*City of Omaha v. Richards* (Neb.) 68 N. W. 528.

§ 103. Overflow from drain.

(Wis.: 1896.)

Where an old drain, which had been constructed in part by public authority, and over which some control was exercised by the city, was closed up by the construction of a new sewer at a point below plaintiff's property, and there was reasonable ground to expect sewage, after having been collected in the old drain, by the closing up of the outlet, would flood plaintiff's property, the city was liable.—*Schroeder v. City of Baraboo* (Wis.) 67 N. W. 27. 93 Wis. 95.

§ 104. Defective and overflowing sewers.

[a] (Iowa: 1896.)

In an action by an owner of property flooded with surface water as a result of the alleged insufficiency of street drains, where defendant city claimed that the overflow was caused by the temporary clogging of catch basins during a severe storm, it was error to refuse to charge that, if the clogging was the proximate cause of the overflow, and the city was not negligent in the construction of the catch basins, it would not be liable, unless it had had sufficient notice of the clogging to enable it to remove the material from the basin before the overflow occurred.—*Knostman & Petersen Furniture Co. v. City of Davenport* (Iowa) 68 N. W. 887.

[b] (Iowa: 1896.)

The fact that a city, after notice that drains constructed by it to carry off street surface water are insufficient, fails to use ordinary diligence to make such changes as appear reasonably necessary to make the drains serve the purpose intended, does not render the city liable for the resulting overflow of private property, where it did not accelerate the flow of the water, or collect the same, and discharge it on such property otherwise than it would naturally have been discharged thereon, and it was not negligent either in devising or in adopting the plan of the drains.—*Knostman & Petersen Furniture Co. v. City of Davenport* (Iowa) 68 N. W. 887.

[c] (Iowa: 1896.)

An owner of property below the level of the street on which it abuts cannot recover for the overflowing of the same by surface water as a result of insufficiency of street drains, if the overflow would not have occurred had his land been filled so as to be on a level with the street.—*Knostman & Petersen Furniture Co. v. City of Davenport* (Iowa) 68 N. W. 887.

[d] (Mich.: 1897.)

A city, whose duty it is to construct a sewer, cannot escape liability for injury to a pedestrian who falls into an unguarded catch basin during the construction of the sewer by a contractor, on the ground that it received no notice of failure to guard the opening.—*Baker v. City of Grand Rapids* (Mich.) 69 N. W. 740.

[e] (Mich.: 1897.)

The construction of a sewer is a private municipal enterprise, for the negligent control of which the city will be liable, under a charter providing for a revenue from its use.—*Ostrander v. City of Lansing* (Mich.) 70 N. W. 332.

[f] (Minn.: 1894.)

A city is not required to exercise extraordinary care to keep its sewers in repair.—*Netzer v. City of Crookston* (Minn.) 61 N. W. 21. 59 Minn. 244.

[g] (Minn.: 1894.)

Where a city has built a sewer partly on private property, it is no excuse, for failing to repair the same, that it has no right to go on such property to make repairs.—*Netzer v. City of Crookston* (Minn.) 61 N. W. 21. 59 Minn. 244.

§ 105. Connecting with private sewer.

(Wis.: 1895.)

A city is not liable for injuries to property of an owner of a private sewer, caused by the negligence of the board of public works in reconnecting such private sewer with the main sewer after the lowering of the latter.—*Streiff v. City of Milwaukee*, 61 N. W. 770, 89 Wis. 218.

§ 106. Obstruction of water course.

[a] (Neb.: 1895.)

A city which grades its streets in such a negligent manner that a natural water course is obstructed and dammed up, and fails to provide outlets for the water, is liable to a property owner for resulting injuries to his land.—*City of Beatrice v. Leary* (Neb.) 63 N. W. 370. 45 Neb. 149.

[b] (Neb.: 1895.)

A city is not liable for damages resulting from the overflow of a lot caused by the owner of an adjacent lot obstructing a water course in making his lot conform to street grade.—*City of Beatrice v. Knight* (Neb.) 63 N. W. 838. 45 Neb. 546.

§ 107. Lack of funds to make repairs.

(Minn.: 1894.)

In an action for damages from a defective sewer, a defense that the city is financially unable to repair the same must be pleaded.—*Netzer v. City of Crookston* (Minn.) 61 N. W. 21. 59 Minn. 244.

§ 108. Question for jury.

[a] (Mich.: 1897.)

Whether a sewer opening was properly lighted was a question for the jury, where witnesses testified that, immediately after the accident, they tried to light and keep lighted the lantern left there by the workmen, but failed.—*Baker v. City of Grand Rapids* (Mich.) 69 N. W. 740.

[b] (Neb.: 1896.)

Whether a boy 10 years old, who was drowned through falling from a section of sidewalk which he was using as a raft on a pond of water which accumulated over a street, was guilty of contributory negligence, is a question for the jury.—*City of Omaha v. Richards* (Neb.) 68 N. W. 528.

IX. PUBLIC IMPROVEMENTS.

Liability for torts committed in making, see ante, § 76.

Due process of law as to assessments, see "Constitutional Law," § 43.

Judicial notice of acts providing for public buildings, see "Evidence," § 4.

1. IN GENERAL.**§ 109. Necessity.**

[a] (Iowa: 1897.)

The necessity for the paving of a street is not to be determined solely by the question of benefit to abutting property, but from all the circumstances, including the use made of the street by the public generally.—*Dewey v. City of Des Moines* (Iowa) 70 N. W. 605.

[b] (Iowa: 1897.)

The power to determine the necessity for improving streets, invested in a municipal body, is exclusive, and cannot be reviewed, when made within the authority given, and without fraud or oppression.—*Dewey v. City of Des Moines* (Iowa) 70 N. W. 605.

[c] (Mich.: 1895.)

When the power exists to repave a street once paved at the expense of a city and adjoin

ing landowners, the question of necessity is with the council, and is not open to review or attack collaterally, except for fraud. *Shimmons v. City of Saginaw* (Mich.) 62 N. W. 725.

104 Mich. 511.

§ 110. Power to make.

(Mich.; 1895.)

A street was opened 66 feet wide, on which a roadway 38 feet wide was filled in 6 feet above an abutting lot. The owner of the lot constructed a stone wall along the curb line of the roadway, to its full height, and a plank sidewalk over the space between the roadway and his lot. Afterwards he sold the lot to plaintiff, excepting the right of way for the street. A contract, under regular proceedings, was afterwards let to pave the roadway 42 feet wide. Notice was given plaintiff to remove the wall, which she refused to do. The contractor, then, under direction of the city, removed the planks, placed them upon plaintiff's lot, covered up the wall, and paved above it. *Held*, that the city was not guilty of conversion. *Fuller v. City of Grand Rapids* (Mich.) 63 N. W. 530.

105 Mich. 529.

§ 111. — Improvement of street.

[a] (Iowa; 1895.)

Where a city lays out a street, and maintains it for 35 years, and the abutting owners improve their land, the improvements conforming for 20 years to the line of the street as laid out, the city will be enjoined from changing the line of the street so as to interfere with such improvements, on the claim that the line as established was not the proper one, unless there is a substantial variance from the legally established line.—*Delashmatt v. City of Oskaloosa* (Iowa) 62 N. W. 16.

[b] (Mich.; 1894.)

The provision of the Detroit city charter that water and gas pipes shall be laid at least one year before a street shall be ordered to be paved is invalid, as being inconsistent with the general power given to the city council in regard to paving streets, the laying of water pipes being in the control of the water board, and the laying of gas pipes being done by private corporations.—*Goodwillie v. City of Detroit* (Mich.) 61 N. W. 526.

103 Mich. 283.

[c] (Mich.; 1894.)

The Detroit city charter (section 188) provides that the common council shall not in any one year enter into contracts for paving of streets "the cost of which shall exceed \$200,000, except on petition of the abutting property owners." When such section was originally adopted, the cost of paving and repaving was assessed against the property owners. It was afterwards provided that the cost of repaving should be paid out of the repairing fund, and that the cost of paving intersections should be paid out of the general road fund. There is no provision in the charter for repaving by petition. *Held*, that section 188 refers only to contracts the cost of which is to be paid for by special assessments.—*Goodwillie v. City of Detroit* (Mich.) 61 N. W. 526.

103 Mich. 283.

[d] (Neb.; 1897.)

The county and city have concurrent jurisdiction to improve a street, one-half of which lies outside the city limits, but within the county.—*County of Douglas v. Taylor* (Neb.) 70 N. W. 27.

[e] (Neb.; 1897.)

Comp. St. c. 78, § 1a, providing that a county in which a metropolitan city is situated may pay a part of the cost of improving, within the corporate limits, a street leading into such city, authorizes the county to make such improvements through its own agents and with its own machinery.—*County of Douglas v. Taylor* (Neb.) 70 N. W. 27.

§ 112. — Sewers.

(Wis.; 1895.)

The right to construct sewers and make certain other designated improvements, and levy assessments therefor, conferred on villages under general charter by Rev. St. § 892, subds. 11, 25, is, by section 926, made applicable to villages under special charter. Sections 895-901 confer the power of eminent domain on villages which "intend" to construct sewers and make the other designated improvements, and authorize the levy of a tax to pay the expenses of the proceedings, "including damages and costs incurred for the taking of private property, and of making any" of the designated improvements. Section 927 authorizes the common council of every city to exercise all the powers conferred on villages by said sections 895-904. *Held*, that the power to construct sewers and levy assessments is conferred on villages by section 892, and is not given to cities by section 927.—*Dietz v. City of Neenah* (Wis.) 65 N. W. 500.

§ 113. Property taken for street.

(Mich.; 1895.)

In a proceeding to open a street, it is not necessary that the portion of a public alley crossing the proposed street should be condemned.—*Scotten v. City of Detroit* (Mich.) 61 N. W. 579.

§ 114. Change of plan for improving street.

(Mich.; 1895.)

The resolution of a common council, declaring the paving of a street 66 feet wide to be a necessary public improvement, was silent as to the width of the new roadway. The estimate of the board of public works, previously made, specified a roadway 38 feet wide, the width of the old roadway. Before the letting of a contract, new plans were filed showing that the roadway was to be 42 feet wide. *Held*, that the change of width did not vitiate the proceedings.—*Fuller v. City of Grand Rapids* (Mich.) 63 N. W. 530.

105 Mich. 529.

§ 115. Repaving.

(Mich.; 1895.)

When it is proposed to reimprove a street which had been once improved at the expense of the city and private property, the city authorities may remove the old material, and use it on other streets, especially when it would have been impossible to apportion the value of such material, and when it appears affirmatively that the cost of reimprovement was not affected by the removal.—*Shimmons v. City of Saginaw* (Mich.) 62 N. W. 725.

104 Mich. 511.

§ 116. — Liability of city.

(Mich.; 1897.)

The removal of the pavement, 40 feet in width, through the center of a street 200 feet wide, and the paving of a roadway 25 feet wide along each side of the street instead, constitutes a repaving within a charter provision making the cost of repaving payable by the city, and not by abutting owners.—*Dickinson v. City of Detroit* (Mich.) 69 N. W. 728.

§ 117. Abutting owner resisting payment of bonds.

[a] (Mich.; 1895.)

Where a city was authorized to issue bonds to pay a certain percentage of a paving assessment, the abutting owners cannot complain of the illegality of the bonds because the city, in addition thereto, paid its proportionate share on frontage owned by it.—*Boehme v. City of Monroe* (Mich.) 64 N. W. 204.

[b] (Mich.; 1895.)

Abutting owners will not be heard to question the legality of bonds issued to pay for

certain paving where the bonds were issued before the assessment was made, and the abutting owners allowed the work to proceed to completion without objection.—*Boehme v. City of Monroe (Mich.)* 64 N. W. 204.

§ 118. Fraud.

(Iowa: 1897.)

The action of a city council in ordering the paving of a street, if not fraudulent in fact, is not rendered so by the fact that there were but few houses on the part of the street covered by the order, and that the owners of the abutting property objected to the improvement, nor because an inducement to the making of the order was the fact that the street was the main thoroughfare to the State Fair Grounds, and as such was used during the holding of the fairs by a large number of people, both residents of the city and others.—*Dowey v. City of Des Moines (Iowa)* 70 N. W. 605.

2. PRELIMINARY PROCEEDINGS.

§ 119. Notice of proposals.

(Iowa: 1897.)

Under a statute requiring notice of proposals for public improvements to state the extent of the work, etc., a notice announcing that "proposals for grading, paving, and sewerage * * * will be received" at a certain place, till a specified time, "for the following described work: * * * Brick Paving. Two courses of brick, on sand foundation, with top filler, as described" in specifications on file. "First, West Grand avenue from Twenty-Eighth street to 400 feet west of Park lane,"—is insufficient.—*Windsor v. City of Des Moines (Iowa)* 70 N. W. 214.

§ 120. Necessity of petition or resolution.

[a] (Wis.: 1895.)

Under the charter of the city of Sheboygan, requiring proceedings for paving streets to be begun either by a petition to the common council signed by abutting owners, or by a resolution of the council declaring why it is necessary to proceed without petition, passed by a three-fourths vote, an assessment for paving made without compliance with either of these requirements is void.—*Dieckmann v. Sheboygan County*, 62 N. W. 410, 89 Wis. 571.

[b] (Wis.: 1896.)

A resolution of the common council declaring a street unsafe for public use, and reciting the failure of the abutting property owners to make the street in a safe condition, or petition therefor, sufficiently shows the necessity for proceeding for the paving of the street without a petition therefor on the part of the property owners.—*Boyd v. City of Milwaukee (Wis.)* 66 N. W. 603.

92 Wis. 456.

§ 121. Resolution and ordinances.

[a] (Iowa: 1895.)

Where a city has fixed in a general ordinance the mode of procedure in assessing property owners for improvements, as provided by Code, § 478, a special assessment, made under resolutions of the city council which do not provide for notice, or the mode of determining the amount, as required by such ordinance, is invalid, and the sum so expended will not become a lien upon the property.—*Zelie v. City of Webster City (Iowa)* 62 N. W. 796.

[b] (Iowa: 1896.)

Acts 2d Gen. Assem. c. 3, incorporating the city of Keokuk, provided that the council might pass such ordinances as should be necessary, and conferred authority to establish the grade of certain streets and alleys. *Held*, that the power of the city council to establish and change the grade of streets could be exercised

only by ordinances duly enacted, approved, and published.—*McManus v. Hornaday (Iowa)* 68 N. W. 812.

[c] (Mich.: 1895.)

Where a resolution to pave a street refers to a map of the district filed with the city clerk as required by How. Ann. St. § 2345, and recites the limits within which the street is to be paved, a more particular designation of the district is unnecessary.—*Boehme v. City of Monroe (Mich.)* 64 N. W. 204.

[d] (Wis.: 1897.)

Under the rule laid down in *Wright v. Forrestal*, 27 N. W. 52, 63 Wis. 341, construing a provision of the Milwaukee charter, which has become a rule of property in the making of assessments in that city, a corresponding provision of the present city charter (chapter 7, § 6) that a resolution ordering the grading, graveling, or paving of a street, without a petition therefor, shall not be voted upon or passed at any meeting of the common council held within four weeks from the time of its presentation to the council, is to be construed as excluding from the computation the day on which the resolution was presented and including the day on which the vote was taken.—*Pittelkow v. City of Milwaukee (Wis.)* 69 N. W. 803.

§ 122. Preliminary estimates and reports.

(Mich.: 1894.)

Under the Detroit city charter, providing that the common council, before proceeding with a public improvement, shall refer the matter to the board of public works, which shall report thereon to the council, giving detailed estimates of the cost of the improvement, the fact that the board reported to the council merely an estimate of the gross cost does not invalidate special assessments levied to pay for the improvement.—*Goodwillie v. City of Detroit (Mich.)* 61 N. W. 526.

103 Mich. 283.

§ 123. Curative acts.

[a] (Iowa: 1896.)

The legislature may legalize any defect in proceedings to improve a street if the defect or want of compliance with the law relates to a requirement which might have been dispensed with in the first instance.—*City of Clinton v. Walliker (Iowa)* 68 N. W. 431.

[b] (Iowa: 1896.)

Act March 23, 1894, providing that the ordinance of the city of Clinton respecting the paving of the streets, and the resolutions assessing and levying taxes therefor, be legalized, and that the actions of the city council in respect thereto be of as binding force as though in strict conformity to law, was a valid curative act, though passed after an action had been commenced to recover a special assessment for improvements made under the ordinance referred to.—*City of Clinton v. Walliker (Iowa)* 68 N. W. 431.

3. CONTRACTS FOR IMPROVEMENTS.

Act validating contracts for paving, special legislation, see "Constitutional Law," § 17. Vested right under contract with city, see "Constitutional Law," § 32.

§ 124. Approval by council.

(Iowa: 1897.)

Acts 22d Gen. Assem. c. 1, which was approved April 9, and went into effect July 4, 1888, created a board of public works in each city of the first class, and provided that such board should advertise for bids and contract for all public improvements ordered by the city council; such contracts to be subject to the approval of the council. Chapter 5, enacted at the same session, which was approved April 16,

and went into effect April 21, 1888, gave such board the power to contract in the name of the city for paving, curbing, and sewerage streets, when ordered by the council, which contracts were not required to be submitted to the council for approval. *Held*, that the later statute to be passed, though first to take effect, governed, and contracts for paving, curbing, or sewerage did not require the approval of the council. *Dewey v. City of Des Moines (Iowa)* 70 N. W. 605.

§ 125. Provision as to repairs.

(Wis.; 1896.)

A provision in a paving contract requiring the contractor to keep the pavement in good repair for five years, except repairs due to cutting through the pavement for laying pipes, etc., renders the assessment therefor against the property owners invalid, the charter of the city requiring the expenses of repairing streets to be paid from the ward fund.—*Boyd v. City of Milwaukee (Wis.)* 66 N. W. 603.

92 Wis. 456.

§ 126. Ultra vires.

[a] (Minn.; 1896.)

A contract for the grading of a street in St. Paul is not ultra vires merely because the council omitted to establish gradient lines for the street prior to its passage of an order directing the street to be graded.—*Keough v. City of St. Paul (Minn.)* 68 N. W. 843.

[b] (Minn.; 1896.)

A contract for the grading of a street in St. Paul is not ultra vires merely because condemnation proceedings through which the city attempted to acquire an easement for slopes along such street were not consummated prior to the passage of an order directing the street to be graded.—*Keough v. City of St. Paul (Minn.)* 68 N. W. 843.

4. ASSESSMENT OF BENEFITS.

§ 127. In general.

[a] (Iowa; 1896.)

An assessment levied upon abutting property to defray the cost of improving a street at a grade other than that legally established by ordinance is invalid.—*McMannus v. Hornaday (Iowa)* 68 N. W. 812.

[b] (Iowa; 1897.)

The improvement of a street is a public object which will support a special assessment therefor on abutting property, regardless of the question of benefit to such property.—*Dewey v. City of Des Moines (Iowa)* 70 N. W. 605.

§ 128. By whom assessment made.

[a] (Mich.; 1895.)

It is no objection to an assessment of benefits for a public improvement by the city council that the members were taxpayers, and therefore interested.—*Brown v. City of Saginaw (Mich.)* 65 N. W. 601.

[b] (Mich.; 1895.)

Where a committee appointed by the council investigated the assessment roll of benefits for a public improvement, before which the property owners assessed were given a hearing, on the confirmation of the roll by the council on report of the committee, the action of the committee is the action of the council.—*Brown v. City of Saginaw (Mich.)* 65 N. W. 601.

§ 129. Delegation of power to make.

(Wis.; 1895.)

Statutes delegating authority to make local assessments for street improvements, being in derogation of the right of property, should be strictly construed against the exercise of the power.—*Oshkosh City Ry. Co. v. Winnebago County*, 61 N. W. 1107, 89 Wis. 435.

§ 130. Uniformity of taxation.

[a] (Minn.; 1895.)

Gen. St. 1894, § 1341, requiring a partial assessment for local improvements, of 85 per cent. of the estimated cost after the contracts for the improvement are let, but before they are completed, is not repugnant to the constitutional rule requiring uniformity of taxation.—*In re Norton*, 64 N. W. 140, 61 Minn. 512; *In re Northwestern Loan & Investment Co.*, 1d.; *State v. Judges of District Court of St. Louis County*, 1d.

[b] (Minn.; 1896.)

Sp. Laws 1891, c. 51, § 7, provides that the appraisers to determine compensation to be paid for property taken by Duluth for park purposes shall appraise the value of the land taken, and the amount of benefit or damage to the owner with respect to adjacent property resulting from the taking, and that said value, adding thereto said damage, or deducting therefrom said benefit, as the case may be, shall be awarded. Section 8 provides that all property receiving special benefits, "derived from such acquirement for park" purposes, shall be assessed therefor. *Held*, that the latter section, in so far as it provides for assessing "adjacent" property for the benefits which under section 7 have been deducted from the value of the land taken, is unconstitutional, as providing for unequal taxation.—*Merchant v. District Court of St. Louis County (Minn.)* 68 N. W. 860.

§ 131. Amount of assessment.

[a] (Mich.; 1895.)

Ilow. Ann. St. § 2646, limits the amount to be levied by special assessment upon any lot for any one improvement at 25 per cent. of the assessed value. 1d. § 2699, limits the amount to be raised in any one year to 5 per cent. *Held*, that where the total amount levied for a pavement assessment was not over 25 per cent. of the taxable value, and the annual installments were less than 5 per cent., the assessment was valid.—*Boehme v. City of Monroe (Mich.)* 64 N. W. 204.

[b] (Minn.; 1897.)

Where an assessment by the board of public works of a city was confirmed under Sp. Laws 1887, c. 2, amended by Sp. Laws 1889, c. 19, § 8, it was the duty of the court to determine whether the assessment in question was excessive, and, if it was, to reduce it accordingly or order a new assessment.—*State v. District Court of St. Louis County (Minn.)* 70 N. W. 1088.

[c] (Neb.; 1896.)

Const. 1875, art. 9, § 6, conferring on certain municipal corporations "power to make local improvements by special assessments or special taxation of property benefited," and Omaha City Charter (Comp. St. c. 12a), by implication limit the amount of assessments for local improvements to the special benefits severally accruing to the lots or parcels of land affected.—*Smith v. City of Omaha (Neb.)* 69 N. W. 402.

[d] (Wis.; 1897.)

If the excess cannot be determined by computation and without proof, the court should determine the same as near as practicable to a reasonable certainty from the evidence produced on the trial.—*Wells v. City of Milwaukee (Wis.)* 70 N. W. 1071.

§ 132. Notice and right of owners to hearing.

[a] (Neb.; 1897.)

In an ordinance authorizing the council, by resolution, to require the construction of sidewalks, a provision for notice to property owners by the publication of such resolution is mandatory.—*Ives v. City of Omaha (Neb.)* 70 N. W. 961.

[b] (Wis.; 1895.)

Provisions of a city charter for making assessments for sewers, which contain no provision for notice of the assessment proceedings to the property owner, are unconstitutional.—*Dietz v. City of Neenah*, 64 N. W. 299, 91 Wis. 422.

§ 133. — Proof of publication.**(Mich.; 1895.)**

Under Local Acts 1889, No. 455, tit. 6, § 16, providing that proceedings of the common council shall be matters of record, and shall not fail on account of any technical error unless the party complaining shall show affirmatively that he has been injured thereby, failure to record proof of publication of notice of hearing on assessments is immaterial, where it is shown that such publication was had.—*Shimmons v. City of Saginaw* (Mich.) 62 N. W. 725, 104 Mich. 511.

§§ 134. Assessment district.**(Mich.; 1895.)**

To provide for paving streets, a city council were authorized by charter to fix assessment districts. An amendment to the charter gave this power to the board of public works. The council fixed an assessment district, but after the amendment, and before any assessments were made, the statement of costs and assessment districts was referred to the board of public works. An assessment roll was reported to the board by the engineer, who testified that he did not regard the assessment district as fixed by the common council. This assessment roll was certified to by the board, which stated that it did not deem itself bound by the district previously fixed by the council. *Held*, that the assessment of the board was valid, though the limits of the district were the same as those fixed by the council.—*Shimmons v. City of Saginaw* (Mich.) 62 N. W. 725, 104 Mich. 511.

§ 135. Statement of cost or assessment roll.**[a] (Mich.; 1895.)**

Under the Saginaw city charter (title 6, § 5), providing that the board of public works "shall prepare a detail statement of the cost of improvements showing the amount to be assessed on the property benefited," a statement setting out the amounts in gross to be paid by the city and the abutting owners, respectively, was sufficiently specific.—*Duffy v. City of Saginaw* (Mich.) 64 N. W. 581.

[b] (Mich.; 1895.)

Where the board of public works authorized its president to sign, and the clerk to attest, an assessment roll, and the roll was afterwards confirmed by the council, and thereby, under a provision of the city charter, made final and conclusive, it was sufficient, though the individual members of the board did not sign it.—*Duffy v. City of Saginaw* (Mich.) 64 N. W. 581.

§ 136. Certificate to assessment roll.**(Mich.; 1895.)**

A city charter's requirement of a certificate to an assessment roll that each parcel of land assessed for the improvement "is benefited specially by such improvement, to the amount of the assessment thereof," does not necessitate the use of those particular words. It is enough that it shows the entire amount assessed, and the amount assessed on each lot deemed to be benefited by the improvement; that the lots on the assessment roll are all which were benefited; and that the assessment was made in proportion to the benefits deemed to have been received.—*Nelson v. City of Saginaw* (Mich.) 64 N. W. 499.

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§ 137. Showing of assessment as to damages.**(Wis.; 1895.)**

An assessment made under Laws 1871, c. 184, subc. 7, § 7 (Milwaukee City Charter), providing that, where the grade of a paved street is changed, the owner of a lot thereon who is injured thereby shall be entitled to compensation therefor, and that the board of public works, at the time of making the assessment, shall assess the damages, costs, and charges arising from such alteration, must show on its face that the board of public works considered and passed upon, not only the question of benefits and injury, but also the question of damages to a lot owner, by way of compensation for the alteration of the grade.—*Liebermann v. City of Milwaukee* (Wis.) 61 N. W. 1112, 89 Wis. 336.

§ 138. Property assessable.**[a] (Iowa; 1896.)**

Special curbing and paving assessments are not taxes "for any city purposes," within the meaning of Acts 23d Gen. Assm. c. 1, § 3, providing that no lands included within the extended limits of a city, not laid off into lots, and which shall in good faith be used for agricultural purposes, shall be taxable for any city purposes, etc.—*Farwell v. Des Moines Brick Manuf'g Co.* (Iowa) 66 N. W. 176.

[b] (Iowa; 1897.)

A two-foot strip abutting on the street along one side of a city block was fraudulently conveyed in order to relieve the block of a paving assessment. A portion of the block, including such strip, was subsequently sold to a corporation, before the lien of the assessment attached. An officer of the corporation who was a son of the owner of the block, made the sale for her, and had negotiated the previous conveyance. The president of the corporation, who made the purchase for it, was also a son of the owner, and had frequently consulted with his brother as to their mother's business. The president testified that he knew of the previous conveyance, and its purpose. *Held*, that the corporation took with such notice of the fraud as would render the land purchased by it subject to the assessment.—*Eagle Manuf'g Co. v. City of Davenport* (Iowa) 70 N. W. 707; *French v. Same*, *Id.*

[c] (Iowa; 1897.)

A sale of land in good faith for value is not rendered void by the fact that one of the reasons therefor was to so divide the grantor's land as to reduce the paving assessment thereon.—*Eagle Manuf'g Co. v. City of Davenport* (Iowa) 70 N. W. 707; *French v. Same*, *Id.*

[d] (Iowa; 1897.)

A conveyance of a strip two feet wide along one side of a city block, made after the letting of a contract for paving the street on which such strip abutted, and for the sole purpose of avoiding the paving assessment on the balance of the block, to a grantee who knew the facts and was paid to accept the conveyance, is void for the purpose of assessment.—*Eagle Manuf'g Co. v. City of Davenport* (Iowa) 70 N. W. 707; *French v. Same*, *Id.*

[e] (Minn.; 1895.)

That part of Gen. St. 1894, §§ 1337-1353, which provides for the levying of assessments for local improvements is not unconstitutional, in authorizing the assessment to be made on property fronting on the improvement.—*In re Norton*, 64 N. W. 190, 61 Minn. 542; *In re Northwestern Loan & Investment Co.*, *Id.*; *State v. Judges of District Court of St. Louis County*, *Id.*

[f] (Wis.; 1896.)

Property exempt from "taxation" (Laws 1889, c. 450) is still liable for assessments for a public improvement.—*Yates v. City of Milwaukee* (Wis.) 66 N. W. 248.

92 Wis. 352.

[a] (Wis.: 1896.)

Laws 1891, c. 82, which went into effect March 31st, exempting certain land leased by the state agricultural society from all "assessments for the year 1891," does not exempt it from liability on an assessment certificate issued in the preceding January in payment for a public improvement theretofore completed.—*Yates v. City of Milwaukee* (Wis.) 66 N. W. 248.

92 Wis. 352.

[a] (Wis.: 1897.)

Const. art. 11, § 3, requiring the legislature to "restrict" the power of assessment of municipal corporations, so as to prevent abuses in assessments, does not deprive the legislature of power to exempt property from assessments.—*Milwaukee Electric Railway & Light Co. v. City of Milwaukee* (Wis.) 69 N. W. 796.

§ 139. — Liability of railroads for street improvements.**[a] (Mich.: 1895.)**

The nonpayment of an assessment levied on a portion of the roadbed of a railroad does not authorize a sale of such portion to satisfy the assessment. *Lake Shore & M. S. Ry. Co. v. City of Grand Rapids* (1894) 60 N. W. 767, 102 Mich. 371, followed.—*Detroit, C. H. & M. Ry. Co. v. City of Grand Rapids*, 63 N. W. 1007.

[b] (Mich.: 1895.)

The roadbed of a railroad company cannot, under a city charter requiring that assessments be made according to benefits received, be assessed for the cost of paving a street which crosses it, where none of the company's buildings are within two blocks of the crossing. *McGrath, C. J., and Hooker, J., dissenting.*—*Detroit, C. H. & M. Ry. Co. v. City of Grand Rapids* (Mich.) 63 N. W. 1007.

[c] (Mich.: 1895.)

Abutting owners cannot demand that a railroad company having its tracks in the street should pay part of the paving assessment.—*Boehme v. City of Monroe* (Mich.) 64 N. W. 204.

[d] (Wis.: 1895.)

Rev. St. § 1836, requiring corporations owning or operating a railroad in a city street to restore the street to its former condition, and "thereafter maintain the same in such condition against any effects in any manner produced by such railroad," confers no authority to levy an assessment on such corporation for the improvement of the street.—*Oshkosh City Ry. Co. v. Winnebago County*, 61 N. W. 1107, 89 Wis. 435.

[e] (Wis.: 1895.)

Rev. St. § 1038, declares that the track and right of way of a railroad corporation shall be exempt from taxation, "except that it shall be subject to special assessments for local improvements in cities and villages." *Held*, that the exception does not become operative to subject such property to assessment in the absence of other statutory provisions defining the cases in which it is subject thereto, and describing the manner of levy.—*Oshkosh City Ry. Co. v. Winnebago County*, 61 N. W. 1107, 89 Wis. 435.

[1] (Wis.: 1895.)

A charter provision conferring power on the aldermen to make street improvements, and charge the expense to any lots fronting or abutting on the street, does not authorize an assessment for the improvement of a street against the tracks and roadbed of a railroad which in lateral extent lie wholly within such street, and form part thereof.—*Oshkosh City Ry. Co. v. Winnebago County*, 61 N. W. 1107, 89 Wis. 435.

[g] (Wis.: 1895.)

Rev. St. § 1038, subd. 14, provides that "the track, right of way * * * and all other property necessarily used in operating any railroad * * * shall henceforth remain exempt from taxation for any purpose except that the

same shall be subject to special assessment for local improvements in cities and villages." *Held*, that the exception has no affirmative force, independent of the provisions as to general taxation which it follows and limits, and that the liability of such property to special assessment is not affected thereby.—*Chicago, M. & St. P. Ry. Co. v. City of Milwaukee* (Wis.) 62 N. W. 417, 89 Wis. 506.

[h] (Wis.: 1895.)

The charter of the city of Milwaukee (Laws 1874, c. 181, sube. 7, §§ 2, 7) makes the expense of street improvements chargeable to the abutting lots to the amount of benefit adjudged by the board of public works to accrue to them, and provides that an assessment therefor may be enforced by a sale of the lots. *Held*, that the tracks and right of way of a railroad are not subject to assessment under the charter for improvements on an adjacent street, since the franchise of the company is an entirety, and, with the property necessarily connected therewith, is impressed with a trust in favor of the public, which cannot be impaired by a sale and severance of a particular part.—*Chicago, M. & St. P. Ry. Co. v. City of Milwaukee* (Wis.) 62 N. W. 417, 89 Wis. 506.

[i] (Wis.: 1895.)

The necessary right of way of a railroad and its tracks, laid on an embankment 25 feet above an adjacent street, and sloping to its curb, are not benefited by the paving of such street, and cannot be assessed therefor.—*Chicago, M. & St. P. Ry. Co. v. City of Milwaukee*, 62 N. W. 417, 89 Wis. 506.

[j] (Wis.: 1895.)

Portions of a railroad company's right of way not used for railroad purposes are assessable for improvements on a street on which they front, if it appears that the benefits are direct, immediate, and certain.—*Chicago, M. & St. P. Ry. Co. v. City of Milwaukee* (Wis.) 62 N. W. 417, 89 Wis. 506.

§ 140. Method of computing benefits and apportioning costs.**[a] (Iowa: 1896.)**

Acts 25th Gen. Assem. c. 7, § 2, provides, when the paving of any street is directed, for contracts either for the entire work in one contract, or for parts in separate sections, as may seem best. Section 20 provides that any part of any street may be improved, as well as the entire street, and the cost of the whole or any part of the improvement included in any contract may be levied at one time, and under one plat and notice, when such action will allow the just proportion of the entire cost to be assessed uniformly to each front foot of the abutting lots. *Held*, that such statute does not require the assessments to be absolutely uniform as to each front foot throughout the entire improvement, but the board can levy a certain amount per front foot on lots abutting on part of the improvement, and a different amount on lots abutting on another part, if a just proportion of the entire cost is assessed uniformly.—*Gilcrest v. McCartney* (Iowa) 66 N. W. 103.

[b] (Mich.: 1895.)

How. Ann. St. § 2649, requires the assessor to enter upon each parcel of land, on which a special assessment is to be made, the valuation thereof. *Held*, in levying an assessment, for paving, on lots abutting on the street, that the assessor has the power to apportion the valuation in cases where certain lots extended twice the depth of the other lots, and the valuation for general taxation purposes had been laid on the whole parcel.—*Boehme v. City of Monroe* (Mich.) 64 N. W. 204.

§ 141. — Front-foot rule.**(Wis.: 1895.)**

Where the city charter requires assessments for public improvements to be made in proportion to the benefits secured thereby, an assessment of the cost of street grading in pro-

portion to the frontage of the property on the improvement made, without an actual view of the property, is invalid.—*Hayes v. Douglas County* (Wis.) 65 N. W. 482.
92 Wis. 429.

§ 142. Effect of abandoning improvement.

(Minn.; 1895.)

The city, being about to grade streets surrounding a square of lots, assessed the property to be benefited by the grading, including lots of plaintiff in the square abutting on one of the streets. After partially completing the improvement, the city abandoned grading the street on which plaintiff's lots abutted. *Held*, that plaintiff could not recover the full amount paid by him as benefits, though benefits were assessed against his lots by the frontage method, the amount of his recovery being limited to the difference between the actual benefits added by such grading as was done and the amount paid by him for benefits.—*Strickland v. City of Stillwater* (Minn.) 65 N. W. 131.
63 Minn. 43.

§ 143. Expense to be borne by city.

(Wis.; 1896.)

A city ordinance was passed, turning over to the park board a strip in the center of a very broad street for a park, and was inclosed and used as such for 10 years. *Held*, that the strip was "public grounds," within the meaning of such words in the city charter, requiring the city to pay the expense of paving the street, opposite its public grounds, to the center of the street.—*Boyd v. City of Milwaukee* (Wis.) 66 N. W. 603.
92 Wis. 456.

§ 144. Conclusiveness of decision of city officers.

[a] (Mich.; 1895.)

The determination of the question of the benefit to private property in improving a highway is vested in the municipal authorities, and, in the absence of fraud, their determination is final.—*Shimmons v. City of Saginaw* (Mich.) 62 N. W. 725.
104 Mich. 511.

[b] (Mich.; 1895.)

Where, in the opening of streets, the fixing of the assessment district is left to the council, its judgment as to the lands benefited is conclusive.—*Brown v. City of Saginaw* (Mich.) 65 N. W. 601.

§ 145. Lien of assessment.

(Iowa; 1897.)

The "commencement of the work" from which Act 23d Gen. Assem. c. 14, provides that the lien of paving assessments shall attach, is not the letting of the contract, but the performance of labor or the furnishing of material under it; the word "work" being used in that sense in the preceding sections of the act.—*Eagle Manuf'g Co. v. City of Davenport* (Iowa) 70 N. W. 707; *French v. Same*, Id.

§ 146. Time of making objections.

(Minn.; 1896.)

Gen. St. 1894, § 1343, provides that no irregularity in a special assessment for improvement shall affect its validity, unless objections be filed with the recorder before confirmation; and section 1346 provides that no action shall be maintained to avoid such assessment after the issuance of bonds covering the same. *Held*, that property owners who failed to interpose objections to an assessment within the prescribed time are concluded by the proceedings had against them.—*Village of West Duluth v. Norton* (Minn.) 65 N. W. 935.
63 Minn. 497.

§ 147. Estoppel to resist assessment.

[a] (Mich.; 1896.)

Where a property owner, having full knowledge, personally and through his agent, of a proposed street improvement, and of the assessment to defray the cost thereof, allowed the same to be completed without making any objection thereto, the collection of such assessment will not be restrained upon a bill brought several months after such completion, alleging irregularities in the assessment.—*Fitzlugh v. City of Bay City* (Mich.) 67 N. W. 904.

[b] (Minn.; 1895.)

Property owners who acquiesced in the partial assessment for local improvements provided for by Gen. St. 1894, § 1341, which prescribed the territory benefited and the basis for assessment, could not contest the final assessment authorized by the same section, covering the same territory and made on the same basis, on grounds available when the first assessment was made.—*In re Norton* (Minn.) 64 N. W. 190.
61 Minn. 542; *In re Northwestern Loan & Investment Co., Id.*; *State v. Judges of District Court of St. Louis County*, Id.

§ 148. Remedies for erroneous assessments.

[a] (Mich.; 1895.)

An objection that the construction of a sewer was not embraced in the report of the board of public works, as required by the city charter, cannot be considered in a suit to set aside an assessment therefor, complainants not having availed themselves of the right provided by the charter to have a review by the city council of the assessments made by the board of public works.—*Nelson v. City of Saginaw* (Mich.) 64 N. W. 499.

[b] (Wis.; 1895.)

Where, in case of assessments for public improvements, the only relief authorized on an appeal from the assessment of benefits is that the difference between the benefits assessed and the benefits actually secured shall be paid by the city, a provision that the appeal shall be the only remedy of the owner of any parcel of land for the redress of any grievance he may have by reason of the making of such improvements does not prevent a property owner from attacking a sale based on such assessment, on the ground that the assessment was unequal and void, as the appeal is no adequate remedy in such case.—*Hayes v. Douglas County* (Wis.) 65 N. W. 482.
92 Wis. 429.

§ 149. — Injunction.

[a] (Neb.; 1897.)

Equity will restrain the sale of land in satisfaction of a void special assessment.—*Ives v. City of Omaha* (Neb.) 70 N. W. 961.

[b] (Wis.; 1894.)

A complaint to cancel a special assessment, and to restrain its perfection and enforcement, is not demurrable because it shows that the assessment is void.—*Beaser v. City of Ashland*, 61 N. W. 77, 89 Wis. 28.

[c] (Wis.; 1895.)

Where an assessment levied by the city of Milwaukee is void, injunction will lie to enjoin its enforcement, though Laws 1874, p. 365, c. 7, §§ 11, 12 (Milwaukee City Charter), provide for appeals from assessments.—*Liebermann v. City of Milwaukee* (Wis.) 61 N. W. 1112, 89 Wis. 336.

[d] (Wis.; 1895.)

Equity will restrain a sale of land under a special assessment that is void for want of authority in the council to make it. *Hixon v. Oneida Co.* (1892) 52 N. W. 445, 82 Wis. 515, distinguished.—*Dietz v. City of Neenah*, 64 N. W. 209, 91 Wis. 422.

§ 150. Reassessments.

[a] (Minn.; 1891.)

Laws 1893, c. 206, authorizing reassessments for local improvements, is retroactive in its operation, and includes in its terms assessments which have been set aside by the courts, as well as those which have not been passed on.—*In re City of Duluth*, 61 N. W. 678, 59 Minn. 522; *Reynolds v. City of Duluth*, Id.; *In re Piedmont Ave. East*, Id.; *Seoville v. City of Duluth*, Id.

[b] (Minn.; 1896.)

The St. Paul charter provides that whenever an assessment is, for any cause, set aside by the court, the property may be reassessed. An assessment on property, as to a part thereof, was set aside, on application of the owners, and as to the balance the city refunded the amount paid on the understanding that the assessment was void. *Held*, in proceedings for reassessment, that the fact that the original assessment was not set aside by the courts as to the whole property was no defense.—*In re Opening Linwood Place (Minn.)* 67 N. W. 77, 64 Minn. 331; *Putnam v. Second Judicial District Court of Ramsey County*, Id.

§ 151. Action to set aside.

[a] (Mich.; 1895.)

Local Acts 1880, Act No. 455 (City Charter of Saginaw), tit. 15, § 3, provides that the resolutions of the city council when private property shall be taken shall describe the lots to be taken, and set forth the names of the owners. Local Acts 1893, Act No. 402, amends such charter, and directs that the provision requiring the council to fix the assessing district and the right of appeal from the finding of the jury by parties thereafter assessed for benefits is taken away. *Held*, that such persons are not necessary parties in the proceeding to determine the necessity of opening the streets.—*Brown v. City of Saginaw (Mich.)* 65 N. W. 601.

[b] (Wis.; 1896.)

Sanb. & B. Ann. St. § 1210h, limiting to one year the time within which an action may be commenced to cancel a tax certificate, applies to a certificate issued on a sale of property for nonpayment of an assessment of benefits for street improvements.—*Pratt v. City of Milwaukee*, 68 N. W. 392, 93 Wis. 658.

§ 152. Tendering amount due as condition precedent to relief.

[a] (Wis.; 1895.)

Where the cost of a public improvement is assessed on the abutting property in proportion to the foot frontage, without regard to the benefit secured thereby, as required by statute, a tax sale based thereon should be set aside, without requiring the property owner to pay his proportion of the assessment as a condition of relief.—*Hayes v. Douglas County (Wis.)* 65 N. W. 482.

92 Wis. 429.

[b] (Wis.; 1896.)

The owner of land is not entitled to enjoin the execution of a tax deed upon a certificate of sale embracing several assessments, on account of the invalidity of one of the assessments, without tendering the amount of the valid assessments.—*Yates v. City of Milwaukee (Wis.)* 66 N. W. 248.

92 Wis. 352.

[c] (Wis.; 1896.)

The fact that no demand was made for the payment of a street assessment, or that a certificate issued on a sale of the property is for an amount slightly too small, does not afford ground for equitable relief, where the lien of the tax has become fixed by the statute of limitations, and no offer is made to pay the correct amount.—*Pratt v. City of Milwaukee (Wis.)* 68 N. W. 392.

93 Wis. 658.

[d] (Wis.; 1897.)

Where the statutory requisites to the assessment of a tax for a street improvement upon property are all complied with up to the time when the assessment of benefits has been in all respects legally made so as to determine a proper basis on which to apportion the cost of the improvement properly chargeable to abutting property, and the subsequent proceedings result in charging such property an excessive amount for any cause, and the owner waits till the improvement is completed before suing for relief against such excess, equity will require him to first pay the balance of the tax.—*Wells v. City of Milwaukee (Wis.)* 70 N. W. 1071.

[e] (Wis.; 1897.)

If such excess can be determined by mere computation, or without proof, failure to plead an offer to pay the balance will be fatal to the cause of action.—*Wells v. City of Milwaukee (Wis.)* 70 N. W. 1071.

[f] (Wis.; 1897.)

Under Milwaukee City Charter (Laws 1874, c. 184, as amended), making payment or tender of all legal taxes unpaid on any property a condition precedent to an action by the owner to set aside an assessment or special tax on it, a failure to comply with such provision is waived unless taken advantage of by demurrer or by plea in abatement.—*Wells v. City of Milwaukee (Wis.)* 70 N. W. 1071.

[g] (Wis.; 1897.)

A failure to tender or offer to pay the balance before suit will be fatal to any claim for costs.—*Wells v. City of Milwaukee (Wis.)* 70 N. W. 1071.

§ 153. Collateral attack upon condemnation proceedings.

[a] (Mich.; 1895.)

The Detroit city charter requires that resolutions providing for the expenditure of money shall be presented to the mayor. Acts 1883, No. 124, after authorizing the jury to determine the necessity for a proposed improvement, provides (section 11) that the "judgment confirming the verdict of the jury unless reversed by the supreme court shall be conclusive as to all persons interested therein." *Held*, that in a separate proceeding for the assessment of property for benefits after a street had been opened, and no appeal taken from the judgment of confirmation, the validity of the prior proceeding cannot be assailed on the ground that the resolution adopted by the council was not presented to the mayor.—*Scotten v. City of Detroit (Mich.)* 64 N. W. 579.

[b] (Mich.; 1895.)

Where the statute provides two different proceedings on the opening of streets, one by which the necessity of opening the street is determined, the other by which the benefits are assessed, in the latter proceeding the judgment opening the street is not open to collateral attack.—*Brown v. City of Saginaw (Mich.)* 65 N. W. 601.

§ 154. Recovery for work improperly done.

(Mich.; 1895.)

Where the improvement of a street was not a substantial performance of the contract, but the common council, after receiving remonstrances approved of and paid for the work, the court will not enjoin the collection of the tax therefor at the suit of a property owner. *Motz v. City of Detroit (1869)* 18 Mich. 515, followed.—*Harper v. City of Grand Rapids*, 63 N. W. 517, 105 Mich. 551.

§ 155. Payment of assessments.

(Minn.; 1896.)

Gen. Laws 1895, c. 236, authorizing the extending of the time of payment of assessments for local improvements by cities, is permissive and not mandatory.—*State v. City*

Conneil of City of Minncapolis (Minn.) 68 N. W. 31.

5. ENFORCEMENT OF ASSESSMENTS.

§ 156. Jurisdiction.

(Minn.: 1895.)

Under the Duluth city charter, the failure of the board of publicworks to establish a street grade or sewer system before constructing a sewer, or to give the required notices of the meeting to make an assessment for the construction of the sewer, and of the application for its confirmation, does not affect the jurisdiction of the district court to render final judgment against the property for the assessment.—*City of Duluth v. Dibblee* (Minn.) 63 N. W. 1117.

62 Minn. 18.

§ 157. Filing assessment warrants.

(Minn.: 1896.)

Municipal Code St. Paul 1893, § 128, does not require the city treasurer, when making his report to the district court, and demanding judgment for unpaid special assessments, to file the original assessment warrants in court.—*Rogers v. Hyderstaedt* (Minn.) 68 N. W. 8.

§ 158. Penalty for failure to pay.

(Minn.: 1896.)

In case of nonpayment of taxes levied by a municipal corporation for local improvements, penalties may be added in the same manner and to the same extent as in case of nonpayment of taxes levied for general purposes.—*Village of West Duluth v. Norton* (Minn.) 65 N. W. 935.

63 Minn. 497.

§ 159. Judgment and execution.

[a] (Iowa: 1897.)

Under Code, § 478, providing that a charge for public improvements in a city "when assessed shall be payable by the owners at the time of the assessment personally, and shall also be a lien on the respective lots or parcels of land from the time of the assessment," it is proper, in an action to enforce a special assessment, for the decree to order a general execution against the owner for any balance which may remain unpaid after the property has been exhausted.—*Dewey v. City of Des Moines* (Iowa) 70 N. W. 605.

[b] (Minn.: 1896.)

In proceedings to enforce collection of special assessments for local improvements in the city of St. Paul upon certain lots under Sp. Laws 1887, c. 7, subc. 7, tit. 1, §§ 36-46, it is not necessary that the form prescribed in section 40 for the order or judgment on default should be strictly adhered to.—*Security Trust Co. v. Von Heyderstaedt* (Minn.) 67 N. W. 219.

64 Minn. 409.

§ 160. Sale for inadequate sum.

(Minn.: 1896.)

If the treasurer, in making a sale to enforce special assessments in St. Paul, under Sp. Laws 1887, c. 7, subc. 7, tit. 1, §§ 36-46, sells a lot for less than the full amount of the judgment, as appears in the process, and the certificate of sale shows that fact, the purchaser acquires no right in the property as against the true owner.—*Security Trust Co. v. Von Heyderstaedt*, 67 N. W. 219, 64 Minn. 409.

§ 161. Void sale—Liability of city to purchaser.

[a] (Wis.: 1897.)

Rev. St. § 4986, providing that all general statutes shall apply to cities when not inconsistent with their charters, does not render Rev. St. § 1184, providing that money paid on a void sale for general taxes shall be returned, applicable to sales under special assessments.—*Hel-ler v. City of Milwaukee* (Wis.) 70 N. W. 1111.

[b] (Wis.: 1897.)

The holder of a void certificate of sale for city assessments cannot recover from the city the amount paid, when the charter provides that no person having a contract with the city shall have any claim against it except from the assessment for the work contracted for, since the city only receives the money paid at the sale for the holder of the board of public works certificates on which the sale is based, and, if it were compelled to indemnify the purchaser as well, it would indirectly pay for the improvement otherwise than from the assessment.—*Hel-ler v. City of Milwaukee* (Wis.) 70 N. W. 1111.

§ 162. Redemption notice.

[a] (Minn.: 1895.)

Mun. Code St. Paul 1893, § 139, providing that the city treasurer shall, at least three months before the expiration of the time for redemption from a special assessment sale, cause to be published once a week for six successive weeks a certain list and notice, is not affected by section 122, providing that the time specified for the publication of any notice shall commence with the first publication.—*Bergen v. Anderson* (Minn.) 64 N. W. 561.

62 Minn. 232.

[b] (Minn.: 1896.)

Under the St. Paul city charter, providing that lands sold for special assessments may be redeemed at any time within five years after the sale, and that a three-months notice of the expiration of redemption shall be published six weeks, where the notice attempted to be given was void, a new notice might be given after expiration of the five years.—*Flanagan v. City of St. Paul* (Minn.) 68 N. W. 47.

6. RIGHTS OF CONTRACTOR.

§ 163. Action by—Defense.

(Mich.: 1896.)

The decision of a township board that a petition for improvement of a street forming the boundary between the township and a city had been signed by a majority of the property owners, as required by law, will not prevent the township from setting up that it had not been so signed, as a defense to an action by the contractor for money due under his contract.—*Collins v. Township of Grand Rapids* (Mich.) 66 N. W. 586.

7. DAMAGES.

§ 164. Change of grade.

[a] (Iowa: 1895.)

Under Code, § 469, which provides that when any city has established the grade of a street, and any person has made improvements thereon, and the city alters such grade to the injury of such property, the city shall respond in damages, the owner of a house built on an established grade, which was subsequently changed by the city, can recover for any injury, though the final grade is on a line with the natural surface of the street.—*Ressegieu v. City of Sioux City* (Iowa) 63 N. W. 184.

[b] (Iowa: 1895.)

In determining the difference in value of improved property before and after a change of grade, as the measure of damages caused by the change, it is proper to consider the use and purposes for which the improvements were made.—*Preston v. City of Cedar Rapids* (Iowa) 63 N. W. 577.

[c] (Minn.: 1897.)

Where commissioners are appointed to assess damages by reason of a change in the grade of a street, under Sp. Laws 1885, c. 5, they are authorized to view the premises and hear the evidence offered, and may use such evidence as a guide; and the presumption is that they proceeded rightly and according to the

statute until the contrary appears.—*Abel v. City of Minneapolis* (Minn.) 70 N. W. 851.

[d] (Minn.: 1897.)

Since, in the absence of express statutory authority, there can be no recovery for injuries to property caused by a change of street grade, the owner cannot contend that the procedure provided by a statute giving such right is unconstitutional.—*Abel v. City of Minneapolis* (Minn.) 70 N. W. 851.

[e] (Neb.: 1895.)

The fact that a husband erected improvements on land, the title to which was in his wife, and was in possession thereof, did not entitle him to recover for damages to the property resulting from a change of street grade.—*Nebraska City v. Northcutt* (Neb.) 63 N. W. 807.

45 Neb. 456.

[f] (Neb.: 1896.)

Under the constitutional provision that private property shall not be taken or damaged for public use without compensation, a city is liable for damage resulting from a material change of the grade of its streets from the natural surface.—*City of Harvard v. Crouch* (Neb.) 66 N. W. 276.

47 Neb. 133.

[g] (Neb.: 1896.)

The measure of damages to one whose property was injured by a material change of grade of a street from the natural surface is the depreciation in the value of the property occasioned by the change.—*City of Harvard v. Crouch* (Neb.) 66 N. W. 276.

47 Neb. 133.

[h] (Neb.: 1896.)

An award of damages under Omaha City Charter (Comp. St. c. 12a) § 116, on a change of grade, must show affirmatively that the appraisers considered the benefits to the property, as provided by said section, and that the award represents the difference in favor of the owner.—*Smith v. City of Omaha* (Neb.) 69 N. W. 402.

[i] (Wis.: 1896.)

The occupation of a public street for its entire width by a permanent viaduct approach on a higher grade than the street is equivalent to a change of grade, and, as such, does not entitle abutting owners to damages as for an original taking of private property for public use, though the act (Laws 1891, c. 122) authorizing its construction, for its protection and police purposes, provides that it shall remain under the absolute control of the city, and prohibits the granting of any exclusive franchise for its use for any purpose.—*Colclough v. City of Milwaukee* (Wis.) 65 N. W. 1039.

92 Wis. 182.

[j] (Wis.: 1897.)

Under the charter of Milwaukee (chapter 7, §§ 6, 11), prescribing the proceedings to be taken before the grading or improvement of a street, including a viewing of the premises by the board of public works, and the assessment of benefits on property fronting on the street, taking into consideration any injury which may result from the proposed improvements, an owner of lots may recover for an injury to them resulting from the grading of a street by the city, under allegations that the grading was done without a compliance with such charter provisions, though the cost of grading was not charged on adjoining property, but was paid by the city.—*Pittolkow v. City of Milwaukee* (Wis.) 69 N. W. 803.

[k] (Wis.: 1897.)

In the absence of statute, a municipality is not liable for damages to abutting property owners caused by a change in the grade of a street.—*Walish v. City of Milwaukee* (Wis.) 69 N. W. 818.

[l] (Wis.: 1897.)

Laws 1874, c. 184, subc. 7, § 8, providing that, where the grade of a street shall hereafter be established, and a street shall have been ac-

tually graded, and the grade so established is changed, the owner of any lot damaged by such alteration of grade shall be entitled to compensation, does not entitle a lot owner to compensation in case of the alteration of an established grade, if the street had not been actually graded to such established grade.—*Walish v. City of Milwaukee* (Wis.) 69 N. W. 818.

[m] (Wis.: 1897.)

Under the charter of the city of Milwaukee, where the grade of a paved street is changed, an assessment is void which does not show on its face that damages from such change were considered in making such assessment.—*Sanderson v. Herman* (Wis.) 69 N. W. 977.

[n] (Wis.: 1897.)

An assessment, not showing on its face that damages for change in the grade of the street were considered, cannot be validated by evidence aliunde that they were considered.—*Sanderson v. Herman* (Wis.) 69 N. W. 977.

§ 165. — Additional servitude.

(Wis.: 1897.)

The occupation of the entire street for the approach to a viaduct, the approach being supported by columns resting on the surface of the street, is merely a change of the grade of the street, and therefore does not entitle the abutting property owners to compensation as an additional servitude.—*Walish v. City of Milwaukee* (Wis.) 69 N. W. 818.

§ 166. Separation of grades.

[a] (Mich.: 1896.)

Since Acts 1893, No. 92, relating to proceedings for separation of grades where a street crosses a railroad, contemplates an award of damages in gross, and not merely those that have already accrued to the abutting owners, the same rule will be applied in an action against the city to recover damages for its failure to proceed in accordance with the statute.—*Harper v. City of Detroit* (Mich.) 68 N. W. 265.

[b] (Mich.: 1896.)

On one side of plaintiff's lot, which fronted on a public street, was a railroad track, and pending proceedings for the extension of the street over the track an agreement was entered into between the city and the railroad company whereby the latter granted the right of way, and agreed to build a viaduct, the city to pay therefor after condemnation. The approach to the viaduct was 20 feet high in front of plaintiff's lot. Acts 1893, No. 92, enacted during pendency of the proceedings to condemn the right of way over the track, provides (section 1) that "where any railroad crosses or shall hereafter cross any public street or highway the separation of the grade at such crossing, by carrying such street or highway either over or under such railroad, * * * may be effected as follows" (setting out provisions for agreement between the parties). Section 2 declares that no such agreement shall be enforceable until the damages referred to in the next section are fixed by judicial proceedings or by compromise, and section 3 provides for damages to abutting owners from the change of grade. *Held*, that the proceedings for separation of grades, as provided for in the agreement between the city and the railroad company, should have been under said act, and that plaintiff was entitled to damages against the city, such damages not being included in those paid when the street was originally opened.—*Harper v. City of Detroit* (Mich.) 68 N. W. 265.

§ 167. Estoppel to claim.

(Iowa: 1895.)

Where a property owner, after the adoption of an ordinance fixing a grade different from that in conformity to which he has improved his property, signs a petition for improvements to the street, he will be estopped from claiming damages resulting from improve-

ments made on the last established grade.—*Preston v. City of Cedar Rapids (Iowa)* 63 N. W. 577.

§ 168. Evidence.

(Neb.; 1896.)

In an action against a city for damages resulting to adjoining premises from the grading of a street, where the value of the improvements separate from the lot had been shown, it was not objectionable to prove the value of the lot separate from the improvements.—*Denise v. City of Omaha (Neb.)* 69 N. W. 119.

X. FISCAL MANAGEMENT AND TAXATION.

Injunction by taxpayer, see post, § 202.

1. IN GENERAL.

§ 169. Power to incur indebtedness.

[a] (Mich.; 1897.)

Sess. Laws 1895, Act No. 3, c. 8, § 1, providing that the cost of waterworks shall be paid from the general fund of a village organized under such act; and chapter 10, authorizing the council to provide suitable fire apparatus and to construct reservoirs, etc., in the streets, for the use of the fire department,—do not authorize the expenditure of money for the construction of a general system of waterworks without a two-thirds vote of the electors, as required by chapter 11, § 4.—*Savidge v. Village of Spring Lake (Mich.)* 70 N. W. 425.

[b] (Minn.; 1897.)

A bond for the benefit of a third person, executed by a village without express authority of law, is void.—*Park v. Sykes (Minn.)* 69 N. W. 712.

[c] (S. D.; 1896.)

A city has no authority to incur indebtedness for expenses of a campaign to secure the selection of the city as the capital of the state.—*Shannon v. City of Huron (S. D.)* 69 N. W. 598.

§ 170. Limitation on indebtedness.

[a] (Iowa; 1896.)

Where a contractor, in full satisfaction for work done in grading a street, accepts, from the city, bonds payable from the special assessment made against the owners of abutting property, such bonds do not create a debt against the city, within the meaning of the constitutional provision limiting the lawful indebtedness of a city to 5 per cent. on the assessed valuation of the property in said city.—*City of Clinton v. Walliker (Iowa)* 68 N. W. 431.

[b] (Iowa; 1897.)

The obligation created by a contract made by a city for water for fire protection is not an indebtedness within the meaning of the constitutional limitation on the indebtedness which may be contracted by municipal corporations.—*Creston Waterworks Co. v. City of Creston (Iowa)* 70 N. W. 739.

[c] (Minn.; 1895.)

Certificates issued by the park board of Minneapolis, under Sp. Laws 1889, c. 30, for the price of land purchased for park purposes, secured by mortgage on the land, and reciting that the amounts thereof are payable out of funds arising from assessments on real estate specially benefited by the park to be established on the land, and expressly stating that there shall be no liability on the part of the city to pay the amounts thereof out of any other fund than the one specified, are not an indebtedness of the city, within Laws 1893, c. 204, § 2, limiting the indebtedness of cities.—*Kelly v. City of Minneapolis (Minn.)* 65 N. W. 115.
63 Minn. 125.

[d] (Minn.; 1895.)

The amount of bonds and money in the sinking fund of Minneapolis is to be deducted from the total amount of outstanding bonds of the city, in determining whether the city's indebtedness exceeds the limit prescribed by Laws 1893, c. 204, § 2.—*Kelly v. City of Minneapolis* 65 N. W. 115, 63 Minn. 125.

[e] (S. D.; 1895.)

A finding that when a city warrant was issued the city had exceeded the constitutional limit of indebtedness does not establish the invalidity of the warrant, since it does not show that the limit was reached when the debt for which the warrant was issued was incurred.—*Western Town Lot Co. v. Lane (S. D.)* 65 N. W. 17.

[f] (S. D.; 1896.)

Warrants issued by a city for current expenses, after the constitutional limit of indebtedness has been reached, but in anticipation of a tax already levied, are valid to the extent of the taxes levied.—*Shannon v. City of Huron (S. D.)* 69 N. W. 598.

[g] (Wis.; 1896.)

An ordinance provided that a certain firm should construct waterworks, to be completed within six months, issue bonds therefor to the amount of \$100,000, mortgage the plant to secure \$80,000 of such bonds, and, when completed, lease the works to the city for 20 years, and assign the lease to the mortgagee or a trustee for the benefit of the bondholders; that the city should take possession of the plant, and pay as rental thereon, annually, \$7,000 during each of the first four years, \$9,000 during each of the next six years, and \$10,000 during each of the last ten years; that all sums so paid in excess of the interest on the original cost might, at time of payment, be at once applied on the bonds; all surplus on the sale of bonds, after paying the \$80,000 and interest, to apply on payment of the principal sums named in said bonds, to the end that the city should only pay, as rentals, the original cost of the plant, \$80,000, and interest; and that on payment of said sums in the manner provided the plant should become the property of the city. *Held*, that such ordinance created an indebtedness, within Const. art. 11, § 3, as amended in 1874, forbidding municipalities from becoming "indebted in any manner or for any purpose" to any amount, including existing indebtedness, in the aggregate exceeding 5 per cent. on the value of the taxable property therein, etc.—*Earles v. Wells (Wis.)* 68 N. W. 964.

§ 171. — Conflict between council and board of estimates.

(Mich.; 1895.)

Detroit City Charter 1893, § 155, provides that the comptroller shall present to the common council his estimate of taxes to be raised for the ensuing year; that the council may revise such estimates, and transmit them to the board of estimates, which may call on the council for any information as to every matter pending before the board. Local Acts 1895, Act No. 366, amending the charter, provides (section 4) that the board of estimates may, after consideration of the various estimates referred to it, disallow any item in the different funds, and that it shall be unlawful for the common council to create any expenditure as to items specifically disallowed by such board. *Held*, that where the board of estimates deducted from the general fund the salaries of certain petty officers, but, notwithstanding the deductions, the council made appointments to those offices, such appointments were void.—*Robinson v. City of Detroit (Mich.)* 65 N. W. 10.

§ 172. Moneys belonging to school district—Payment over.

(Neb.; 1896.)

Since Const. art. 8, § 5, provides that moneys arising from a liquor license granted

by a village shall belong to the school district in which the village is located, and must be applied to the support of the schools therein, mandamus will lie to compel a village treasurer to pay such moneys to the proper district, even before expiration of the municipal year for which the license was issued, in the absence of a showing that there is a probability of the license being revoked before that time.—*Guthrie v. Hester* (Neb.) 66 N. W. 853.

47 Neb. 819.

§ 173. Liability of succession for debts of old corporation.

(Minn.: 1894.)

After a town had issued bonds, a village was created within the town by Sp. Laws 1885, c. 296, providing that the bonded indebtedness of the town incurred by the issue of its bonds should be apportioned and made chargeable to the town and village pro rata. Before the bonds were paid, a city was created from the territory of the village and a part of the town by Sp. Laws 1889, c. 4, providing that the city should be liable for all debts and obligations then existing against the village. *Held*, that the city succeeded to the liabilities of the village on the bonds.—*Rumsey v. Town of Sauk Centre* (Minn.) 61 N. W. 330.

59 Minn. 316.

§ 174. Right to share in road fund.

(Neb.: 1895.)

Act March 29, 1889, § 49, providing that road taxes in cities of the first class shall be paid to the city treasurer, and expended as the council may direct, has reference merely to such taxes as are by general law collected for the use of the city as a road district.—*State v. Cobb* (Neb.) 62 N. W. 867.

44 Neb. 434.

2. PAYMENT OF CLAIMS—SIGNING WARRANTS.

Receiving warrants in payment of taxes, see post, § 188.

§ 175. Allowance and audit of claims.

[a] (Mich.: 1895.)

Detroit City Charter, pp. 190-194, provides that the board of health shall determine the compensation of its employes, and that the common council shall include in their final estimate an amount sufficient to maintain the board, which fund shall be paid out on the vouchers of the board. Pub. Acts 1895, No. 10, creates a new board, and provides that it shall assume all claims against the old one, and shall appoint and dismiss all employes. *Held* that, where an employe of the old board presented a claim for extra work to the new board, which was allowed for a smaller amount than that claimed, and the council, on the board's recommendation, appropriated a sum for the payment of the claim as allowed, and the claimant refused to accept it, the council had no power, on presentation to them of the claim by the claimant, to allow it for the original amount.—*Schneider v. Blades* (Mich.) 65 N. W. 559.

[b] (Wis.: 1896.)

Where a claim is made against a city for injuries, and the city council, on report of a committee, allows the claimant a certain amount, less than the sum claimed, a demand by the claimant in writing, on the city treasurer, for an order, after such allowance, and before any proceedings are taken to reconsider the matter, constitutes an acceptance completing the contract by the city to pay the sum allowed.—*Sharp v. City of Maunston* (Wis.) 66 N. W. 803.

92 Wis. 629.

§ 176. Special appropriations.

(Neb.: 1895.)

A city of the second class with more than 5,000 inhabitants may make special appropriations for improvements otherwise than by the annual appropriation bill required by Comp. St. c. 11, art. 2, § 39, if such appropriations are first sanctioned by a majority of the electors.—*Christensen v. City of Fremont* (Neb.) 63 N. W. 361.

45 Neb. 169.

§ 177. Payment of warrants.

[a] (Neb.: 1895.)

It is the duty of the treasurer to refuse to pay city warrants, when ordered to do so by the city; such instruments being nonnegotiable.—*State v. Cook*, 61 N. W. 693, 43 Neb. 318.

[b] (S. D.: 1895.)

A city council cannot divide the amount levied for general city purposes into separate funds, and appropriate it to the payment of warrants issued in any particular year, so as to deprive the holder of warrants on the general fund, issued the year previous, of the right to apply the same to the payment of his city taxes.—*Western Town-Lot Co. v. Lane* (S. D.) 62 N. W. 982.

[c] (S. D.: 1895.)

Municipal warrants should be paid in the order of their registration for payment, though some were issued in payment of an indebtedness of a previous year.—*State v. Campbell* (S. D.) 64 N. W. 1125.

[d] (S. D.: 1896.)

Under Comp. Laws, §§ 1671-1679, requiring city warrants to be paid in the order of their registration, and that the treasurer shall notify the holder, and set apart the money for his use, the fact that taxes collected after the issuance of a warrant have been paid out on other warrants subsequently issued will not prevent the holder of the unpaid prior warrant from recovering thereon; the treasurer having failed to notify him, or set apart money for his use.—*Shannon v. City of Huron* (S. D.) 69 N. W. 598.

§ 178. Unauthorized partial payment—Effect as estoppel.

(Iowa: 1896.)

The unauthorized payment by officers of a public corporation of part of a claim against the corporation will not estop the corporation from denying the validity of the claim.—*McGillivray v. District Tp. of Barton* (Iowa) 65 N. W. 974.

3. BONDS—INVESTMENT OF SINKING FUND.

Submitting issuance of bonds to voters, see post, § 190.

§ 179. Power to issue.

[a] (Mich.: 1895.)

A provision of a city charter authorizing the city to construct and operate an electric light plant, provided that no indebtedness for such purpose shall be incurred unless by vote of the electors, does not authorize the city to borrow money for such purpose, and issue its bonds therefor, payable in the future, where, by other parts of the charter, power is given to issue bonds for other specific purposes, under limitations carefully defined.—*Farr v. City of Grand Rapids* (Mich.) 70 N. W. 411.

[b] (Neb.: 1895.)

Where, from an analysis of the whole of an act purporting to authorize certain political divisions of the state to issue bonds, the intention is doubtful, the doubt will be resolved against the authority to issue the bonds.—*State v. Moore* (Neb.) 63 N. W. 130.

45 Neb. 12.

§ 180. — For waterworks.

(Wis.; 1895.)

Rev. St. § 942, provides that any city may issue its bonds for the erection of waterworks, or to accomplish any other purpose within its lawful power. The Reedsburgh city charter (section 1) provides that it shall have the powers possessed by cities under the general statutes. Sections 119 and 129 provide that the city shall contract no debt exceeding the revenues of the fiscal year, except as expressly authorized by charter. *Held*, that said city had power to issue bonds, in the manner provided by law, for the erection of waterworks and an electric light plant.—*Ellinwood v. City of Reedsburgh* (Wis.) 64 N. W. 885, 91 Wis. 131.

§ 181. Provisions with regard to coupons.

(Neb.; 1895.)

Comp. St. 1893, c. 9, § 37, providing that the auditor shall detach coupons of municipal bonds presented to him for registration which mature before the first taxes levied to meet the same, applies to bonds issued by a city to aid a work of internal improvement.—*Brinkworth v. Grable* (Neb.) 63 N. W. 952, 45 Neb. 647.

§ 182. Right of purchasers—Rights of bona fide holders.

[a] (Iowa; 1896.)

While bonds delivered by a school district in payment of judgments against it cannot be defeated, in the hands of innocent holders for value, without notice of their illegality, by showing that the judgments were rendered upon warrants issued in excess of the constitutional limit, defendant, in an action to cancel such bonds, must show that they were actually applied in payment of specific judgments, or that at least part of them were legal, particularly where it appears that more bonds were issued than were necessary to pay the judgments.—*Independent Dist. of Rock Rapids v. Society for Savings of Cleveland, Ohio* (Iowa) 67 N. W. 370.

[b] (Neb.; 1895.)

Under Comp. St. 1893, c. 9, § 37, providing that, when municipal bonds shall be presented to the auditor for registration, the auditor shall detach as many interest-bearing coupons as shall mature before the first taxes levied to meet the same, where municipal bonds dated November 1, 1889, with interest payable semi-annually, evidenced by coupons maturing May 1, 1890, and every six months thereafter, were deposited with the auditor on December 21, 1889, for registration, and the auditor was prevented by injunction from registering the bonds till January 1, 1891, the coupons maturing prior to October 1, 1890, being properly detachable, were void, though in the hands of subsequent innocent purchasers.—*Brinkworth v. Grable* (Neb.) 63 N. W. 952.

45 Neb. 647.

§ 183. — Effect of recitals.

(S. D.; 1895.)

Where a majority of the electors of a school district present and voting at a special meeting held by said district for the purpose of voting bonds with which to build and furnish a schoolhouse are in favor of the bonds, which are afterwards issued, and sold for full value, and a schoolhouse is erected and furnished with the proceeds thereof, and teachers are employed and schools are maintained therein, and the first installment of interest on said bonds is paid at maturity, the fact that said school board submitted the question of bonding the district without having been petitioned in writing by a majority of the resident electors, and without giving the notice required by statute, is not sufficient to invalidate, in the hands of an innocent purchaser, bonds on the face of which the officers of the district have placed a recital of authority and regu-

larity, which imports a strict compliance with all the statutory requirements in regard to conditions precedent to the issuance thereof.—*Coler v. Rhoda School Tp. of Charles Mix County* (S. D.) 63 N. W. 158, 6 S. D. 640.

§ 184. Investment of sinking fund.

(Minn.; 1895.)

The commissioners of the sinking fund of Minneapolis are without authority to purchase, for the fund, bonds issued by the city, at the time they are offered for sale by it.—*Kelly v. City of Minneapolis* (Minn.) 65 N. W. 115.

63 Minn. 125.

4. TAXATION.

§ 185. Charter and statutory provisions.

[a] (Mich.; 1895.)

Under the charter of Grand Rapids, as amended by Act May 27, 1895, which provides for a board of assessors to perform duties of supervisors as to assessments of taxes, on the taking effect of the act, which was immediate, and which also provides for the abolishing of the offices of supervisors, the board of assessors, and not the supervisors, were to spread the taxes for 1895.—*State v. Cogshall* (Mich.) 65 N. W. 2.

[b] (Neb.; 1896.)

The general provision of Act March 10, 1885, amending Act March 1, 1879, § 69, authorizing cities "to levy any other tax or special assessment authorized by law," does not control the special provision thereof relating to levying a tax to pay for water furnished a city under contract.—*State v. City of Kearney* (Neb.) 68 N. W. 523.

§ 186. Rate and amount.

[a] (Mich.; 1894.)

A section of a city charter authorized the city council to levy a tax for ordinary expenses, not to exceed $1\frac{1}{2}$ per cent. of the property valuation, and to levy an additional tax when authorized by a vote of the freeholders, but provided that "the amount that may be voted or raised under" said section should not exceed 2 per cent. of the property valuation. *Held*, that the total tax that could be levied in any one year could not exceed the 2 per cent. limit.—*Schneewind v. City of Niles* (Mich.) 61 N. W. 498.

103 Mich. 301.

[b] (Minn.; 1895.)

Gen. Laws 1885, c. 145, § 34, and Gen. St. 1878, c. 11, § 48 (Gen. St. 1894, § 1557), provide that the village council shall fix the specific amounts of corporate taxes, and that subsequently the county auditor shall fix the rate per cent. thereof, according to the amount of property as equalized by the state board. *Held*, that a resolution of the council fixing a certain rate per cent. of taxation, and not specifying the amount of the tax, was void.—*In re Cloquet Lumber Co.* (Minn.) 63 N. W. 628.

61 Minn. 233.

§ 187. Property taxable.

[a] (Iowa; 1895.)

Plaintiff's land, within defendant city limits, had always been used for agricultural purposes, except that the dwelling house was once used for a residence by one not engaged in farming, and it was remote from the platted portion of the city. None of it had ever been laid out in city lots or held for speculation, and the nearest street or alley, except a public highway on one side, was 250 rods away. The nearest city lamp was 250 rods distant, and the nearest water supply for extinguishing fires was a mile distant. *Held*, that the property was exempt from taxation for city purposes.—*Taylor v. City of Waverly* (Iowa) 63 N. W. 377.

[b] (Iowa; 1896.)

In an action to set aside certain paving assessments on 100 acres of land within the city limits of Des Moines, it appeared that 95 acres were on one side of the street, and 5 acres were on the other side; that, before the street was laid out and paved the land had all been fenced in one field; that since, it has been occupied and used, in fact, for agricultural purposes; that plaintiff paid about \$600 per acre for it; that its location was favorable for the purpose of being platted as city lots; that in its immediate neighborhood the whole territory was divided into city lots, blocks, streets, and alleys; and that on such street, and other streets in the vicinity, are water mains and public lights. *Held*, that such land has not been "in good faith" occupied and used by plaintiff for agricultural purposes, within Acts 23d Gen. Assm., c. 1, § 3, providing that no lands within the extended limits of such city which shall not have been laid off into lots of 10 acres or less, and which shall also in good faith be used for agricultural purposes, shall be taxed for any city purposes, etc.—*Farwell v. Des Moines Brick Manuf'g Co.* (Iowa) 66 N. W. 176.

[c] (Neb.; 1896.)

Where the officers in whom power is vested generally to define or extend the boundaries of a city have undertaken to extend its boundaries, the owner of land so incorporated cannot, at least after the lapse of a number of years, maintain an action for the purpose of restraining the collection of city taxes on the ground that there was no authority to incorporate the particular land in question. *South Platte Land Co. v. Buffalo Co.* (1884) 19 N. W. 711, 15 Neb. 605, followed.—*Sage v. City of Plattsmouth*, 67 N. W. 455, 48 Neb. 558.

§ 188. Receiving warrants in payment of taxes.**(S. D.; 1895.)**

Comp. Laws, § 1598, making city warrants receivable for city taxes, does not restrict the use of warrants in payment of taxes to such as were issued on account of debts incurred during the year for which the taxes were assessed.—*Western Town Lot Co. v. Lane* (S. D.) 65 N. W. 17.

§ 189. Certiorari to review.**[a] (Wis.; 1895.)**

Certiorari will lie to review the proceedings of a municipal organization in levying a tax.—*State v. Bell*, 64 N. W. 845, 91 Wis. 271.

[b] (Wis.; 1895.)

On certiorari to review the proceedings of a municipal organization levying a tax, the court may pass on the constitutionality of a statute from which the organization assumes to derive its power.—*State v. Bell* (Wis.) 64 N. W. 845, 91 Wis. 271.

XI. SUBMISSION OF QUESTIONS TO VOTERS.

See, also, "Schools and School Districts," § 10. Change of county boundaries, see "Counties," § 3.

Disposition of county lands, see "Counties," § 34.

Erection of county buildings, see "Counties," § 34.

§ 190. Question of issuing bonds.**[a] (Minn.; 1895.)**

Under Sp. Laws 1891, c. 55 (Duluth City Charter, § 35), the city of Duluth has power to submit to the electors a proposition as to the issuance of water and light bonds for the construction of a combination plant, and as to whether the proceeds should be used to erect a new plant or to the purchase of one already ex-

isting.—*Truelsen v. Mayor of Duluth* (Minn.) 63 N. W. 714.

[b] (Minn.; 1895.)

Where the propositions relative to a proposition for the issuance of bonds in a certain amount for the erection or purchase of light and water plants, or either of them, were so submitted that the amount of the issue for the separate erection or purchase of either one of the plants was the same as the amount of the issue proposed for both in the main proposition, and the amount for the erection of both plants was double the amount proposed for both in the main proposition, the election to determine such proposition was illegal.—*Truelsen v. Mayor of Duluth* (Minn.) 63 N. W. 714.

[c] (Neb.; 1897.)

That a separate ballot box was used for the votes on a proposition to issue city bonds, submitted at a general city election, did not render the vote on the proposition a separate election; it being taken at the same polling places, under supervision of the same officers, and at the same time, as the general vote.—*Bryan v. City of Lincoln* (Neb.) 70 N. W. 252.

[d] (Neb.; 1897.)

Where county commissioners illegally established a city precinct, and called an election therein to submit a vote to the electors as to the issuance of a bond to aid railroads, there being no precinct in existence which could by its vote authorize such issuance, the bonds were void.—*Morton v. Carlin* (Neb.) 70 N. W. 966.

§ 191. Competing propositions—Option of voter.**(Minn.; 1897.)**

The ballot in a city election to pass upon the issuing of water and light bonds submitted three propositions,—the first for issuing bonds to a specified amount for the erection or purchase of a water and light plant, the second for expending the proceeds of the bonds in purchasing an existing plant, and the third for expending such proceeds in building such a plant. *Held*, that the second and third were competing propositions, and an elector might vote against, but not for, both.—*Bauman v. City of Duluth* (Minn.) 69 N. W. 919.

§ 192. Votes required to carry proposition.**[a] (Mich.; 1896.)**

A city charter provided that bonds for a city market shall not be issued "unless the qualified electors of said city, voting in their respective wards, shall have authorized the issuing of said bonds by a majority of their votes cast at any regular election, or at a special election called for the purpose"; and a provision subsequently added to such charter that no debt should be incurred by the city for an electric plant unless authorized by the qualified electors of said city "voting thereon" shows a legislative intent to provide a different rule in each case. *Held* that, where a proposition for issuance of market bonds was placed on a general election ticket, a majority of all votes cast at the general election controls, and not a majority of those cast on the bonding proposition.—*Stebbins v. Judge of Superior Court of Grand Rapids* (Mich.) 66 N. W. 594.

[b] (Neb.; 1897.)

The provisions of Comp. St. c. 18, art. 1, § 30, relative to the proportion of votes necessary to the adoption of a proposition submitted at an election, applies to an election to determine whether public grounds of a county shall be sold.—*Stenberg v. State* (Neb.) 69 N. W. 849.

[c] (Neb.; 1897.)

The provision of Comp. St. 1895, c. 13a, § 67, that cities of the first class may issue funding bonds "when the same shall have been au-

thorized by a vote of the people," means when authorized by a majority of the voters of the city; and a proposition to issue such bonds, submitted at a general city election, to be adopted, must receive a majority of all the votes cast at the election, and not merely a majority of the votes cast on the proposition.—*Bryan v. City of Lincoln* (Neb.) 70 N. W. 252.

For change of county seat, see "Counties," § 16.

To create new county, see "Counties," § 6.

§ 193. Departure from plan authorized by voters.

(Wis.: 1895.)

Where a city council submitted to the voters a proposition as to whether or not the city should build waterworks and issue bonds therefor, and, on the morning of election, passed a resolution that the waterworks, if built, would be according to a certain plan, the adoption of said proposition to build did not preclude the council from afterwards changing the plan.—*Ellinwood v. City of Reedsburgh* (Wis.) 64 N. W. 885, 91 Wis. 131.

§ 194. — Contract disregarding vote.

(Mich.: 1895.)

When the majority of the qualified electors of a city or village, at an election under Act 186, Pub. Acts 1891, relative to the adoption of methods for street lighting, have expressed themselves in favor of the purchase or construction by the city of an electric light plant, a contract by the council afterwards with an electric light company for street lighting for a term of years is void.—*George v. Wyandotte Electric Light Co.* (Mich.) 62 N. W. 985; *Campbell v. City of Wyandotte*, Id.

105 Mich. 1.

XII. ACTIONS.

By contractor for public improvement, see ante, § 163.

Evidence in action for damages from change of grade, see ante, § 168.

—for injuries from defects in street or sidewalk, see ante, §§ 95–97.

To set aside assessment, see ante, § 151.

§ 195. By attorney general.

(Mich.: 1895.)

An information by the attorney general will not lie to compel municipal officers to repay into the city treasury moneys unlawfully taken therefrom.—*Ellis v. City of Detroit* (Mich.) 64 N. W. 1057.

§ 196. Actions against city.

(Wis.: 1896.)

Though the city charter provides that no money shall be drawn from the city treasury except on an order signed by the mayor and clerk, and mandamus will lie to compel the proper officers to issue an order to the claimant for a sum so allowed on settlement of a claim, such remedy is not exclusive, and an action will lie against the city on the contract to pay the sum allowed.—*Sharp v. City of Mauston* (Wis.) 66 N. W. 803.

92 Wis. 629.

§ 197. Conditions precedent to actions against.

[a] (Iowa: 1896.)

Acts 22d Gen. Assem. c. 25, which is made applicable to cities acting under special charters, provides that actions against a city for personal injuries resulting from a defective sidewalk shall not be brought after six months from the time of the injury, unless written notice be served upon the municipality. *Held*, that a person injured by a defective sidewalk,

having complied with the act, could sue therefor without presenting her claim to the council, though an ordinance of the city, under a special charter, requires claims to be so presented.—*McFarland v. City of Muscatine* (Iowa) 67 N. W. 233.

[b] (Mich.: 1895.)

The charter of a city required the auditing of accounts against the city, and provided that it should be a sufficient defense to any suit for a claim or demand against the city that the same had not been presented for audit. *Held* not to apply to a suit for damages for personal injuries.—*Mackie v. City of West Bay City* (Mich.) 64 N. W. 25.

[c] (Mich.: 1897.)

Muskegon City Charter, tit. 6, § 20, requiring claims for damages against the city growing out of its negligence or default to be presented to the common council within six months, applies to claims for personal injuries.—*Davidson v. City of Muskegon* (Mich.) 69 N. W. 670.

[d] (Mich.: 1897.)

There being no provision excepting infants from the limitation, the section applies alike to infants and adults.—*Davidson v. City of Muskegon* (Mich.) 69 N. W. 670.

[e] (Mich.: 1897.)

Where a claim for the repayment of taxes was presented to the city council March 16th, and the next regular meeting was held April 5th, a suit upon such claim, brought March 29th, was brought before the council had reasonable time to investigate and allow or reject the claim, within the city charter declaring that it shall be a sufficient defense in an action on a claim against the city that reasonable time for investigation was not allowed.—*Mason v. City of Muskegon* (Mich.) 70 N. W. 332.

[f] (Mich.: 1897.)

The defense that plaintiff's claim for injury caused by a defective walk was not presented to the city council, as prescribed by charter, is waived, unless interposed at the trial.—*Canfield v. City of Jackson* (Mich.) 70 N. W. 444.

[g] (Minn.: 1896.)

The St. Paul city charter provides that when the tax deed or certificate of sale of land sold for special assessments is set aside in any action in which its validity is brought in question, the holder may recover from the city the amount paid at the sale with certain interest. *Held*, that the setting aside of the deed or certificate in the prior action is a condition precedent to the right to maintain the action against the city.—*Flanagan v. City of St. Paul* (Minn.) 68 N. W. 47.

[h] (Neb.: 1895.)

Comp. St. c. 14, § 80, does not require a claim for personal injuries to be presented to the council of a city of the second class, as a condition precedent to maintaining an action.—*City of Chadron v. Glover* (Neb.) 62 N. W. 62. 43 Neb. 732.

[i] (Neb.: 1895.)

The fact that plaintiff was confined to his bed, and was incapacitated to transact business, for 10 weeks after receiving the injury complained of, did not excuse him from filing with the city clerk within six months of the injury as provided by Comp. St. c. 14, art. 2, § 34, a statement giving the circumstances of the injury.—*City of Hastings v. Foxworthy* (Neb.) 63 N. W. 955. 45 Neb. 676.

[j] (Wis.: 1895.)

The words "claim or demand," as used in Laws 1891, c. 160, subc. 5, § 4, providing that no action shall be maintained against the city upon any claim or demand until the same shall have been presented to the council and disallowed, apply to actions upon contract only, and not to those for injuries caused by defec-

tive sidewalks.—*Sommers v. City of Marshfield* (Wis.) 62 N. W. 937.
90 Wis. 59.

[1c] (Wis.: 1896.)

Where a claim is made against a city for injuries, and the city council, on report of a committee, allows the claimant a certain amount, less than the sum claimed, which allowance is accepted, and the city afterwards refuses to pay the sum so allowed, an action by the claimant will lie against the city without any claim being first filed and disallowed by the council, though its charter provides that no action can be maintained against a city until the claim shall have been filed and disallowed.—*Sharp v. City of Manston* (Wis.) 66 N. W. 803.

92 Wis. 629.

§ 198. — Notice of claims on account of defective street.

[1a] (Iowa: 1895.)

The provision of Laws 1888, c. 25, § 1, that no action shall be brought against a municipality after six months from the date of a personal injury caused by a defective street, unless written notice of the injury be served upon the corporation within 90 days after the injury, is mandatory, and cannot be waived by the municipality.—*Starling v. Incorporated Town of Bedford* (Iowa) 62 N. W. 674.

[1b] (Iowa: 1896.)

McClain's Code, § 633, provides that in all cases of personal injury resulting from defective streets or sidewalks no suit shall be brought against a city after six months, unless written notice, specifying the place and circumstances, shall have been served upon the corporation within 90 days after the injury. *Held*, that a notice reciting that plaintiff received her injuries "while walking along the sidewalk on the west side of C. street (which ran north and south), and attempting to cross L. street (which ran east and west) at the southeast corner of C. at its intersection with L.," by reason of a "defect in the crossing at said point by the planks being placed so far apart,"—was sufficient, though it intended to refer to the corner bounded on the east by C. street and on the south by L. street, there being no evidence that there was any other crossing over L. street at or near that point, or that there was any other constructed with planks.—*Owen v. City of Ft. Dodge* (Iowa) 67 N. W. 281.

[1c] (Iowa: 1896.)

Evidence that the mayor's attention was called to the exact place of the accident three days after it happened was admissible to show that the city was not misled by the defective description in the notice.—*Owen v. City of Ft. Dodge* (Iowa) 67 N. W. 281.

[1d] (Iowa: 1896.)

The facts being undisputed, the sufficiency of the notice of the accident was for the court.—*Owen v. City of Ft. Dodge* (Iowa) 67 N. W. 281.

[1e] (Iowa: 1897.)

Under Acts 22d Gen. Assem., providing that no suit shall be brought for personal injuries against a city after six months from the time of injury, unless notice shall be served on the city within 90 days from the injury, an action therefor may be brought at any time within the general statutory limitation of two years when such notice is served.—*Robinson v. City of Cedar Rapids* (Iowa) 69 N. W. 1064.

[1f] (Iowa: 1897.)

Under statute providing that an action against a city for personal injuries cannot be brought after six months unless written notice of the injury has been given, the fact of the service of the notice is a material allegation.—*Pardey v. Incorporated Town of Mechanicsville* (Iowa) 70 N. W. 183.

[1g] (Wis.: 1895.)

Under Rev. St. § 1339, by which notice to a city of personal injuries received on a defective sidewalk is required to state the place where such damage occurred, a notice describing the place as on the east side of G. street, very near the southeast corner of G. and O., and stating that the injury occurred as plaintiff stepped from O. street onto the sidewalk, is insufficient, where the place was in fact on G. street 150 feet north of O. street.—*Dolan v. City of Milwaukee*, 61 N. W. 564, 89 Wis. 497.

[1h] (Wis.: 1895.)

Under Rev. St. § 1339, requiring the notice to describe generally the insufficiency or want of repair, a notice which states that its insufficiency consisted in having the north end of the walk 16 inches higher than the ground surrounding is insufficient, where the defect consisted in three steps upward, the top plank of which was loose and icy.—*Dolan v. City of Milwaukee*, 61 N. W. 564, 89 Wis. 497.

[1i] (Wis.: 1895.)

The word "no," in the notice of plaintiff's claim against defendant town in an action for personal injuries, "that the breaking of the bridge was due to its insufficiency, no rotten timbers being used in its construction," will not be regarded as so misleading as to render the notice invalid.—*Althous v. Town of Jamestown*, 64 N. W. 423, 91 Wis. 46.

Averments as to notice, see ante, § 91.

§ 199. Pleading.

[1a] (Mich.: 1896.)

In an action against a city for the death of plaintiff's decedent caused by a defective sidewalk, a complaint alleging that defendant negligently suffered the walk to be and remain in bad repair, without alleging a failure on its part to repair the walk within a reasonable time after notice of the defect, is sufficient when attacked for the first time on trial.—*Storrs v. City of Grand Rapids* (Mich.) 68 N. W. 258.

[1b] (Mich.: 1896.)

In an action for injuries caused by a defective highway, a complaint alleging that defendant negligently allowed said highway to become and remain in a dangerous condition, and that defendant, by the exercise of reasonable care, might have known of such condition, and thereafter had sufficient time to repair the same, sufficiently alleges notice to defendant of the unsafe condition of the highway after general issue pleaded.—*Storrs v. City of Grand Rapids* (Mich.) 68 N. W. 258, followed.—*Moody v. Shelby Tp.* (Mich.) 68 N. W. 259.

[1c] (Neb.: 1895.)

The requirement of Comp. St. c. 14, art. 2, § 34, that a party, before suing a city of the second class, having more than 5,000 inhabitants, for injury or damage to person or property, must file a statement with the city clerk within six months from the date of the injury, giving certain information in regard thereto, being a condition precedent to beginning the suit, compliance therewith must be alleged.—*City of Hastings v. Foxworthy* (Neb.) 63 N. W. 955.

45 Neb. 676.

§ 200. — Recovery of taxes paid.

(Wis.: 1896.)

An action to recover alleged illegal taxes paid to a city sounds in tort, and, where the city charter provides that no action for a tort shall lie against it unless a statement of the claim shall have been presented to the council within 90 days after the happening of the tort, a complaint for the recovery of taxes which does not allege the presentation of such statement is demurrable.—*Flieth v. City of Wausau* (Wis.) 67 N. W. 731.

93 Wis. 446.

§ 201. Evidence.

[a] (Iowa; 1896.)

A policeman, charged in part with the duty of reporting to the city defects in the sidewalks of his beat, can testify to the age of a walk, and its condition a short time before an accident which resulted on account of a defect in it.—*Lorig v. City of Davenport* (Iowa) 68 N. W. 717.

[b] (Wis.; 1895.)

The burden of showing that plaintiff's claim against defendant town for personal injuries has been allowed is on defendant.—*Alt-house v. Town of Jamestown* (Wis.) 64 N. W. 423. 91 Wis. 46.

§ 202. Suit for injunction by taxpayer.

[a] (Mich.; 1896.)

Collection of a general tax for proper city purposes will not be restrained, on the ground that it was rendered necessary by the use of city funds for building sidewalks, the cost of which should have been paid by individuals.—*Clee v. Village of Trenton* (Mich.) 66 N. W. 48.

[b] (Mich.; 1897.)

A resident taxpayer may sue to restrain the illegal expenditure of money by the municipality, though he did not object to previous illegal expenditures for the same purpose.—*Savidge v. Village of Spring Lake* (Mich.) 70 N. W. 425.

[c] (Minn.; 1896.)

Though the ordinance of St. Paul establishing the House of the Good Shepherd as a workhouse is void, and all contracts by the city with the corporation controlling such house for the detention and board of prisoners therein are consequently illegal, a taxpayer of said city is not entitled to an injunction restraining the

city from paying such institution for its past services in boarding and caring for such prisoners, or to an accounting for money paid by the city in the past for similar services.—*Farmer v. City of St. Paul* (Minn.) 67 N. W. 990.

[d] (Neb.; 1897.)

Injunction will lie at the suit of a taxpayer to restrain the levy of taxes with which to pay principal or interest on void bonds.—*Morton v. Carlin* (Neb.) 70 N. W. 966.

MUNICIPAL COURTS.

See "Courts," § 18.

MURDER.

See "Homicide," §§ 3-10.

MUTUAL BENEFIT INSURANCE.

See "Insurance," §§ 149-184.

MUTUAL FIRE INSURANCE.

See "Insurance," §§ 141-147.

MUTUALITY.

In contract, see "Contracts," § 3.

N.

NAME.

See, also, "Trade-Marks and Trade-Names."

Corporate name, right to exclusive use, see "Corporations," § 5.

Indorsing names of witnesses on indictment or information, see "Indictment and Information," §§ 9-11.

Of candidate on ballot, see "Elections and Voters," § 11.

Of corporation, signature to contract, see "Corporations," § 26.

(Minn.; 1895.)

The rule that the middle name or initial is not a material part of a person's name does not apply when the first name is not given, but only its initial.—*State v. Higgins* (Minn.) 61 N. W. 816.

60 Minn. 1.

NATIONAL BANKS.

See "Banks and Banking," §§ 40, 41.

NAVIGABLE WATERS.

See, also, "Riparian Rights."

Judicial notice as to navigability, see "Evidence," § 1.

Meander line as boundary, see "Boundaries," § 2.

§ 1. Bridges.

[a] (Mich.; 1895.)

Under Const. art. 18, § 4, and How. Ann. St. §§ 493, 495, 496, which place the control of the building and erection of bridges across navigable streams in the board of supervisors of the proper county, the town authorities have no right to build a bridge over such a stream without the sanction of the proper board of supervisors.—*Stofflet v. Estes* (Mich.) 62 N. W. 347.

104 Mich. 208.

[b] (Mich.; 1895.)

A stream in its natural condition was, at some seasons, deep enough to float logs, but never deep enough to float a steamer. Plaintiff maintained a dam by which the stream was rendered navigable for a steamboat, which plaintiff had operated 15 years. When plaintiff commenced to operate the boat by arrangements with the authorities of the town, draws were constructed in two bridges then existing, and these bridges, when rebuilt, were placed high enough to permit the boat to pass. One of these bridges having broken down, the town authorities prepared to rebuild it so as to prevent the passage of the boat. *Held*, that plaintiff could not be deprived of his right to run a steamboat on the stream without condemnation and compensation.—*Stofflet v. Estes* (Mich.) 62 N. W. 347.

104 Mich. 208.

§ 2. Piers.

(Iowa; 1897.)

A riparian owner on a navigable lake may construct a pier below high-water mark if it does not obstruct navigation.—*Mills & Allen v. Evans* (Iowa) 69 N. W. 1043.

§ 3. Dams.

(Mich.; 1895.)

Where defendant has, by proper proceedings, acquired the right to maintain a dam in

a stream navigable for logging purposes, and by accident there is a recent break in the dam, he is entitled to a reasonable time in which to repair the dam, and to a reasonable detention of the logs of a navigator for its protection.—*Pratt v. Brown* (Mich.) 61 N. W. 583.

NAVIGATION.

See "Admiralty"; "Maritime Liens"; "Navigable Waters"; "Shipping."

NECESSARIES.

Furnished to infants, see "Infancy," §§ 4, 5; "Parent and Child," § 4.

—to wife, see "Husband and Wife," § 1.

NECESSARY PARTIES.

See "Parties," §§ 1-5.

NEGATIVE PREGNANT.

See "Pleading," § 34.

NEGLIGENCE.

I. WHAT CONSTITUTES, §§ 1-9.

II. REMOTE AND PROXIMATE CAUSE, §§ 10-16.

III. DANGEROUS PREMISES, §§ 17-23.

IV. CONTRIBUTORY NEGLIGENCE, §§ 24-28.

V. COMPARATIVE AND IMPUTED NEGLIGENCE, §§ 29-31.

VI. PLEADING, §§ 32-36.

VII. EVIDENCE, §§ 37-43.

VIII. PROVINCE OF COURT AND JURY, §§ 44-48.

Defective bridges, see "Bridges," §§ 3-6.

—highways, see "Highways," §§ 33-38.

—streets, see "Municipal Corporations," §§ 77-101.

Delay in transporting goods, see "Carriers," § 10.

Estoppel through, clothing person with title, see "Estoppel," § 18.

Exemption of state agricultural society from liability, see "Agricultural Societies."

In pointing firearms, see "Pointing Firearms," §§ 1, 2.

In presenting check for payment, see "Negotiable Instruments," § 62.

Loss or injury to animals shipped, see "Carriers," § 14.

—to goods, see "Carriers," §§ 11, 12, 24.

Master's liability for injuries to servant, see "Master and Servant," §§ 22-55.

Of abstracter, see "Abstracts of Title."

Of bailee, see "Bailment," § 4.

Of bank in making collections, see "Banks and Banking," § 18.

Of connecting carrier, see "Carriers," § 22.

Of druggist, see "Druggists."

Of inspector, see "Inspection."

Of insurer as defense to action on policy, see "Insurance," § 105.

Of physician, see "Malpractice," § 2.

Of railroad company, see "Railroad Companies," §§ 17-80.
 Of road officer, see "Highways," § 25.
 Of street-car company, see "Horse and Street Railroads," §§ 8-18.
 Signing paper in blank, see "Alteration of Instruments," § 4.

I. WHAT CONSTITUTES.

§ 1. In general.

[a] (Mich.: 1897.)

Plaintiff was an employé of the operator of a salt block, with which was connected a pier extending 30 rods into the lake to a warehouse. A tramway extended from the block to the warehouse, which was in use day and night, for hauling salt by horse car. Above such tramway was another used for piling lumber, making the lower one very dark at night, and compelling the driver of the car to be seated with his legs, from his knees downward, hanging over the end of the car. Defendant's employé brought his schooner to such pier at night, and, to moor her, carelessly and negligently caused a hawser attached to her to be extended over the lower tram, to a spile where it was fastened. Plaintiff did not know of the line on the track, and, while driving the car, he was injured by the rope's catching the lower part of his legs. *Held*, that there was an implied duty on defendant's part not to have so carried his hawser across the tramway as to cause injury to persons using it, and hence he was liable.—*Ella v. Boyce* (Mich.) 70 N. W. 1106.

[b] (Mich.: 1897.)

One who caused injury to the servant of another by negligently obstructing a tramway used by the servant in discharging his duties, is not relieved of liability because there was no contract relation between him and said servant.—*Ella v. Boyce* (Mich.) 70 N. W. 1106.

[c] (Neb.: 1897.)

One conducting a bathing resort frequented by 10,000 people a month should keep some one on duty to supervise bathers and rescue any apparently in danger.—*Brotherton v. Manhattan Beach Imp. Co.* (Neb.) 69 N. W. 757.

[d] (Wis.: 1895.)

Where earth removed from defendant's cellar was thrown in a pile on the street, and defendant placed a light thereon at night sufficient to warn travelers of the danger, and the light was removed without fault of defendant, and plaintiff was injured before defendant, in the exercise of ordinary care, could have discovered such removal and replaced the light, defendant was not liable.—*Raymond v. Keseberg*, 64 N. W. 861, 91 Wis. 191.

§ 2. Ordinary care.

(Wis.: 1896.)

It is not error in an instruction, to define "ordinary care" as "such care as the great majority of men would use under like or similar circumstances."—*Olwell v. Milwaukee St. Ry. Co.* (Wis.) 66 N. W. 362.
 92 Wis. 330.

§ 3. Careless driving and management of vehicles.

[a] (Iowa: 1895.)

Negligence consisting in driving a team at reckless speed on a public street cannot be overcome by showing an urgent necessity for thus driving.—*Eaton v. Crips* (Iowa) 62 N. W. 687.

[b] (Iowa: 1895.)

Where, in an action for personal injuries caused by reckless driving, there was evidence that plaintiff did not see the approaching team, a city ordinance regulating the speed of vehicles upon public streets is admissible in evidence.—*Eaton v. Crips* (Iowa) 62 N. W. 687.

[c] (Mich.: 1895.)

It is for the jury to determine whether it was negligence to leave a team unhitched, where the evidence showed that the team had run away once before.—*Doyle v. Detroit Omnibus Line Co.* (Mich.) 62 N. W. 1031.
 105 Mich. 195.

[d] (Neb.: 1896.)

A boy 17 years old was sitting on a sled hitched to a wagon moving slowly. The driver of defendant's team, which was walking behind the sled, knowingly permitted his horses to gain on the team in front, and step on the clothes of the boy, dragging the latter to the ground, and causing him to be run over and killed. *Held*, that a finding of negligence based on evidence of those facts was warranted.—*Post v. Olmsted* (Neb.) 66 N. W. 828.
 47 Neb. 893.

[e] (Neb.: 1896.)

Whether it was negligence for the owner of a team of horses not known to be vicious, to leave the team unhitched in charge of a boy 18 years of age, who was crippled in one arm, was a question for the jury.—*Miller v. Strivens* (Neb.) 67 N. W. 458.
 48 Neb. 458.

§ 4. Fires.

[a] (Iowa: 1895.)

Under Code, § 3890, making the person setting fire to prairie land, and allowing it to escape beyond control, liable for resulting injuries, one will not be liable where a fire was started for a lawful purpose, and escaped without negligence, setting fire to prairie land.—*Ellsworth v. Ellingson* (Iowa) 64 N. W. 774.

[b] (Mich.: 1896.)

Where a stationary mill is situated near to wooden buildings, the owner is bound to use such appliances, adapted to the chimney thereof, as will most efficiently arrest the escape of sparks, whether such apparatus has been previously used on that kind of a chimney or not, particularly where he has notice of the danger from such sparks.—*Webster v. Symes* (Mich.) 66 N. W. 580.

§ 5. Blasting.

[a] (Mich.: 1896.)

One blasting rock in a trench was not required to fill the trench with dirt in order to lessen the noise, in the absence of any showing of a necessity therefor.—*Mitchell v. Prange* (Mich.) 67 N. W. 1096.

[b] (Mich.: 1896.)

Defendants were not negligent in failing to give every one who resided or worked within a radius of 500 feet notice of an intended blast, especially after the blasting had been going on, to the knowledge of such persons, for several weeks.—*Mitchell v. Prange* (Mich.) 67 N. W. 1096.

[c] (Mich.: 1896.)

Where the specifications under which defendants were excavating a trench for a city provided that in all cases where blasting was necessary the blast was to be covered with brush or timber sufficient to prevent injury to persons or property, and plaintiff was injured by a kick from a horse which became frightened at the noise of an explosion, it was error to charge, in an action to recover therefor, that it was for the jury to determine whether the blast was so covered, as such provision was intended to protect persons and property from injury by fragments which might otherwise be thrown from the trench.—*Mitchell v. Prange* (Mich.) 67 N. W. 1096.

§ 6. Frightening horses.

(Wis.: 1896.)

That a horse which is being driven on a street becomes frightened at an approaching street car does not render the company liable

for injuries received by the driver. *Bishop v. Belle City St. Ry. Co.* (Wis.) 65 N. W. 733.
92 Wis. 139.

§ 7. — Sounding whistle.

[a] (Iowa; 1895.)

It is not negligence, as a matter of law, for an engineer, in the proper operation of his train, to whistle "Off brakes," when he knows a team is from 150 to 200 feet from him on a highway, unless he knows or should know that it might frighten them.—*Ochiltree v. Chicago & N. W. Ry. Co.* (Iowa) 62 N. W. 7.
93 Iowa, 628.

[b] (Iowa; 1895.)

Where horses being driven on a highway near a crossing are frightened by a whistle signaling to release brakes, the railroad company was not liable, unless the engineer could have known that such signal would frighten the horses.—*Ochiltree v. Chicago & N. W. Ry. Co.* (Iowa) 62 N. W. 7.
93 Iowa, 628.

[c] (Iowa; 1895.)

In an action against a railroad company for injuries at a crossing caused by the negligent blowing of the locomotive's whistle, it is error to charge that, even if the only whistling done was to give the usual signal for "Off brakes," the engineer was negligent, where the evidence showed that, up to the time of the accident, plaintiff's horses were fully under his control.—*Ochiltree v. Chicago & N. W. Ry. Co.* (Iowa) 62 N. W. 11.

[d] (Iowa; 1895.)

If an engineer was justified, as a reasonably prudent man, in concluding, from the conduct of a team near a railroad crossing, that it would not be frightened by signals required for the management of the train, he was not negligent in giving them.—*Ochiltree v. Chicago & N. W. Ry. Co.* (Iowa) 64 N. W. 788.

[e] (Iowa; 1896.)

Where plaintiff's horses, which she was driving, with another woman and some children in the wagon, had given no sign of being frightened, as an engine, within 40 or 50 rods of them, approaching a crossing, had given the crossing signal and signal for brakes, but she had whipped them up, and turned into a field, and had them under control, an instruction that the subsequent giving of the signal for "Off brakes!" within 150 or 200 feet of them, whereby they were frightened, was not negligence, should not be qualified by the provision "unless the facts and circumstances * * * were such as to render the giving thereof negligence."—*Ochiltree v. Chicago & N. W. Ry. Co.* (Iowa) 68 N. W. 832.

[f] (Iowa; 1896.)

An engineer of a train running at an unlawful rate of speed through a city failed to give the statutory signals by ringing the bell before approaching a crossing, but blew the whistle in the rear of a wagon that had passed over the crossing just before the train reached it, thereby causing the horses to run away and injure plaintiff. *Held*, that it was for the jury to determine whether the team would have been out of reach of the effect of the sounding of the whistle if the bell had been rung for 60 rods before reaching the crossing, and the train had been running at the statutory speed.—*Ward v. Chicago, B. & Q. R. Co.* (Iowa) 65 N. W. 999.

[g] (Minn.; 1894.)

Where plaintiff approached to within 40 paces of a railroad crossing, on horseback, where he could have seen an approaching train when within 80 rods, and there was no evidence of a failure of the engineer to sound the whistle for the crossing, as required by law, plaintiff cannot recover for an injury resulting from his horse becoming frightened at the blowing of the whistle on a passing train in the

usual manner. *Heininger v. Great Northern Ry. Co.* (Minn.) 61 N. W. 558.
59 Minn. 458.

[h] (Neb.; 1895.)

Where a crossing is provided at a railroad station, one whose team had been driven to a car on the side track near the station, for the purpose of unloading the car, is within the protection of Comp. St. c. 16, § 101, requiring signals for crossings. *Chicago, B. & Q. R. Co. v. Metcalf* (Neb.) 63 N. W. 51.
41 Neb. 848.

[i] (Wis.; 1894.)

Where plaintiff alleges that her injury was caused by the lack of a signal from defendant's train, and the jury finds that the whistle was sounded, and that such signal, by frightening her horse, was one of the causes of plaintiff's injury, she cannot recover, there being no finding or proof that the whistle was negligently sounded.—*Barron v. Chicago, St. P., M. & O. Ry. Co.*, 61 N. W. 303, 89 Wis. 79.

§ 8. Defective elevators.

[a] (Wis.; 1895.)

One who places an elevator in the building of another on condition that the elevator is to be operated by the latter on trial, but under the supervision of the vendor, and not to be accepted until in complete running order, will not be liable to an employé of his vendee for an injury sustained by reason of a defect in the elevator while on trial.—*Ziemann v. Kieckhefer Elevator Manuf'g Co.* (Wis.) 63 N. W. 1021.
90 Wis. 497.

[b] (Wis.; 1895.)

Placing a passenger elevator in a building is not a breach of the common-law duty prohibiting an act the natural and probable consequence of which would be imminently dangerous to the lives of other persons. *Ziemann v. Kieckhefer Elevator Manuf'g Co.* (Wis.) 63 N. W. 1021.
90 Wis. 497.

§ 9. Instructions.

[a] (Iowa; 1895.)

It is not necessary that the court, when instructing that the jury could not find for plaintiff unless they found that defendant's negligence was the "immediate or proximate cause of the injury," should define "immediate" and "proximate."—*Miller v. Boone County* (Iowa) 63 N. W. 352.

[b] (Mich.; 1896.)

In an action for causing the destruction of plaintiff's premises by permitting sparks to escape from a mill on a windy day, an instruction that, if the operation of the mill endangered plaintiff's property to the extent that a prudent man would have shut down such mill until the violence of the wind had abated, the failure of defendant to do so was negligence, was not objectionable, in that the use of the word "prudent," without qualification, was understood to mean more than "ordinarily prudent," particularly as the court also charged that persons operating such mill were only required to use ordinary care.—*Webster v. Symes* (Mich.) 66 N. W. 580.

[c] (Mich.; 1897.)

In its charge the court said: "Here was a railroad on a small scale, called a 'tramway,' which was in constant use, at least every 15 minutes, night and day. I think that of itself was a sign of danger." *Held*, that the second sentence was not error, where it was further charged that, "If it was there, the inquiry would necessarily arise whether or not a person stretching that line across the track knew it was there, or were the surroundings such as to apprise them of that fact. If they did know, then it was the duty of such person or persons to exercise reasonable and ordinary diligence in ascertaining whether or not it was in use before ob-

structing it with a line."—*Ella v. Boyce* (Mich.) 70 N. W. 1106.

[d] (Neb.; 1896.)

While it is not generally proper to group together certain facts, and state to the jury that, if they are found to exist, they constitute negligence, still it is not reversible error to do so, provided the facts so stated are such as to induce an inference of negligence in all reasonable minds.—*Omaha & C. B. Railway & Bridge Co. v. Levinston* (Neb.) 67 N. W. 887.

[e] (Wis.; 1896.)

Error cannot be predicated of an instruction, in an action for negligence, that the question was whether defendant ought to have apprehended that injury to plaintiff would probably result from his negligent act,—no request having been made for a further instruction that if an ordinarily intelligent and prudent person would have apprehended such result, then defendant ought to have apprehended it.—*Pier v. Chicago, M. & St. P. Ry. Co.* (Wis.) 68 N. W. 464.

II. REMOTE AND PROXIMATE CAUSE.

See, also, "Damages," § 6.

Province of court and jury, see post, § 47.

Of death, see "Insurance," § 139.

Of injuries from defects in highway, see "Highways," § 34.

—from surface water, see "Surface Water," § 2.

—at crossings, see "Railroad Companies," § 40.

—to passengers, see "Carriers," § 42.

—to persons on track, see "Railroad Companies," § 45.

—to servants, see "Master and Servant," §§ 41, 90.

§ 10. In general.

[a] (Mich.; 1895.)

Where plaintiff's intestate, a youth of 18, was detected stealing a ride on defendant's passenger train, by the conductor, who said that he would take him to a station, and turn him over to an officer, and he jumped from the train, and was killed, the statement of the conductor could not be said to have been the proximate cause of the injury, and the court was right in directing verdict for the defendant.—*Burden v. Lake Shore & M. S. Ry. Co.* (Mich.) 62 N. W. 173.

104 Mich. 101.

[b] (Mich.; 1896.)

Where a horse, in spite of his driver, and solely by reason of the condition of a check-rein, backs a buggy upon, and then off at the side of, a bridge just crossed, the absence of railings on the side of the bridge is not the proximate cause of the accident.—*Kingsley v. Bloomington Tp.* (Mich.) 67 N. W. 333.

[c] (Minn.; 1896.)

A person is liable for an injury proximately resulting from his negligent act, though he could not have reasonably anticipated such a result.—*Christianson v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 640.

[d] (Neb.; 1895.)

A railroad company built an embankment, filling up a ditch running through plaintiff's land, used by him for drainage, in such a manner that his lands were flooded by surface water. *Held*, that the negligence of the company was the proximate cause of the injuries.—*Lincoln & B. H. R. Co. v. Sutherland* (Neb.) 62 N. W. 859.

44 Neb. 526.

[e] (Wis.; 1896.)

The mere fact that plaintiff was injured by defendant's failure to exercise ordinary care in respect to some duty owed to plaintiff does not render defendant liable for the injury, un-

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less it was the natural and probable result of such negligence, and one which, in the light of attending circumstances, defendant ought reasonably to have foreseen might probably occur as a result of such negligence.—*Sheridan v. Bigelow* (Wis.) 67 N. W. 732.

93 Wis. 426.

§ 11. Concurring cause.

(Iowa; 1897.)

The fact that some other cause operates with the negligence of defendant to produce the injuries complained of will not relieve him from liability, if his wrong, concurring with such other cause, was the proximate cause of the injury.—*Gould v. Schermer* (Iowa) 70 N. W. 697.

§ 12. Intervening cause.

[a] (Neb.; 1895.)

In an action for the death of one killed by a collision of a passenger train with a hand car on which he was riding, the evidence showed that deceased was intoxicated; that he had procured the liquor at defendant's saloon; that his condition was such that he refused to obey a timely warning not to start out ahead of the train; and that he did not see its approach before the hand car was struck. *Held*, that the drunkenness of deceased was the primary cause of the accident.—*Cornelius v. Hultman* (Neb.) 62 N. W. 891.

44 Neb. 441.

[b] (Neb.; 1895.)

Where, in an action of tort, it is shown that, subsequent to the alleged negligent act, a new and independent cause had intervened, sufficient of itself to stand for the cause of the injury, the former is too remote to be made the basis of recovery.—*St. Joseph & G. I. R. Co. v. Hedge* (Neb.) 62 N. W. 887.

44 Neb. 448.

§ 13. Injury to frightened and runaway animals.

[a] (Mich.; 1895.)

Plaintiff's horse, while being driven over a culvert, which was without guard rails, on a narrow road, beside an embankment, shied at a hole in the roadway, and fell from the culvert. *Held*, that the hole in the roadway, the narrowness of the road, and want of guard rails were concurring causes of the accident.—*Simons v. Township of Casco* (Mich.) 63 N. W. 500.

105 Mich. 588.

[b] (Mich.; 1895.)

Where, without fault on plaintiff's part, his horse shies while on the approach to a bridge erected by a railroad company across its road, and, through the failure of the company to make its crossing safe by placing railings at the side of the approach, the team is thrown over the side of the approach, the company is liable, though the shying of the horse contributes to the accident.—*Gage v. Pontiac, O. & N. R. Co.* (Mich.) 63 N. W. 318.

105 Mich. 335.

[c] (Mich.; 1895.)

Where a horse becomes frightened while being driven along a street, and runs away, and by reason thereof collides with a car standing in the street, such fright is the proximate cause of injuries to the driver by such collision. *McGrath, C. J.*, dissenting.—*Lambeck v. Grand Rapids & I. R. Co.* (Mich.) 64 N. W. 479.

[d] (N. D.; 1895.)

When a horse of ordinary gentleness becomes frightened at an obstruction in a street, and shies across the street, where it causes the buggy to strike platform scales outside the sidewalk, as a result of which the occupants of the buggy are thrown out and injured, the proximate cause of the injury is the obstruction, and not the scales.—*Onverson v. City of Gratton* (N. D.) 65 N. W. 676.

5 N. D. 281.

1c1 (Wis.: 1895.)

The evidence showed that the alleged obstruction was on the west side of a bridge, and that plaintiff's horse, after shying from the obstruction, and crossing the bridge, appeared to take a second fright, previous to the accident. *Held*, that it was error to refuse to submit to the jury for special findings the questions as to whether the horse was frightened by certain objects on the east side of the bridge, and, if so, whether such second fright was the proximate cause of the injury.—*Laird v. Town of Otego* (Wis.) 62 N. W. 1042.

90 Wis. 25.

§ 14. Losses caused by fire.**(Mich.: 1896.)**

In an action for causing the destruction of plaintiff's premises by permitting sparks to escape from a mill, an instruction that, if defendant was guilty of negligence in operating his mill, he is liable for the injury sustained, if it was the result of a continuous succession of events, so linked together as to make a natural whole, and flowed naturally from such negligence, and this even if he could not have foreseen or anticipated such injury, should be construed to mean that, though defendant's negligence did not, in the first instance, cause the destruction of plaintiff's property, yet, if it ultimately did take fire as a result of such negligence, defendant was liable.—*Webster v. Symes* (Mich.) 66 N. W. 580.

§ 15. Sufficiency of evidence.**(Wis.: 1896.)**

In an action against an electric railway company for personal injury, it appeared that plaintiff, employed by an electric light company, while climbing a pole to remove an electric light, came in contact with a span wire supporting defendant's trolley wire and the iron post to which the span wire was fastened, receiving an electric shock which threw him to the ground; that the trolley wire was suspended from the span by a bell insulator, and the span wire supplied with a circuit break, interposed between the trolley and the post; that the plaintiff was experienced, and knew all the dangers connected with the trolley and span wires. *Held* insufficient to show that defendant's negligence was the proximate cause of plaintiff's injury.—*Huber v. La Crosse City Ry. Co.* (Wis.) 66 N. W. 708.

92 Wis. 636.

§ 16. Finding as to proximate cause.**(Wis.: 1896.)**

Defendants were operating a railroad, over which they hauled logs to a point where they were unloaded by men, of whom plaintiff was one, employed by another firm. The unloading was by skidways. The skids were placed as near to the track as the train would permit, and sometimes worked up so that they projected far enough to be struck by a loaded car; and, in such cases, it was customary for the unloaders to place them back the proper distance. On the occasion of plaintiff's injury, one of the skids was so projecting, and plaintiff, standing about six feet from the track, with his back to the approaching train, paid no attention to whether the skids were in proper place. As the train moved into position it struck the projecting skid, throwing it against plaintiff, who was knocked under the cars. The verdict found specially only that defendant did not exercise ordinary care in the operation of its train, and in keeping the track free from obstruction, and that plaintiff was not guilty of any want of ordinary care contributing to such injury. *Held*, that the verdict was fatally defective for want of any finding on the subject of proximate cause.—*Sheridan v. Bigelow* (Wis.) 67 N. W. 732.

93 Wis. 426.

III. DANGEROUS PREMISES.**§ 17. Places attractive to children.****(Neb.: 1895.)**

The owner of a vacant, unfenced lot, on which there was a pond of water, was not liable for the death of a boy accustomed to play by the pond, who fell from a raft constructed by himself, and was drowned.—*Richards v. Connell* (Neb.) 63 N. W. 915.

45 Neb. 467.

§ 18. Defects and obstructions in streets and sidewalks.**[a] (Wis.: 1895.)**

Laws 1882, c. 169 (Green Bay City Charter), requiring a lot owner to keep the sidewalk adjacent to his lot in safe condition, and providing that, if a sidewalk is out of repair, the owner shall be notified by the superintendent of streets, who, if necessary, shall make the repairs at the owner's cost, does not make a lot owner liable for personal injuries caused by a defect in the sidewalk adjacent to his lot.—*Toutloff v. City of Green Bay* (Wis.) 65 N. W. 168, 91 Wis. 490.

[b] (Wis.: 1896.)

Under a city charter making it the duty of the lot owners to construct and keep in repair sidewalks in front of their property, and providing that on their failure so to do the city shall make the repairs at the lot owners' expense, and that whenever an injury occurs, due to defects in a sidewalk for which the city would be liable, if the defect arises from the default or negligence of any person other than the city, such person shall be primarily liable for all damages for such injury, a lot owner is not liable for injuries resulting from the sidewalk being out of repair; the charter provision having reference only to injuries caused by active negligence of the lot owner in obstructing the sidewalks, or otherwise rendering them unsafe. *Toutloff v. City of Green Bay* (1895) 65 N. W. 169, 91 Wis. 190, followed.—*Scheek v. Tallman*, 67 N. W. 36.

§ 19. Falling buildings and walls.**[a] (Minn.: 1895.)**

The owner of a building veneered with brick, the brick portion of the wall of which fell, through the failure of the builder to anchor the same to the sheathing of the wall, as was proper and customary, was not liable for injuries occasioned by the fall, in the absence of evidence that by his exercising ordinary care before the wall fell he might have discovered the defect therein.—*Ryder v. Kinsey* (Minn.) 64 N. W. 94.

62 Minn. 85.

[b] (Neb.: 1895.)

Where, on the day succeeding the fire defendant consulted an architect with regard to reconstructing the damaged building, and was advised by the latter, after an examination of the walls, that the walls were not damaged, and might be used for the purpose of rebuilding, and were perfectly safe as they then stood, and thereupon defendant employed the architect to prepare plans for a new building, and the architect was preparing the same at the time the walls fell and injured plaintiff, a verdict for defendant was warranted.—*Olsen v. Meyer* (Neb.) 64 N. W. 954, 46 Neb. 240.

[c] (Neb.: 1896.)

The owner of a building one wall of which fell, not because of defects in material and workmanship, but because of the action of a fire in the building, was not liable to a fireman who was injured by the fall.—*Kitchen v. Carter* (Neb.) 66 N. W. 855.

47 Neb. 776.

§ 20. — Act of God.

(Neb.; 1895.)

In an action for injuries occasioned by the falling of a wall, where defendant claimed that the falling was occasioned by a wind storm of such unusual severity as to constitute an "act of God," it was proper to permit him to show that for over two years since the date of the falling there had occurred in the vicinity no storm of equal severity.—*Olsen v. Meyer* (Neb.) 64 N. W. 954, 46 Neb. 240.

§ 21. Material falling from building.

(Wis.; 1895.)

The failure of an owner or contractor to comply with the requirements of a reasonable ordinance as to the method of protecting passers-by from injuries resulting from the falling of materials or implements constitutes negligence as a matter of law.—*Smith v. Milwaukee Builders' & Traders' Exchange*, 64 N. W. 1041, 91 Wis. 360.

§ 22. Injuries to trespassers

(Mich.; 1895.)

A teamster who, after delivering goods at the back door of a store, as directed by the proprietor, starts through the rear part of the store for a receipt, and falls through an open trap door, is not, as a matter of law, a trespasser, so as to prevent a recovery for the injuries received.—*Pelton v. Schmidt* (Mich.) 62 N. W. 552.

104 Mich. 345.

§ 23. Injuries to licensees.

[a] (Mich.; 1895.)

Leaving open an unguarded trap door in the back part of a store, where goods are stored, is negligence rendering the storekeeper liable for injuries caused thereby to persons coming into that part of the store at the owner's invitation.—*Pelton v. Schmidt* (Mich.) 62 N. W. 552.

104 Mich. 345.

[b] (Mich.; 1897.)

A plaintiff who, while in the store of defendant as a customer, intentionally entered the door of a freight elevator, situated in the back part of the store, and used by employes only, without invitation or permission, and was injured by falling down the shaft, cannot recover therefor.—*Bennett v. Butterfield* (Mich.) 70 N. W. 410.

[c] (Minn.; 1896.)

The owner of premises who stored dynamite thereon was liable for damages to the property of one occupying the property as a bare licensee, caused by an explosion of the dynamite as a result of the owner's want of ordinary care and skill in its management.—*Clarkin v. Biwabik-Bessemer Co.* (Minn.) 67 N. W. 1020.

[d] (Minn.; 1896.)

Certain contractors erected a boarding camp upon mining property, where they were engaged in mining, under contract with the owners of the property; and, by their permission, plaintiffs occupied the camp, and boarded the contractors' workmen. Subsequently the contractors abandoned the contract and premises, and plaintiffs intended and attempted to remove from the camp, with their property used therein, but were delayed by reason of the severity of the weather, dangerous sickness of a member of their family, and financial inability in obtaining another place. The defendant company resumed possession of the mining property, and stored a large amount of dynamite in a building thereon, situate within 33 feet of the boarding camp; and, about three weeks thereafter, this dynamite, while being heated by defendants, exploded, damaging plaintiffs' personal property situate in the boarding camp. Prior to the explosion, defendants notified plaintiffs that, if they remained in the boarding camp, they would do so at their own

risk, but gave them no notice to remove from the camp, and took no legal steps to compel them to do so. *Held*, that plaintiffs remained in possession of the boarding camp as bare licensees, and the question whether they had reasonable opportunity to remove from the boarding camp with their property before the time of the explosion was for the jury.—*Clarkin v. Biwabik-Bessemer Co.* (Minn.) 67 N. W. 1020.

[e] (Wis.; 1895.)

Plaintiff alleged that his intestate was invited by defendant into an uncompleted building, to make certain estimates. At the head of the stairs there was a hallway, in which there was a partially open window. Deceased followed defendant up the stairs, thrust his head through the window, without knowledge that the window was part of the elevator shaft, and was struck by the descending elevator. *Held*, that defendant was not guilty of any breach of duty to the deceased, and therefore the facts alleged did not constitute a cause of action.—*Peake v. Buell* (Wis.) 63 N. W. 1053.

90 Wis. 508.

IV. CONTRIBUTORY NEGLIGENCE.

Of licensee on dangerous premises, see ante, § 23.

Pleading, see post, §§ 34, 35.

Province of court and jury, see post, § 45.

Of owner of property destroyed by fire, see "Railroad Companies," § 72.

— of stock, see "Railroad Companies," § 62,

63.

Of passenger, see "Carriers," §§ 55-62.

Of patient, see "Malpractice," § 3.

Of person ejected from train, see "Carriers," § 68.

— injured at crossing, see "Railroad Companies," §§ 34-39.

— injured by careless use of firearms, see "Pointing Firearms," § 2.

— injured by defect in street or sidewalk, see "Municipal Corporations," §§ 89-91.

— injured by street car, see "Horse and Street Railroads," §§ 13-15.

— injured on track, see "Railroad Companies," §§ 49, 50.

Of servant, see "Master and Servant," §§ 80-94.

Of traveler on defective bridge, see "Bridges," § 6.

— on highway, see "Highways," §§ 36, 37.

§ 24. What constitutes.

[a] (Iowa; 1895.)

The same high degree of diligence is not required of a person about to cross a public street to avoid contact with vehicles as would be required at a railroad crossing.—*Eaton v. Crips* (Iowa) 62 N. W. 687.

[b] (Iowa; 1896.)

The fact that defendant's engine which caused the fire was placed, in relation to the stacks of grain burned, in a position suggested by plaintiff, which was in fact a dangerous place, does not show that plaintiff was negligent, he having reason to think that the engine had an efficient spark arrester.—*Richardson v. Douglas* (Iowa) 69 N. W. 530.

[c] (Iowa; 1897.)

Plaintiff, a boy of 18, who was employed in a building in which there were two elevators, one of which was used for passengers, and had regular attendants, employed by the owner of the building, while the other had no attendants, and was seldom used, rather than wait for the elevator in use, went into the other, and used it by operating it himself, and in so doing was injured by reason of its being out of repair. He had frequently used it in the same way before, but without permission, and, so far as shown, without the knowledge of the owner. *Held*,

that plaintiff was negligent. *Hansen v. State Bank Bldg. Co. (Iowa)* 69 N. W. 1029.

[d] (Mich.; 1895.)

Plaintiff, who was in the rear of defendant's store at his invitation, fell through an open trap door, upon which he suddenly came as he passed around a pile of goods, and of the existence of which he was unaware. *Held*, that plaintiff was not, as a matter of law, guilty of contributory negligence.—*Pelton v. Schmidt (Mich.)* 62 N. W. 552.

104 Mich. 345.

[e] (Mich.; 1896.)

A pedestrian on a sidewalk, injured by falling into an open manhole, left guarded only by a barrel partially covering the same, by a person excavating under the walk with authority from the city, whose attention was attracted by men working in a trench beside the walk, and who therefore wholly failed to look out for obstructions in his general course, cannot, as a matter of law, be said to be free from contributory negligence.—*Le Beau v. Telephone & Telegraph Const. Co. (Mich.)* 67 N. W. 339.

[f] (Mich.; 1897.)

Since the intoxication of a plaintiff at the time he received a personal injury is not negligence as a matter of law, where plaintiff alleged that the injury was caused by his being pushed from defendant's street car by the conductor, an instruction that he could not recover if he was intoxicated was erroneous.—*Kingston v. Ft. Wayne & E. Ry. Co. (Mich.)* 70 N. W. 315.

§ 25. Of aged person.

(Neb.; 1897.)

The law requires no greater care of an aged person to avoid injury than it requires of a young person. It requires of each the exercise of ordinary care.—*Village of Culbertson v. Holliday (Neb.)* 69 N. W. 853.

§ 26. Of children.

[a] (Iowa; 1896.)

Plaintiff, a boy 12 years old, was playing, with others, after dark, on a turntable in defendant's yards, and, after having helped to set the table in motion, in attempting to get off, stepped between the table and the side of the pit, and was injured. *Held*, that plaintiff was guilty of contributory negligence. *Merryman v. Railway Co. (1892)* 52 N. W. 545, 85 Iowa, 634, followed.—*Carson v. Chicago, R. I. & P. Ry. Co.*, 65 N. W. 831.

[b] (Mich.; 1895.)

A child 10 years old is guilty of contributory negligence in falling into a hole in a sidewalk, of the existence of which he knows, only in case he has failed to exercise the care and discretion which children of his age usually exercise under like circumstances.—*Strudgeon v. Village of Sand Beach (Mich.)* 65 N. W. 616.

[c] (Minn.; 1897.)

The rule of law requiring of infants only a degree of care commensurate with their age and discretion applies alike to persons whose senses are blunted and mental faculties impaired by age.—*Johnson v. St. Paul City Ry. Co. (Minn.)* 69 N. W. 900.

[d] (Neb.; 1897.)

Plaintiff, 16 years old, while leaning into an elevator shaft to look at the ascending elevator, was struck and injured by the descending weights. He was familiar with the elevator, being employed in an office near it, and knew that the wire screens protecting the shaft had been removed on that day to be painted. *Held*, that he could not recover.—*Knapp v. Jones (Neb.)* 70 N. W. 19.

[e] (Wis.; 1895.)

A boy seven years old cannot be held guilty of contributory negligence as a matter of law.—*McVoy v. Oakes*, 64 N. W. 748, 91 Wis. 214.

[f] (Wis.; 1895.)

A boy of 16 years must exercise only such care as boys of his age, intelligence, and experience usually use under similar circumstances.—*Kuehn v. Merrill Lumber Co. (Wis.)* 65 N. W. 374, 91 Wis. 637.

[g] (Wis.; 1897.)

A child eight years old who has been playing around the depot in a village is not necessarily negligent in climbing between the cars of a long freight train on the crossing for the purpose of going home, the train having stood there for nearly an hour.—*Carner v. Chicago, St. P., M. & O. Ry. Co. (Wis.)* 70 N. W. 560.

§ 27. Effect—Injury avoidable by defendant.

(Neb.; 1896.)

Although plaintiff may have negligently exposed himself to an injury, yet if the defendant, after discovering his exposed situation, negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is, because thereof, injured, he may nevertheless recover.—*Omaha St. Ry. Co. v. Martin (Neb.)* 66 N. W. 1007.

§ 28. Instructions.

[a] (Iowa; 1895.)

An instruction that plaintiff suing for personal injuries must establish negligence on the part of defendant, and that he did not contribute to the injuries by his own "ordinary negligence," is not erroneous because of the use of the term "ordinary negligence."—*Kerns v. Chicago, M. & St. P. Ry. Co. (Iowa)* 62 N. W. 692.

[b] (Iowa; 1896.)

In an action for personal injuries caused by a defective sidewalk, an instruction basing the theory of contributory negligence on the ground that plaintiff "well knew" of the dangerous condition of the walk, is not ground for reversal, especially where the same instruction precludes recovery if plaintiff "knew" of its condition.—*Barnes v. Town of Marcus (Iowa)* 65 N. W. 984.

[c] (Iowa; 1897.)

Where the jury are told that the negligence was the doing or the omitting to do what persons of ordinary prudence would not have done or omitted, and that contributory negligence was such want of care as was directly instrumental in producing the injury, a further charge that plaintiff must use ordinary care to avert danger that could be "readily" discovered is not misleading.—*Deyne v. Chicago, M. & St. P. Ry. Co. (Iowa)* 69 N. W. 1042.

[d] (Iowa; 1897.)

A charge that, in determining the contributory negligence of a person injured, the jury could consider plaintiff's habits of life as to care and prudence, was erroneous.—*Gould v. Schermer (Iowa)* 70 N. W. 697.

[e] (Neb.; 1897.)

Such expressions as "slight negligence" and "slight want of ordinary care" tend to confuse the charges, and should not be used.—*Village of Culbertson v. Holliday (Neb.)* 69 N. W. 853.

[f] (Wis.; 1895.)

Where, in an action for injuries from the falling of a brick which had struck her while passing on the sidewalk below, plaintiff denies having received any warning, and the evidence shows that she did not understand or know that she was in danger, it was error to instruct that though "plaintiff, at the time the brick was seen to be falling from the top of the building, was warned and told to escape, she is not chargeable with negligence because she did not use the best means of escape from receiving an injury at that time."—*Smith v. Milwaukee Builders' & Traders' Exchange*, 64 N. W. 1041, 91 Wis. 360.

[g] (Wis.; 1896.)

An instruction that, if the negligence of deceased was the direct cause of the injury, his

representative could not recover, though the machinery was defective, "if he [deceased] knew of the defects," is erroneous, since it allows a recovery in case deceased had no knowledge of any defect, even though he was otherwise negligent.—*Christianson v. Pioneer Furniture Co. (Wis.)* 66 N. W. 639.
92 Wis. 649.

V. COMPARATIVE AND IMPUTED NEGLIGENCE.

§ 29. Comparative.

(Neb.; 1897.)

The doctrine of comparative negligence is not in force in Nebraska.—*Village of Culbertson v. Holliday (Neb.)* 69 N. W. 853.

§ 30. Imputed.

[a] (Iowa; 1896.)

Negligence of plaintiff's companion, who was merely walking upon the sidewalk with him, in stepping upon a loose board, whereby plaintiff was thrown and injured, cannot be imputed to plaintiff, so as to prevent a recovery from the city on account of its negligence in keeping the walk in repair.—*Barnes v. Town of Marcus (Iowa)* 65 N. W. 984.

[b] (Minn.; 1897.)

Where a tenant leases the upper story of a building with the use of the elevator, and the landlord is liable for the safe condition of the elevator, the fact that the manager of the tenant's factory in charge of his workmen knew of certain defects therein, which defects were not the cause of the injury, is not ground for imputed knowledge of the defects by the tenant which would preclude him from recovery for injuries on the ground of contributory negligence.—*Olson v. Schultz (Minn.)* 70 N. W. 779.

§ 31. — Negligence of driver of vehicle.

[a] (Neb.; 1896.)

The driver of a private conveyance is the agent of the passenger so as to charge the latter with the former's negligence in going upon a railroad crossing without first looking and listening for the approach of a train.—*Omaha & R. V. Ry. Co. v. Talbot (Neb.)* 67 N. W. 599.
48 Neb. 627.

[b] (N. D.; 1895.)

One who, at her own request, was riding in a buggy with another, who owned and controlled the horse and conveyance, and whose capacity to drive there was no reason to question, was not imputable with the driver's negligence in attempting to drive past an obstruction in the street.—*Ouverson v. City of Grafton (N. D.)* 65 N. W. 676.
5 N. D. 281.

VI. PLEADING.

§ 32. In general.

[a] (Mich.; 1897.)

In an action for negligence, defendant can take advantage of the failure of the declaration to specifically aver the duty of defendant, and the breach, only by demurrer.—*Ella v. Boyce (Mich.)* 70 N. W. 1106.

[b] (Minn.; 1897.)

A complaint for damages caused by another's negligence is not demurrable unless the acts alleged could not be negligent under any competent evidence.—*Stendal v. Boyd (Minn.)* 69 N. W. 899.

§ 33. Specifying acts of negligence.

[a] (Neb.; 1896.)

An allegation of negligence in a pleading is a mere conclusion, and the facts from which

the inference of negligence arises must be pleaded.—*Omaha & R. V. Ry. Co. v. Wright (Neb.)* 66 N. W. 842.
47 Neb. 886.

[b] (Neb.; 1897.)

A petition alleging that defendant railroad company negligently constructed ditches along its track through plaintiff's land, so as to cause surface waters to collect and be precipitated upon the land, destroying plaintiff's crops, and depositing clay and sand upon the land, thereby depreciating its value, states a cause of action, though open to a motion to make more definite and certain with respect to the negligence charged.—*Fremont, E. & M. V. R. Co. v. Harlin (Neb.)* 70 N. W. 263.

[c] (Wis.; 1895.)

A complaint in a personal injury suit which alleges that, while plaintiff was driving along the highway, defendant drove up behind at a great speed, and negligently ran into plaintiff's vehicle, is sufficiently definite as to defendant's negligence.—*Hanson v. Anderson (Wis.)* 62 N. W. 1055.
90 Wis. 195.

§ 34. Contributory negligence.

(Minn.; 1895.)

In order to render a complaint in a personal injury suit demurrable on the ground that plaintiff was guilty of contributory negligence, it must conclusively appear from the facts stated in the complaint, as a matter of law, that plaintiff was guilty of negligence that contributed to his injury.—*Lydecker v. St. Paul City Ry. Co. (Minn.)* 63 N. W. 1027.
61 Minn. 414.

§ 35. — Negating in complaint.

[a] (Iowa; 1895.)

A complaint for injuries from a runaway, caused by defendant's dog frightening plaintiff's horse, which does not allege that plaintiff was not guilty of contributory negligence, is demurrable.—*Gregory v. Woodworth (Iowa)* 61 N. W. 962.
93 Iowa, 246.

[b] (Neb.; 1895.)

In an action for personal injuries, it is not necessary for plaintiff to plead the particular precautions taken by him to avoid injury.—*Chicago, B. & Q. R. Co. v. Putnam (Neb.)* 63 N. W. 826.
45 Neb. 440.

§ 36. Pleading and proof.

[a] (Mich.; 1895.)

Though plaintiff in a personal injury suit alleges defendant's negligence to have been gross, he need show actionable negligence only.—*Keating v. Detroit, B. C. & A. R. Co. (Mich.)* 62 N. W. 575.
104 Mich. 418.

[b] (Mich.; 1896.)

In an action to recover for alleged negligence in causing an explosion in a trench without giving warning thereof, it was error to submit the issue of negligence in using an excessive charge, or in not properly covering the trench, when neither fact was alleged as negligence in the declaration.—*Mitchell v. Prange (Mich.)* 67 N. W. 1096.

VII. EVIDENCE.

Sufficiency of evidence as to proximate cause, see ante, § 15.

Expert testimony of, see "Evidence," § 57.

Opinion evidence of, see "Evidence," § 44.

§ 37. Competency, relevancy, and materiality.

[a] (Iowa; 1894.)

In an action against a husband and wife for injuries caused by the negligent discharge

of a rifle, it appeared that the wife took it, her husband telling her to "shoot at that hinge" on the lower part of a door, but, instead of doing so, she raised the rifle higher, saying, "I am going to shoot at the crosspiece on the door," and fired, the ball passing through the door, and injuring plaintiff. *Held*, that testimony that the husband directed the wife to shoot at a hinge close to the ground, and that he did not know that she intended to shoot at the crosspiece, was admissible on the question of his negligence.—*Bethel v. Otis* (Iowa) 61 N. W. 200.

92 Iowa, 502.

[b] (Iowa; 1895.)

On an issue as to whether a yard master, killed while overseeing the switching of cars, was negligent, testimony wholly of a general nature that he was always careful and on the lookout for dangers is inadmissible.—*Adams v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 1059.

93 Iowa, 565.

[c] (Iowa; 1896.)

In an action for damages caused by a fire negligently set by defendant, evidence of the value of property of defendant which was destroyed by the fire is inadmissible.—*Allen v. Barrett* (Iowa) 69 N. W. 272.

[d] (Mich.; 1896.)

Evidence to show the entire surroundings of the scene of the accident is admissible.—*Le Beau v. Telephone & Telegraph Const. Co.* (Mich.) 67 N. W. 339.

[e] (Mich.; 1897.)

Under a defense to an action for a personal injury that the injury was due to plaintiff's being intoxicated, evidence that he was in the habit of becoming intoxicated two or three years previous to the accident is inadmissible.—*Kingston v. Ft. Wayne & E. Ry. Co.* (Mich.) 70 N. W. 315.

[f] (Minn.; 1896.)

In an action for negligence of defendant in knowingly permitting a dangerous horse, a track bolter, to run in a race controlled by it, in which plaintiff rode, and was injured, without informing her of the vicious character of the horse, of which she was ignorant, where there was evidence that the horse was known by defendant to bolt in practice, and that it came on the track wearing blinkers, plaintiff could show that a horse which bolts in practice will usually do so in a race, and, further, for what purpose blinkers are put on race horses.—*Lane v. Minnesota State Agricultural Soc.* (Minn.) 69 N. W. 463.

§ 38. Burden of proof.

[a] (Iowa; 1895.)

In an action against a druggist for negligently giving him an injurious medicine, plaintiff, to recover, must show himself not guilty of contributory negligence.—*Rabe v. Sommerheck* (Iowa) 63 N. W. 458.

[b] (Mich.; 1896.)

Where a bicyclist, approaching a pedestrian from behind, who is unconscious of his approach, and who is walking on a path beside a highway, without giving warning of his approach, strikes the pedestrian with his bicycle, the burden is cast on the bicyclist to show, to relieve himself from liability, freedom from negligence.—*Myers v. Hinds* (Mich.) 68 N. W. 156.

[c] (Neb.; 1896.)

In an action, the basis of which is negligence, if the plaintiff can prove his case without disclosing any negligence on his part, his negligence then becomes a matter of defense, the burden of proving it being on the defendant. *Stock-Yards Co. v. Conover* (1894) 59 N. W. 950, 41 Neb. 617, and cases there cited, followed.—*Omaha St. Ry. Co. v. Martin*, 66 N. W. 1007, 48 Neb. 65.

§ 39. Presumption from accident.

(Neb.; 1895.)

In a suit by an administrator against a railroad company for negligently causing the death of his intestate, there is no presumption of law that either party was guilty of negligence.—*Spears v. Chicago, B. & Q. R. Co.* (Neb.) 62 N. W. 68, 43 Neb. 720.

§ 40. Custom and usage.

[a] (Minn.; 1896.)

That other men have attempted or performed reckless and negligent acts of a certain character cannot be allowed to justify or excuse one who attempts or performs the same reckless and negligent act.—*Wherry v. Duluth, M. & N. Ry. Co.* (Minn.) 67 N. W. 223.

64 Minn. 415.

[b] (Wis.; 1896.)

In an action by one who, while riding in a wagon loaded with wood, was injured by reason of defects in the street, evidence, on the issue of contributory negligence, as to the customary way of loading and hauling wood, is inadmissible.—*Simonds v. City of Baraboo* (Wis.) 67 N. W. 40.

93 Wis. 40.

§ 41. Conditions of place before and after accident.

[a] (Iowa; 1895.)

In an action for injuries caused by the wrecking of a train while crossing a bridge which was in the course of construction, evidence of the condition of the bridge on the day before the accident was not admissible.—*Kentley v. Illinois Cent. R. Co.* (Iowa) 63 N. W. 560.

[b] (Wis.; 1896.)

In an action against a city for injuries received on account of a hole in a highway, the admission of evidence as to the size of the hole on the second day after the accident, as cinders were being dug therefrom, which had been placed therein soon after the accident, is not ground for reversal where the other evidence shows there had been no substantial change in the hole.—*Larson v. City of Eau Claire* (Wis.) 65 N. W. 731.

92 Wis. 86.

§ 42. Other defects.

(Wis.; 1895.)

To prove that defendant street-railroad company negligently piled snow in the street, to plaintiff's injury, it may be shown that defendant had previously piled snow in that vicinity, but not that it did so elsewhere.—*Mayer v. Milwaukee St. Ry. Co.* (Wis.) 63 N. W. 1048.

90 Wis. 522.

§ 43. Precautions and alterations after accident.

[a] (Minn.; 1896.)

Plaintiff cannot show that after the accident defendant repaired the defect.—*Hammargren v. City of St. Paul* (Minn.) 69 N. W. 470.

[b] (Wis.; 1895.)

In an action for personal injuries alleged to have been caused by a defect in a highway, negligence cannot be proved by showing repairs made after the accident.—*Jennings v. Town of Albion* (Wis.) 62 N. W. 926.

90 Wis. 22.

VIII. PROVINCE OF COURT AND JURY.

Finding as to proximate cause, see ante, § 16. Instructions as to contributory negligence, see ante, § 28.

§ 44. In general.

[a] (Iowa; 1896.)

As plaintiff was driving across F. street, defendant's horse, driven to a buggy on F.

street, collided with plaintiff's buggy. A city ordinance provided that no person should drive on any street faster than six miles per hour. Defendant and two other persons were nearly abreast, and the others were racing their horses. Defendant and his wife, who was with him, testified that he was not racing, but, while driving at an ordinary gait, the other two horses came up behind him, frightened his horse, and he could not hold him in; and that when he came to plaintiff's buggy he jumped or fell into the buggy, and crushed it. Two witnesses testified that defendant's horse did not jump, and one of them said he came "on a straight trot." Defendant's was a fast horse, and he and the owners of other fast horses were accustomed to speed them on F. street. *Held*, that whether the collision was a mere accident, and not the result of defendant's negligence, was a question for the jury.—*Osborn v. Jenkinson* (Iowa) 60 N. W. 548.

[b] (Mich.; 1896.)

In an action for causing the destruction of plaintiff's premises by negligently permitting sparks to escape from the smokestack of defendant's mill on a violently windy day, defendant's witness stated that, on said day, the circular doors in the fire box were partly open, and there was other evidence that the drafts were open part of the time on said day, and that cinders were emitted from the stack. Defendant testified that sparks could not have escaped with the drafts closed. *Held*, that there was sufficient evidence to authorize the submission to the jury of the issue as to whether the drafts were open.—*Webster v. Symes* (Mich.) 66 N. W. 580.

[c] (Wis.; 1895.)

Whether a company operating an electric railroad was negligent in not maintaining a guard wire over its trolley wire, so as to prevent a fallen telephone wire from resting on its trolley wire, and becoming charged with electricity, to the injury of one driving along the street, is a question of fact.—*Block v. Milwaukee St. Ry. Co.*, 61 N. W. 1101, 89 Wis. 371.

§ 45. Question of contributory negligence.

[a] (Iowa; 1895.)

Where, in an action for injuries caused by reckless driving, the evidence shows that there were many people on the street at the time of the accident between plaintiff and the team, an instruction submitting the question whether there was anything that prevented plaintiff from seeing the approaching team is proper.—*Eaton v. Crips* (Iowa) 62 N. W. 687.

[b] (Iowa; 1895.)

In an action for personal injuries caused by falling into an excavation made by defendant in a sidewalk in front of his buildings, the question whether plaintiff was intoxicated at the time, and hence guilty of contributory negligence, is for the jury.—*Kingsley v. Mulhall* (Iowa) 64 N. W. 659.

[c] (Iowa; 1896.)

It appeared that plaintiff was a dairyman; that he had stopped at a store on the corner; that he had gotten into his buggy, and started across the street, driving in a proper manner; that one or more persons called aloud to him to look out for "the race"; and that he had no time to get out of the way of defendant's horse. *Held*, that whether he was negligent was a question for the jury.—*Osborn v. Jenkinson* (Iowa) 69 N. W. 548.

[d] (Minn.; 1896.)

The question of contributory negligence is one of fact, for the jury, when the evidence in regard thereto is conflicting or uncertain.—*Leonard v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.) 65 N. W. 1034.

§ 46. Competency and sufficiency of evidence.

(Neb.)

Whether or not a certain act or omission is competent evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury.—(1895) *Spears v. Chicago, B. & Q. R. Co.*, 62 N. W. 68, 43 Neb. 720; (1896) *Omaha St. Ry. Co. v. Martin*, 66 N. W. 1007, 48 Neb. 65; (1897) *Village of Culbertson v. Holliday*, 69 N. W. 853.

§ 47. Remote and proximate cause.

[a] (Mich.; 1895.)

Where a bridge built across a stream, 16 and 28 feet below the wastewear of a mill-dam at the respective ends, has no railings to the approaches, or anything to hide the view of the water from the sight of horses at any point on the bridge or approaches, and a horse, frightened at the sight and noise of the water while on the approach, backs off and injures the driver, the question whether the want of barriers was the proximate cause of the injury is for the jury.—*Ross v. Ionia Tp.* (Mich.) 62 N. W. 401.

104 Mich. 320.

[b] (Neb.; 1896.)

The question of the proximate cause of an injury is one for the jury; but, when their decision thereof is clearly and manifestly wrong, it will be set aside.—*Kitchen v. Carter* (Neb.) 66 N. W. 855.

47 Neb. 776.

[c] (Wis.; 1895.)

In submitting an interrogatory whether plaintiff was injured by defendant's want of ordinary care, which caused the injury, it is error to instruct that if the jury find lack of ordinary care on the part of defendant they must answer, "Yes," as it withdraws the question whether defendant's negligence was the proximate cause of the injury.—*Guinard v. Knapp, Stout & Co. Company* (Wis.) 62 N. W. 625.

90 Wis. 123.

§ 48. Directing verdict.

[a] (Iowa; 1895.)

In an action for injuries, where the evidence as to the conduct of both parties is conflicting, it is not error to refuse to direct a verdict for defendant on the ground that plaintiff had not shown himself free from contributory negligence.—*Orr v. Cedar Rapids & M. C. Ry. Co.* (Iowa) 62 N. W. 551.

[b] (Neb.; 1896.)

There being evidence that a steam thrasher was operated in a yard containing several stacks of grain on a windy day, that it was moved about from place to place, and that cinders were dumped therefrom several times containing live coals, the question whether it was operated negligently, so as to cause the burning of the grain, was for the jury.—*McClelland v. Scroggin* (Neb.) 66 N. W. 1123.

[c] (Wis.; 1896.)

Proof of contributory negligence must be clear and decisive, leaving no room for an impartial mind to reach any other conclusion, to warrant the direction of a verdict on that ground.—*Steinhofel v. Chicago, M. & St. P. Ry. Co.* (Wis.) 65 N. W. 852.

92 Wis. 123.

NEGOTIABLE INSTRUMENTS.

I. IN GENERAL, § 1.

II. EXECUTION AND DELIVERY, §§ 2-4.

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IX. INDORSEMENT AND TRANSFER, §§ 21-57.

1. In General, §§ 21-41.

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XI. CHECKS, §§ 60-62.

XII. DEMAND, NOTICE, AND PROTEST, §§ 63-67.

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XIV. ACTIONS, §§ 75-89.

See, also, "Orders"; "Principal and Surely"; "Usury."

Acceptance as payment, see "Payment," §§ 3, 4.
— of note as waiver of lien, see "Mechanics' Liens," § 45.Effect of antedating note, see "Usury," § 2.
— of draft as assignment, see "Assignment," § 10.

— of usury, see "Usury," § 11.

Injunction against negotiation, see "Injunction," § 13.

Liability on premium notes, see "Insurance," § 16.

Notes of wife, charge on separate estate, see "Husband and Wife," § 16.

— of wife to pay husband's debts, see "Husband and Wife," § 8.

Power of officer of corporation, see "Corporations," § 33.

— of partner to execute or indorse notes for firm, see "Partnership," § 15.

What law governs, see "Conflict of Laws," § 7.

I. IN GENERAL.

§ 1. What constitutes promissory note.

[a] (Mich.; 1895.)

The plaintiff received from defendants the following certificate: "B. has deposited in this bank \$8,000 (eight thousand dollars), payable to the order of himself on the return of this certificate properly indorsed. Interest at 6 per cent. if left 12 months for all full months. Interest to cease if not renewed at end of one year from date." *Held*, that such a certificate of deposit is a promissory note, payable on demand.—*Beardsley v. Webber* (Mich.) 62 N. W. 173.

104 Mich. 88.

[b] (S. D.; 1896.)

An instrument duly made, which recites, "Due W. C. R. the sum of \$98.65, payable at this office, on the 20th day of June, 1893, to him or order," is a promissory note, within Comp. Laws, §§ 4456, 4562, declaring that "a promissory note is an instrument, negotiable in form, whereby the signer promises to pay a specified sum of money."—*Schmitz v. Hawkeye Gold-Mining Co.* (S. D.) 67 N. W. 618.

II. EXECUTION AND DELIVERY.

By executor or administrator, see "Executors and Administrators," § 9.

Effect of fraud on rights of bona fide purchasers, see post, § 56.

Indorsement before delivery, see post, §§ 28-30.

§ 2. Signing after delivery of note.

(Iowa; 1895.)

The liability of one who becomes a co-maker on a note after its execution is not affected by the fact that, though the other signers were thereby discharged from liability, one of them has died, and another has allowed judgment to be entered against him thereon.—*Rhoades v. Leach* (Iowa) 61 N. W. 988.
93 Iowa, 337.

§ 3. Procurement by fraud.

[a] (Mich.; 1896.)

In an action on notes given for a quit-claim deed of one N.'s title to an undivided interest in land owned by defendant, it appeared that such title was apparently vested in defendant by a deed executed by one G. as attorney in fact of N., and that N. had placed on file a declaration that the purported power of attorney was a forgery. Defendant claimed that the notes were given on the understanding that, if the power was a forgery, N. had a fourth interest in the fee, whereas, he had no interest in that case. Defendant admitted he did not believe it was a forgery, and preferred to pay the notes to taking his chances; but his action was on the supposition that, if the power was a forgery, N. had title to one-fourth. Plaintiff testified that his agent made no representations when the deed was made, and that defendant claimed the N. claim appeared on the abstract, and he wanted to clear it off. *Held*, that whether defendant knew what he was buying when he gave the notes was a question for the jury.—*Walton v. Mason* (Mich.) 67 N. W. 692.

[b] (Minn.; 1896.)

The mere promise to pay, or the procuring of an extension of the time for paying, a note obtained by fraud to pay which the maker is under no legal or moral obligation, does not, as a matter of law, constitute a ratification of the note, in the absence of facts creating an estoppel in pais.—*First Nat. Bank of Decorah v. Holan* (Minn.) 65 N. W. 952.
63 Minn. 523.

§ 4. Duress.

(Wis.; 1897.)

The fact that defendant, who had unlawfully caused the pregnancy of a girl, was threatened by the girl's father with a criminal prosecution unless he gave a note and a mortgage to provide for the care of the girl and the child, and that he complied with the demand, does not show duress, where several days intervened between the demand and the compliance, in which defendant consulted with friends, who advised him to settle.—*Wolff v. Blum* (Wis.) 70 N. W. 73.

III. INTERPRETATION.

§ 5. Interest.

(Iowa; 1896.)

On a note dated June 19, 1893, wherein the maker promised to pay "the principal sum of \$4,000, with interest thereon from date until paid, at the rate of 7 per cent. per annum, payable annually, in each year, until said principal sum is fully paid; said payments to be made as follows: \$1,000 on or before Sept. 15th, 1894, and \$1,000 on or before Sept. 15th in each year, until 'fully paid,'—the interest matured on June 19th in each year after the date of the note.—*Jurgensen v. Carlsen* (Iowa) 66 N. W. 877.

§ 6. Liability of acceptor.

[a] (Iowa; 1895.)

Orders on a lessee, drawn and accepted on the same day, directing him to pay certain sums out of the first royalties to become due under the lease, take priority in the order of their acceptance; those accepted at the same time having no priority over each other.—*In re Mahaska Coal Co.* (Iowa) 64 N. W. 405.

[b] (Iowa; 1895.)

Acceptance by a lessee of an order of the lessor to pay a certain sum out of the first royalties to become due under the lease does not change his rights under the provision of the lease to apply, at his option, the royalties in payment of liens on the property, or make him liable on the orders for any amount in excess of what would become due the lessor after

the lessee had exercised his option.—In re Mahaska Coal Co. (Iowa) 64 N. W. 405.

IV. NEGOTIABILITY.

§ 7. What instruments are negotiable.

[a] (Mich.; 1895.)

A note is not rendered nonnegotiable because of an indorsement thereon of a statement by the maker of the value of the property owned by him.—Hudson v. Emmons (Mich.) 65 N. W. 542.

[b] (Mich.; 1896.)

The fact that the maker of a nonnegotiable note, secured by mortgage, delivered the same to the payee, the latter agreeing to discharge certain mortgages on the land mortgaged, does not render the payee the agent of the maker to negotiate the note, so as to entitle a purchaser to enforce it.—Carmody v. Crane (Mich.) 68 N. W. 268.

[c] (Mich.; 1896.)

A note for the payment of a certain sum, at a fixed date, is not rendered nonnegotiable by a provision that it may become due sooner, at the option of the holder, on default in the payment of interest, nor by the fact that a mortgage securing it contains similar provisions in regard to default in the payment of taxes and assessments on the mortgaged property, where, at the time of the execution of the note and mortgage, the obligation rested on the mortgagor by law to pay all taxes, though by subsequent legislation the duty of paying a portion of such taxes was imposed on the mortgagee.—Wilson v. Campbell (Mich.) 68 N. W. 278.

[d] (S. D.; 1895.)

A note not made payable to order or bearer is not negotiable (Comp. Laws, § 4456); and an assignee takes it subject to all defenses to which it would be subject in the hands of the original payee.—Searles v. Seipp (S. D.) 61 N. W. 804.

6 S. D. 472.

§ 8. Statement of "value received."

(Iowa; 1895.)

The words "value received," in a bill of exchange, do not show an intent to make the bill negotiable.—Culbertson v. Nelson (Iowa) 61 N. W. 854.

93 Iowa, 187.

§ 9. Certainty as to sum payable.

[a] (Iowa; 1895.)

Code, § 2085, providing that "instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor or money to be due to another, are negotiable * * * whenever it is manifest from their terms that such was the intent of the maker," does not render a bill of exchange negotiable when it is uncertain as to the amount to be paid.—Culbertson v. Nelson (Iowa) 61 N. W. 854.

93 Iowa, 187.

[b] (Mich.; 1896.)

A promissory note containing a stipulation to "pay all taxes assessed against the real estate and the mortgagee's interest therein, described in the mortgage given to secure this note, until it is paid," is not negotiable.—Walker v. Thompson (Mich.) 66 N. W. 584.

[c] (Mich.; 1896.)

A mortgage note, providing for the payment by the maker of all taxes which may thereafter be authorized by statute to be assessed against the interest of the mortgagee, is not negotiable, the amount being uncertain. Walker v. Thompson (Mich.) 66 N. W. 584, followed.—Carmody v. Crane (Mich.) 68 N. W. 268.

[d] (S. D.; 1895.)

The negotiability of a note is not affected by a provision therein for an additional rate of interest after maturity.—Merrill v. Hurley (S. D.) 62 N. W. 958.

6 S. D. 592.

§ 10. — Promise to pay attorney's fees.

[a] (Neb.; 1895.)

A note is not rendered nonnegotiable by a provision therein for an attorney's fee in case of suit thereon.—Stark v. Olsen (Neb.) 63 N. W. 37.

44 Neb. 646.

[b] (N. D.; 1894.)

A clause in a note, "agreeing to pay all expenses incurred by suit or otherwise in attempting the collection of this note, including reasonable attorney's fees," renders the note nonnegotiable.—First Nat. Bank v. Laughlin (N. D.) 61 N. W. 473.

4 N. D. 391.

[c] (S. D.; 1895.)

The fact that a stipulation for attorney's fee in a note is declared against public policy and void, by Laws 1889, c. 16, § 1, does not destroy the negotiability of the note.—Chandler v. Kennedy (S. D.) 65 N. W. 439.

[d] (S. D.; 1897.)

A provision for attorney's fees in a note is void, and does not affect its negotiability.—National Bank of Commerce v. Feeney (S. D.) 70 N. W. 874.

§ 11. — Promise to pay attorney's fees and costs.

(S. D.; 1897.)

The provision for costs in a note for a certain sum with attorney's fees and "other costs, in case the holder is obliged to enforce payment at law," renders the note nonnegotiable, under the statute.—Johnson v. Schar (S. D.) 70 N. W. 838.

§ 12. — Provision as to exchange.

[a] (Iowa; 1895.)

A bill of exchange for the payment of a certain sum, "with exchange," is not negotiable.—Culbertson v. Nelson (Iowa) 61 N. W. 854.

93 Iowa, 187.

[b] (Minn.; 1897.)

A written promise to pay a sum of money in "New York or Chicago exchange" is not negotiable.—First Nat. Bank v. Slette (Minn.) 69 N. W. 1148.

§ 13. Certainty as to time of payment.

[a] A note is not rendered nonnegotiable by a provision therein that, on default in payment of an installment of interest, the owner may declare the whole amount due.

—(Neb.; 1895) Stark v. Olsen, 63 N. W. 37, 44 Neb. 646;

(S. D.; 1895) Merrill v. Hurley, 62 N. W. 958.

[b] (Mich.; 1896.)

A note negotiable on its face referred to the mortgage securing it, which provided that the mortgagor should pay any and all taxes that might be levied on the lands or on the mortgage, and that, if he should leave any tax unpaid for 30 days, such tax, and the whole principal and interest, should become payable at once. *Held*, nonnegotiable, per Hooker and Grant, JJ., on the ground that the time of payment was not certain; per Long, C. J., and Montgomery and Moore, JJ., on the ground that the amount payable to the mortgagee was uncertain by reason of the undertaking to relieve the mortgagee of his liability under the law (as it existed at the time the note and mortgage were executed) to pay the tax on the mortgage or on his interest in the premises.—Brooke v. Struthers (Mich.) 68 N. W. 272.

§ 14. Notes payable in installments.

(Mich.; 1895.)

Where a note provides that it is given in accordance with the terms of a certain contract, its negotiability is not destroyed, though the contract provides that the series of notes of which it is one should be payable, at the option of the payee, on failure to pay any of them.—*Markey v. Corey* (Mich.) 66 N. W. 493.

§ 15. Municipal warrants.

(Neb.; 1895.)

The warrants of a city are not negotiable.—*State v. Cook*, 61 N. W. 693, 43 Neb. 318.

V. CONSIDERATION.

Paid by bona fide purchaser, see post, § 46.

Parol evidence as to consideration, see post, § 86.

Gaming consideration, see "Gaming," § 3.

§ 16. In general.

(Ia.) (Iowa; 1897.)

Evidence that a note was executed to a bank by one of its officers to take the place, on the books, of a note of a debtor, after the comptroller of the currency had objected thereto; that the bank officers agreed that the note should create no liability against defendant; that the debtor's note was also retained by the bank, and a mortgage taken thereafter to secure the same,—shows that defendant's note was without consideration.—*First Nat. Bank v. Felt* (Iowa) 69 N. W. 1057.

(Ib.) (Iowa; 1897.)

In a suit by a national bank on a note executed to it by defendant, where the bank is solvent, and the rights of creditors are not involved, defendant may show that it was executed, without consideration, to take the place, on the bank books, of a note given to the bank by one of its debtors, after the comptroller of currency had objected thereto, and that it was understood by all parties that the note created no liability against defendant.—*First Nat. Bank v. Felt* (Iowa) 69 N. W. 1057.

(Ic.) (Minn.; 1895.)

A negotiable note executed by a surety as collateral security imports a consideration.—*Nichols & Shepard Co. v. Dedrick* (Minn.) 63 N. W. 1110.

61 Minn. 513.

§ 17. Collateral security for another's debt.

(Minn.; 1895.)

A note given by one to a creditor as collateral to the naked debt of another, in consideration of the creditor's refraining from criminally prosecuting the debtor, but without consideration to the maker or an extension of time of payment of the debt, was invalid.—*Turle v. Sargent* (Minn.) 65 N. W. 349.

63 Minn. 211.

VI. RENEWAL.

Bona fide purchasers of renewal notes, see post, § 51.

Effect of renewal note on question of payment, see post, § 72.

§ 18. What constitutes renewal.

(Wis.; 1896.)

In an action on a note, it appeared that defendant was surety on notes for which the one in suit was made in renewal. The evidence tended to show that the note was taken at defendant's request, and that an interest payment was made, without defendant's knowledge; that defendant afterwards saw the note and the indorsement, and endeavored to pro-

cure an extension, and made a collateral note to secure it. *Held* proper to instruct that, if the renewal note was taken at defendant's request, the verdict should be for plaintiff; that otherwise it should be for defendant, unless defendant learned of the extension, and afterwards recognized his liability by making a collateral note.—*First Nat. Bank v. Jones* (Wis.) 65 N. W. 861.

92 Wis. 36.

§ 19. Consideration of renewal notes.

(N. D.; 1896.)

Where the maker of overdue notes executed new notes in lieu thereof, and a chattel mortgage securing the same, to his creditor, as he supposed, but the creditor without his knowledge inserted the name of a stranger as payee and mortgagee, the stranger could not, on maturity of the new notes, maintain an action thereon, since there was no consideration for the execution thereof, the old notes not having been taken up or canceled.—*Towle v. Greenberg* (N. D.) 68 N. W. 82.

VII. PARTIES.**§ 20. In general.**

(Minn.; 1895.)

In an action on a note purporting to have been executed by corporate officers, extrinsic evidence is admissible to show that they executed the same in their official capacity, as the note of the corporation.—*Kraniger v. People's Bldg. Soc.* (Minn.) 61 N. W. 904.

60 Minn. 94.

VIII. ACCOMMODATION PAPER.**§ 21. What constitutes.**

(Ia.) (Mich.; 1894.)

In an action against the estate of a decedent for the amounts of notes paid by plaintiff, which the latter had signed or indorsed, decedent's books showed that decedent had had the notes discounted, and credited the proceeds to bills payable. In the journal entries of the notes there was a memorandum, "For me to pay." In a separate book, on a page headed, "Bills Payable," the notes were entered with a memorandum showing when and where they were due. It was shown that all the entries were made by decedent's direction. *Held* sufficient to show that the notes were for decedent's accommodation.—*Bliss v. Plummer's Estate* (Mich.) 61 N. W. 263.

103 Mich. 181.

(Ib.) (Minn.; 1897.)

W., at the suggestion of a bank to which he was largely indebted, compromised with his creditors, and, to raise the money to pay those other than the bank, defendant gave his note to the bank, the amount of which was credited to him, and at the same time gave a check for the full amount to W., who drew it out, no part being paid to the bank. *Held*, that defendant's claim that the note was made for the accommodation of the bank was not sustained.—*Mathoney v. Barber* (Minn.) 69 N. W. 886.

(Ic.) (Neb.; 1895.)

An accommodation note or bill, within the meaning of the law merchant, is one which is made or accepted, not upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit.—*Pollard v. Huff*, 63 N. W. 58, 44 Neb. 892; *Peoria Manuf'g Co. v. Same*, 63 N. W. 121, 45 Neb. 7.

(Id.) (Neb.; 1895.)

In an action on a joint note made by the president of a corporation and two of its stockholders, it appeared that plaintiff was pressing the corporation for the payment of an indebtedness; that defendants, other than the president of the corporation, claimed to have signed the

note merely as accommodation for plaintiff, and so testified; that the signatures of such defendants were procured by their codefendant. Plaintiff's agent, who procured the note, testified that the consideration of the note was an extension allowed on past-due paper of defendant corporation. *Held*, that defendants were liable as makers.—*Peoria Manuf'g Co. v. Huff* (Neb.) 63 N. W. 121.

45 Neb. 7.

§ 22. Accommodation indorser.

[a] (Mich.; 1895.)

Where it is found that plaintiff signed a note as accommodation indorser for defendants, who were makers thereof, he cannot, on payment of the note, recover under the theory of contribution between sureties.—*Hanish v. Kennedy* (Mich.) 64 N. W. 459.

[b] (Mich.; 1896.)

That defendant, who indorsed a note after its indorsement by the payee, for the accommodation of the maker, said to the holder of the note that he was going to arrange with the payee so that the latter and defendant would pay the note, does not show an admission that defendant signed it under an agreement to become liable as co-surety.—*Harrah v. Doherty* (Mich.) 69 N. W. 242.

[c] (Wis.; 1895.)

An indorsement by an accommodation indorser of a renewal note, in ignorance that the debt was discharged, so far as he was concerned, by application to other purposes of the security for the original note, on which he was indorser, is without consideration, and does not bind him.—*Price County Bank v. McKenzie* 65 N. W. 507, 91 Wis. 658.

§ 23. Discharge of indorser.

(Wis.; 1895.)

An accommodation indorser on a note secured by mortgage of the maker is discharged by application of the security without his knowledge to other purposes, he being a surety.—*Price County Bank v. McKenzie* (Wis.) 65 N. W. 507, 91 Wis. 658.

IX. INDORSEMENT AND TRANSFER.

Accommodation indorser, see ante, § 22.

Of check, see post, § 60.

Of guaranty, see post, § 58.

1. IN GENERAL.

§ 24. Transfer by indorsement.

[a] (Mich.; 1895.)

An indorsement of a nonnegotiable note by the payee, accompanied by delivery, operates as an assignment.—*Merchants' Nat. Bank v. Gregg* (Mich.) 64 N. W. 1052.

[b] (Mich.; 1896.)

An indorsement on a nonnegotiable note, upon the back of it, by the payee, and its delivery, was a sufficient assignment of the instrument to pass title.—*Steere v. Trehilcock* (Mich.) 66 N. W. 342.

§ 25. — Special indorsement.

(N. D.; 1896.)

Where the payee of a negotiable certificate of deposit indorsed the same to the cashier of a bank unqualifiedly, though his testimony showed that the deposit was made for collection only, an unqualified indorsee of the cashier was vested with the legal title, as against the bank issuing the certificate, entitling him to maintain an action thereon as the real party in interest.—*Seybold v. Grand Forks Nat. Bank* (N. D.) 67 N. W. 682.

5 N. D. 460.

§ 26. Transfer without indorsement.

(Wis.; 1896.)

Where a debtor delivers to his creditor notes of a third person, payable to himself or order, under an agreement that, after inquiring as to the solvency of the maker, the creditor shall have the option of keeping the notes, and giving the debtor credit therefor, or of returning them, the refusal of the creditor, after a reasonable time, to return the notes, on demand, vests him with the ownership thereof, though they are not indorsed, and an assignment thereafter by the debtor conveys no title or interest to the assignee.—*Elsau v. Greene & Button Co.* (Wis.) 68 N. W. 405.

§ 27. — By separate written order.

(Wis.; 1896.)

A bank which had delivered to a trustee, as collateral, notes whose value exceeded the amount of the loan, gave defendant, to whom it was indebted, by order on the trustee, the option of selecting from the notes, in excess of the amount necessary to satisfy the loan, such notes as defendant would take in payment of his claim against the bank, he to surrender to the trustee the evidence of such claim; but the order contained nothing to indicate that any of the notes were to be held as security for defendant. Subsequently the bank withdrew from the trustee a note made by B., and substituted therefor another note, and defendant never exercised the option of selection. *Held*, that defendant could have no title to the B. note until it was ascertained to be a part of the surplus, and was selected by him, and hence had no claim to the substituted note.—*Burnam v. Merchants' Exch. Bank* (Wis.) 66 N. W. 510. 92 Wis. 277.

§ 28. Indorsement before delivery.

(Minn.; 1895.)

The obligation of irregular indorsers of a note who were liable as original makers is joint and several, and not joint alone, with the obligation of the makers signing their names at the foot of the note, though the instrument is in form, in other respects, joint.—*Schultz v. Howard* (Minn.) 65 N. W. 363; Same v. *World's Fair Masonic Hotel Co., Id.* 63 Minn. 196.

§ 29. — Liability as joint maker or indorser.

[a] (Mich.; 1895.)

How. Ann. St. § 7316, provides that when an action on a contract is brought in the circuit court against joint defendants, one of whom does not reside in, and is not found in, the county, and one or more of whom are served with process in the county, service may be had on the defendant not so found or served in the county, provided "such joint defendants are original parties to such contract," and "not made parties thereto by being indorsers or guarantors." *Held*, that one other than the payee, who indorses a note before delivery, and before any advances are made thereon, is an original party to the contract, and not an indorser or guarantor, within the meaning of the statute.—*Allison v. Washtenaw Circuit Judge* (Mich.) 62 N. W. 152. 104 Mich. 141.

[b] (Mich.; 1896.)

One, not the payee, who indorses a note before it is uttered, or indorsed by the payee, is a joint maker.—*Gumz v. Giegling* (Mich.) 66 N. W. 48.

[c] (Mich.; 1897.)

A person, other than the payee, who indorses a note at the time of its execution, and before delivery, is a joint maker.—*Peninsular Sav. Bank v. Hosie* (Mich.) 70 N. W. 890.

[d] (Mich.; 1897.)

How. Ann. St. § 1580, providing that notes payable to the order of the maker, and nego-

tiated by him, shall have the same effect, as against "all persons having knowledge of the facts," as if payable to bearer, does not contemplate that in order to charge an indorser before delivery of a note which was given, with the knowledge of all the parties, to a bank in renewal of another unpaid note by the same maker, but which by mistake had not been indorsed to the bank by the payee, he must have had knowledge of the want of such indorsement.—*Peninsular Sav. Bank v. Hosie* (Mich.) 70 N. W. 890.

[c] (Minn.; 1894.)

Where, for the purpose of securing a debt due to A. from B., C. makes a note payable to the order of B., and B. indorses the same, and it is then delivered to A., the nominal payee, B. is an indorser, and not a maker.—*People's Bank v. Howes* (Minn.) 61 N. W. 457.
59 Minn. 420.

§ 30. — Indorsement on condition.

[a] (Minn.; 1895.)

Where one indorsed a note on condition that it should not be delivered or take effect until certain others indorsed it, and the indorsements of those others were not procured, he was not liable.—*German-American Nat. Bank v. People's Gas & Electric Co.* (Minn.) 65 N. W. 90.
63 Minn. 12.

[b] (Minn.; 1895.)

Where the president of a corporation, in negotiating a loan for the company, stated, in response to the lender's demand for indorsers on the note to be given by the company, that four persons, including himself, would indorse, and, on procuring one of such persons to indorse the note, indorsed it himself also, and left it with the lender, and drew drafts on the proceeds, which the lender paid, he could not assert that he was not liable because the other parties referred to by him did not indorse the note also.—*German-American Nat. Bank v. People's Gas & Electric Co.* (Minn.) 65 N. W. 90.
63 Minn. 12.

§ 31. Indorsement for transfer.

[a] (Iowa; 1896.)

The indorsement in blank, by the payee, of a written instrument for the payment of money to himself or his order, though such instrument is not negotiable by the law merchant, creates a contract on which the indorser is liable to any subsequent indorsee.—*Lynch v. Mead* (Iowa) 68 N. W. 579.

[b] (Neb.; 1895.)

Where the payee of a note indorsed it in blank to defendants, who sold it before maturity to a bank, and the bank recovered judgment against the payee as indorser, the payee could not, without first paying the judgment, recover the amount thereof of defendants on an agreement, made at the time he transferred the note to them, that he was not to be liable as indorser.—*True v. Bullard* (Neb.) 63 N. W. 824.
45 Neb. 409.

§ 32. — For collection.

[a] (Neb.; 1897.)

An indorsement for collection passes title only so far as to enable the indorsee to enforce payment.—*Branch v. United States Nat. Bank* (Neb.) 70 N. W. 34.

[b] (Neb.; 1897.)

The owner of paper indorsed for collection may control it until paid in full, and may intercept the proceeds in the hands of an intermediate agent.—*Branch v. United States Nat. Bank* (Neb.) 70 N. W. 34.

§ 33. — Without recourse.

(Neb.; 1896.)

The words "without recourse," following the name of the first, and preceding the name of a second, indorser of a bill or note, may, as be-

tween the original parties to the indorsement, be shown by parol evidence to apply to the former, instead of the latter.—*Corbett v. Fetzer* (Neb.) 66 N. W. 417.
47 Neb. 269.

§ 34. — Parol evidence.

[a] (Minn.; 1895.)

The effect of a blank indorsement of a note cannot be varied by parol because accompanied by a written assignment of the note and a mortgage securing it.—*Clarke v. Patrick* (Minn.) 62 N. W. 281.
60 Minn. 269.

[b] (Minn.; 1895.)

Parol evidence is not admissible to vary the legal effect of a second indorsement, as between the second indorser and a subsequent holder.—*Bowler v. Braun* (Minn.) 65 N. W. 124.
63 Minn. 32.

§ 35. Indorsement or assignment.

(S. D.; 1895.)

The managing president of a corporation indorsed in his official capacity, on the back of a negotiable interest-bearing bond: "For value received, I hereby assign the within bond, together with all our interest in and all our rights under the mortgage securing the same, to [indorsee], without recourse." Held to constitute a contract of indorsement, and not a mere assignment.—*Merrill v. Hurley* (S. D.) 62 N. W. 958.
6 S. D. 592.

§ 36. Sale and assignment.

[a] (Iowa; 1897.)

Where mortgaged chattels are sold by the mortgagor at public sale, and by agreement between him and the mortgagee the notes taken at the sale are at the time put in the hands of the clerk of the sale for the mortgagee, it amounts to an assignment of the notes to the latter.—*Wood v. Duval* (Iowa) 69 N. W. 1061.

[b] (Mich.; 1895.)

The writing on the back of a note by the payee, when transferring the same, of an assignment, above his signature, in the following form, "I hereby assign the within note to * * *," does not exclude or affect his liability thereon as indorser.—*Markey v. Corey* (Mich.) 96 N. W. 493.

[c] (Minn.; 1894.)

One who sells commercial paper impliedly guarantees that the signatures thereto are genuine.—*Brown v. Ames* (Minn.) 61 N. W. 448.
59 Minn. 476.

[d] (S. D.; 1896.)

A payment by a third person to a bank on its delivery to him of a note secured by mortgage, on which payments have been made, but not indorsed, which fact was known to all the parties thereto, is an assignment by the bank of the note, and continues the lien in behalf of the assignee for the amount paid by him.—*Locke v. Hubbard* (S. D.) 69 N. W. 588.

§ 37. — Personal liability of selling agent.

(Minn.; 1894.)

One who sells commercial paper as agent must, in order to relieve himself from personal liability, disclose not only the fact of his agency, but also the name of his principal; and the person named as principal must be such in fact.—*Brown v. Ames* (Minn.) 61 N. W. 448.
59 Minn. 476.

§ 38. — Sale on execution.

(Neb.; 1897.)

The purchaser of a negotiable note at an execution or attachment sale acquires the interest which the execution or attachment defendant had, and occupies the same relation to the maker as he would had said note been indorsed to him, without recourse, by the payee.—*Jones v. Wiesen* (Neb.) 69 N. W. 762.

§ 39. Sale or loan.

(Minn.; 1897.)

Whether the discounting of a bill or note, with the general indorsement of the holder, is a sale of the paper, or a loan to the holder, secured by the paper and indorsement as collateral, is ordinarily a question of fact.—*Stolze v. Bank of Minnesota* (Minn.) 63 N. W. 813.

§ 40. Release of indorser.

[a] (Iowa; 1895.)

Where defendant indorsed a note to plaintiff without any agreement limiting his liability as indorser, and on its maturity plaintiff surrendered it to the maker, taking in renewal thereof another 90-day note of the maker, purporting to be also signed by several other persons, and, six months after maturity of the renewal note, brought suit thereon, and three months thereafter, convinced that the signatures thereto, other than those of the original maker, were forgeries, amended so as to ask for judgment against defendant on the original note, plaintiff is not guilty of negligence in asserting his rights on the original note that should estop him from demanding the judgment against defendant.—*Humboldt State Bank v. Rossing* (Iowa) 63 N. W. 351.

[b] (Iowa; 1895.)

Nor is plaintiff estopped to assert defendant's liability by reason of not having discovered the forgeries when taking the renewal note; he having had no reason to suspect a forgery, or facilities for determining by comparison the genuineness of the signatures.—*Humboldt State Bank v. Rossing* (Iowa) 63 N. W. 351.

[c] (Mich.; 1894.)

The individual promise of one member of a firm to release defendant as an accommodation indorser on a note due the firm, and to pay it out of funds in his hands, which had been furnished by the maker, is no defense to an action on the note.—*Webber v. Alderman* (Mich.) 61 N. W. 57.
102 Mich. 638.

[d] (Mich.; 1897.)

A note "payable on demand after date," executed to cover the amount due upon prior unpaid notes by the same maker, is merely a demand note, and does not extend the time of payment for one day, so as to release an indorser on such other notes.—*Peninsular Sav. Bank v. Hosie* (Mich.) 70 N. W. 890.

[e] (Wis.; 1896.)

An agreement by the holder of a note to release an indorser thereon from all liability, after such indorser had assigned his property for the benefit of creditors, and the holder of the note had acquired a lien by presenting a claim to the assignee, releases a subsequent indorser.—*Plankinton v. Gorman* (Wis.) 67 N. W. 1128.

93 Wis. 560.

Of accommodation indorser, see ante, § 23.

§ 41. Contribution between indorsers.

[a] (Mich.; 1896.)

A mere naked promise by a second indorser, after the note matured, to pay one-half thereof, did not render him liable to the first indorser for contribution.—*Harrah v. Doherty* (Mich.) 69 N. W. 242.

[b] (Mich.; 1896.)

Successive indorsers of commercial paper do not, in the absence of an agreement to that effect, bear the relation of sureties to one another, and are not liable for contribution.—*Harrah v. Doherty* (Mich.) 69 N. W. 242.

2. BONA FIDE PURCHASERS.**§ 42. Who are in general.**

[a] (Iowa; 1895.)

On an issue as to whether plaintiff bank was a bona fide purchaser of certain notes, it appeared that the payee lived in a distant city, and

that defendant lived in the county where plaintiff was located. The notes were unsecured; had 6 and 12 months, respectively, to run; had no provision for costs of collection; and the maker was not considered prompt. Plaintiff's cashier testified that he bought them at a discount. *Held*, that a finding that plaintiff was not an innocent purchaser would not be disturbed.—*First Nat. Bank v. Wade* (Iowa) 63 N. W. 345.

[b] (Iowa; 1896.)

An indorsee of a note after maturity, whose indorser, before transfer of the note, forged a similar note, which was negotiated by him, and paid by the maker of the genuine note without notice that it was not the genuine note, cannot recover from the maker.—*Leach v. Fink* (Iowa) 66 N. W. 768.

[c] (Mich.; 1895.)

Where a note accepted by a bank in renewal of a former note is rediscounted for it by others, the latter are bona fide holders thereof, although the original note was not surrendered, and the new note was not entered upon the books of the bank.—*Davenport v. Stone* (Mich.) 62 N. W. 722.

104 Mich. 521.

[d] (Minn.; 1895.)

The words "good faith," as applied to the transfer of negotiable paper, refer only to the acts of the indorsee.—*Haugan v. Sunwal* (Minn.) 62 N. W. 398.

60 Minn. 367.

[e] (Minn.; 1895.)

In an action on a note, it appeared that 35 days before the note matured, and when there was over \$5,000 due on it, the payee, wishing, as he testified, to raise money to pay a debt due plaintiff, indorsed the note, without recourse, to plaintiff, who was then notoriously insolvent and not in business, accepting in return plaintiff's note for \$4,740, on which was indorsed as a payment thereon \$175, the amount of the payee's debt to plaintiff; that the maker of the note was known by both parties to be worth \$100,000; and that the note was not discounted after the transfer, but was placed with a bank for collection. *Held*, that a finding of the jury that plaintiff was a bona fide indorsee was not warranted.—*Fuller v. Goodnow* (Minn.) 64 N. W. 161.

62 Minn. 163.

[f] (Minn.; 1896.)

On an issue whether plaintiff was a bona fide purchaser of a mortgage note it appeared that at the time he purchased it the holder represented it to be first-class security, and although the face value of the note was about \$700, it was sold to plaintiff for \$400, and that plaintiff made no inquiry as to why such a heavy discount was made; and that the note was in possession of plaintiff's assignor at the time the suit was brought to foreclose the mortgage. Plaintiff could not testify as to the denomination of the money with which he paid for the note, and the evidence as to the note's delivery at the time of the purchase was doubtful. *Held*, that a finding for plaintiff should be set aside.—*Watkins v. Goessler* (Minn.) 67 N. W. 796.

[g] (Minn.; 1897.)

An overdue and unpaid installment of interest, known to the indorsee at the time of the purchase, renders the note subject, in the hands of the purchaser, to existing defenses between the original parties.—*First Nat. Bank v. Forsyth* (Minn.) 69 N. W. 909.

[h] (N. D.; 1896.)

When the payee of a negotiable promissory note transfers it by indorsing thereon a guaranty of payment, the purchaser is an indorsee, within the rule protecting an innocent purchaser of such paper for value, and before maturity, against defenses good between the original parties.—*Dunham v. Peterson* (N. D.) 67 N. W. 293.

5 N. D. 414.

[H] (Wis.; 1896.)

Defendants executed a note to a bank, which, after becoming insolvent, indorsed it, before maturity, to a third person as collateral, and the note was thereafter, and after maturity, transferred to plaintiff. *Held*, that defendants were entitled to set off the amount of funds on deposit to their credit in such bank at the date of insolvency.—*Merchants' Exch. Bank v. Fuldner* (Wis.) 66 N. W. 691, 92 Wis. 415.

§ 43. Notice.**[a] (Iowa; 1896.)**

An old man engaged a woman as house-keeper for the balance of his life; agreeing to support her, and that on his death she should succeed to his estate. He afterwards delivered to her a note for \$800, with other collateral, as security for her services. This note she afterwards disposed of, to a neighbor acquainted with the circumstances, for a small sum in cash and his unsecured note for \$700. The purchaser was a farmer worth little, except his farm, which was incumbered. *Held*, that he was not a purchaser for value.—*Haggin v. Garwood* (Iowa) 65 N. W. 989.

[b] (Minn.; 1894.)

One who, in Colorado, cashed, in good faith, checks drawn in Minnesota on a Minnesota bank, was not affected with notice of defenses by the fact that the payee sought to cash the checks at such a distant point.—*Estes v. Loring Shoe Co.* (Minn.) 61 N. W. 674, 59 Minn. 504.

[c] (Minn.; 1896.)

More notice to an indorsee of negotiable paper, for value, before maturity, in the usual course of business, that the same is accommodation paper, will not, without more, prevent him from being an innocent purchaser in good faith.—*Tourtelot v. Bushnell* (Minn.) 68 N. W. 104.

[d] (S. D.; 1895.)

Where plaintiff's note, given in payment of bank stock sold to him by the president and manager of the bank, was made payable to the bank at the request of such president, and was delivered to him, and by him delivered to the bank, which had knowledge of false representations of the president, by which it was procured, in exchange for notes held by the bank against the president, the bank is not a bona fide holder.—*Taylor v. National Bank* (S. D.) 62 N. W. 99, 6 S. D. 511.

§ 44. — Facts putting on inquiry.**[a] (Iowa; 1897.)**

One buying a note signed with the name of a corporation, as by the president, followed by the name of an individual, to which is attached "Sec'y & Treas.," is put on notice that such words were not intended merely as description, but that the signature was intended to be official.—*Capital Savings Bank & Trust Co. v. Swan* (Iowa) 69 N. W. 1065.

[b] (Minn.; 1895.)

It does not affect the title of an indorsee for value before maturity that there were circumstances known to him which would have put a reasonably prudent man on inquiry regarding the purpose for which the note was executed, unless those circumstances were such as to justify the conclusion that the indorsee's failure to make inquiry arose from a suspicion that inquiry would disclose a vice in the paper.—*Tourtelot v. Reed* (Minn.) 64 N. W. 928; Same v. Paulson, *Id.*

62 Minn. 384.

[c] (Minn.; 1895.)

More notice that a note is accommodation paper will not preclude an indorsee for value, in the course of business, from being a bona fide purchaser, nor impose on him the duty

of inquiring as to the particular purpose for which the note was executed. *Tourtelot v. Reed* (Minn.) 64 N. W. 928; Same v. Paulson, *Id.* 62 Minn. 384.

[d] (Minn.; 1896.)

Where the cashier of the plaintiff bank, which took the note as collateral security in due course of business, knew when he took the note that the business of the payee was gambling; that the indorser of the note was a gambler, connected with the payee's establishment, and had no other business; and that the maker had been gambling there and had given notes in settlement of gambling debts indorsed by the same party, and offered to the bank in the same manner,—the bank was not a bona fide purchaser of the notes.—*Merchants' Nat. Bank v. Sullivan* (Minn.) 65 N. W. 924, 63 Minn. 468.

[e] (Minn.; 1896.)

The fact that a note which plaintiff purchased before maturity for value bore the stamp of a bank, also an erased indorsement "Without recourse" on the back, and indorsements showing several payments to have been made thereon by parties other than the makers, did not constitute notice of such facts that plaintiff's failure to make inquiry amounted to bad faith disentitling him to recover on the note as against defendant's equities.—*Collins v. McDewell* (Minn.) 67 N. W. 845.

[f] (Minn.; 1896.)

To preclude an indorser for value before maturity of a negotiable note, taken in the usual course of business, from being an innocent purchaser, it is not sufficient that he have notice or knowledge of facts which would put an ordinarily prudent person on his guard or on inquiry; he must have knowledge or notice of such facts that his failure to make inquiry amounts to bad faith.—*Gale v. Birmingham* (Minn.) 67 N. W. 639, 64 Minn. 555.

[g] (Neb.; 1897.)

A bank taking, as security, a note accompanied by an assignment to the debtor's wife of the mortgage securing it, is charged with notice of her title to the note.—*Norfolk Nat. Bank v. Nenow* (Neb.) 69 N. W. 936.

§ 45. Acquirement in due course of business.**[a] (Minn.; 1895.)**

Where the members of a firm formed a partnership with other persons, and all the assets, including negotiable notes not due, of the original partnership, were transferred to the new firm, the new firm was not a purchaser of the notes in course of business.—*Stephens v. Olson* (Minn.) 64 N. W. 898; Same v. Olstad, *Id.*

62 Minn. 295.

[b] (N. D.; 1896.)

One who purchases a promissory note before maturity and for full consideration, and to whom the note is at the time indorsed by the payee and holder, takes such note in the ordinary course of business; and the fact that the purchaser took such note relying wholly upon the sufficiency of the mortgage security, or for the purpose of acquiring the mortgaged property by foreclosure, will in no legal sense affect his bona fides.—*Christianson v. Farmers' Warehouse Ass'n* (N. D.) 67 N. W. 300, 5 N. D. 438.

[c] (Wis.; 1896.)

A writing by which a debtor gives his creditor the option of selecting from any notes belonging to the debtor in the hands of his pledgee, which shall remain after payment of the amount for which they were hypothecated, such paper as the creditor is willing to take in payment of his claim, does not make the creditor a purchaser "in the usual course of business" of any particular note in the pledgee's hands.—

Burnam v. Merchants' Exch. Bank (Wis.) 66 N. W. 510.
92 Wis. 277.

§ 46. Consideration—Parting with value.

[a] (Mich.; 1896.)

A mere credit given by a bank to its depositor for a note procured by fraud does not constitute a purchase for value, in the absence of evidence that the credit was ever drawn upon, or that the account of which it became a part was exhausted, before maturity of the note, or before notice of the fraud.—Drovers' Nat. Bank v. Blue (Mich.) 67 N. W. 1105.

[b] (Mich.; 1896.)

Where a bank discounts a draft in advance of its acceptance, it is not a bona fide holder for value unless it has funds in its hands which it releases or fails to withhold from the drawer because of the acceptance.—First Nat. Bank v. Wills Creek Coal Co. (Mich.) 68 N. W. 232.

§ 47. Taking note as collateral security.

[a] (Neb.; 1895.)

One who receives, as collateral security to a loan then made, negotiable bonds, not yet matured, without knowledge of any defense to such bonds, is entitled to protection, as a purchaser thereof, to the extent of the amount of such loan.—Hayden v. Lincoln City Electric Ry. Co., 62 N. W. 73, 43 Neb. 680.

[b] (N. D.; 1895.)

A subpledgee of notes, which he knows were pledged to his pledgor, did not acquire the notes in due course of business.—Security Bank v. Kingsland (N. D.) 65 N. W. 697.
5 N. D. 263.

§ 48. Taking notes as collateral and other consideration.

(Wis.; 1895.)

The transferee of an accommodation note, who received the same both as collateral security for his previous indorsement of a note given by the payee therein, and in consideration of an extension of the duration of his obligation on such note by his indorsement of a note given in renewal thereof, may be a bona fide holder.—Black v. Tarbell, 61 N. W. 1106, 89 Wis. 330.

§ 49. Taking for antecedent debt.

[a] (Minn.; 1895.)

A bona fide indorsee of negotiable paper, who takes it before maturity as security for an antecedent indebtedness, holds it free from defenses available between the original parties.—Rosemond v. Graham (1893) 56 N. W. 38, 54 Minn. 323, followed.—Haugan v. Sunwal, 62 N. W. 398, 60 Minn. 367.

[b] (N. D.; 1896.)

One who, in the usual course of business, takes negotiable paper in payment of an antecedent debt, is a purchaser for value.—Dunham v. Peterson (N. D.) 67 N. W. 293.
5 N. D. 414.

§ 50. Rights of one taking from bona fide holder.

[a] (Iowa; 1895.)

A transferee, before maturity, of a negotiable note, with notice of want of consideration, cannot enforce the payment.—Skinner v. Raynor (Iowa) 64 N. W. 601.

[b] (Minn.; 1895.)

Under Gen. St. 1894, § 2214, providing in part that nothing in the section shall be construed to prevent the purchase of negotiable usurious paper for value by an innocent purchaser, free from all equities, at any price, before maturity, when there is no intent to evade the act, and the purchase is not part of the original usurious transaction, one who purchased an usurious note for value, after maturity, from a bona fide purchaser thereof before maturity,

took the same freed from the vice of usury, and could enforce the same.—Robinson v. Smith (Minn.) 64 N. W. 90.
62 Minn. 62.

[c] (Neb.; 1897.)

One who purchases for value a negotiable note, either before or after its maturity, knowing of a defense existing against it, may enforce the entire note if his assignor was an innocent purchaser before maturity, for value, in the usual course of business.—Jones v. Wiesen (Neb.) 69 N. W. 762.

§ 51. Renewal notes.

[a] (Iowa; 1895.)

Defendant gave his note in payment of an insurance premium, receiving from the payee a contract which gave him a right to renew the note for three years. A second note was afterwards given in renewal of the first note, and prior to its maturity a third note was sent to the payee, who acknowledged its receipt, and promised to return the second note, but failed to do so, and such second note was, before its maturity, transferred to plaintiff, who had no knowledge of any contemplated fraud on the part of the payee. Held that, there being no illegality in the inception of the note, plaintiff was entitled to recover, though, as between the original parties, such note could not be enforced.—First Nat. Bank v. Getz (Iowa) 64 N. W. 799; Getz v. Equitable Life Assur. Soc. of the United States, 1d.

[b] (Mich.; 1895.)

Where the holder of a note agrees to surrender it on the execution of another note by one of the makers, with sufficient indorsement, he is not bound to notify an indorser on the renewal note that it was a renewal note, or that the maker thereof had been furnished by the other makers of the prior note with funds with which to pay it, or that such maker was insolvent, since he may presume that such maker disclosed the facts to the indorser on procuring the signature.—Cristy v. Campau (Mich.) 65 N. W. 12.

§ 52. Note of infant—Disaffirmance.

(Iowa; 1896.)

Where the payee of a note takes it knowing that the maker is a minor, and the minor, within a proper time, disaffirms it, and returns the consideration, the note cannot be enforced against him by a bona fide purchaser before maturity.—Des Moines Ins. Co. v. McIntire (Iowa) 68 N. W. 565.

§ 53. Presumption and burden of proof.

[a] (Iowa; 1896.)

The presumption that a note was not negotiated until after maturity, arising from the fact that it was in the hands of an agent of the payee after that time, is overcome by the direct testimony of the holder that he purchased the same before maturity, corroborated by the testimony of the treasurer of the payee.—Graff v. Adams (Iowa) 69 N. W. 539.

[b] (Iowa; 1896.)

The burden is on the maker of a note to show that the holder thereof is not a bona fide purchaser.—Graff v. Adams (Iowa) 69 N. W. 539.

[c] (Iowa; 1897.)

Where a bank sues as an indorser of a note, and defendant pleads that it was obtained by fraud, the burden is on the bank to show that none of its officers had notice.—Bennett State Bank v. Schloesser (Iowa) 70 N. W. 705.

[d] (Minn.; 1896.)

The burden is on the indorsee of a note obtained from the maker by fraud to show that he took the note in good faith for value before maturity.—First Nat. Bank of Decorah v. Holan (Minn.) 65 N. W. 952.
63 Minn. 525.

[e] (Neb.; 1895.)

Where, in an action on a note by an indorsee thereof, the only defense is a failure of consideration, the burden is on defendant to overcome the presumption that the note was transferred before due, for value, in the usual course of business.—*Kelman v. Calhoun* (Neb.) 61 N. W. 615, 43 Neb. 157.

[f] (Neb.; 1895.)

In an action by an indorsee of a note against the maker, where defendant pleads fraud in the inception of the note, the burden is on the plaintiff to show that he is a bona fide holder for value.—*Fawcett v. Powell* (Neb.) 61 N. W. 586, 43 Neb. 437.

[g] (Neb.; 1897.)

In an action by an indorsee against the maker of a note, its production, duly indorsed, raises a presumption of a bona fide transfer.—*First Nat. Bank v. McKibbin* (Neb.) 70 N. W. 38.

[h] (N. D.; 1896.)

One claiming as a bona fide first indorsee of a note must show that the note was in fact indorsed by the payee.—*Vickery v. Burton* (N. D.) 69 N. W. 193.

[i] (N. D.; 1896.)

Where the maker proves that the note was procured by fraud, the burden is on plaintiff to show that he is a bona fide purchaser.—*Vickery v. Burton* (N. D.) 69 N. W. 193.

§ 54. Rights of bona fide purchasers.**[a] (Minn.; 1895.)**

Defendants indorsed a negotiable note, leaving certain blanks to be filled up, and left it with a third person to secure other indorsements, with instructions that it was not to be negotiated until they were secured. The blanks were filled up and the note negotiated in violation of instructions. *Held*, that defendants were liable to one who purchased for value without notice and before maturity.—*First Nat. Bank v. Compo-Board Manuf'g Co.* (Minn.) 63 N. W. 731.

61 Minn. 274.

[b] (Minn.; 1897.)

The rights of a bona fide holder for value of a bill of exchange are the same whether he acquired the bill before or after its acceptance.—*In re Jacoby-Mickolas Co.* (Minn.) 70 N. W. 1085; *American Trust & Savings Bank v. Gluck, Id.*

§ 55. — Lien.**(Neb.; 1897.)**

The indorsee of a note, taking it as security for a debt due him by the payee, in good faith and before maturity, acquires a lien thereon for the amount of his debt.—*Jones v. Wiessen* (Neb.) 69 N. W. 762.

§ 56. — Fraud in inception or procurement of instrument.**[a] (Iowa; 1894.)**

Where a person induces another to sign a paper containing no writing, and which is to be used merely as a means of identifying the signer, who does not intend to execute a note or contract of any kind, and then fills out the blanks so as to make the paper a note, the note will be void even in the hands of an innocent holder.—*First Nat. Bank v. Zeims* (Iowa) 61 N. W. 483.

93 Iowa, 140.

[b] (Iowa; 1896.)

A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intent to so do, and is chargeable with no negligence in not ascertaining its character, is not bound by it, in the hands of a bona fide purchaser.—*Green v. Wilkie* (Iowa) 66 N. W. 1046.

[c] (Mich.; 1895.)

In an action on a note against the maker and an accommodation indorser, the latter cannot escape liability on the ground that his signature was procured by false representations of such maker, where the note in suit was given in renewal of a former note on which such maker was liable, and was presented to plaintiff in the usual course of business, with the name of such indorser written thereon, and plaintiff was wholly ignorant of such false representations.—*Cristy v. Campau* (Mich.) 65 N. W. 12.

§ 57. — Effect of alteration.**(Iowa; 1895.)**

In an action on a note, where the defenses were that it was procured by fraud, and had been fraudulently altered after delivery by the insertion of a clause providing for interest, it was error to charge that defendant was not entitled to a verdict, though both defenses were proved, if plaintiff was an innocent holder, since, in the absence of evidence of negligence on the part of defendant, or authority from him to insert the interest clause, such alteration, if made without his knowledge, and after delivery, would defeat a recovery by an innocent holder.—*Derr v. Keough* (Iowa) 65 N. W. 339.

X. GUARANTY AND SURETYSHIP.

See, also, "Principal and Surety."

§ 58. Guaranty.**[a] (Mich.; 1896.)**

Where the holder of a note states positively that it is good, and that its maker is financially responsible, and a purchaser takes the note in reliance on the statement, and the note proves worthless, the statement is a verbal warranty, on which the purchaser can recover without prosecuting the collection of the note.—*Knauss v. Major* (Mich.) 69 N. W. 489.

[b] (Neb.; 1895.)

An indorsement on a note that, "for value received, we hereby guaranty payment of the within note at maturity, or any time thereafter, waiving protest and notice of nonpayment," *held* an indorsement with an enlarged liability, and not merely a guaranty.—*Pollard v. Huff* (Neb.) 63 N. W. 58.

44 Neb. 892.

[c] (S. D.; 1894.)

In an action on a note against the guarantor thereof, proof of execution by the maker need not be made, as a guarantor of a note is estopped from denying the genuineness of the signature of the maker.—*Austin, Tomlinson & Webster Manuf'g Co. v. Heiser* (S. D.) 61 N. W. 115.

6 S. D. 429.

§ 59. Suretyship.**[a] (Neb.; 1895.)**

In an action on a note by the payee against two makers, one answered that he was only surety for the other; that he was induced to sign said note by representations of plaintiff that he had been requested by the principal to become surety for him, but that such statement was false, and made for the purpose of fraudulently inducing him to become a party to said note. *Held* to state a defense.—*Gist v. Feitz*, 61 N. W. 621, 43 Neb. 238.

[b] (S. D.; 1896.)

Though an indorsement of a note contains the word "guaranty," the indorsers are sureties if they make the contract merely to give credit to the maker of the note, and not for any benefit to themselves, and as sureties they may set up plaintiff's failure to comply with their demand that he proceed against the maker of the note and the pledge securing it.—*Bailey Loan Co. v. Seward* (S. D.) 69 N. W. 58.

XI. CHECKS.

Conversion of checks, see "Trover and Conversion," § 6.

Duty of bank as to checks, see "Banks and Banking," § 16.

Effect of check as assignment, see "Assignment," § 10.

§ 60. Indorsement.

(Minn.; 1894.)

A check is within the purview of Gen. St. 1878, c. 73, § 89, which makes possession of a note or bill of exchange by an indorsee prima facie evidence that it was indorsed by the person by whom it purports to be indorsed.—*Estes v. Lovering Shoe Co.* (Minn.) 61 N. W. 674. 59 Minn. 504.

§ 61. Liability of drawer.

(Minn.; 1894.)

One who, in good faith and for value, takes a check several days after it is drawn, receives it without being subject to defenses of which he had no notice.—*Estes v. Lovering Shoe Co.* (Minn.) 61 N. W. 674. 59 Minn. 504.

§ 62. Negligence and delay in presenting for payment.

[a] (Neb.; 1895.)

The indorser of an ordinary check is released from liability thereon where the indorsee might have presented the check for payment within 24 hours, but sent the same by a circuitous route, so that it was not presented until 5 days, when payment was refused. 55 N. W. 1064, 37 Neb. 500 (1893) affirmed.—*First Nat. Bank v. Miller*. 61 N. W. 195, 43 Neb. 791.

[b] (Wis.; 1896.)

Where a check drawn by defendants on a bank in a foreign city arrived at plaintiff's post-office address on the 19th day of the month, and it appeared that, if said check had been forwarded for collection by the last mail on the 20th, it would have arrived at a bank for collection on the morning of the 21st, and that the drawee bank suspended at 3 p. m. on the 22d, but there was no evidence to show when the hours of business closed in said city, plaintiff was not liable for negligence in failing to have the check presented for payment before the bank suspended.—*Lloyd v. Osborne* (Wis.) 65 N. W. 859. 92 Wis. 93.

[c] (Wis.; 1896.)

Where a letter containing a check drawn on a bank in a foreign city was sent to the plaintiff's former post-office address, and was sent from there, without unnecessary delay, to the place where he had removed, but said bank had suspended before the letter was received, plaintiff was not chargeable with negligence in failing to receive and forward the check.—*Lloyd v. Osborne* (Wis.) 65 N. W. 859. 92 Wis. 93.

[d] (Wis.; 1896.)

The payee of a check must present the same for payment within a reasonable time, in order to preserve his right of recourse on the drawer in case of nonpayment by the drawee.—*Grange v. Reigh* (Wis.) 67 N. W. 1130. 93 Wis. 552.

[e] (Wis.; 1896.)

Where the payee of a check resides and receives the check at the place where the bank is located, a reasonable time for presentation to the drawee reaches, at the latest, only to the close of banking hours on the succeeding day, excluding Sundays and holidays.—*Grange v. Reigh* (Wis.) 67 N. W. 1130. 93 Wis. 552. 4 N.W.DIG.—45

XII. DEMAND, NOTICE, AND PROTEST.**§ 63. Presentment and demand for payment.**

[a] (1896) Mere insolvency of the maker of a note will not excuse presentment and demand of payment.

—*Leonard v. Olson* (Iowa) 68 N. W. 677;

Reinke v. Wright (Wis.) 67 N. W. 737, 93 Wis. 368.

[b] (Iowa; 1896.)

A demand for payment of a demand note, made nearly 10 years after its date, is not within a reasonable time, to charge an indorser thereon.—*Leonard v. Olson* (Iowa) 68 N. W. 677.

[c] (Iowa; 1896.)

Where the makers of a demand note remove from the state where it was executed and made payable within a short time after its execution, and remain away, and the note, though payable at a town named, is not payable at any designated place therein, demand of payment is excused as to an indorser.—*Leonard v. Olson* (Iowa) 68 N. W. 677.

[d] (Mich.; 1895.)

No specific demand was necessary before suit on a note in the form of a certificate of deposit.—*Beardsley v. Webber* (Mich.) 62 N. W. 173. 104 Mich. 88.

[e] (Minn.; 1897.)

To hold the indorser of a time certificate of deposit, it must be presented on the last day of grace.—*Towle v. Starz* (Minn.) 69 N. W. 1098.

[f] (Minn.; 1897.)

A certificate of deposit payable on its surrender properly indorsed, reciting that the money is "to be left six months," and shall draw no interest after "maturity," is a time certificate, and, as between the holder and indorser, matures six months from its date. Buck, J., dissenting.—*Towle v. Starz* (Minn.) 69 N. W. 1098.

[g] (Wis.; 1896.)

Where the maker of a note, prior to its maturity, abandons his place of business, if he has a residence in the place which is known, or may be with reasonable diligence ascertained, a presentment and demand at the old place of business is insufficient.—*Reinke v. Wright* (Wis.) 67 N. W. 737. 93 Wis. 368.

§ 64. Notice of nonpayment.

[a] (Iowa; 1896.)

It is the duty of the holder of a demand note, who is unable to make a demand, to give notice to an indorser within a reasonable time of such fact, and of the fact of nonpayment.—*Leonard v. Olson* (Iowa) 68 N. W. 677.

[b] (N. D.; 1896.)

Any agent or subagent holding paper for collection may give notice of dishonor, in view of Comp. Laws, § 4500, declaring that notice may be given by a "holder" of the paper, and of section 4506, which shows that the word "holder" is not used synonymously with "owner."—*Ashe v. Beasley* (N. D.) 69 N. W. 188.

§ 65. — Delay in serving.

[a] (Iowa; 1894.)

The failure of the indorsee of a draft to notify the notary of the address of his indorser, and of the notary to make inquiries in regard thereto of the drawee or others, in consequence of which the notices of protest are first sent to the indorsee, thereby causing an unnecessary delay of two days in serving notice of protest on the indorser, releases the indorser from liability.—*First Nat. Bank v. Farneman* (Iowa) 61 N. W. 424. 93 Iowa, 161.

[b] (Iowa; 1894.)

Plaintiff sent a draft, indorsed to it by defendant, to bank V. for collection, and bank V., in turn, sent it to bank G. for collection. The notices of protest were sent to bank V., and by bank V. to plaintiff, who, in turn, sent the same to defendant, on the second day after demand. The indorsements of bank V. and of bank G. were erased. *Held*, that the question whether notice of protest had been given defendant in due time must be determined on the theory that plaintiff was the only indorser.—*First Nat. Bank v. Farneman* (Iowa) 61 N. W. 421.

93 Iowa, 161.

§ 66. Waiver of presentment, protest, notice, etc.

[a] (Iowa; 1894.)

A waiver, on the part of makers, indorsers, and guarantors, of presentation, protest, and notice of nonpayment, contained in the body of a note, is binding on the payee in case he indorses the note.—*Philips v. Dippo* (Iowa) 61 N. W. 216.

93 Iowa, 35.

[b] (Iowa; 1895.)

Where a note provided that the indorsers waived presentment, notice of nonpayment, and due diligence, the indorsement thereof by the payee made him liable absolutely.—*Iowa Valley State Bank v. Sigstad* (Iowa) 65 N. W. 407.

[c] (Wis.; 1896.)

Where the payee of a note, after default, sells property under a mortgage given to him to secure indorsers, and with consent of the indorsers applies the proceeds on the note, such application does not, as a payment by the indorsers, operate as a waiver by them of presentment and demand on the maker.—*Reinke v. Wright* (Wis.) 67 N. W. 737.

93 Wis. 368.

§ 67. Evidence.

[a] (Mich.; 1896.)

In an action on a note, the cashier of the C. bank testified that it was the custom among the banks in the city to send messengers once a day to one of the banks to adjust accounts; that it was the duty of each messenger, on receiving claims against the bank represented by him, to take the same to such bank to be passed on by the cashier; that, on the day the note in suit matured, it was delivered to the messenger of the I. bank, at which it was payable; that the clearance books of both banks showed a balance that day of \$510 in favor of the C. bank, but that \$100 (the amount of said note) was rejected by the I. bank, and a check for \$410 given by it to the C. bank to adjust the accounts; and that witness, as notary public, made certificate of protest. *Held* sufficient to warrant a finding of due presentment, demand, and dishonor.—*Martin v. Smith* (Mich.) 66 N. W. 61.

[b] (Mich.; 1896.)

The testimony of a notary who had made certificate of protest of a note for nonpayment that he did not remember mailing notice to the indorser, but testified that he did so because of his habit of mailing notices when he made certificate of protest, is sufficient to justify a finding that notice of dishonor was sent to the indorser.—*Martin v. Smith* (Mich.) 66 N. W. 61.

[c] (Minn.; 1895.)

The probative force of a notary's certificate that he mailed to an indorser of a note notice of nonpayment is not overcome by evidence that the notice was not received.—*Roberts v. Wold* (Minn.) 63 N. W. 739.

61 Minn. 291.

[d] (N. D.; 1896.)

The certificate of protest of a notary public is prima facie evidence of presentment, demand, and dishonor therein set forth, as well in a case of an inland bill or note as in a case of a foreign bill, in view of Comp. Laws, §§ 499, 501, requir-

ing the notary to give notice of protest, and to keep a record thereof, which record, or copy thereof, shall be competent evidence to prove notice, and of section 507, declaring that "full faith and credit" shall be given all protestations of notaries public.—*Ashe v. Beasley* (N. D.) 69 N. W. 188.

[e] (N. D.; 1896.)

When a note is payable at a bank, a statement in the certificate of protest that it was presented at the place of payment, and payment demanded, is sufficient evidence of a legal demand, without a further statement to whom it was presented for payment.—*Ashe v. Beasley* (N. D.) 69 N. W. 188.

XIII. PAYMENT.

Certainty as to sum payable, effect on negotiability, see ante, §§ 9-12.

—as to time of payment, effect on negotiability, see ante, § 13.

Notes payable in installments, negotiability, see ante, § 14.

§ 68. What constitutes.

[a] (Iowa; 1895.)

Where the books of a bank show the nonpayment of one of several notes, and defendant keeps no books, and cannot state when or under what circumstances he paid the note, a judgment for plaintiff will not be disturbed though the note is found in the possession of the maker.—*Bank of Milo v. Vertz* (Iowa) 65 N. W. 318.

[b] (Neb.; 1895.)

Payment of money on a note at a bank where it is payable is not a payment of the note if the note is not at the bank, and is not produced.—*First Nat. Bank v. Chilson* (Neb.) 63 N. W. 362.

45 Neb. 257.

§ 69. By whom made.

(Mich.; 1895.)

Where the payee of a draft, before it is accepted, and before notice of dishonor, indorses on it, above his signature, "Received payment," such indorsement raises no presumption of payment by the drawer or acceptor.—*First Nat. Bank v. Union Cent. Life Ins. Co.* (Mich.) 65 N. W. 759.

§ 70. Who entitled to payment.

[a] (Iowa; 1895.)

When a firm in which the payee of a note is a member, by his authority, accepts in payment an order on the firm from a party to which it is or expects to be indebted, an assignee of the note after such acceptance, and after the maturity of the note, cannot maintain an action on it.—*Fidelity Loan & Trust Co. v. Hogan* (Iowa) 62 N. W. 740.

[b] (Neb.; 1895.)

The maker of a note, in order to avail himself of the defense of payment before maturity, must show that the indorsee had prior notice of the payment.—*Yenney v. Central City Bank* (Neb.) 62 N. W. 872.

44 Neb. 402.

§ 71. Time of maturity.

(Minn.; 1895.)

Under Civ. Code Dak. T. § 4492, which declared that a note without grace falling due on a legal holiday was not payable until the day following, a note payable on Sunday, but entitled to grace, became due on the following Wednesday.—*Roberts v. Wold* (Minn.) 63 N. W. 739.

61 Minn. 291.

§ 72. Effect of renewal note.

(Mich.; 1894.)

Where a bank loans money to a firm, and takes the firm note therefor, and, after

the creation of a new firm, composed of the same members and another, accepts its notes in renewal, with knowledge that one of its members, who was a member of the old firm, has retired, the renewal operates as a payment of the old note, precluding the bank from recourse against the property of such retired member.—*Childs v. Pellett* (Mich.) 61 N. W. 54. 102 Mich. 558.

§ 73. Extension.

[a] (Minn.; 1896.)

The payment and reception of interest in advance on a past-due note by the act and assent of the holder and maker thereof constitute, in the absence of any contrary understanding or agreement, an implied contract to extend the time of payment for the period for which the interest is paid in advance.—*St. Paul Trust Co. v. Driscoll* (Minn.) 67 N. W. 350. 64 Minn. 439.

[b] (Neb.; 1895.)

Evidence that notes deposited as collateral security for the payment of other notes were renewed from time to time, interest thereon collected in advance, and the time of payment extended, will not of itself support a finding that the holder of the original notes extended the time of payment of the latter.—*Benton v. German-American Nat. Bank* (Neb.) 64 N. W. 227. 45 Neb. 850.

[c] (N. D.; 1896.)

The evidence showed that the holders of notes were pressing for payment, and that the maker was unable to pay them; that new notes were then given by the maker, secured by mortgage, apparently as collateral to the old notes; that the latter were not taken up, but that no attempt was made to enforce payment of them until after maturity of the new notes. *Held*, that the presumption is that there was an extension of time for payment of the old notes, which was a sufficient consideration to support the new notes and mortgage.—*First Nat. Bank v. Lamont* (N. D.) 67 N. W. 145.

5 N. D. 393.

[d] (S. D.; 1896.)

Under Comp. Laws, § 3538, subd. 2, providing that a written instrument is presumptive evidence of a consideration, a writing, "Extended to Dec. 1, 1891," placed by the payee on a note, pursuant to an agreement with the maker to extend the time of payment, is a written extension, and is presumptive evidence of a consideration.—*Corbett v. Clough* (S. D.) 65 N. W. 1074.

§ 74. Presumption of nonpayment.

(Iowa; 1894.)

Plaintiff, in a suit to foreclose a mortgage securing two notes,—one for \$233, due September 7, 1887, and the other for \$167, due May 7, 1888,—relied on his possession of the two to show nonpayment. Defendants introduced a letter from plaintiff to the maker of the notes, dated May 14, 1888, in which plaintiff had said, "The last note I have of yours, for \$167, was due May 7, 1888," and asked that it be paid. A credit of \$100 was indorsed on this note, as of the date of May 22, 1888. *Held*, that the presumption of nonpayment of the \$233 note, arising from plaintiff's possession of it, was overcome.—*Coe v. Anderson* (Iowa) 61 N. W. 177.

92 Iowa, 515.

XIV. ACTIONS.

Against guaranter, see ante, § 58.

Evidence as to demand, notice and protest, see ante, § 67.

Parol evidence to vary indorsement, see ante, § 34.

Presumption and burden of proof as to good faith of transfer, see ante, § 53.

§ 75. When cause of action arises.

(Iowa; 1896.)

Where the whole amount of the principal and interest becomes due by the express terms of the note and mortgage on default in payment of interest, neither demand nor notice of election is necessary as a condition precedent to a right of action.—*Jurgensen v. Carlsen* (Iowa) 66 N. W. 877.

§ 76. Who may sue or defend.

[a] (Iowa; 1895.)

Defendants H. and S. executed a note to a bank. Thereafter defendant H., who was in partnership with plaintiff, paid part of the note with partnership funds. Plaintiff did not know at the time that partnership funds were applied on the note, but afterwards plaintiff and H. gave their joint note to the bank for the balance due on the first note, which was marked "Paid" by the bank, and plaintiff obtained possession thereof with the understanding that he was to keep it until H. paid plaintiff what he owed on it. Plaintiff did not demand payment from defendants until more than four years afterwards. Defendant S. did not know the circumstance under which the note was taken up until demand was made on him, shortly prior to the commencement of an action by plaintiff upon the note executed by defendants to the bank. *Held*, that plaintiff could not maintain the action.—*Kennedy v. Hensley* (Iowa) 63 N. W. 343.

[b] (Mich.; 1897.)

Where the indorsee of a note sues, the representative of the estate of the payee may take upon himself the defense of the suit at the trial.—*Coon v. Dennis* (Mich.) 69 N. W. 666.

[c] (Minn.; 1896.)

The payee of a note may sue thereon, though the consideration paid belonged to another, for whose benefit the note was taken.—*Cooper v. Hayward* (Minn.) 69 N. W. 638.

§ 77. Premature action.

(Mich.; 1895.)

An action commenced on a note on the last day of grace is prematurely brought.—*Wiesinger v. First Nat. Bank* (Mich.) 64 N. W. 59.

§ 78. Defenses.

[a] (Iowa; 1896.)

The provisions of Code, § 2546, that the assignment of a thing in action shall be without prejudice to any counterclaim or defense existing in favor of defendant, and against the assignor, before notice of the assignment, do not apply to the indorsement of an accepted draft before maturity, nor permit the acceptor to plead as a defense to the draft in the hands of the indorsee a claim against the drawer, who is not an assignor within the statute.—*Jack v. Hosmer* (Iowa) 65 N. W. 1009.

[b] (Mich.; 1896.)

Where plaintiff, in an action on a note, undertook, but failed, to establish that it purchased the note before maturity in good faith, proof of fraud by the payee in procuring the note is a complete defense, unless plaintiff shows a bona fide purchase.—*Drovers' Nat. Bank v. Blue* (Mich.) 67 N. W. 1105.

[c] (Mich.; 1897.)

As a defense to an action against the representative of the payee's estate, defendant may show that the indorsement of the note was procured by the undue influence of the indorsee over the payee, and that the note belongs to the payee's estate.—*Coon v. Dennis* (Mich.) 69 N. W. 666.

[d] (Minn.; 1894.)

One who, after signing what he supposed to be a contract, learned that it was a negotiable note, and then assisted the payee in obtaining additional signatures thereto, cannot, in an action thereon by an innocent purchaser, set up in defense the fraud in procuring his signature.—

Yellow Medicine County Bank v. Wiger (Minn.) 61 N. W. 452.

59 Minn. 384.

[e] (Neb.: 1895.)

In an action on a promissory note by an alleged indorsee thereof, a denial of the indorsement and of plaintiff's ownership is a good defense.—Central City Bank v. Rice (Neb.) 63 N. W. 60.

41 Neb. 531.

[f] (Neb.: 1895.)

It was no defense to an action on a note, against the maker thereof, that the note was not to be delivered until certain persons had signed as sureties, which they failed to do, and that the payee had notice thereof.—Brunback v. German Nat. Bank (Neb.) 65 N. W. 198, 46 Neb. 540.

[g] (S. D.: 1895.)

In an action on a note by the payee against the maker, it was a defense that the note was executed on condition that it should not be deemed a note or considered as delivered until it was also executed by a third party, and that such party never executed the same.—McCormick Harvesting Mach. Co. v. Faulkner (S. D.) 64 N. W. 163.

[h] (Wis.: 1895.)

In an action against a married woman on a note, it appeared that defendant had empowered her husband to make and indorse paper in her behalf. He had discounted her note for a loan to him at plaintiff bank, and had pledged, as collateral, notes which he had forged. The note sued on was a renewal of the note discounted, which had been returned, and was executed by defendant under threats of a criminal prosecution against her husband. *Held*, that she could not maintain her defense without returning to plaintiff the note which it had returned.—City Nat. Bank v. Kusworm, 64 N. W. 843, 91 Wis. 166.

§ 79. Pleading—Petition or complaint.

[a] (Minn.: 1895.)

In an action on a note payable to a third party, the mere allegation that "plaintiff is now the owner and holder thereof" is not a sufficient allegation of title.—Topping v. Clay (Minn.) 63 N. W. 1038.

62 Minn. 3.

[b] (Minn.: 1895.)

A complaint in an action on a note alleged that the payee delivered the note for collection to a bank which sent it to plaintiff, who caused the same to be protested; that the payee claimed the protest to be invalid, and insisted that the bank pay the note, and that the bank, believing itself liable, required plaintiff to pay the same; and that on such payment the bank, as agent for the payee, delivered the note to plaintiff,—and prayed that plaintiff be subrogated to the rights of the payee. *Held*, that the absence of an averment that the bank was authorized to deliver the note to plaintiff on payment, or that the payee received the money paid, or ratified the transaction, rendered the complaint insufficient on demurrer.—Marine Nat. Bank v. Humphreys (Minn.) 64 N. W. 148.

62 Minn. 141.

[c] (Minn.: 1896.)

An allegation that, in writing, and prior to the commencement of the action, the note sued on had been duly assigned and transferred to the plaintiff, and that he has ever since been the holder thereof, is a sufficient allegation that it has been assigned and transferred by the payee named therein.—Topping v. Clay (Minn.) 63 N. W. 34.

[d] (Minn.: 1896.)

In a complaint in an action brought upon a promissory note, wherein it is alleged that defendant made, executed, and delivered the note in question, whereby he promised to pay a specified sum of money to a certain payee therein

named, it is unnecessary to allege that the note was delivered to such payee.—Topping v. Clay (Minn.) 65 N. W. 31.

[e] (S. D.: 1896.)

A complaint on a note which shows that the time for paying the note has been extended, and that the rate of interest thereon has been reduced, is not defective in failing to show that the defendant maker accepted the extension and the reduction.—Van Dyke v. Doherty (S. D.) 69 N. W. 200.

§ 80. — Plea, answer, and affidavit of defense.

[a] (Mich.: 1895.)

Under Cir. Ct. Rule 79, in an action on a draft against a drawer and indorsers, a plea of the general issue, merely, admits the genuineness of the signatures of the indorsers, in the absence of an affidavit denying the same. *Lohdell v. Bank* (1876) 33 Mich. 408, followed. —First Nat. Bank v. Union Cent. Life Ins. Co., 65 N. W. 759.

[b] (Neb.: 1896.)

Want of consideration in an action on a promissory note is new matter, which must be specially pleaded, and is not available as a defense under a general denial.—Sharpless v. Giffen (Neb.) 66 N. W. 285.

47 Neb. 146.

[c] (Neb.: 1896.)

In pleading fraud in an action on a note, it is necessary to set out the facts relied upon for relief.—Crosby v. Ritchey (Neb.) 66 N. W. 1005.

47 Neb. 924.

[d] (Neb.: 1897.)

An answer by the maker of a note in an action by the indorsee, alleging that defendant delivered to the payee who held the note collaterals which have been rendered worthless by the payee's failure to collect them at maturity, and that defendant has been damaged by the payee's negligence "to carry out its contract in the collection of" the collaterals, but which does not plead any such contract, nor allege that the payee owned the notes when the collaterals were delivered, states no defense.—First Nat. Bank v. McKibbin (Neb.) 70 N. W. 38.

[e] (S. D.: 1897.)

An answer which alleges that plaintiff payee is not the owner and holder of the note sued on presents a material issue, and hence is not frivolous.—Northwestern Cordage Co. v. Galbraith (S. D.) 70 N. W. 1048.

§ 81. Pleading and proof.

[a] (Iowa: 1895.)

Where defendant in an action on a due-bill answered that it was agreed that he was not to pay the amount thereof unless he procured a loan for plaintiff from an insurance company, and that he did not procure the loan, it was error to permit a recovery, in the absence of a reply, by showing that, though the loan was not procured, by reason of plaintiff's failure to remove incumbrances, the mortgage executed by plaintiff, to be used in procuring the loan, was held by the insurance company and by defendant as binding on plaintiff.—Smith v. Griswold (Iowa) 64 N. W. 624.

[b] (Minn.: 1895.)

Where the complaint declared on a separate promissory note, and the proof showed a several promissory note of defendant and another, in the absence of evidence that defendant was misled, the variance was not material.—Nichols & Shepard Co. v. Dedrick (Minn.) 63 N. W. 1110.

61 Minn. 513.

[c] (Minn.: 1895.)

Under a complaint, in an action on a note payable to order by an indorsee thereof, alleging as to the transfer merely that the note was "sold, assigned, and delivered" to plaintiff, the indorsement was admissible to prove the trans-

fer.—Red River Valley Inv. Co. v. Cole (Minn.) 64 N. W. 1149.
62 Minn. 457.

[d] (Neb.: 1896.)

In a suit upon a promissory note the answer of the defendant was a general denial. *Held*, that the defense that the consideration for the note was an illegal sale of intoxicating liquors made by the payee to the maker, was an affirmative defense, and could not be proved.—Dillon v. Darst (Neb.) 67 N. W. 783.

48 Neb. 803.

§ 82. Evidence.

[a] (Iowa: 1896.)

In a suit in equity to recover an amount alleged to be due on a note, and to foreclose a mortgage on land given to secure it, defendants claimed payment; and they and their daughter testified that, when defendants sold plaintiff a horse, on which was a mortgage to secure past-due notes given by one of defendants and his son to plaintiff, he agreed to apply the purchase price on the note in suit. Plaintiff testified that there was no such agreement, but that the notes secured on the horse were to be satisfied first. A person who was present at the sale, and was to buy the horse of plaintiff, understood the mortgage thereon was satisfied by defendants' sale thereof to plaintiff. Another person testified that defendants told him they wished to sell the horse to pay the mortgage thereon. *Held* that, the burden being on defendants to prove the note was paid, and their testimony being unreasonable, decree for them would be reversed, as against the preponderance of evidence.—Bucknell v. Marcy (Iowa) 67 N. W. 86.

[b] (Iowa: 1896.)

In replevin for property taken under a chattel mortgage by the indorsee of the note secured thereby, the plaintiff alleged that the note had been paid before the transfer. It appeared that plaintiff and one of the payees had been engaged in a joint enterprise, with an agreement that the note should be paid from plaintiff's share of the proceeds. *Held*, that it was competent to show payment under the agreement without first showing settlement of the joint ventures.—C. Aultman & Co. v. Teeple (Iowa) 67 N. W. 236.

[c] (Iowa: 1896.)

In an action on notes given for goods sold defendants alleged that the consideration was intoxicating liquors sold to them by plaintiff in violation of law, and set up a counterclaim for the wrongful suing out of the attachment, and for money paid to plaintiff for liquors sold to defendants in violation of law. The reply denied the facts pleaded as counterclaims. *Held*, that a defendant could not be asked on cross-examination why he did not demand the counterclaim before giving the notes for the full amount, which was greater than his counterclaim.—Hurlbut v. Bagley (Iowa) 68 N. W. 585.

[d] (Iowa: 1897.)

In an action on a note by an indorsee, where defendant pleads that plaintiff was not a bona fide purchaser, he can introduce evidence to sustain such allegation, though plaintiff has only offered the note and the indorsement.—Bennett State Bank v. Schloesser (Iowa) 70 N. W. 705.

[e] (Mich.: 1895.)

A note was delivered by the payee to the maker when payment was demanded, and retained by the maker, though the full amount due was not paid, the maker having claimed a credit which the payee refused to allow. *Held*, that the maker, by marking the note "Paid," could not destroy its character as evidence of the indebtedness.—Liesemer v. Burg (Mich.) 63 N. W. 999.

[f] (Mich.: 1895.)

On an issue as to the time of execution of a note, another note, in payment of which the first was used as soon as executed, and which was stamped "Paid" on a certain date, was admissible; and the fact that the payee was allowed to state his conclusion that such note was paid at the time indicated by the stamp was not reversible error, since the court could draw the same conclusion from the stamped note itself.—Hanish v. Kennedy (Mich.) 64 N. W. 459.

[g] (Minn.: 1896.)

In an action on a contract for the payment of money on condition that the promisee should satisfy several mortgages, it was error to exclude evidence offered by defendant that all the mortgages were not paid.—Bowman v. Horr (Minn.) 65 N. W. 725.

63 Minn. 400.

[h] (Minn.: 1896.)

The plaintiff was permitted in the first instance to prove that it was an innocent purchaser for value before maturity of the note in suit. The defendant makers, without offering or intending to offer proof to rebut the same, merely offered to prove facts which would constitute a defense to the note in the hands of the original payee. *Held* properly rejected.—Merchants' & Mechanics' Sav. Bank v. Cross (Minn.) 67 N. W. 147.

[i] (Neb.: 1895.)

In an action on a note against an indorser who defended on the ground of forgery, it was error to admit evidence that the maker of the note had illegally disposed of mortgaged property, or that he was insolvent, or that he had said to witness that he could imitate the handwriting of any one.—Stratton v. Nye (Neb.) 63 N. W. 928.

45 Neb. 619.

[j] (Neb.: 1897.)

When there is no other disputed question, the signatures of defendants are sufficiently proved to allow of the receipt in evidence of a note alleged to have been signed by them, when a witness, duly qualified to testify on that question, gives it as his opinion that the alleged signatures are genuine.—Mosher v. Farmers' & Merchants' Nat. Bank (Neb.) 70 N. W. 540.

§ 83. — Presumption and burden of proof.

[a] (Minn.: 1895.)

A general denial alone puts in issue the execution of the note sued on, but the burden is on defendant to show that he did not execute the note.—McCormick Harvesting Mach. Co. v. Doucette (Minn.) 63 N. W. 95.

61 Minn. 40.

[b] (Minn.: 1897.)

Plaintiff, as indorsee of a note, brought suit thereon against the maker, who admitted its execution, but alleged usury as a defense. Upon the trial in justice court, the plaintiff introduced the note and indorsements thereon in evidence, and rested, and thereupon the defendant also rested. The justice rendered judgment in favor of the defendant. *Held* error, under Gen. St. 1894, § 5751, making possession of the note proof of its execution and delivery.—Thorson v. Sauby (Minn.) 70 N. W. 1083.

[c] (Neb.)

Where the only defense alleged in an action by an indorsee of a promissory note is the failure of consideration, the burden is upon the defendant to overcome the presumption that such note was transferred before due, for value, in the usual course of business.—(1896) Crosby v. Ritchey (Neb.) 66 N. W. 1005, 47 Neb. 924; (1897) National Bank v. Miller (Neb.) 70 N. W. 933.

[d] (N. D.: 1896.)

The mere fact that a note, when offered in evidence, bears on its back the name of the payee,

does not of itself show that the payee indorsed the same.—*Vickery v. Burton* (N. D.) 69 N. W. 193.

[*Id.* (N. D.; 1896.)]

The fact that a note payable to Pulaski J. S. bears on its back the indorsement "P. J. S." does not create a presumption that the indorsement is the name of the payee.—*Vickery v. Burton* (N. D.) 69 N. W. 193.

[*Id.* (Wis.; 1895.)]

Where plaintiff in an action on a note produces the note properly executed, and showing on its face that it is due and payable, there is a presumption of nonpayment, which must be overcome by allegation and proof of payment.—*Studebaker Bros. Manufg Co. v. Langson*, 61 N. W. 773, 89 Wis. 200.

§ 84. — Option of holder to declare note due.

[*a*] (Minn.; 1895.)

Where the principal of a note becomes due at the option of the holder on default in the payment of interest, the holder of the legal title of such note may exercise such option, and maintain the action in his own name, though he hold such title in trust for others.—*St. Paul Title Insurance & Trust Co. v. Thomas* (Minn.) 61 N. W. 1134.

60 Minn. 140.

[*b*] (Minn.; 1895.)

Where, by the terms of a note, the principal becomes due at once, on default in payment of the interest, without notice, at the option of the legal holder thereof, the bringing of an action to recover the principal and interest is a sufficient exercise of the option.—*St. Paul Title Insurance & Trust Co. v. Thomas* (Minn.) 61 N. W. 1134.

60 Minn. 140.

§ 85. — Proof of ownership.

[*a*] (Minn.; 1895.)

Possession of a negotiable note payable to bearer is prima facie evidence of ownership thereof, though it was transferred after maturity.—*Robinson v. Smith* (Minn.) 64 N. W. 90.

62 Minn. 62.

[*b*] (Minn.; 1896.)

Under Gen. St. 1894, § 5751, when the name and style of the payee are written on the back of a note, the possession of the note is prima facie evidence that the signature is genuine.—*Merchants' & Mechanics' Sav. Bank v. Cross* (Minn.) 67 N. W. 1147.

[*c*] (Minn.; 1896.)

The possession of a promissory note by the payee with his own indorsement in blank thereon is prima facie evidence of his ownership of it.—*Ames & Frost Co. v. Smith* (Minn.) 67 N. W. 999.

[*d*] (Minn.; 1896.)

Possession by the payee of a negotiable promissory note indorsed specially by him to a third party is prima facie evidence that such payee is the owner of the note.—*Kells v. Northwestern Live-Stock Ins. Co.* (Minn.) 67 N. W. 215.

64 Minn. 390.

[*e*] (S. D.; 1896.)

In an action on a duebill bearing no indorsement, but which plaintiff testified was assigned to him, a written order by the payee, made subsequently to the alleged assignment, directing plaintiff to deliver the duebill to defendant, was incompetent to disprove the assignment.—*Kirby v. Jameson* (S. D.) 67 N. W. 554.

§ 86. — Proof of consideration.

(Neb.; 1896.)

The maker of a note having died before its maturity, leaving the major portion of his estate to his sons, subject to payment of his debts, the sons, in consideration of the cancellation of the note and the extension of time for payment

of the debt evidenced thereby, executed a note for the debt. *Held* that, in an action on the note, the will of the deceased maker of the canceled note was admissible as bearing on the consideration.—*McCormick v. Redden* (Neb.) 65 N. W. 881, 46 Neb. 776.

§ 87. Questions for court or jury.

[*1*] (Iowa; 1895.)

In an action on a note, which was shown to have been procured by fraud, there was evidence of circumstances sufficient to put plaintiff on inquiry in buying it; but there was also evidence that he purchased for value, without notice, and before maturity. *Held*, that whether plaintiff was a bona fide purchaser was properly submitted to the jury.—*Derr v. Keough* (Iowa) 65 N. W. 339.

[*2*] (Mich.; 1897.)

Defendant, a member of a partnership association, guaranteed the payment of notes given by the association; and, desiring to sell his stock, free from liability, the amount of the debts of the association was ascertained, and the share that he should bear was agreed upon, and he gave his note for such amount to plaintiff, who advanced the money to pay the amount of such share, and his stock was transferred. *Held*, in an action on the note, it was proper to direct a verdict for plaintiff.—*Hilbert v. Barry* (Mich.) 70 N. W. 318.

[*3*] (Neb.; 1897.)

Where the signatures on a note are proved, and there is no other disputed question in the case, the court may direct a verdict in favor of plaintiff for the amount shown by the note.—*Mosher v. Farmers' & Merchants' Nat. Bank* (Neb.) 70 N. W. 540.

[*4*] (Wis.; 1896.)

Where a counterclaim in an action on a note alleged that it was given for the price of a newspaper, and that the sale of such paper was induced by fraudulent representations as to its value, and there was evidence that the payee, who was plaintiff's testator, had admitted making such representations, and that they were false in several particulars, it was error to direct a verdict for plaintiffs.—*Cawker v. Seamans* (Wis.) 66 N. W. 253.

92 Wis. 328.

§ 88. Instructions.

(Neb.; 1896.)

Where, in an action on a note against two defendants as joint makers, each defendant answered separately, denying execution of the note, and alleging that his name thereon was a forgery, it was not reversible error that the court charged that the forgery upon the note of the name of a certain one of the defendants as a maker, after its execution by the other, and after its delivery to plaintiff, would defeat a recovery as to both defendants, there being no claim that the name of one defendant was added after the execution of the note by the other.—*Norfolk Nat. Bank v. Job* (Neb.) 67 N. W. 781.

48 Neb. 774.

§ 89. Verdict.

(Minn.; 1895.)

In an action on a note by an indorsee thereof, defendant alleged that plaintiff was not a bona fide purchaser, and that the note was procured through fraud of the payee. The court submitted two special questions to the jury: First, whether plaintiff purchased the note, before it was due, in good faith and for value, and instructed them that if he did they should find for plaintiff; and, second, whether plaintiff, at the time of purchase, had knowledge of any defense to the note, and instructed them that if he did not they should find for plaintiff, but that, if he did, they should then determine whether there was fraud in the procurement of the note. The jury answered the first ques-

tion in the affirmative, and the second in the negative, and gave a general verdict for plaintiff. *Held*, that the finding as to the defense of fraud was not involved in such verdict.—*Fuller v. Goodnow* (Minn.) 64 N. W. 161, 62 Minn. 103.

NEWLY-DISCOVERED EVIDENCE.

As ground for new trial, see "Criminal Law," §§ 198, 199; "New Trial," §§ 33-36.

NEW PROMISE.

To pay debt barred by limitations. see "Limitation of Actions," § 32.

NEWSPAPERS.

Designation of paper for publication of delinquent taxes. see "Taxation," § 67.
Liability of managing editor for libel. see "Libel and Slander," § 8.
Publication constituting contempt of court, see "Contempt," § 2.

§ 1. Selection of official paper.

[a] (Iowa; 1895.)

One to whom a publisher sends a newspaper, without his consent, at the instance of a third person, who pays the yearly subscription price, is not a bona fide "subscriber," within Code, § 307, requiring the county board to select two newspapers having the largest number of bona fide yearly subscribers within the county to be the official papers for that year.—*Ashton v. Story* (Iowa) 64 N. W. 804.

[b] (Minn.; 1895.)

The county commissioners could not designate the newspaper in which delinquent tax lists should be published, after the expiration of the time prescribed therefor by Gen. Laws 1874, c. 1, § 112. *Start, C. J., and Mitchell, J., dissenting.*—*Finnegan v. Gronerud*, 65 N. W. 128, 63 Minn. 53.

[c] (S. D.; 1896.)

Comp. Laws, §§ 607-609, authorize the county board to erect and repair county buildings, and make contracts therefor. Laws 1889, c. 49, amending section 609, provides that the provisions of such section shall apply to all contracts for fuel, stationery, and all other articles for the use of the county, or labor to be performed therefor, when the amount to be paid therefor during any year exceeds \$100. Laws 1891, c. 14, § 104, provides that the treasurer shall give notice of sale of real property by publication in a newspaper in his county, if there be one, and, if there be none, by written or printed notices posted, etc. *Held*, that it is the duty of the county treasurer, and not of the county board, to designate the paper in which to publish the tax-sale notices.—*Dewell v. Board of Com'rs of Hughes County* (S. D.) 66 N. W. 1079.

§ 2. — Contest.

[a] (Iowa; 1895.)

On an appeal to the district court from the decision of a county board in a contest over the selection of the official newspapers, defendant filed a motion requiring plaintiffs to state more particularly the manner in which they were aggrieved by the action of the board, which motion was overruled, and defendant proceeded to trial. *Held* that, having filed no subsequent pleading, defendant did not waive his right to insist on his exception to the ruling.—*Ashton v. Story* (Iowa) 64 N. W. 804.

[b] (Iowa; 1895.)

On an appeal from the decision of a county board in a contest over the selection of official newspapers for the county, the district court

must try the case on the subscription lists of the contesting papers, as deposited with the county auditor; and a party is not entitled to amend his list by adding thereto the name of a subscriber alleged to have been omitted.—*Ashton v. Story* (Iowa) 64 N. W. 804.

[c] (Iowa; 1895.)

Where fraud is charged, in a contest before a board of county supervisors over the selection of an official county newspaper, it should be alleged before the hearing is had, and the selection made.—*Ashton v. Story* (Iowa) 64 N. W. 804.

[d] (Iowa; 1896.)

Under Code, § 307 (providing that, in case of contest over the selection of official newspapers, two applicants shall be selected whose certified statements show the largest bona fide circulation, and, in case fraud is charged by an aggrieved publisher, the supervisors shall seek other evidence, and the aggrieved publisher shall have the right of appeal to the district court, etc.), a publisher is aggrieved when an adverse application, based on a fraudulent list, is filed; and, unless the charge of fraud is brought to the attention of the board before any selection is made, it cannot be heard on appeal to the district court. *Ashton v. Story* (1895) 64 N. W. 804, followed.—*Ross v. Campbell*, 66 N. W. 1064.

[e] (Iowa; 1896.)

Code, § 307, provides that the supervisors shall select as official newspapers those two having the largest circulation in the county, and that in case of contest the applicants shall file a certified statement of the names of bona fide subscribers, the two applicants showing the most subscribers to be the official papers. *Held*, that there is a "contest" when more than two statements are filed, with applications to have specified newspapers selected as the official papers of the county.—*Ross v. Campbell* (Iowa) 66 N. W. 1064.

§ 3. Compensation for legal printing.

[a] (Iowa; 1895.)

Code, § 3832, limiting the price to be paid "per square of ten lines of brevier type, or its equivalent," for the publication of legal notices, does not require the same price to be paid regardless of the type or form used in the printing, but merely makes the sum named the standard by which to measure the rates of compensation to be paid for printing in type other than brevier.—*Brown v. Lucas County* (Iowa) 62 N. W. 694.

[b] (Minn.; 1895.)

Gen. St. 1878, c. 11, § 110 (Gen. St. 1894, § 1628), *held* not to govern the rate of compensation for publishing the "forfeited tax list," pursuant to Laws 1893, c. 150; that, in the absence of express contract, the publisher is entitled either to the reasonable value of the work, or to the rate fixed by Gen. St. 1878, c. 70, § 31 (Gen. St. 1894, § 5581).—*Fergus Printing & Pub. Co. v. Board of Com'rs of Otter Tail County*, 62 N. W. 272, 60 Minn. 212.

NEW TRIAL.

I. IN GENERAL. §§ 1-6.

II. APPLICATION. §§ 7-15.

III. GROUNDS, §§ 16-36.

1. In General, §§ 16, 17.

2. Disqualification and Misconduct of Jury, §§ 18-23.

3. Misconduct of Parties or Counsel, §§ 24, 25.

4. Objections to Verdict and Findings, §§ 26-28.

5. Surprise, Accident, Inadvertence, and Mistake, §§ 29-32.

6. Newly-Discovered Evidence, §§ 33-36.

IV. STATUTORY NEW TRIAL AS OF RIGHT, § 37.

Appealable orders on motion for, see "Appeal," § 36.
 Assignments of error as to rulings on motion, see "Appeal," § 94.
 Discretion of court, see "Appeal," §§ 205-207.
 Effect of reversal, see "Appeal," § 287.
 In criminal cases, see "Criminal Law," §§ 192-199.
 Judicial notice as to distance of absent witness from court, see "Evidence," § 1.
 Jurisdiction to hear motion made in case tried before other judge, see "Judge," § 4.
 Manner of bringing objections to attention of trial court, see "Appeal," §§ 79-86.
 Necessity of exceptions to order refusing, see "Appeal," § 75.
 — of making objections on motion for, see "Appeal," §§ 83, 84.
 — of motion, see "Appeal," §§ 80-82.
 — of motion before granting equitable relief from judgment, see "Judgment," § 111.
 Of condemnation proceedings, see "Eminent Domain," § 21.
 Ordered by appellate court, see "Appeal," § 293.
 Remedy by relief from judgment, see "Judgment," § 112.
 Rendition of judgment pending motion for, see "Judgment," § 31.
 Review of objections submitted by affidavit, see "Appeal," § 79.
 — of ruling on motion made after judgment, see "Appeal," § 86.
 — on appeal from decision on motion, see "Appeal," § 181.

I. IN GENERAL.

§ 1. Number of new trials.

(Minn.: 1896.)

Where there have been four successive verdicts in favor of the same party, three of which had been set aside on the ground that they were not justified by the evidence, it would be an abuse of discretion to set aside the fourth verdict on the same ground, provided it was fairly justified by the evidence.—*Van Doren v. Wright* (Minn.) 67 N. W. 668.

§ 2. Granting by court suo motu.

[a] (Neb.: 1895.)

The trial court may, on its own motion, re-examine its record, and set aside a verdict on account of prejudicial error, in the absence of a request by either party.—*Weber v. Kirkendall* (Neb.) 63 N. W. 35.
 44 Neb. 766.

[b] (N. D.: 1896.)

The trial court cannot, as a rule, vacate a verdict of its own motion merely on the ground that it violates the instructions, or is not justified by the evidence, under Rev. Codes, § 5475, limiting the right to so set aside verdicts to cases where there has been such plain disregard by the jury of the instructions or the evidence as to satisfy the court that the verdict was rendered under a misapprehension of the instructions, or under the influence of passion or prejudice.—*Flugel v. Henschel* (N. D.) 69 N. W. 195.

[c] (S. D.: 1895.)

A verdict of a jury, to which neither party has objected, should not be vacated by the court on its own motion, under Comp. Laws, § 5091, unless there has been such a clear disregard of the instructions or the evidence that the court is at once satisfied, without mature reflection or the aid of argument, that such verdict is the result of passion or prejudice, or was rendered under a misapprehension of the instructions; and the order should be made promptly on the coming in of the verdict.—*Clement v. Barnes* (S. D.) 61 N. W. 1126.
 6 S. D. 483.

§ 3. Granting relief not specified in motion.

(Minn.: 1896.)

Under Laws 1895, c. 320, providing that when a party was entitled, on the trial, to have a verdict directed in his favor, and duly moved for the same, the court may, on a motion for a new trial, or on an appeal in such motion, order judgment in the party's favor notwithstanding the verdict, the party is not entitled to such order for judgment, either in the court below or in the supreme court, unless he asks for that relief in his moving papers on his motion for a new trial.—*Kernan v. St. Paul City Ry. Co.* (Minn.) 67 N. W. 71.
 64 Minn. 312.

§ 4. Conditions imposed—Costs.

(Wis.: 1894.)

It is error to grant plaintiff a new trial, on the ground that the verdict is not supported by the evidence, without compelling him to pay the costs of the former trial.—*Wilson v. City of Eau Claire*, 61 N. W. 290, 89 Wis. 47.

§ 5. Effect of granting.

(Iowa: 1896.)

The granting of a new trial on the ground of newly-discovered evidence operates as a vacation of the judgment.—*Means v. Yeager* (Iowa) 65 N. W. 993.

§ 6. Setting aside order granting.

(Minn.: 1897.)

The district court has power to set aside an order granting a new trial at least until the time to appeal therefrom expires.—*Beckett v. Northwestern Masonic Aid Ass'n* (Minn.) 69 N. W. 923.

II. APPLICATION.

For newly-discovered evidence, see post, § 34.
 Necessity, granting by court, suo motu, see ante, § 2.

§ 7. Time of making or filing.

[a] (Minn.: 1896.)

Nineteen years after a railroad company went into possession of a right of way, claiming under a guardian's deed, and 10 years after the youngest of the minor wards became of age, an action was brought by one claiming under the minors to dispossess the company, in which there was a finding for defendant, affirmed on appeal, advising plaintiff that the guardian's deed conveyed the right of way. In 1894, relying on a supposed right to impeach the probate records of the guardian's sale collaterally, plaintiffs entered on a second trial, but were advised by the supreme court, on appeal from the result of that trial, that the records could not be so impeached. Two months thereafter they obtained an amendment of the records, which resulted in a showing that the right of way in suit was not included in the guardian's deed; and three months later they moved for a new trial on the ground of newly-discovered evidence consisting of the amended records. *Held*, that a new trial should be refused on the ground that plaintiffs were guilty of laches.—*Kurtz v. St. Paul & D. Ry. Co.* (Minn.) 67 N. W. 808.

[b] (Wis.: 1896.)

A motion for a new trial made after the judgment cannot be entertained unless joined with a motion to vacate the judgment.—*Bailey v. Costello* (Wis.) 68 N. W. 663.

§ 8. Stating grounds.

(Neb.: 1897.)

The grounds of a motion for a new trial need not be stated in the exact language of Code Civ. Proc. § 314, if they are in substance the

same.—*Chicago, B. & Q. R. Co. v. Cass County* (Neb.) 70 N. W. 955.

§ 9. Notice.

[a] (Iowa; 1896.)

Where the adverse party files an affidavit in resistance to a motion for new trial, he thereby appears, and notice is unnecessary.—*Means v. Yeager* (Iowa) 65 N. W. 993.

[b] (N. D.; 1896.)

A notice of motion for new trial, otherwise in proper form, which contains a notice that the motion will be made upon the minutes of the court, and upon a ground specifically stated in the notice, will operate as a notice of intention, as well as a notice of motion.—*Fletcher v. Nelson* (N. D.) 69 N. W. 53.

§ 10. On what papers based.

(S. D.; 1896.)

Comp. Laws, § 5089, provides that, when application for new trial is made for certain causes, it must be made on affidavits, and that "for any other cause it may be made either upon a bill of exceptions or a statement of the case, or upon the minutes of the court." Section 5092 provides that the application for a new trial shall be heard at the earliest practicable period after the bill of exceptions or statement is filed. And section 5090, subd. 3, provides that "when settled the statement shall be signed by the judge * * * and shall be filed with the clerk." *Held*, that the provision for bill of exceptions or statement is not merely directory, but that in a case for application on one or the other, or on the minutes, application not having been made on the minutes, or on affidavits, an order for new trial made without an authenticated bill of exceptions or statement cannot stand.—*Parrott v. City of Hot Springs* (S. D.) 68 N. W. 329.

§ 11. Sufficiency—Specification of grounds.

[a] (Neb.; 1896.)

Errors in instructions should be separately assigned in the motion for a new trial.—*Graham v. Frazier* (Neb.) 68 N. W. 367.

[b] (Neb.; 1896.)

An assignment in a motion for a new trial, that a group of instructions is erroneous, is insufficient if one of them was properly given.—*Union Pac. Ry. Co. v. Montgomery* (Neb.) 68 N. W. 619.

[c] (Neb.; 1896.)

The assignment in a motion for a new trial that the finding is not sustained by the evidence does not, in an action on contract, raise the question of error in the assessment of the amount of recovery.—*Wachsmuth v. Orient Ins. Co.* (Neb.) 68 N. W. 935.

[d] (Neb.; 1897.)

An assignment of error in a motion for a new trial that "the court erred in giving paragraphs three, five, seven, eight, nine, ten, eleven, twelve, and thirteen of the instructions, and in giving each of them, given by the court on its own motion," is sufficiently specific.—*Kirchman v. Corcoran* (Neb.) 70 N. W. 916.

[e] (Neb.; 1897.)

If a joint motion for a new trial cannot be sustained as to all it must be overruled as to all.—*D. M. Osborne & Co. v. Plano Manuf'g Co.* (Neb.) 70 N. W. 1124.

[f] (S. D.; 1895.)

Where the notice of intention to move for a new trial states as the grounds thereof insufficiency of the evidence, and errors in law occurring at the trial, but the record upon which such motion is heard contains no further specification as to the alleged errors in law, or the insufficiency of the evidence, the trial court may properly deny the motion, so far as it is based upon the grounds named. Comp. Laws, § 5090.—*Billingsley v. Hiles* (S. D.) 61 N. W. 687.
6 S. D. 445.

[g] (S. D.; 1895.)

The directing of a verdict on the evidence, if erroneous, is properly specified in a motion for a new trial as "errors of law occurring at the trial."—*Sioux Banking Co. v. Kendall* (S. D.) 62 N. W. 377.

6 S. D. 543.

§ 12. Hearing of motion.

[a] (Neb.; 1895.)

On an application for a new trial because of an unauthorized appearance of an attorney for one of the plaintiffs, the court may consider all matters of record having a bearing on the issue, aside from the affidavits on which the application is made.—*Spottswood v. National Bank of Commerce* (Neb.) 62 N. W. 245.
44 Neb. 1.

[b] (Wis.; 1896.)

While a pending motion for new trial ordinarily falls with the close of the term, under Rev. St. § 2878, it may be kept alive after the term by stipulation of the parties.—*Steinhofel v. Chicago, M. & St. P. Ry. Co.* (Wis.) 65 N. W. 852.

92 Wis. 123.

§ 13. Showing in support of motion.

[a] (Iowa; 1894.)

That a party may take advantage of the fact that a juror expressed an opinion on the merits before the trial, it must appear of record that the juror was examined as to whether he had found or expressed such opinion; and a showing thereof by affidavit is not sufficient.—*Light v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 350.

93 Iowa, 83.

[b] (Wis.; 1896.)

Defendant moved for a new trial on the ground of newly-discovered evidence. On the hearing the order was granted, reciting that new trial was allowed on the ground of mistake. *Held* that, in the absence of anything in the record on appeal indicating that affidavits were filed, or other showing made in support of the motion, the order must be set aside.—*Wheeler v. Russell* (Wis.) 67 N. W. 43.
93 Wis. 135.

§ 14. Evidence—Testimony and affidavits of jurors.

[a] (Iowa; 1895.)

A verdict cannot be impeached by the affidavit of a juror that, on a vote taken without deliberation or reading the instructions, he cast his ballot for plaintiff, but that it was counted for defendant, and that "the jury then and there declared their verdict for the defendant," where the juror, when polled, answered affirmatively though he was of opinion that plaintiff should recover.—*Hallenbeck v. Garst* (Iowa) 65 N. W. 417.

[b] (Iowa; 1896.)

Affidavits of jurors as to the manner in which the interest on notes was computed will not be received to impeach their verdict, where it appears that the interest was calculated in conformity with the instructions.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

[c] (Iowa; 1897.)

A verdict cannot be impeached by jurors' affidavits that a juror was unduly influenced by statements of his fellows.—*Purcell v. Tibbles* (Iowa) 69 N. W. 1120.

[d] (Mich.; 1896.)

As to the questions whether undue influence is exerted by one of the jurors on his fellows, and his conduct indicates bias, the affidavits of fellow jurors are inadmissible.—*Sharp v. Merriman* (Mich.) 66 N. W. 372.

[e] (Neb.; 1895.)

Affidavits of jurors as to conversations held in the jury room while the jury were considering the case, which tended to show that the jurors were improperly influenced, are not ad-

missible to impeach the verdict on motion for new trial.—*Gran v. Houston* (Neb.) 61 N. W. 215, 45 Neb. 813.

[1] (Wis.; 1894.)

On motion for a new trial in a personal injury case, on the ground that the jury visited the place of the accident without any view having been authorized, affidavits of jurors are admissible to prove the fact of their visiting the place.—*Peppercorn v. City of Black River Falls*, 61 N. W. 79, 89 Wis. 38.

§ 15. — Conflicting evidence.

(Minn.; 1896.)

The refusal of a new trial on the ground of misconduct of a juror will not be set aside where the affidavits relating to the alleged misconduct are conflicting.—*Hull v. Minneapolis St. Ry. Co.* (Minn.) 67 N. W. 218, 64 Minn. 402.

III. GROUNDS.

1. IN GENERAL.

§ 16. Trying case on erroneous theory.

(Minn.; 1896.)

A party who tries the case on a certain theory of law, and consents to its being submitted to the jury on that theory, cannot claim of right a new trial on the ground that such theory was erroneous.—*Engler v. Schneider* (Minn.) 69 N. W. 139.

§ 17. Grounds not urged in time.

(Neb.; 1895.)

Where an attorney is unprepared when his case is reached, he will not be allowed to urge, on motion for new trial, matters which, if presented at the time, would have excused his entering on the trial.—*Corbett v. National Bank of Commerce* (Neb.) 62 N. W. 445, 44 Neb. 230.

2. DISQUALIFICATION AND MISCONDUCT OF JURY.

§ 18. Disqualification.

[a] (Mich.; 1896.)

That plaintiff, in an action for personal injuries against a town stopped some time before the trial at the house of one of the jurors, who, on being told about the injuries received by her, asked why she did not sue the town therefor, and was told that suit had been commenced, is not ground for a new trial, where the juror, on voir dire, stated that he had been told by plaintiff about her injuries, but that he had no prejudice in her favor, and could try the case impartially.—*Will v. Village of Mendon* (Mich.) 66 N. W. 58.

[b] (Mich.; 1896.)

A plaintiff in an action against a city for damages is not entitled to a new trial on the ground that one of the jurors was a member of the city council, where such juror was accepted without objection by plaintiff, with knowledge of the fact.—*Walker v. City of Ann Arbor* (Mich.) 69 N. W. 87.

[c] (Minn.; 1894.)

Where a party, during the trial, discovers a relationship between a juror and the other party such as to disqualify the juror, but fails to then ask for the discharge of the juror, he cannot make the juror's disqualification ground for a new trial.—*Wells-Stone Mercantile Co. v. Bowman* (Minn.) 61 N. W. 135, 59 Minn. 364.

§ 19. Misconduct.

[a] (Iowa; 1895.)

The fact that a juror during the progress of a trial took measurements of the locality

where plaintiff was injured is not ground for new trial, where said juror made affidavit that he did not consider said measurement in arriving at a verdict, and did not communicate the fact to any other juror.—*Carlson v. City of Ottumwa* (Iowa) 61 N. W. 413.

[b] (Iowa; 1897.)

Plaintiff is not, in the absence of a showing of prejudice, entitled to new trial, because, when the jury was viewing the premises, they asked questions of plaintiff and his wife, and stated to them that certain things were not as they had testified, they having made no answer, except that she, on being asked where the hole was through which the water had come into their cellar, said it had been bricked up.—*Foedisch v. Chicago & N. W. Ry. Co.* (Iowa) 69 N. W. 1055.

[c] (Minn.; 1897.)

It is within the discretion of the court to grant a new trial, after a verdict for defendant, because the jury, before returning the verdict, prepared and sent a message requesting defendant to give plaintiff a permanent position because of the injuries.—*Svenson v. Chicago G. W. Ry. Co.* (Minn.) 70 N. W. 795.

[d] (Neb.; 1895.)

A verdict should be set aside when it appears that jurors discussed the merits of the case before final submission, and that an unauthorized communication took place between a juror and one of the attorneys while the jury was deliberating.—*Edney v. Baum* (Neb.) 62 N. W. 461.

44 Neb. 294.

[e] (Neb.; 1895.)

It was no ground for granting a new trial of an action against a principal and his sureties, wherein a judgment was had for plaintiff, that one of the jurors filed an affidavit stating that the principal defendant told him, immediately after the verdict, that one of the jurors was out drinking with the speaker the night before, and had promised not to cast his ballot for a verdict for plaintiff.—*Gran v. Houston* (Neb.) 64 N. W. 245, 45 Neb. 813.

§ 20. — Use of liquor.

[a] (Iowa; 1897.)

The fact, alone, that jurors drank beer during the time a case was being tried, and before its submission, does not vitiate their verdict.—*Hemmi v. Chicago G. W. Ry. Co.* (Iowa) 70 N. W. 746.

[b] (Mich.; 1896.)

In a civil suit a verdict will not be set aside because two of the jurors drank beer during the recesses of the court, where it appears that such misconduct did not unfit the jurors for duty, and was not discovered till after verdict.—*Sharp v. Merriman* (Mich.) 66 N. W. 372.

§ 21. — Private view.

[a] (Iowa; 1895.)

The action of two of the jurors in seeking out the premises from which defendant claims that merchandise left in his possession by plaintiff was stolen from him, the jurors not being in charge of an officer, or any person appointed for the purpose of showing them the premises, is not ground for a new trial where it appears that they merely inspected the entrance to the building, and that there was no controversy as to the appearance of that entrance or its approaches.—*Bowman v. Western Fur Manufacturing Co.* (Iowa) 64 N. W. 775.

[b] (Wis.; 1894.)

In an action against a city for injuries caused by a defective sidewalk, misconduct of jurors in visiting the place of the accident, without any view having been authorized, is ground for new trial.—*Peppercorn v. City of Black River Falls*, 61 N. W. 79, 89 Wis. 38.

§ 22. — Waiver of objections.**[a] (Iowa; 1897.)**

A party who, knowing before conclusion of the trial of misconduct of the jury, proceeds without objection, cannot have a new trial by reason thereof.—*Foedisch v. Chicago & N. W. Ry. Co.* (Iowa) 69 N. W. 1055.

[b] (Neb.; 1895.)

Where it is sought to set aside a verdict, for misconduct of jurors, it must appear that the misconduct was not known to the party complaining, or his counsel, during the progress of the trial.—*Peterson v. Skjelver* (Neb.) 62 N. W. 43, 43 Neb. 663.

[c] (Neb.; 1895.)

That the misconduct of jurors in making notes of testimony, and taking them to their room, may be available on a motion for a new trial, it must be shown that the complaining party had no knowledge of such misconduct before the verdict was rendered.—*Watson v. Roode*, 61 N. W. 625, 43 Neb. 348.

§ 23. Communication between juror and counsel.**[a] (Neb.; 1895.)**

An unauthorized communication between counsel and a juror is presumed to be prejudicial.—*Edney v. Baum* (Neb.) 62 N. W. 461, 44 Neb. 294.

[b] (Wis.; 1895.)

The fact that plaintiff's attorney and one of the jurors were together a short time during the trial is not ground for reversal, the circumstance being satisfactorily explained by affidavits presented to the trial court.—*Delaney v. Hartwig*, 64 N. W. 1035, 91 Wis. 412.

3. MISCONDUCT OF PARTIES OR COUNSEL.**§ 24. Misconduct of party.****(Iowa; 1895.)**

In an action on notes alleged to have been executed in Germany, January 1, 1884, before defendant came to America, defendant secured a verdict by the testimony of himself and wife that they were married in Iowa in 1883, thus making it appear that he had emigrated before the execution of the notes. *Held*, that it was within the court's discretion to grant a new trial for misconduct of the prevailing party, under Code, § 2837, the record of the county in which defendants were married and other testimony tending to show that their marriage took place in October, 1884.—*Clesle v. Frerichs* (Iowa) 63 N. W. 581.

§ 25. Misconduct of counsel.**[a] (Minn.; 1895.)**

A new trial is granted for the misconduct of the attorney of the prevailing party in offering prejudicial, incompetent evidence, and in persisting in discussing the same in his argument to the jury, though his offer was ruled out, and in still persisting in so discussing it notwithstanding the ruling of the court that he should not do so.—*Belyea v. Minneapolis, St. P. & S. M. Ry. Co.* (Minn.) 63 N. W. 627, 61 Minn. 224.

[b] (Neb.; 1895.)

A dismissed case was reinstated without notice to defendant's counsel being given until the day of trial, upon receipt of which he telegraphed that the case should be continued. *Held*, that it was misconduct, entitling defendant to a new trial, for plaintiff's counsel to press the case to trial.—*Chicago, St. P., M. & O. Ry. Co. v. Deaver* (Neb.) 63 N. W. 790, 45 Neb. 307.

4. OBJECTIONS TO VERDICT AND FINDINGS.**§ 26. In general.****[a] (Iowa; 1896.)**

A conflict between a special finding and a general verdict is not ground for a new trial.—*Moffitt v. Albert* (Iowa) 66 N. W. 162.

[b] (Minn.; 1895.)

Where, in an action for land on the ground of adverse possession, on evidence requiring a finding that defendant has possession and an easement in a part of the tract, and plaintiff has possession of the other part, a finding is made that defendant is in possession of the whole tract, and that plaintiff, being without title or possession, cannot maintain his action, if the exact part each party is in possession of cannot be determined without a new finding by the appellate court, a new trial must be granted.—*Great Northern Ry. Co. v. City of St. Paul* (Minn.) 63 N. W. 240.

[c] (Neb.; 1897.)

A judgment is contrary to law, within Code Civ. Proc. § 314, relating to allowances of new trial when the findings are not responsive to the issues made by the pleading.—*Wilson v. City Nat. Bank* (Neb.) 70 N. W. 501.

§ 27. Sufficiency of evidence.**[a] (Mich.; 1896.)**

It is not error to overrule a motion for a new trial, though the trial court has said that it might, on the evidence, have made a different finding.—*Robde v. Biggs* (Mich.) 66 N. W. 331.

[b] (Minn.; 1896.)

When there is a fair conflict in the evidence on an issue of damages in an action for conversion, it is not an abuse of discretion to grant a new trial. *Hicks v. Stone* (1898) 13 Minn. 434 (Gil. 398), followed. *Nelson v. Village of West Duluth* (1893) 57 N. W. 149, 55 Minn. 497, overruled.—*State v. Sherlin-Carpenter Co.*, 68 N. W. 973.

§ 28. Inadequate or excessive damages.**[a] (Mich.; 1896.)**

The trial court has discretionary power to grant, of its own motion, a new trial, in a personal injury case, on the ground that the verdict was inadequate.—*Ft. Wayne & B. I. Ry. Co. v. Donovan* (Mich.) 68 N. W. 115.

[b] (Minn.; 1896.)

To warrant the grant of a new trial in an action of tort, on the ground of excessiveness of the verdict, it must appear that the verdict was given under the influence of passion or prejudice.—*Meeks v. City of St. Paul* (Minn.) 66 N. W. 966, 64 Minn. 220.

[c] (Neb.; 1895.)

A verdict will not be set aside for the inadequacy of the damages awarded, though on one issue they would be inadequate, where it may have been based on other issues, calling for a smaller recovery.—*Edney v. Baum* (Neb.) 62 N. W. 461, 44 Neb. 294.

[d] (Wis.; 1896.)

In tort, where there is no fixed rule as to damages, the court is not allowed to set aside the verdict on the ground that the damages were excessive, unless it appears that the jury was misled by passion, prejudice, or ignorance.—*Donovan v. Chicago & N. W. Ry. Co.* (Wis.) 67 N. W. 721, 93 Wis. 373.

5. SURPRISE, ACCIDENT, INADVERTENCE, AND MISTAKE.**§ 29. Surprise.****[a] (Minn.; 1895.)**

Where witness for defendant testified as to matters within defendant's knowledge, con-

trary to his previous statements, to defendant's surprise, but defendant did not testify as to those matters, a new trial on the ground of surprise was properly refused.—*Adamant Manuf'g Co. v. Pete* (Minn.) 63 N. W. 1027.

61 Minn. 464.

[b] (Minn.; 1896.)

It appeared that there had been five trials of the case, in three of which the jury disagreed; that plaintiff had a verdict but once; that the last verdict was for defendant; and that, excluding all consideration of the testimony of a certain witness, the preponderance of the evidence was in defendant's favor. *Held*, that the discretion of the trial court in refusing a new trial on the ground of surprise, in that said witness appeared for the first time at the fifth trial and testified for defendant as an eyewitness of the accident out of which the alleged cause of action grew, would not be disturbed.—*Hull v. Minneapolis St. Ry. Co.* (Minn.) 67 N. W. 218.

64 Minn. 402.

[c] (Minn.; 1897.)

A refusal of a new trial on the ground of surprise, because a witness for plaintiff testified at the trial contrary to plaintiff's expectation, and thereafter, in support of a motion for a new trial, made an affidavit contradicting such testimony on a material point, will not be disturbed.—*Bristol v. Schulz* (Minn.) 70 N. W. 872.

[d] (S. D.; 1896.)

On a trial of the right of ownership of property levied upon, the creditor called the debtor, who testified that the property belonged to plaintiff. The creditor then applied for a continuance on the ground of surprise, which was denied, and a judgment was entered for plaintiff, time being given to prepare affidavits in support of the application. *Held*, that the subsequent grant of a new trial, on the ground that it appeared by the affidavits that the debtor had previously stated to the creditor, under oath, that he owned the property at the time of the levy, would not be disturbed.—*C. Gotzian & Co. v. McCollum* (S. D.) 65 N. W. 1068.

§ 30. Failure to discover defects in return of attachment.

(Minn.; 1895.)

The attachment of logs on which defendant in replevin relied being invalid for failure of the return of the writ to show that a copy of the writ was filed in the office of the surveyor general, judgment was rendered for plaintiff. Several months after, defendant moved for a new trial, alleging that he had just discovered that the sheriff's return was incorrect, and that a certified copy of the writ was in fact filed in the surveyor general's office. *Held* that, in the absence of excuse for his failure sooner to discover the omission in the return, the motion was properly denied.—*Scott & Holston Lumber Co. v. Sharvey* (Minn.) 64 N. W. 1132.

62 Minn. 528.

§ 31. Absence of witness or evidence.

(Neb.; 1896.)

A litigant whose witnesses were absent when the case was called for trial, but who made no objection to an immediate trial on that account, could not, on a motion for new trial, complain that he was prejudiced because the cause was not continued.—*Kreamer v. Irwin* 65 N. W. 885, 46 Neb. 827.

§ 32. Failure to procure counsel—Unavoidable casualty or misfortune.

(Iowa; 1894.)

Where one of several defendants agreed to attend to the defense of the action, and retained an attorney to do so, and such attorney, by reason of his own and his wife's illness, was unable to look after the case, and so informed defendant, but defendant understood that said

attorney would engage another attorney, who was already connected with the case, to prepare the defense, and therefore rested in the matter, the court did not abuse its discretion in settling aside a default and granting a new trial, under Code, § 3151, par. 7, "for unavoidable casualty or misfortune" preventing the parties from defending.—*White v. Gray* (Iowa) 61 N. W. 173. 92 Iowa, 525.

6. NEWLY-DISCOVERED EVIDENCE.

Discretion of court, see "Appeal," § 206.

§ 33. In general.

[a] (Iowa; 1895.)

On a motion by plaintiff for a new trial for newly-discovered evidence, in an action for injuries to a boy, brought by his father as next friend, it appeared that the father had sued in his own name for the same tort; that the issue in each case was the same; that the father managed both cases; that the latter case was tried immediately after the former; that a brother of plaintiff was a witness in the latter case, but not in the former; that he named a certain boy who witnessed the accident; that, after all the other witnesses for plaintiff were examined, a delay was granted to enable plaintiff to get such boy; that, after plaintiff rested in the former case, he was permitted to call as a witness a boy who lived near by, and had been in court during the entire trial; that the witness whose testimony it was claimed was newly-discovered gave an affidavit as to what he knew of the accident; that a counter affidavit was filed showing that he had made contradictory statements; and that his evidence would contradict all of plaintiff's other witnesses as to the manner of the accident. *Held*, that a denial of the motion was within the court's discretion.—*Searey v. Martin-Woods Co.* (Iowa) 61 N. W. 934.

93 Iowa, 420.

[b] (Iowa; 1895.)

There is no abuse of discretion in refusing a new trial for newly-discovered evidence, where it was of doubtful relevancy, in view of the evidence submitted on the trial.—*Moore v. Davenport & R. I. Ry. Co.* (Iowa) 62 N. W. 679.

[c] (Iowa; 1896.)

After judgment for plaintiff in an action for personal injuries, defendant moved for a new trial on newly-discovered evidence that the day before the injury for which plaintiff sued "she fell downstairs at home, from the first steps to the bottom." The height of the stairs was not shown, or that plaintiff made any complaint, or suffered any pain, or manifested any injury before the accident in controversy. *Held*, that the evidence was not material.—*Lorig v. City of Davenport* (Iowa) 68 N. W. 717.

[d] (Minn.; 1895.)

A new trial of an action against a city could not be granted for newly-discovered evidence consisting of a published resolution of the city council.—*Walsh v. City of St. Paul* (Minn.) 64 N. W. 147, 62 Minn. 145; *Galvin v. Same*, *Id.*

[e] (Minn.; 1896.)

A motion for a new trial will not be granted, on the ground of newly-discovered evidence, where such evidence is conflicting or cumulative, or where no facts are shown why it could not have been discovered before the trial by reasonable diligence.—*Meeks v. City of St. Paul* (Minn.) 66 N. W. 966.

64 Minn. 220.

§ 34. Application and affidavits.

[a] (Mich.; 1897.)

To warrant a new trial on the ground of newly-discovered evidence, the applicant must show that the evidence itself, and not merely its materiality, is newly discovered, that it is

not cumulative, that it will render a different result probable on retrial, and that his failure to produce it was not due to want of reasonable diligence.—*Canfield v. City of Jackson* (Mich.) 70 N. W. 444.

[b] (Minn.; 1896.)

It is not error to refuse a new trial where the affidavit merely alleges the discovery, soon after the judgment, of witnesses who will testify to certain material facts, and that affiant, before the trial, had "exercised the greatest diligence" in searching for such evidence; the time and manner of the discovery of such witnesses not being stated.—*Bradley v. Norris* (Minn.) 69 N. W. 624.

[c] (Wis.; 1896.)

A new trial for newly-discovered evidence is properly denied where the petition fails to show any adequate excuse for not having the witness present at the trial.—*Lewis v. Newton* (Wis.) 67 N. W. 724.

93 Wis. 405.

§ 35. Cumulative and impeaching evidence.

[a] (Iowa; 1895.)

A new trial will not be granted for newly-discovered evidence which is merely cumulative.—*Eaton v. Crips* (Iowa) 62 N. W. 687.

[b] (Iowa; 1895.)

A new trial on the ground of surprise and newly-discovered evidence is properly denied, where the evidence relied on is cumulative.—*Names v. Dwelling-House Ins. Co. of Boston* (Iowa) 64 N. W. 628.

[c] (Iowa; 1896.)

Where each of the affidavits in support of a motion for new trial for newly-discovered evidence describes a different transaction from that testified to by witnesses on the trial, such evidence is not cumulative.—*Means v. Yeager* (Iowa) 65 N. W. 993.

[d] (Mich.; 1895.)

The denial of a motion for a new trial on the ground of newly-discovered evidence which appears to be principally cumulative is no ground for reversal.—*White v. Peabody* (Mich.) 64 N. W. 41.

[e] (Minn.; 1895.)

Where the newly-discovered evidence on which was based a motion for a new trial was merely cumulative, the motion was properly denied.—*Adamant Manufg Co. v. Pete* (Minn.) 63 N. W. 1027.

61 Minn. 464.

[f] (Minn.; 1896.)

Cumulative evidence is additional evidence of the same kind and to the same point as that given on the first trial, but evidence is not cumulative if it relate to distinct and independent facts of a different character, though it tend to establish the same claim.—*Layman v. Minneapolis St. Ry. Co.* (Minn.) 69 N. W. 329.

§ 36. Diligence of applicant.

[a] (Mich.; 1896.)

A claim was presented against a decedent's estate, based on a written agreement which a witness testified was intended as an agreement of trust. On appeal to the circuit court the claimant attempted to enforce it as an absolute sale. *Held* error to refuse a motion for a new trial because of newly-discovered evidence, based on the affidavit of the attorney who drew the instrument that it was intended as a trust agreement, because defendant had not used diligence in looking up the evidence, since he had no reason to expect the claim to be based on a different theory in the circuit court.—*Raub v. Nishett* (Mich.) 69 N. W. 77.

[b] (Minn.; 1894.)

Where a party, in June, knew of alleged newly-discovered evidence, but failed to move for a new trial because thereof until December, he is guilty of such laches as should bar the

motion.—*Lathrop v. Schutte* (Minn.) 61 N. W. 24.

59 Minn. 234.

[c] (Minn.; 1896.)

There was no error in denying a new trial on the ground of newly-discovered evidence which it was claimed would be given by a witness with whom the moving party was acquainted before the trial, and who was known to have been on the train which caused the injuries on which the action was based, at the time of the accident.—*Wherry v. Duluth, M. & N. Ry. Co.* (Minn.) 67 N. W. 223.

64 Minn. 415.

[d] (S. D.; 1895.)

A new trial because of newly-discovered evidence will not be granted where diligence to procure the evidence on the first trial is not shown, nor where the new evidence is merely cumulative.—*Demmon v. Mullen* (S. D.) 62 N. W. 380.

6 S. D. 564.

IV. STATUTORY NEW TRIAL AS OF RIGHT.

§ 37. Actions involving title to land.

(Minn.; 1895.)

Where, in an action involving the title to real estate, recovery of possession is not sought by either party, Gen. St. 1878, c. 75, § 11 (Gen. St. 1894, § 5815), giving a second trial as a matter of right, does not apply.—*Schons v. Village of Kellogg* (Minn.) 63 N. W. 257.

61 Minn. 128.

NEXT FRIEND.

See "Infancy," § 6.

Action by, necessity of security for costs, see "Costs," § 19.

NEXT OF KIN.

See "Descent and Distribution," §§ 1-3.

NOMINAL DAMAGES.

See "Damages," § 2.

NOMINATION.

To office, see "Elections and Voters," §§ 5-9.

NON COMPOS MENTIS.

See "Insanity."

NON OBSTANTE VEREDICTO.

See "Judgment," § 27.

NONRESIDENCE.

Effect of running of limitations, see "Limitation of Actions," § 22.

— on right to divorce, see "Divorce," § 4.

Insolvency of nonresidents doing business in state, see "Insolvency," § 3.

Issuance of replevin writ against nonresidents, see "Replevin," § 9.

Necessity of nonresidents giving security for costs, see "Costs," § 18.

Notice to nonresidents of proceedings to establish drain, see "Drainage," § 5.
 Place of taxing debts due nonresidents, see "Taxation," § 18.
 Qualification of attorney appointed to assist prosecuting attorney, see "Criminal Law," § 56.
 Right to attachment against nonresidents, see "Attachment," § 4.

NONSUIT.

See "Practice in Civil Cases," §§ 4-10.

NONSUPPORT.

Ground for divorce, see "Divorce," § 11.

NOTARY PUBLIC.

Certificate to affidavit, see "Affidavit," § 1.
 Certificate to deposition, see "Deposition," § 3.

NOTES.

See "Negotiable Instruments."

NOTICE.

See, also, "Practice in Civil Cases," §§ 11, 12;
 "Writs and Notice of Suit."

Given before obtaining tax deed, see "Taxation," §§ 94, 95.

Of acceptance of guaranty, see "Guaranty," § 5.
 Of adjoining landowner of intention to make excavation, see "Adjoining Landowners," § 1.
 Of appeal, see "Appeal," §§ 53-60.

— from justice, see "Appeal," § 162.
 — in criminal cases, see "Criminal Law," § 203.

Of application for accounting by executor, see "Executors and Administrators," § 31.
 — for security for costs, see "Costs," § 16.
 — for tax deed, see "Taxation," § 106.

Of assessment of taxes, see "Taxation," § 26.
 — under mutual policy, see "Insurance," §§ 173-175.

Of assignment of mortgage, see "Mortgages," §§ 31, 32.

Of cancellation of policy, see "Insurance," § 25.
 Of change of boundaries of school district, see "Schools and School Districts," § 4.

Of claim for damages from fire, see "Railroad Companies," § 73.

— to property seized, see "Execution," § 16.
 Of contest of land entry, see "Public Lands," § 17.

Of default in conditions of mortgage, see "Mortgages," § 32.

Of defects in bridges, see "Bridges," § 5.
 — in goods sold, see "Sale," §§ 35, 36.
 — in streets or sidewalks, see "Municipal Corporations," §§ 86-88.

Of dissolution of firm, see "Partnership," § 22.
 Of drainage proceedings, see "Drainage," §§ 4, 5.

Of election, see "Elections and Voters," § 3.
 — contest, see "Elections and Voters," § 28.
 — to determine amount of license, see "Intoxicating Liquors," § 12.

— to fix or change location of county seat, see "Counties," § 14.

Of equities, rights of bona fide purchasers, see "Negotiable Instruments," § 54; "Sale," §§ 89-92; "Vendor and Purchaser," § 38.

Of execution sale, see "Execution," § 21.

Of foreclosure by advertisement, see "Mortgages," § 84.

Of forfeiture of contract to convey, see "Vendor and Purchaser," § 15.

Of highway proceedings, see "Highways," § 8.

Of levy, see "Attachment," § 26.

Of lien claim, see "Mechanics' Liens," §§ 22-26.
 — of attorney, see "Attorney and Client," § 19.

Of lis pendens, see "Lis Pendens."

Of local option election, see "Intoxicating Liquors," § 4.

Of loss or injury to live stock in transit, see "Carriers," § 18.

— under policy, see "Insurance," §§ 72-75.

Of maturity of premium, see "Insurance," § 46.

Of meeting of county board, see "Counties," § 26.

Of motion, see "Practice in Civil Cases," § 16.
 — to discharge attachment, see "Attachment," § 51.

Of nonpayment of note, see "Negotiable Instruments," §§ 64, 65.

Of proposal for public improvements, see "Municipal Corporations," § 119.

Of relation of principal and surety, see "Principal and Surety," § 7.

Of removal from office, see "Office and Officer," § 27.

Of suit, see "Writs and Notice of Suits."

Of taking of deposition, see "Depositions," § 1.

Of taxation of costs, see "Costs," § 23.

Of termination of lease, see "Landlord and Tenant," § 22.

Of title to land held adversely, see "Adverse Possession," § 6.

To agent, binding effect on principal, see "Principal and Agent," § 27.

To claimant of goods attached, see "Attachment," § 45.

To owner, taking property without due process of law, see "Constitutional Law," § 42.

To quit, see "Forcible Entry and Detainer," § 3; "Landlord and Tenant," § 61.

[a] (Iowa; 1895.)

A statement by the owner of certain corn to the sheriff, who was about to levy execution thereon, that such property was mortgaged, was not such actual notice as will enable the mortgagee to recover from the purchaser, where, by mistake, the mortgage did not in fact cover the corn in controversy.—*King v. Howell* (Iowa) 62 N. W. 738.

[b] (Minn.; 1894.)

Public records do not cease to be constructive notice when they are burned.—*Thomas v. Hanson* (Minn.) 61 N. W. 135.
 59 Minn. 274.

NOVATION.

Release of original debtor by oral agreement, see "Frauds, Statute of," § 10.

Rights and obligations of old firm, see "Partnership," § 47.

§ 1. What constitutes.

[a] (Mich.; 1895.)

Where defendants sublet a contract to one who assigned to them moneys due the laborers, which defendants agreed to pay, they are liable where the subcontractors abandoned the work, and gave time checks to the laborers.—*Gleason v. Fitzgerald* (Mich.) 63 N. W. 512.
 105 Mich. 516.

[b] (Mich.; 1896.)

Defendants were mortgagees of chattels, which were sold by the mortgagor to another with defendants' consent, and a bill of sale was executed to defendants by the mortgagor in an amount exceeding the sum due on the mortgage, and the purchaser was to pay for the same in monthly installments to defendants. There was evidence of an arrangement between defendants, the mortgagor, and plaintiffs, creditors of the mortgagor, whereby defendants were to assume

the debt due from the mortgagor to plaintiffs, and that plaintiffs looked to defendants for payment. After making two payments, the purchaser surrendered the property to defendants. *Held*, that it was proper to submit to the jury the question as to whether the arrangement between the parties amounted to a novation.—*Brown v. Neidhold* (Mich.) 66 N. W. 349.

[c] (Neb.: 1896.)

Where a state treasurer accepted from his predecessor, in payment of state funds, certificates of deposit issued by a bank in which the funds had been deposited for safe-keeping, and thereupon redeposited the certificates under the depository law in the same bank which issued them, the subsequent cancellation of the certificates, and the state's acceptance of a credit on open account for their amount, operated as a novation, making the bank the state's debtor, and releasing the treasurer from liability.—*State v. Hill* (Neb.) 66 N. W. 541.

47 Neb. 456.

§ 2. Requisites.

[a] (Mich.: 1896.)

A novation cannot be created without consent of the debtor.—*Dean v. Ellis* (Mich.) 65 N. W. 971.

[b] (Neb.: 1897.)

There can be no novation of a debt without an unqualified discharge of the original debtor.—*Western White Bronze Co. v. Portrey* (Neb.) 70 N. W. 383.

§ 3. Sufficiency of evidence.

(Neb.: 1895.)

Where the vendee of an employer retained a servant with whom the vendor had a contract for services, and paid him at the contract rate for several months, it was sufficient evidence of novation to charge the vendee with the obligations of the contract.—*Culbertson Irrigating & Water-Power Co. v. Wildman* (Neb.) 63 N. W. 947.

45 Neb. 663.

NUDUM PACTUM.

See "Contracts," § 12.

NUISANCE.

- I. PUBLIC NUISANCES, §§ 1, 2.
- II. PRIVATE AND MIXED NUISANCES, §§ 3-6.
- III. CIVIL REMEDIES, §§ 7-11.

I. PUBLIC NUISANCES.

§ 1. What constitutes.

[a] (Neb.: 1895.)

A gambling house is a public nuisance.—*Hill v. Pierson* (Neb.) 63 N. W. 835.

45 Neb. 503.

[b] (Wis.: 1896.)

It is not, *prima facie*, a nuisance to cast garbage in one of the Great Lakes 15 miles from shore.—*Kuehn v. City of Milwaukee* (Wis.) 65 N. W. 1030.

92 Wis. 263.

§ 2. Rights of individuals.

[a] (Minn.: 1895.)

A private individual cannot sue to enjoin an obstruction or other nuisance in a public street unless he suffers damages peculiar to himself, his property, or his business, other than that suffered in common with the public.—*Gundlach v. Hamm* (Minn.) 64 N. W. 50.

62 Minn. 42.

[b] (Neb.: 1895.)

The maintenance of a gambling house by a lessee will not be enjoined at the instance of the lessor, in the absence of a showing of some special injury suffered by the latter aside from that suffered in common with the public.—*Hill v. Pierson* (Neb.) 63 N. W. 835.

45 Neb. 503.

II. PRIVATE AND MIXED NUISANCES.

§ 3. Liability as between adjoining owners.

[a] (Mich.: 1895.)

The operation of a machine and blacksmith shop devoted to boat repairing, in a neighborhood otherwise given up to costly residences, established after the character of the locality as a residence district had been determined, and in the face of protests, will be enjoined.—*McMoran v. Fitzgerald* (Mich.) 64 N. W. 369.

[b] (Mich.: 1895.)

A shed used for coal and wood removed by a lot owner to the portion of his lot adjoining a tenement building of his adjoining lot owner, though placed there maliciously, cannot be considered a nuisance. *Flaherty v. Moran* (1890) 45 N. W. 381, 81 Mich. 52, distinguished.—*Kuzniak v. Kozminski*, 65 N. W. 275.

[c] (Mich.: 1896.)

Injunction will lie to restrain an adjoining property owner from maintaining a fence 11 feet high on the division line, which shuts off the circulation of air from plaintiff's building, thereby rendering it damp and unhealthy.—*Peck v. Roe* (Mich.) 67 N. W. 1080.

[d] (Minn.: 1895.)

Where defendant, for his own use, stored on his own land petroleum, which escaped on the premises of his neighbors, he is liable for the damages without proof of negligence on his part. *Cahill v. Eastman* (1871) 18 Minn. 324 (Gil. 292), followed.—*Berger v. Minneapolis Gaslight Co.*, 62 N. W. 336, 60 Minn. 296; *Lindberg v. Same, Id.*; *Hanson v. Same, Id.*; *Johnson v. Same, Id.*; *Boive v. Same, Id.*; *Lindquist v. Same, Id.*; *Samuelson v. Same, Id.*; *Anderson v. Same, Id.*; *Olson v. Same, Id.*; *Jonson v. Same, Id.*; *Siller v. Same, Id.*; *Jepson v. Same, Id.*

§ 4. Markets established by city.

[a] (Iowa: 1895.)

A market established at an appropriate place by a city council, under authority of Code, § 456, is not rendered a nuisance, per se, by the fact that stock confined therein corrupt the air, to the injury of adjacent residents.—*Miller v. City of Webster City* (Iowa) 62 N. W. 648.

[b] (Iowa: 1895.)

In an action to enjoin the use of a square for a market and weighing place, as being a nuisance, it is immaterial that the ordinance establishing the place is unreasonable, in requiring the entire weighing of the city to be done on one set of scales.—*Miller v. City of Webster City* (Iowa) 62 N. W. 648.

§ 5. Sanction of city.

(Iowa: 1895.)

The fact that a company was authorized by the city council, under legislative authority, to erect and operate waterworks, does not relieve it from liability for discharging smoke and soot from its smokestack on an adjacent residence.—*Churchill v. Burlington Water Co.* (Iowa) 62 N. W. 646.

§ 6. Prescriptive right to maintain.

(Minn.: 1896.)

To constitute an adverse user sufficient to sustain a right, by prescription, to maintain a nuisance, the nuisance must have been continued in substantially the same way, and with equally injurious results, for the entire

statutory period.—*Matthews v. Stillwater Gas & Electric Light Co.* (Minn.) 65 N. W. 947.
63 Minn. 493.

III. CIVIL REMEDIES.

Abatement by city, see "Municipal Corporations," § 13.

— by health officer, see "Health," § 4.

Injunction against maintenance of liquor nuisance, see "Intoxicating Liquors," §§ 46, 47.

§ 7. Abatement.

[a] (Minn.; 1896.)

In an action by a wife to abate a nuisance caused by the manner in which defendant handled oil in the vicinity of plaintiff's dwelling, and to recover damages, it was proper to permit plaintiff to testify, for the purpose of showing the use to which she was putting her property, that her family consisted of her husband and six children.—*Friburk v. Standard Oil Co.* (Minn.) 68 N. W. 1090.

[b] (Minn.; 1896.)

In an action to abate an alleged nuisance caused by the manner in which defendant handled coal oil in the vicinity of plaintiff's dwelling, and to recover damages, it was error to exclude evidence as to whether plaintiff had complained of the alleged nuisance to defendant.—*Friburk v. Standard Oil Co.* (Minn.) 68 N. W. 1090.

[c] (Wis.; 1896.)

A complaint alleged that plaintiffs owned certain lots; that they platted a street on them; that the plat had been recorded, but the street had not been formally accepted by the village; that defendants maintained a house partly on a lot owned by them, but which encroached 11 feet on such street; that defendants threatened to also build a sidewalk on said street next to such house; and that such house and sidewalk were obstructions to the street, and obstructed the view along such street, and thereby damaged plaintiffs' property, etc. *Held*, that the complaint stated a cause of action for the abatement of a private nuisance, and this though ejectment would lie, since ejectment would not afford an adequate remedy.—*Ryan v. Schwartz* (Wis.) 69 N. W. 178.

§ 8. Injunction.

[a] (Iowa; 1895.)

The fact that excrement is deposited in the street by horses tied to hitching posts erected by a city is not a ground for an injunction against the maintenance of the posts.—*Miller v. City of Webster City* (Iowa) 62 N. W. 648.

[b] (Iowa; 1895.)

Where a rendering establishment located within a city, while operated so as to give the least possible offense, so contaminates the atmosphere as to affect the comfort and health of the occupants of houses in its vicinity, and there

is nothing in the character of the business which requires that it shall be carried on in its present location, the owners and occupants of the houses may enjoin its further maintenance, under Code, § 3331 providing that whatever is injurious to health or offensive to the senses is a nuisance which may be enjoined by any person injured thereby though the general public is affected in the same manner as the occupants.—*Millhiser v. Willard* (Iowa) 65 N. W. 325.

§ 9. Action for damages.

(Minn.; 1895.)

A personal action cannot be maintained for acts constituting a public nuisance.—*Long v. City of Minneapolis* (Minn.) 63 N. W. 174.
61 Minn. 46.

§ 10. Measure of damages.

[a] (Iowa; 1895.)

In an action for discharging smoke and soot on premises occupied as a residence, plaintiff may recover for the deprivation of the comfortable enjoyment of the property, and is not confined to the depreciation in its rental value.—*Churchill v. Burlington Water Co.* (Iowa) 62 N. W. 616.

[b] (Iowa; 1895.)

Where the discharge of smoke and soot from a smokestack onto an adjacent residence was abated before the trial, damages cannot be recovered as for a permanent injury.—*Voote v. Burlington Water Co.* (Iowa) 62 N. W. 648.

[c] (Minn.; 1895.)

Where a nuisance is created on premises occupied by plaintiffs as their homes, by the escape of petroleum stored on adjoining premises, they may recover for any inconvenience and injury to their health or property caused by the nuisance, without fault on their part.—*Berger v. Minneapolis Gaslight Co.* (Minn.) 62 N. W. 336, 60 Minn. 296; *Lindberg v. Same, Id.*; *Hanson v. Same, Id.*; *Johnson v. Same, Id.*; *Boive v. Same, Id.*; *Lindquist v. Same, Id.*; *Samuelson v. Same, Id.*; *Anderson v. Same, Id.*; *Olson v. Same, Id.*; *Jouson v. Same, Id.*; *Siller v. Same, Id.*; *Jepson v. Same, Id.*

§ 11. Excessive damages.

(Minn.; 1896.)

A verdict for \$300 in an action to recover damages for a nuisance caused by the manner in which defendant handled coal oil in the vicinity of plaintiff's dwelling was not supported by evidence that when oil was spilled by defendant, and the wind blew towards plaintiff's house, there was a strong odor of oil, which sometimes compelled the closing of windows, and that the nuisance continued during two summers.—*Friburk v. Standard Oil Co.* (Minn.) 68 N. W. 1090.

NUNC PRO TUNC.

Entry of judgment, see "Judgment," § 33.

O.

OATH.

See "Affidavit."

OBJECTIONS.

First raised on appeal, see "Appeal," §§ 193-201.
 — on appeal from justice, see "Appeal," §§ 172-174.
 — on appeal in criminal cases, see "Criminal Law," § 227.
 Reached by demurrer, see "Pleading," §§ 19-21.
 Relating to bill of exceptions, see "Appeal," §§ 131, 132.
 To appraisement, see "Judicial Sales," § 2.
 To argument of counsel, waiver, see "Trial," § 48.
 To certificates of nomination, see "Elections and Voters," § 9.
 To depositions, see "Deposition," § 9.
 To evidence, see "Trial," §§ 21-35.
 — in criminal cases, see "Criminal Law," §§ 73-78.
 To indictment, see "Criminal Law," §§ 22-24.
 To instructions, see "Criminal Law," § 150; "Trial," §§ 81-87.
 To jurisdiction, see "Abatement and Revival," § 3.
 To pleading, waiver, see "Pleading," §§ 86-100.
 To sureties on appeal bonds, see "Appeal," § 66.
 Waiver by action or nonaction on appeal, see "Appeal," § 261.
 — by appearance, see "Appearance," § 5.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," §§ 29-31.

OBSCENE PUBLICATIONS.

(Mich.: 1895.)

One cannot be convicted, under an information charging her with having procured a certain obscene picture of herself for the purpose of exhibition, loan, and circulation, upon evidence tending to show merely that she sat for such a negative, there being nothing to show her purpose in doing so.—*People v. Ketchum* (Mich.) 61 N. W. 776.
 103 Mich. 443.

OBSTRUCTING JUSTICE.

[a] (Iowa: 1895.)

On a trial for resisting an officer, evidence that defendant, when the arrest was attempted, drew a revolver, and said that he would shoot the officer before he would go with him, sufficiently shows actual resistance.—*State v. Seery* (Iowa) 64 N. W. 631.

[b] (Iowa: 1895.)

On trial for resisting an officer, where it appeared that defendant, when an attempt was made to arrest him, drew a revolver, and said that he would shoot the officer before he would go, a fine of \$500 was not excessive, the statutory maximum being \$1,000.—*State v. Seery* (Iowa) 64 N. W. 631.

[c] (Mich.: 1897.)

It is an indictable offense at common law for any person to prevent the mayor of a city from examining the books of the fire commis-

sioners, as he is authorized to do by its charter.—*Tryon v. Pingree* (Mich.) 70 N. W. 905.

OBSTRUCTIONS.

Of highway, see "Highways," §§ 26-32.
 Of light and air, see "Adjoining Landowners," § 3.
 Of water course, see "Waters and Water Courses," §§ 5, 6.

OBTAINING GOODS UNDER FALSE PRETENSES.

See "False Pretenses."

OCCUPATION.

See "Use and Occupation."

OCCUPATION TAXES.

Power of city, see "Municipal Corporations," § 29.

OFFER.

And acceptance of proposition, see "Contracts," § 1; "Sale," §§ 1, 2; "Vendor and Purchaser," § 2.
 Of evidence, see "Criminal Law," § 64; "Trial," §§ 9, 10.
 To dedicate, see "Dedication," § 5.

OFFICE AND OFFICER.

- I. APPOINTMENT, ELECTION, AND TENURE, §§ 1-5.
- II. ELIGIBILITY AND QUALIFICATION—WHEN TITLE TO OFFICE VESTS, §§ 6-8.
- III. RIGHTS PENDING CONTEST, § 9.
- IV. PROCEEDINGS BY BOARDS, §§ 10, 11.
- V. COMPENSATION, §§ 12-15.
- VI. DE FACTO OFFICERS, §§ 16, 17.
- VII. DUTIES AND LIABILITIES—SUIT ON BOND, §§ 18-25.
- VIII. SUSPENSION AND REMOVAL, §§ 26-29.
- IX. DETERMINATION OF TITLE—RECOVERING POSSESSION OF OFFICIAL PAPERS, §§ 30, 31.

See, also, "Bribery"; "Clerk of Court"; "Coroners"; "District and Prosecuting Attorneys"; "Jail and Jailer"; "Judge"; "Justices of the Peace"; "Receivers"; "Register of Deeds"; "Sheriffs and Constables"; "States and State Officers."

Contract to influence official action, public policy, see "Contracts," § 22.
 Embezzlement by public officers, see "Embezzlement," § 5.
 Garnishment of public officers, see "Garnishment," § 5.
 Health officers, see "Health," §§ 1, 2.
 Injunction against public officers, see "Injunction," §§ 14, 15.

Judicial notice of official acts, see "Evidence," § 2.
 Jurisdiction of justice over action for misconduct of public officer, see "Justices of the Peace," § 5.
 Libelous charges of official misconduct, see "Libel and Slander," § 5.
 Mandamus to state officers, see "Mandamus," § 11.
 — to try title to office, see "Mandamus," §§ 5, 6.
 Nominations to office, see "Elections and Voters," §§ 5-9.
 Of bank, see "Banks and Banking," §§ 21-27.
 Of city, see "Municipal Corporations," §§ 38-52.
 Of corporation, see "Corporations," §§ 12-23.
 Of county, see "Counties," §§ 17-25.
 Of election, see "Elections and Voters," § 33.
 Of insane asylum, see "Asylums."
 Of insurance company, see "Insurance," §§ 94-103.
 Of militia company, see "Militia," § 1.
 Of penitentiary, see "Penitentiary," § 3.
 Of school district, see "Schools and School Districts," § 17.
 Of state, see "States and State Officers," §§ 3-8.
 Of town, see "Towns," § 3.
 Personal liability for costs, see "Costs," § 13.
 Power to remove, see "Constitutional Law," § 9.
 Privileged communications concerning, see "Libel and Slander," § 18.
 Road officers, see "Highways," § 25.
 Venue of actions against, see "Venue in Civil Cases," § 8.
 What officers may take acknowledgments, see "Acknowledgment," § 3.

I. APPOINTMENT, ELECTION, AND TENURE.

Removal from office, see post, § 26.

§ 1. In general.

(Neb.: 1895.)

Const. art. 10, § 4, requiring the legislature to provide for the "election" of county and township officers, does not preclude that body, when it reduces the number of a body of officers, from providing that those already elected shall cast lots to determine whose terms of office shall be discontinued.—*Van Horn v. State* 64 N. W. 365, 46 Neb. 62.

§ 2. Preference of Union soldiers.

(Minn.: 1896.)

Laws 1887, c. 149 (Gen. St. 1894, § 8041), giving preference in appointment and employment of public officers to honorably discharged Union soldiers and sailors, is constitutional.—*State v. Miller* (Minn.) 68 N. W. 732.

§ 3. Filling vacancies.

[a] (Minn.: 1896.)

The rule is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee.—*State v. O'Leary* (Minn.) 66 N. W. 264.
 64 Minn. 207.

[b] (Neb.: 1895.)

Const. art. 3, § 20, providing that all offices created by the constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind, does not preclude the legislature from providing that vacancies may result from other causes.—*State v. Lansing* (Neb.) 64 N. W. 1104, 46 Neb. 514.

161 (S. D.: 1896.)

Laws 1890, c. 6, § 1, enacted to carry into effect the provision of the constitution respecting regents of education, having failed to provide for the future appointment of regents, or for the filling of vacancies in the board, and having so fixed the terms of its members that they expire in even-numbered years, when the senate is not in session, vacancies caused by the expirations of such terms are to be filled by the governor, under the general provisions of Const. art. 4, § 8, that, "when an office shall, from any cause, become vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill such vacancy by appointment."—*State v. Sheldon* (S. D.) 67 N. W. 613.

§ 4. Tenure.

(S. D.: 1896.)

Const. art. 14, § 3, provides that "the State University * * * shall be under the control of a board of nine members appointed by the governor and confirmed by the senate, to be designated the 'Regents of Education.' They shall hold their office for six years, three retiring every second year." *Held* that, there being no provision for their holding over, the term of a regent is absolutely fixed at six years, and at its expiration, unless his successor has been appointed, the office becomes vacant.—*State v. Sheldon* (S. D.) 67 N. W. 613.

§ 5. Holding over.

[a] (Iowa; 1895.)

Where, in an action of ouster against a public officer elected to succeed himself, for illegality in election, the entire election is found to have been illegal, a verdict for the defendant is proper, under Code, § 781, providing that an officer shall hold office until his successor is elected.—*State v. Smith* (Iowa) 63 N. W. 453.

[b] (Minn.: 1896.)

The repeal of Sp. Laws 1889, c. 412, by Gen. Laws 1895, c. 382, did not create any vacancy in the office of county commissioner of Aitkin county; but those who had been previously elected under the special law continue, under Gen. St. 1894, § 657, to hold over until their successors are elected and qualified, under section 661.—*State v. Marr* (Minn.) 68 N. W. 8.

II. ELIGIBILITY AND QUALIFICATION—WHEN TITLE TO OFFICE VESTS.

§ 6. Eligibility.

(Minn.: 1895.)

Where a minor of foreign birth came to the state when nine years old, with his father, who declared his intention of becoming a citizen, and served in the United States army, and the minor, one month before coming of age, declared his intention of becoming a citizen, and was repeatedly elected to public office, but never took out naturalization papers until January, 1895, *held*, that he was eligible to the office of county auditor in November, 1894.—*State v. Streukens* (Minn.) 62 N. W. 259.
 60 Minn. 325.

§ 7. Approval and filing of bonds.

[a] (Mich.: 1896.)

Pub. Acts 1895, No. 266, declares that when a bond is, by the law of the state, or of any municipality, required to be given with surety or sureties, it may be executed by a qualified surety company, and that, where more than one surety is required, the court or officer authorized to approve the bond may approve a bond with but one surety, if such surety is a corporation qualified to act as surety or guarantor. *Held*, that the act is permissive merely, and does not require the acceptance of such bond, irrespective of whether such surety is

satisfactory to the accepting officer or not.—Schmitt v. Common Council of Village of Clinton (Mich.) 69 N. W. 153.

[b] (Mich.; 1896.)

The acceptance of a state treasurer's bond is discretionary with those charged with the duty of accepting it.—Steel v. Auditor General (Mich.) 69 N. W. 738.

[c] (Mich.; 1896.)

Pub. Acts 1895, No. 266, § 6, providing that a surety on a bond, when it is a surety company, may agree for the deposit of moneys for which such surety is responsible with a trust company, does not apply to the bond of a state treasurer.—Steel v. Auditor General (Mich.) 69 N. W. 738.

[d] (Neb.; 1895.)

Since the statute requires that official bonds of all county officers, except the commissioners and supervisors, shall be approved by the county board, and that no bond shall be filed until so approved, an officer whose bond the county board refused to approve was not a de jure officer, and hence could not recover fees of the office received by a de facto officer.—McMillin v. Richards, 64 N. W. 242, 45 Neb. 786.

[e] (Neb.; 1895.)

Comp. St. 1895, § 716, providing that if any person elected or appointed to office shall neglect to have his official bond filed within the time limited by the act "his office shall thereupon ipso facto become vacant," creates a condition precedent to the right of a person so elected or appointed to be inducted into office. Norval, C. J., and Ragan, C., dissenting.—State v. Lansing, 64 N. W. 1104, 46 Neb. 514.

[f] (Neb.; 1895.)

Comp. St. 1895, § 716, providing, if any person elected or appointed to office shall neglect to have his official bond filed within the time limited by the act, "his office shall thereupon ipso facto become vacant," is self-executing, so that, unless the bond be filed within the specified time, the vacancy can be filled without previous judicial determination of vacancy. Norval, C. J., and Ragan, C., dissenting.—State v. Lansing 64 N. W. 1104, 46 Neb. 514.

Liability on bond, see post, § 24.

§ 8. Holding two offices.

[a] (Mich.; 1896.)

A board of supervisors cannot refuse to recognize one elected as a member, because, at the time of his election, he held an office the duties of which are so conflicting with that of supervisor that one person ought not to be allowed to hold them both on the ground of public policy, since one who, while occupying one office, accepts another incompatible with the first, ipso facto vacates the first office.—Northway v. Sheridan (Mich.) 69 N. W. 82.

[b] (Mich.; 1897.)

The office of mayor of the city of Detroit is an office under the state, within Const. art. 5, § 15, providing that no person holding office under the state shall execute the office of governor.—Attorney General v. Common Council of City of Detroit (Mich.) 70 N. W. 450.

[c] (Mich.; 1897.)

As How. Ann. St. § 653, confers on the governor power to remove all city officers chosen by the electors of any city, the offices of a mayor so chosen and of governor are incompatible.—Attorney General v. Common Council of City of Detroit (Mich.) 70 N. W. 450.

[d] (Mich.; 1897.)

A mayor of a city, by accepting the office of and becoming governor, vacates the office of mayor, the offices being incompatible.—Attorney General v. Common Council of City of Detroit (Mich.) 70 N. W. 450.

[e] (Mich.; 1897.)

The fact that the mayor of a city is elected to the office of governor after a public declaration by him of an intent to continue to perform the duties of mayor is no reason why the

office of mayor should not be declared vacant in accordance with law, on his acceptance of the office of governor.—Attorney General v. Common Council of City of Detroit (Mich.) 70 N. W. 450.

III. RIGHTS PENDING CONTEST.

§ 9. Rights of appellee pending appeal.

(S. D.; 1895.)

The right of a successful party in a contest of election to perform the duties of the office, and receive the emoluments thereof, is neither stayed nor obstructed by an appeal.—Fylpaa v. Brown County (S. D.) 62 N. W. 962, 6 S. D. 634.

IV. PROCEEDINGS BY BOARDS.

§ 10. In absence of members.

(Neb.; 1895.)

Where the governor, ex officio a member of the board of fire and police commissioners created by Act 1887, as amended by Act 1895, had reasonable notice of the meetings of the board, his failure to attend did not render invalid the proceedings at such meetings of the other two members acting as the board.—State v. Bemis, 64 N. W. 348, 45 Neb. 724.

§ 11. Power of majority.

(Neb.; 1897.)

Where authority is conferred by law upon three or more persons to execute a public trust, such as the approval of the bonds of state depositors, the act of a majority is binding if all were assembled to deliberate or had notice and opportunity to be present, unless the statute expressly requires the concurrent action of all.—In re State Treasurer's Settlement (Neb.) 70 N. W. 532.

V. COMPENSATION.

§ 12. Fees and per diem allowance.

[a] (Neb.; 1895.)

Act April 3, 1891, providing that all fees of the county clerk shall be accounted for, did not deprive that officer of fees to which he had become entitled before the act went into effect.—State v. Vincent, 65 N. W. 50, 46 Neb. 408.

[b] (N. D.; 1895.)

Under Laws 1889, c. 93, § 4, entitling a member of the board of trustees of the penitentiary to a certain per diem for each day employed in attendance on a session of the board, the "attendance" includes the time actually spent in traveling by the usual route from the member's residence to and from the place where the session of the board is held.—State v. Briggs (N. D.) 63 N. W. 206, 5 N. D. 69.

§ 13. Rights of one wrongfully excluded.

(S. D.; 1895.)

The payment by the county board of the salary of one who retains a public office after it has been judicially determined that another is entitled thereto does not defeat an action against the county by de jure officer to recover a compensation allowed by law for the time he was thus excluded.—Fylpaa v. Brown County (S. D.) 62 N. W. 962, 6 S. D. 634.

§ 14. — Payment to de facto officer.

[a] (Mich.; 1895.)

Payment of salary to a de facto officer after judgment of ouster will not affect the right of the de jure officer to recover salary.—Scott v. Crump (Mich.) 64 N. W. 1.

[b] (Mich.; 1895.)

Where one candidate for city comptroller is given the office by virtue of the decision of the board of canvassers, payment of salary to him prior to a judgment of ouster in favor of the other candidate will bar recovery of salary by the latter for such time as the former occupied the office and received the salary therefor; and it makes no difference that the city had notice of contest, or that members of the city council were ex officio members of the canvassing board, there having been no fraud on their part.—*Scott v. Crump* (Mich.) 64 N. W. 1.

[c] (S. D.; 1896.)

Plaintiff was elected county assessor in 1892, and in April, 1893, took the prescribed oath; but the county board erroneously and without authority refused to approve his bond because he did not qualify, etc., on the first Monday in January preceding, or within 10 days thereafter, declared the office vacant, and appointed one L., who qualified, and made the assessment in May and June following, as provided by law. Plaintiff was an applicant for the appointment, and took no legal steps to compel the board to approve or act on his bond, and did not present the bond to the judge of the circuit court for approval, as provided by Comp. Laws, § 1376, in such cases. Held that, after L. received the compensation, plaintiff could not recover from the county a sum equal thereto, or any other sum. *Fylpaa v. Brown Co.* (1895) 62 N. W. 962, 6 S. D. 634, distinguished.—*Chandler v. Hughes County*, 67 N. W. 946.

[d] (S. D.; 1896.)

A county or municipality which has paid a salary to a de facto officer, who performed the duties of the office, under color of title, while the right to it was in litigation, cannot be held liable thereafter again to another who may thereafter establish his title to the office.—*Fuller v. Roberts County* (S. D.) 68 N. W. 308.

§ 15. Reduction.**(Mich.; 1895.)**

The reduction by a city council of the salary of an officer from \$1,200 to \$5 a year will be presumed to have been for good reasons, in the absence of a contrary showing.—*Wesch v. Common Council of City of Detroit* (Mich.) 64 N. W. 1051.

VI. DE FACTO OFFICERS.

Payment of salary to, rights of persons wrongfully excluded, see ante, § 14.

§ 16. Who are.**[a] (Iowa; 1895.)**

One who has received a written appointment by the clerk of court as deputy, and has discharged the duties of office thereunder, though his appointment has not been confirmed, and he has not given bonds, as required by Code, § 766, is a de facto officer.—*Wheeler & Wilson Manuf'g Co. v. Sterrett* (Iowa) 62 N. W. 675.

[b] (Iowa; 1897.)

The acts of school directors who were duly elected, but were sworn by a person having no authority to administer oaths, are the acts of officers de facto.—*State v. Powell* (Iowa) 70 N. W. 592.

[c] (Mich.; 1895.)

In a suit to restrain the collection of a special assessment for paving, the court will not determine whether certain persons who were appointed assessors by the council under How. Ann. St. § 2643, and discharged the duties of such officers, were officers de jure.—*Boehme v. City of Monroe* (Mich.) 64 N. W. 204.

[d] (Mich.; 1896.)

Notwithstanding How. Ann. St. § 649, providing that every office shall become vacant

on the neglect of the officer to deposit his oath of office or official bond in the manner and within the time prescribed by law, a justice of the peace is a de facto officer, though he does not file his oath of office and bond within the time stipulated by sections 767-769.—*People v. Payment* (Mich.) 67 N. W. 689.

[e] (N. D.; 1895.)

An incumbent merely holding over after the expiration of his term, is not such a de facto officer, as against a candidate who holds a proper certificate of election, and has duly qualified, as will prevent the issuance of a writ of mandamus to compel him to turn over the office.—*State v. Callahan* (N. D.) 61 N. W. 1025, 4 N. D. 481.

§ 17. Validity of acts.**[a] (Iowa; 1895.)**

An acceptance of a notice of appeal by a de facto deputy clerk of court is valid.—*Wheeler & Wilson Manuf'g Co. v. Sterrett* (Iowa) 62 N. W. 675.

[b] (S. D.; 1895.)

The acts of a de facto officer are valid in respect to the rights of third persons, but void so far as they may be of exclusive interest to himself.—*Fylpaa v. Brown County* (S. D.) 62 N. W. 962.

6 S. D. 634

VII. DUTIES AND LIABILITIES—SUIT ON BOND.**§ 18. In general.****[a] (Mich.; 1897.)**

While a county treasurer may not accept a note given directly in payment of a tax, he violates no public trust by making a loan of his private funds, and applying the loan in payment of the borrower's taxes.—*Hatch v. Reid* (Mich.) 70 N. W. 889.

[b] (S. D.; 1896.)

An officer who, without legal excuse, fails to perform a ministerial duty, is liable for the proximate results of his failure to any person to whom he owes performance of such duty.—*State v. Ruth* (S. D.) 68 N. W. 189.

[c] (S. D.; 1896.)

The commissioner of school and public lands is not liable for delay in distributing the public school income fund to the various public schools entitled thereto, where it does not appear that the schools sustained any loss by the delay.—*State v. Ruth* (S. D.) 68 N. W. 189.

[d] (S. D.; 1896.)

The commissioner of school and public lands is not liable for failing to distribute among the counties entitled thereto, within the time required by law, certain funds, which were afterwards lost through the defalcation of the state treasurer.—*State v. Ruth* (S. D.) 68 N. W. 189.

[e] (S. D.; 1896.)

The commissioner of school and public lands is liable for failure to make, at the time required by law, an estimate of the permanent school fund, and notify the county auditors thereof; thereby causing the funds to remain uninvested, and a consequent loss of interest. If the loss of interest was not caused by failure to make such estimate, the commissioner is liable for at least nominal damages.—*State v. Ruth* (S. D.) 68 N. W. 189.

§ 19. Use of seal.**(Wis.; 1896.)**

The requirement of Rev. St. § 182, that a commissioner of deeds for Wisconsin in another state shall have a seal of office, by which his official acts shall be authenticated, is not complied with by the use of a seal which does not contain the name of the state, but in which the space for such name is left blank, and in the impression the word "Wisconsin" is written in such

space with a pen.—*Oelbermann v. Ide* (Wis.) 68 N. W. 393.
93 Wis. 669.

§ 20. Liability as for money received.

[a] (Neb.; 1896.)

In the absence of statutory restriction upon the subject, the method employed in the monetary transactions of the world by which payments are made, and charges and credits adjusted, through the agency of checks, drafts, and certificates of deposit, is so far applicable to custodians of public funds in this state as to render them liable for remittances by that means made and received, provided such instruments be in good faith tendered and accepted as payment, and not for collection and credit at the debtor's risk. Per Post, C. J.; Ryan, Ragan, and Irvine, CC., concurring.—*State v. Hill* (Neb.) 66 N. W. 541.
47 Neb. 456.

[b] (Wis.; 1897.)

Where public officers wrongfully retain public money coming into their hands by virtue of their offices, a settlement between them and the corporation does not prevent a subsequent suit therefor, on discovery of the facts, within the period of the statute of limitations.—*Town of Cady v. Bailey* (Wis.) 70 N. W. 285.

§ 21. For moneys lost by failure of bank.

[a] (Neb.; 1896.)

A state treasurer, who, on taking charge of the office, instead of demanding the funds due from his predecessor in cash, accepts in payment thereof certificates of deposit issued by a bank in which such funds have been deposited for safe-keeping, is chargeable upon his bond for the amount of such payment, and his liability therefor is not affected by the fact that he is unable to realize the money upon such certificates by reason of the subsequent failure of said bank.—*State v. Hill* (Neb.) 66 N. W. 541.
47 Neb. 456.

[b] (Neb.; 1896.)

Under a bond of a county treasurer conditioned for the faithful accounting for and payment over of all the moneys of the county which he received, the treasurer and his bondsmen are liable for moneys lost to the county by the failure of the bank in which the treasurer deposited.—*Bush v. Johnson County* (Neb.) 66 N. W. 1023.
48 Neb. 1.

§ 22. For money lost through theft.

(Neb.; 1896.)

It is no defense to an action against a county treasurer and his bondsmen that the public fund, the amount of which is sought to be recovered, was lost or stolen without the fault or negligence of the treasurer.—*Bush v. Johnson County* (Neb.) 66 N. W. 1023.
48 Neb. 1.

§ 23. Accounting.

[a] (Iowa; 1896.)

In an action by a district township against its former treasurer for an accounting it appeared that defendant made regular semiannual settlements, as required by Code, § 1732, during his term of office, and that at several of these settlements vouchers submitted by him were, after examination, destroyed, against his protest. *Held*, that the burden was on plaintiff to show what credits, if any, were improperly allowed to defendant.—*District Tp. of Viola v. Bickelhaupt* (Iowa) 68 N. W. 914.

[b] (Iowa; 1896.)

In an action by a district township against two of its former officers for an accounting, it appeared that plaintiff had authorized new orders to be issued to a firm in renewal of old orders which had been issued for school furniture

sold to and used by plaintiff; that the new orders were signed by defendant B., who was then president, and by defendant J., then treasurer; that they were delivered to J., who, instead of giving them to the firm, sold them, B. being present at the sale, and applied a portion of the proceeds on the old orders which were in bank. *Held*, that though such sale was unauthorized, it was proper to credit defendants with the amount paid on the old orders, charging them only with the proceeds of the sale in excess of that sum.—*District Tp. of Viola v. Bickelhaupt* (Iowa) 68 N. W. 914.

§ 24. Liability on official bond.

[a] (Mich.; 1896.)

The sureties on a county treasurer's bond, conditioned for the payment, according to law, of all moneys which should come into his hands as treasurer, are liable for a misappropriation by the treasurer of funds illegally borrowed for county purposes by authority of the board of supervisors.—*Cheboygan County v. Erratt* (Mich.) 67 N. W. 1117.

[b] (Neb.; 1896.)

Parties who signed an official bond subsequent to its approval, as additional sureties, must be presumed to have known what would be the effect of such signing, including the discharge of the prior sureties, and they became bound and liable for any subsequent failure or default of the principal in the bond to perform its obligations.—*Stoner v. Keith County* (Neb.) 67 N. W. 311.
48 Neb. 279.

[c] (Neb.; 1896.)

If there has been no proof of any particular date at which it is claimed that the money was misappropriated by a county treasurer, or other proof than that he failed to account for and pay over to his successor at the close of the term of office all funds for which he was liable to account, it will be presumed to have occurred at the close of the term, and the liability accrues as of such time.—*Stoner v. Keith County* (Neb.) 67 N. W. 311.
48 Neb. 279.

[d] (S. D.; 1895.)

A county which recovered judgment against a county treasurer who had absconded, and his sureties, for an amount shown to be due, was entitled to the 20 per cent. penalty specified in Comp. Laws, § 617, as against the sureties.—*Jerauld County v. Williams* (S. D.) 63 N. W. 905.

§ 25. Action on bond.

[a] (Mich.; 1896.)

In an action by a county on a bond given by a county treasurer on his re-election to office, it was proper to submit to the jury the question whether any portion of the defalcation occurred during the treasurer's first term, on evidence that the disbursements during the first two months of the second term greatly exceeded the receipts, so that, if there had been a defalcation during the first term, the evidence tended to show that it was subsequently made good, and that money of the county to the amount claimed by plaintiff was afterwards embezzled.—*Cheboygan County v. Erratt* (Mich.) 67 N. W. 1117.

[b] (Neb.; 1896.)

Where the bond of a county treasurer was presented and approved at or prior to the commencement of his term of office, and was signed by additional sureties during the term, and an additional bond was afterwards given and approved, and the default or failure, if any, of the principal in the discharge of the duties of the office occurred at the close of his term, it was proper to join all the sureties as defendants in one action on the bonds.—*Stoner v. Keith County* (Neb.) 67 N. W. 311.
48 Neb. 279.

1c1 (Wis.: 1897.)

In an action by a town, where the complaint alleged that defendant was appointed its treasurer, and qualified by giving the statutory bond, the conditions of which were set out, and the facts constituting the breach were pleaded, the sureties were not parties. *Held*, that the action was on defendant's official bond, and not on his personal liability as treasurer.—*Town of Cady v. Bailey* (Wis.) 70 N. W. 285.

VIII. SUSPENSION AND REMOVAL.**§ 26. Power of removal.****1a1 (N. D.: 1896.)**

The fact that the superintendent of the state hospital for the insane may be removed from office for the causes mentioned in Const. § 197 (assuming this to be the case), does not impair the power of the board to remove him at pleasure.—*State v. Archibald* (N. D.) 66 N. W. 234.

5 N. D. 359.

1b1 (S. D.: 1895.)

Comp. Laws, § 117 et seq., providing that, on the filing of a report of a public examiner, the governor, if he deem the public interests to require, may suspend the officer with reference to whom the examination was made from further performance of duty until an investigation be had or security be obtained for the protection of the public funds, does not authorize the governor to remove such officer from office.—*State v. Shannon* (S. D.) 64 N. W. 175.

1c1 (S. D.: 1895.)

Under Const. art. 16, § 4, providing that all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance, or crimes or misdemeanor, in office, or for drunkenness or gross incompetency, a law which empowers the governor to remove, in his discretion, any public officer, on the filing by the public examiner of a report, whether unfavorable to such officer or not, is invalid.—*State v. Shannon* (S. D.) 64 N. W. 175.

§ 27. Right to notice and hearing.**1a1 (Mich.: 1896.)**

In a proceeding before the board of county supervisors for the removal of the superintendents of the poor, for improperly allowing to themselves claims, a bill of particulars, setting out the amount of the items improperly allowed, with date of allowance, sufficiently notifies the officers of the charge against them.—*Burt v. Board of Sup'rs Iron County* (Mich.) 66 N. W. 387.

1b1 (Mich.: 1896.)

In proceedings, before the county supervisors, for removal of an officer on the ground of incompetency, the notice to the officer need not set out the specific charges of incompetency.—*Burt v. Board of Sup'rs Iron County* (Mich.) 66 N. W. 387.

1c1 (N. D.: 1896.)

The grant of power to appoint to public office, where no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or a hearing, and without the cause for removal being inquired into by any court, and cannot be limited by any action taken by such board, whether by appointing the officer for a fixed term, or by by-laws restricting the power of removal to cases where cause for removal exists.—*State v. Archibald* (N. D.) 66 N. W. 234.

5 N. D. 359.

§ 28. Pleading.**(S. D.: 1895.)**

A complaint in an action by a county under Comp. Laws, §§ 1387, 1388, charging a public officer with a penal offense, and seeking to remove him from office, must show that the action is brought by the board of county com-

missioners. *Kellam, J., dissenting.*—*Minnehaha County v. Thorne* (S. D.) 61 N. W. 688.

6 S. D. 449.

§ 29. Right of appeal.**(N. D.: 1896.)**

An order of the district court overruling a demurrer to a written accusation against a sheriff, filed under Rev. Codes, § 7838, in order to obtain his removal, is not appealable.—*In re McCabe* (N. D.) 67 N. W. 143.

5 N. D. 422.

IX. DETERMINATION OF TITLE—RECOVERING POSSESSION OF OFFICIAL PAPERS.**§ 30. Ouster after expiration of term.****(Iowa: 1897.)**

A judgment of ouster will not be entered against an officer after his term of office has expired, where no rights of third persons are involved.—*State v. Powell* (Iowa) 70 N. W. 592.

§ 31. What are official papers.**(Minn.: 1895.)**

Where one about to plat his land as a town site employs the county surveyor to make a survey, and a plat is made in accordance therewith, to which the county surveyor attaches his official certificate in the form prescribed by statute, the survey is official, and the record of it, including the field notes and calculations, should be transmitted by the county surveyor to his successor in office.—*State v. Patton* (Minn.) 64 N. W. 922.

62 Minn. 388.

OFFSET.

See "Set-Off and Counterclaim."

OIL INSPECTION.

See "Inspection."

OPINION EVIDENCE.

See "Evidence," §§ 43-69.

OPTION.

In contract of sale, see "Sale," § 7; "Vendor and Purchaser," § 4.

Of tenant to purchase improvements, see "Landlord and Tenant," § 12.

ORDERS.

See, also, "Practice in Civil Cases," § 18.

Appealable orders, see "Appeal," §§ 15-38.

Effect of order as assignment, see "Assignment," § 10.

Reviewable on writ of error, see "Error, Writ of," § 1.

1a1 (Mich.: 1894.)

An acceptance of an order, "Accepted when B's lien is satisfied," is not an absolute agreement to pay the full amount of the order after such lien has been satisfied, but merely to pay the order to the extent of the amount due the person drawing the order, after deducting B's lien, if any.—*Tyler v. Stack* (Mich.) 61 N. W. 496.

103 Mich. 268.

1b1 (Mich.: 1894.)

Where the owner of a building accepted an order for materials furnished to be paid

"when B.'s lien is satisfied," the full amount of B.'s lien is to be deducted, though, by reason of the insufficiency of the amount owing by the owner on the entire contract, B. has to prorate with other subsequent lien holders.—*Tyler v. Stack* (Mich.) 61 N. W. 496.
103 Mich. 268.

[c] (Mich.; 1895.)

Under Hcw. Ann. St. § 1583, an action cannot be brought on an oral acceptance of an order.—*Upham v. Clute* (Mich.) 63 N. W. 317.

105 Mich. 350.

ORDINANCE.

See "Municipal Corporations," §§ 22-37.

ORE TENUS.

Demurrer see "Pleading," § 27.

ORGANIZATION.

Of school district, see "Schools and School Districts," §§ 2, 3.

Of town, see "Towns," § 1.

ORIGINAL UNDERTAKING.

See "Frauds, Statute of," § 8.

OVERCHARGES.

By carrier, see "Carriers," §§ 26, 27.

OVERFLOWING LANDS.

See "Surface Water"; "Waters and Water Courses."

P.

PARDON.

[a] (Mich.; 1895.)

Pub. Acts 1893, No. 150, § 6, providing for a board of pardons, whose duty it shall be to investigate petitions for pardons, and to report to the governor the result of their investigation, with such recommendations as they shall deem fit, and that the governor, on receipt of such report, may, as he shall deem fit, grant or refuse the pardon, does not violate Const. art. 5, § 11, vesting the pardoning power exclusively in the governor, subject to regulations by the legislature in regard to the manner of making applications for pardons. *McGrath, C. J., and Hooker, J., dissenting.*—*Rich v. Chamberlain* (Mich.) 62 N. W. 584.
104 Mich. 436.

[b] (Mich.; 1895.)

Hcw. Ann. St. § 9865, providing that, whenever the sentence of any female confined in the state prison shall be, by the governor or other competent authority, "commuted" to confinement for any period in the Detroit House of Correction, it shall be the duty of the prison agent to transfer such convict, etc., authorizes the governor to transfer a female sentenced to life imprisonment in the state prison to the house of correction.—*Rich v. Chamberlain* (Mich.) 63 N. W. 235.

PARENT AND CHILD.

See, also, "Adoption"; "Bastardy"; "Guardian and Ward"; "Infancy."

Act authorizing father to sue for injuries to child, due process of law, see "Constitutional Law," § 41.

Action by father for seduction of adult daughter, see "Seduction," §§ 1, 2.

—by parent for injuries to child, effect of judgment, see "Judgment," § 56.

Adverse possession of land belonging to child, see "Adverse Possession," § 20.

Consideration of transfer between, see "Fraudulent Conveyances," § 13.

Death of child, damages to parent, see "Death by Wrongful Act," § 9.

Rescission of contracts between, see "Equity," § 35.

§ 1. In general.

[a] (Neb.; 1897.)

Money paid by a brother's estate, on a note given by the brother to the sister for funds placed by the father in the brother's hands, intended as the sister's share in the father's estate, is not money which the father may appropriate to himself by reason of the family relation.—*Bell v. Rice* (Neb.) 70 N. W. 25.

[b] (Neb.; 1897.)

Board, lodging, medicines, and attention furnished by a stepdaughter to her imbecile stepfather, who was brought to her home at the request of those having charge of his property, are necessities for which she may recover against his estate.—*Bell v. Rice* (Neb.) 70 N. W. 25.

§ 2. Custody and control of child.

[a] (Iowa; 1897.)

A judgment awarding to a father the custody of a child 23 months old, which had previously been cared for by the parents of its deceased mother under an agreement, made before her death,—to which the father consented,—that the grandparents should have the child until its majority, will not be disturbed, where based on a finding by the trial court, on conflicting evidence, that it was for the best interests of the child that the father should be given its custody.—*Kuhn v. Breen* (Iowa) 70 N. W. 722.

[b] (Minn.; 1895.)

Where the parents of a child were living apart, without prospect of reconciliation, and the child was but four years old, and the mother, who had had the care of it since its birth, was admitted to be perfectly competent to have its care and custody, and the father had no female inmate of his family, except a daughter by a former marriage, aged 14, and his engagements required his absence from home during the day, and frequently in the night, the court would, without regard to which party was more to blame for the separation, commit the child, for the time being, to its mother, subject to the father's right, at seasonable intervals, to visit it and take it out for walks or drives.—*State v. Flint* (Minn.) 65 N. W. 272.

63 Minn. 187.

[c] (Wis., 1895.)

Where the father is an unfit person to have the custody of his children, they will not be taken from the mother, who is industrious and leading a reputable life, though she is in straitened circumstances, and though her mother, with whom she lives, is a woman of coarse speech, to give them to the care of their paternal grandfather, who is wealthy.—*Johnston v. Johnston*, 62 N. W. 181, 89 Wis. 416.

[d] (Wis., 1897.)

A father is not "unsuitable" (Rev. St. § 3964), so as to authorize the court to deny him the custody of his child, which had been in the custody of its maternal relatives since its birth and the death of its mother, a period of 21 months, because he is reserved by nature, and, due to his business, is absent from his home a great part of his time, and that during his absence the child would be in the care of his second wife, the only objection to whom was that she was young, and without much experience in the care of children.—*Markwell v. Pereles* (Wis.) 69 N. W. 798.

[e] (Wis., 1897.)

A father, at his wife's funeral, requested that he be left alone with her remains. The two brothers of the wife remained in the room, and one of them requested the father to consent, in the name of his wife, that they should have the custody of the infant child. The father remained silent, and one of the brothers said to him that, if he would not speak, to shake hands. The father took their hands, and after the funeral left the child in their care, where it remained for 21 months. The father, during such time, constantly claimed the right to its custody. *Held*, that he had not surrendered his right to the custody of the child.—*Markwell v. Pereles* (Wis.) 69 N. W. 798.

§ 3. Liability of parent—Support of child.

[a] (Mich., 1895.)

On the question of the value of board and care furnished an infant child, payment of which is sought to be enforced against the father, evidence of the standing of the father and the expectancy of the child is properly excluded, on objection by the father.—*Liesemer v. Burg* (Mich.) 63 N. W. 999.

[b] (N. D., 1896.)

Rev. Codes, § 2789, declaring that a parent is not bound to compensate a relative for support of the child, without an agreement for compensation, does not require the agreement, in order to bind the parent, to state the specific amount of compensation which shall be paid.—*Flugel v. Henschel* (N. D.) 69 N. W. 195.

§ 4. — Necessaries.

[a] (Mich., 1895.)

A person attempting to hold the father liable for necessities furnished his child while in the custody of the mother, who had abandoned the father's house, must show that the mother was justified in taking the child away. Per *Grant, J.*—*Hyde v. Leisenring* (Mich.) 65 N. W. 536.

[b] (Mich., 1895.)

A father is not liable for necessary medical attendance furnished his infant child while in the custody of its mother, who had left the father's house without cause. Per *Grant, J.*—*Hyde v. Leisenring* (Mich.) 65 N. W. 536.

§ 5. — For services rendered by child.

[a] (Iowa, 1896.)

The presumption that services rendered by a son while a member of his father's family were gratuitous, and the father's denial of any agreement to pay wages, are not overcome by the son's testimony and a book, kept by him without his father's knowledge, containing accounts which had been altered, entries evidently not made at the time they purported to be,

and memoranda of alleged settlements, all made at one time.—*Enger v. Lolland* (Iowa) 69 N. W. 526.

[b] (Mich., 1895.)

Where, in an action against a father-in-law for services, there is evidence that plaintiff and her husband lived with defendant before the husband's death, and performed services without any agreement for payment, and after his death defendant allowed plaintiff to remain on the same terms as before, a refusal to direct a verdict for defendant is error.—*Harris v. Harris* (Mich.) 61 N. W. 15.

[c] (Mich., 1895.)

Where the services of a child to a father and mother, who are infirm, are rendered and accepted with the understanding that they are to be paid for by the father, a claim for the services is enforceable against his estate.—*Sammon v. Wood* (Mich.) 65 N. W. 529.

[d] (Neb., 1897.)

A child may recover for services rendered his parent while a member of the family, if, from the circumstances, a contract by the parent to pay for them may be inferred.—*Bell v. Rice* (Neb.) 70 N. W. 25.

§ 6. Actions for services or wages of child.

[a] (Iowa, 1896.)

In an action by a father for injuries to his minor son, not wholly disabling him, an instruction fixing the measure of damages at the value of his services during his minority, instead of the "lessened value," is erroneous.—*Goodrich v. Burlington, C. R. & N. Ry. Co.* (Iowa) 66 N. W. 770.

[b] (Mich., 1895.)

In an action by a daughter to enforce a claim against her father's estate for services, where there is evidence that they were valuable, that the father frequently stated that he intended to pay her for them, that he deeded his farm to her for them, and that the deed was void because his wife had not joined therein, the question whether the services were rendered and accepted with the understanding that they should be paid for should be submitted to the jury.—*Sammon v. Wood* (Mich.) 65 N. W. 529.

[c] (Mich., 1895.)

Where a conveyance of land by a father to his child for services is void, because it includes the homestead of the grantor, the value of the land is admissible to prove the value of the services.—*Sammon v. Wood* (Mich.) 65 N. W. 529.

§ 7. Injuries to child—Action by parent.

[a] (Minn., 1895.)

Under Gen. St. 1894, § 5164, providing that "a father * * * may maintain an action for the injury of the child," etc., he may maintain such action in his own name in all cases where, at common law, it might be maintained in behalf of such minor. *Gardner v. Kellogg* (1877) 23 Minn. 463, followed.—*Buechner v. Columbia Shoe Co.*, 62 N. W. 817, 60 Minn. 477.

[b] (Minn., 1895.)

Under Gen. St. 1894, § 5164, providing that a father may maintain an action for injuries to his child, the complaint need not allege that it is brought for the child's benefit.—*Buechner v. Columbia Shoe Co.* (Minn.) 62 N. W. 817, 60 Minn. 477.

[c] (Minn., 1895.)

Gen. St. 1894, § 5164, authorizing a father to maintain an action in his own name for an injury to his minor child, applies in all cases where at common law such an action might be maintained in behalf of such minor. *Buechner v. Shoe Co.* (Minn.) 62 N. W. 817, 60 Minn. 477, followed.—*Lathrop v. Schutte* (Minn.) 63 N. W. 493, 61 Minn. 196.

[d] (Minn.: 1895.)

The amount recovered by a father under Gen. St. 1894, § 5164, authorizing him to maintain an action for injury to his minor child, belongs to the child.—*Lathrop v. Schutte* (Minn.) 63 N. W. 493.

61 Minn. 196.

[e] (Minn.: 1896.)

Gen. St. 1894, § 5164, authorizing a father to sue for injuries to his child, is not unconstitutional as assuming to transfer a cause of action in favor of the child to the father for the sole use of the latter.—*Hess v. Adamant Manuf'g Co. of America* (Minn.) 68 N. W. 774.

PARISH.

See "Counties."

PARKS.

Delegation of legislative power to park commissioners, see "Constitutional Law," § 13.

PARLIAMENTARY LAW.**[a] (Mich.: 1895.)**

A by-law of a board of education provided that no text-book should be adopted unless proposed at a regular meeting at least one month before its adoption. By-laws could be suspended by a two-thirds vote of the members present. A report recommending the adoption of a text-book was made, and a motion to lay the report on the table was lost by a two-thirds vote, after which the book was adopted by a majority vote. *Held*, that the by-law requiring a text-book to be proposed a month before its adoption was suspended by the loss, by the two-thirds vote, of the motion to lay the report on the table, thereby rendering the adoption of the text-book valid.—*Kendall v. Board of Education of City of Grand Rapids* (Mich.) 64 N. W. 745.

[b] (N. D.: 1896.)

A motion to remove the defendant having been made and seconded at a meeting of the board of trustees at which all the members were present, the chairman of the meeting refused to put the motion, on the ground that it was illegal. Thereupon it was put by the trustee who made the motion, and received the vote of three of the five members, the other two trustees refusing to vote. *Held*, that these proceedings were effectual to remove the defendant.—*State v. Archibald* (N. D.) 66 N. W. 234.

5 N. D. 359.

PAROL CONTRACT.

See "Frauds, Statute of."

Specific performance, see "Specific Performance," § 5.

PAROL EVIDENCE.

See "Evidence," §§ 86-102.

PAROL TRUSTS.

See "Trusts," §§ 3, 4.

PAROL WARRANTY.

See "Frauds, Statute of," § 13; "Sale," § 28.

PARTIES.**I. NECESSARY PARTIES, §§ 1-5.****II. PROPER PARTIES, §§ 6-10.****III. INTERVENTION AND SUBSTITUTION, §§ 11-13.**

Absence from trial, see "Trial," § 6.

Action by trustee of religious society in behalf of members, see "Religious Societies," § 5.

Admissibility of declarations by, see "Evidence," § 23.

Amending pleading as to, see "Pleading," § 65.

Appealable orders relating to, see "Appeal," § 27.

Consolidation of actions between different parties, see "Action," § 9.

Co-parties entitled to notice of appeal, see "Appeal," § 57.

Death of party, abatement of action, see "Abatement and Revival," §§ 9-12.

Designation in complaint, see "Pleading," §§ 8, 9.

— in judgment, see "Judgment," § 24.

Effect of judgment on persons not parties, see "Judgment," §§ 50-54.

Harmless error with regard to, see "Appeal," § 256.

In actions for injuries from defects in streets or sidewalks, see "Municipal Corporations," § 79.

— for money had and received, see "Assumpsit," § 3.

— for partition, see "Partition," § 4.

— on bonds, see "Bonds," § 6.

— on contract, see "Contracts," § 63.

— on official bonds, see "Office and Officer," § 25.

— on policies, see "Insurance," § 110.

— on sheriffs' bonds, see "Sheriffs and Constables," § 14.

— to enforce claims against school district, see "Schools and School Districts," § 32.

— to enforce mechanics' liens, see "Mechanics' Liens," § 53.

— to redeem, see "Mortgages," § 100.

— to set aside street assessment, see "Municipal Corporations," § 151.

In equitable proceedings, see "Creditors' Bill," § 4; "Equity," §§ 54-56; "Fraudulent Conveyances," § 35; "Injunction," § 21; "Mortgages," §§ 56-58; "Quieting Title—Removal of Cloud," § 8.

In replevin, see "Replevin," § 19.

Interest as affecting joinder of causes of action, see "Action," § 7.

Joining co-parties as appellants, see "Appeal," § 72.

Misconduct as ground for new trial, see "New Trial," § 24.

On appeal, see "Appeal," §§ 71-73.

— from justice, see "Appeal," § 164.

Stockholders suing in behalf of corporation, see "Corporations," § 68.

To certiorari proceedings, see "Certiorari," § 7.

To contracts, see "Contracts," §§ 23-25.

To highway proceedings, see "Highways," § 9.

To mandamus proceeding, see "Mandamus," § 25.

To proceedings for dissolution of corporation, see "Corporations," § 102.

— for sale of decedents' lands, see "Executors and Administrators," § 43.

— to enforce tax, see "Taxation," § 71.

To qui tam and penal actions, see "Qui Tam and Penal Actions."

To supplementary proceedings, see "Execution," § 41.

To will contest, see "Wills," § 20.

When parties may testify as to transactions with decedents, see "Witness," § 20.

Who are parties entitled to appeal, see "Appeal," § 11.

Who may allege error, see "Appeal," §§ 187, 188.

I. NECESSARY PARTIES.

In action to foreclose mechanic's lien, see "Mechanics' Liens," § 53.

In mortgage foreclosure proceeding, see "Mortgages," § 56.

On appeal, see "Appeal," § 71.

To determine claims to property attached, see "Attachment," § 46.

§ 1. Plaintiffs.

[a] (S. D.; 1896.)

A wife who joins in an acceptance of an offer for her husband's property, and in a deed tendered to the person making the offer, is not a necessary party plaintiff in an action for specific performance.—Edmison v. Zborowski (S. D.) 68 N. W. 288.

[b] (Wis.; 1897.)

In the absence of fraud on the part of a vendee in obtaining goods, the vendor who has taken the notes of the vendee cannot maintain attachment against the vendee after the notes have been assigned to and while they remain with another, even if the assignee, in purchasing the notes, relied upon the vendor's indorsement.—Laudauer v. Espenhain (Wis.) 70 N. W. 287.

§ 2. — Action in behalf of others similarly situated.

(Iowa; 1895.)

Code, § 2549, provides that when the question is one of common interest to many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. *Held*, that one or more policy holders of a mutual insurance company can maintain an action for the benefit of the plaintiffs, and for all who are similarly interested, against the company, its assignee for creditors, and others concerned, to set aside the assignment of the company, to declare not collectible certain obligations made by plaintiffs and others, and for general relief.—Corey v. Sherman (Iowa) 64 N. W. 828.

§ 3. Defendants.

[a] (Mich.; 1894.)

In an action by a surviving partner against the administrator of his deceased partner to have the proceeds of a sale of land declared firm assets, one who loaned to the partners part of the money paid by them for the land, under an agreement that the partners would pay him one-third of the profits arising out of the purchase, is not a necessary party.—Lindsay v. Race (Mich.) 61 N. W. 271. 103 Mich. 28.

[b] (Neb.; 1897.)

An action may be prosecuted against any one or more of several persons jointly and severally bound.—Council Bluffs Sav. Bank v. Griswold (Neb.) 70 N. W. 376.

[c] (Wis.; 1895.)

In an action against a city for injuries resulting from the leaving open of a drawbridge without barriers or lights, the bridge tender need not be joined as defendant, when it was not his duty to furnish such barriers and lights.—Stephani v. City of Manitowoc (Wis.) 62 N. W. 176, 89 Wis. 467.

§ 4. Defect of parties.

(Minn.; 1895.)

In an action by a subcontractor to enforce a mechanic's lien, the two original contractors, who were jointly liable, were impleaded as defendants, but service of the summons was made on but one of them. *Held*, that it was not error to deny the motion of the owner of the property to continue the action until service was made on the other contractor.—Julius v. Callahan (Minn.) 65 N. W. 267. 63 Minn. 154.

§ 5. — Walver and estoppel.

[a] An objection that there is a defect of parties is waived if not taken by demurrer or answer.

—(Iowa; 1894) Coe v. Anderson, 61 N. W. 177, 92 Iowa, 515;

(Minn.; 1895) Moore v. Bevier, 62 N. W. 281, 60 Minn. 240;

(Neb.; 1896) Stephens v. Harding, 67 N. W. 746, 48 Neb. 659.

[b] (Mich.; 1895.)

The defense of nonjoinder of parties defendant can only be raised by plea in abatement. Searles v. Reed (1886) 29 N. W. 884, 63 Mich. 485, explained.—Dillenbeck v. Simons, 63 N. W. 438, 105 Mich. 373.

[c] (Wis.; 1896.)

Though the liability of one, estopped to deny that he is a member of a firm, to a creditor of the firm, is only joint with real partners, yet, being sued alone, he waives his right to require joinder of the others, and to have merely a joint judgment against himself, by not pleading the defect of parties in abatement.—Evans & Howard Fire-Brick Co. v. Hadfield (Wis.) 68 N. W. 468.

93 Wis. 665.

II. PROPER PARTIES.

§ 6. Plaintiffs.

[a] (Iowa; 1894.)

A person may sue on a contract made in his own name, under Code, § 2544, though it was in fact made by him as agent of another.—Brown v. Sharkey (Iowa) 61 N. W. 364.

93 Iowa, 157.

[b] (Mich.; 1894.)

A bill by a number of complainants for an injunction restraining the construction of a street railway cannot be maintained upon evidence only of grievances and damage special to one or more of them.—Niemann v. Detroit Suburban St. Ry. Co. (Mich.) 61 N. W. 519. 103 Mich. 256.

§ 7. — Real party in interest.

[a] (Neb.; 1896.)

Except as against his creditors, one may sell his property for a nominal consideration, or give it away; and, if he does either, his vendee or donee is the real party in interest, within Code Civ. Proc. § 29, in a suit for the conversion of such property.—Kinsella v. Sharp (Neb.) 66 N. W. 634.

47 Neb. 664.

[b] (Neb.; 1896.)

An action on an insurance policy issued to W., and payable to M. O. M., mortgagee, as her interest may appear, cannot be maintained by Olive M. M., in the absence of an allegation that the policy was assigned to plaintiff, or that her name was misstated in the policy, or that plaintiff and the mortgagee are the same person.—Farmers' & Merchants' Ins. Co. v. Moore (Neb.) 67 N. W. 764.

48 Neb. 713.

[c] (S. D.; 1895.)

Since shares of stock of an incorporated banking association are by Laws 1891, c. 14, assessable against and payable by the individual owners thereof, the bank cannot, in its own name, and for itself, sue to restrain the collection of the tax on such shares from the individual owners.—Northwestern Loan & Banking Co. v. Muzzi (S. D.) 64 N. W. 1122; *Id.*, 65 N. W. 442.

[d] (S. D.; 1895.)

A bank the shares of stock of which are assessed against the individual owners thereof could not in its own name and for itself sue to restrain collection of the tax from the individual owners, on the ground of avoidance of a multi-

plicity of suits, where it did not appear that it would be exposed to suits.—*Northwestern Loan & Banking Co. v. Muggli* (S. D.) 65 N. W. 442.

[e] (S. D.; 1897.)

Where a note for money due plaintiff was, at his instance, made payable to a third person, who indorsed it to plaintiff without recourse, the latter is the real party in interest in respect to the note and the chattel mortgage securing the same, and may bring replevin against an officer who wrongfully levies on the chattels on execution against the mortgagor.—*Coughran v. Sundback* (S. D.) 70 N. W. 644.

§ 8. — Trustees.

[a] (Iowa; 1895.)

Where goods are delivered to a railroad company to be delivered to the consignee upon the payment of drafts drawn upon him by the consignor for the price, and an agent of the company wrongfully delivers the goods without payment of the drafts, the railroad company, as trustee of an express trust, may recover the price for which the consignee sold the goods after the wrongful delivery.—*Starker v. McCosh Iron & Steel Co.* (Iowa) 62 N. W. 848.

[b] (S. D.; 1897.)

A nonresident corporation, which was not entitled to sue in South Dakota on a claim, not having filed its articles and appointed a resident agent (Laws 1895, c. 47), transferred the claim by assignment absolute on its face, but with the understanding that the assignee should collect it, and pay the net proceeds to the corporation; no consideration being paid. *Held*, that the assignee was not only the "real party in interest," but was entitled to sue in his own name, under Comp. Laws, §§ 4870, 4872, as trustee of an express trust.—*Citizens' Bank v. Corkings* (S. D.) 70 N. W. 1059.

§ 9. Defendants.

(Minn.; 1894.)

In an action by an administrator with the will annexed to recover from the widow and her son assets of the estate, a bank in which she had deposited money derived from a sale of a portion of the estate, and which had given her a certificate therefor, is a proper party defendant.—*Reiser v. Gigrich* (Minn.) 61 N. W. 30.

59 Minn. 368.

§ 10. Waiver of objection.

(Neb.; 1895.)

Where the creditor, after a novation, sued both of the other parties to the novation for his debt, the misjoinder of the parties defendant could not be raised for the first time on appeal.—*Culbertson Irrigating & Water-Power Co. v. Wildman* (Neb.) 63 N. W. 947.

45 Neb. 663.

III. INTERVENTION AND SUBSTITUTION.

Effect of dismissal on rights of intervener, see "Practice in Civil Cases," § 9.

Enforcing liability of stockholders by petition in intervention, see "Banks and Banking," § 31.

Intervention in attachment, see "Attachment," §§ 44-48.

— in execution, see "Execution," §§ 15-18.

— in garnishment, see "Garnishment," §§ 30-32.

— in replevin, see "Replevin," § 19.

Striking petition in intervention, appealable order, see "Appeal," § 27.

Substitution in action to foreclose, see "Mortgages," § 58.

— on appeal, see "Appeal," § 73.

— on death of party, see "Abatement and Revival," § 12.

§ 11. Intervention.

[a] (Iowa; 1896.)

In an action to recover for goods sold, an intervener cannot, by tendering an equitable issue, delay or change the form of procedure.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

[b] (Minn.; 1896.)

Where an action is brought against the city of St. Paul to recover the award made as damages for taking property for a public use, a third party, who claims to have been the owner of the property taken, or of a part of it, and hence entitled to the award, or part of it, may come in as a party to the action, and assert his claim.—*Smith v. City of St. Paul* (Minn.) 68 N. W. 32.

[c] (S. D.; 1897.)

It is not an abuse of discretion to permit a party who has any interest in the subject of litigation to intervene, though he might amply protect his right in some other way.—*Taylor v. Bank of Volga* (S. D.) 70 N. W. 834.

[d] (S. D.; 1897.)

In a suit by the receiver of a corporation against a bank to recover certain securities, a claim of an adverse interest in a note among the securities, which claimant alleged he had been induced to execute to the corporation on fraudulent representations, and which he had rescinded before the receiver was appointed, and had demanded a surrender of, entitled claimants to intervene, within Comp. Laws, § 4886, providing that any person may intervene who has an interest in the matter in litigation, or an adverse interest against both parties.—*Taylor v. Bank of Volga* (S. D.) 70 N. W. 834.

§ 12. — Leave of court.

[a] (Mich.; 1895.)

Though an intervener should first obtain permission from the court to file his petition, yet the court may, by order *nunc pro tunc*, authorize and validate the filing of a petition filed without permission.—*People v. Ingham Circuit Judge* (Mich.) 63 N. W. 79.

105 Mich. 234.

[b] (Mich.; 1895.)

An order refusing to strike from the files a petition of intervention, filed without permission of court, and an order overruling a demurrer thereto, are together equivalent to a *nunc pro tunc* order granting petitioner permission to intervene.—*People v. Ingham Circuit Judge* (Mich.) 63 N. W. 79.

105 Mich. 234.

[c] (Neb.; 1895.)

Where a stranger asked to intervene, and filed pleadings, but obtained no order to that effect, and the party appealing cross-examined his witnesses, and the court, without objection, rendered a decree on his claim, appellant could not, on appeal, urge that the intervener was not in fact a party.—*Chadron Banking Co. v. Mahoney*, 61 N. W. 594, 43 Neb. 214.

§ 13. Substitution.

[a] (Minn.; 1895.)

Gen. St. 1894, § 5171, provides that, in case of a transfer pending an action of an interest therein, the action may be continued in the name of the original party, or the transferee may be added or substituted in the action. *Held*, that, where an interest in the subject-matter of an action is assigned pending the action, it is within the discretion of the court to allow the assignee to be substituted as complainant, or allow the action to proceed in the name of the original party.—*Brown v. Kohout* (Minn.) 63 N. W. 248.

61 Minn. 113.

[b] (Wis.; 1896.)

Under Rev. St. § 2610, which authorizes a substitution of parties defendant on a proper showing at any time before answer, a court may, in its discretion, grant such substitution after answer is filed, in a proper case, and for good

cause shown.—*Merriam v. Horner* (Wis.) 66 N. W. 808.

92 Wis. 654.

[*et. Wis.*; 1896.)

That, pending an appeal from a judgment in favor of a county judge on an administrator's bond, an heir of the decedent purchased the judgment from the administrator, and the estate has been settled, shows merely a transfer of interest pending litigation, which does not render a substitution of parties necessary (Rev. St. § 2801), nor prevent affirmance in the name of the county judge.—*Belden v. Hurlbut* (Wis.) 69 N. W. 357.

PARTITION.

See, also, "Judicial Sales."

Pendency of foreclosure proceedings, see "Abatement and Revival," § 5.

§ 1. In general.

[*al. Neb.*; 1896.)

The plaintiff and defendant, owners in severalty of adjoining lots, pursuant to a mutual agreement, erected thereon buildings corresponding in size, having the stairs, hallways, skylight, and heating apparatus in common. *Held*, that the mere existence of these cross easements would not authorize the partition of said lots at the suit of either party.—*Barr v. Lamaster* (Neb.) 66 N. W. 1110.

48 Neb. 114.

[*b. Neb.*; 1897.)

The right to partition is not affected by the fact that making partition will be inconvenient or difficult, or may involve a loss.—*Oliver v. Lausing* (Neb.) 70 N. W. 369.

[*et. Neb.*; 1897.)

Where the case is fairly within a law authorizing a partition, the right to partition is absolute, and not a matter of mere grace.—*Oliver v. Lausing* (Neb.) 70 N. W. 369.

[*id. Neb.*; 1897.)

Where real property leased for a term of years is owned by several persons as tenants in common both of the rents and the reversion, partition upon the petition of one of the tenants may be had, and, if a sale is thereby rendered necessary, the lessee will become a tenant of the purchaser of the rents and reversion.—*Oliver v. Lausing* (Neb.) 70 N. W. 369.

§ 2. Limitation.

(*Iowa*; 1895.)

The law provides for the filing of a will and appointment of an executor directly after testator's death, and requires the executor to give notice of his appointment within 10 days thereafter. Creditors are given one year after such notice in which to file their claims, and the executor is limited to three years in which to settle and close the estate, unless otherwise directed by the court. *Held*, that a petition by devisees for the partition of real estate, which shows that more than four years have elapsed since testator's death, is not demurrable because it fails to allege that the estate has been finally settled and is solvent, as a compliance with the law is presumed.—*Miner v. Hogg* (Iowa) 63 N. W. 444.

§ 3. Title to maintain.

(*Iowa*; 1896.)

The owner of a life estate in land cannot maintain an action of partition against the remainder-men, to have it sold.—*Smith v. Runnels* (Iowa) 65 N. W. 1902.

§ 4. Parties.

(*Wis.*; 1895.)

A railroad company which, as a mere trespasser, has taken and occupied for railroad purposes land owned by tenants in common, is not a necessary party to a suit between such

tenants for partition.—*Tucker v. Chicago, St. P., M. & O. Ry. Co.*, 65 N. W. 515, 91 Wis. 576.

§ 5. Decree—Effect.

(*Iowa*; 1896.)

In partition, the court entered a decree on the pleadings, confirming the shares of the respective parties in the property, and decreed that each was liable to contribute his proportionate part of the expense of maintaining the property, and that plaintiff was entitled to have the property (water power) partitioned, so that each owner should receive his proper share, and no more, of the water and water power at all times, and appointed referees to make partition. *Held*, that the decree was interlocutory, and not conclusive as to whether the partition should be made in kind, or the property be sold and the proceeds divided.—*Brown v. Cooper* (Iowa) 67 N. W. 378.

§ 6. Sale.

(*Iowa*; 1896.)

Where partition of a water power in kind necessarily involves the parties in great expense for repairs before the partition can be made, and to render it effective in the future there must be a supervisor appointed, whose duty it will be to divide the water, keep up the weirs, and otherwise oversee the property for the joint benefit of the owners thereof, the partition should be by sale and distribution of the proceeds.—*Brown v. Cooper* (Iowa) 67 N. W. 378.

§ 7. Rents and profits.

(*Mich.*; 1896.)

In an action for partition and for an accounting for rents and profits the decree may properly include rents and profits accruing pending the action, where the evidence furnishes a sufficient basis for it.—*Hunt v. Hunt* (Mich.) 67 N. W. 510.

§ 8. Costs.

(*Iowa*; 1897.)

Where the issue tried was whether defendant owned one-sixth or one-half of the land in controversy, and the land was divided by the parties themselves after a decree giving him one-sixth, plaintiff's attorneys were not entitled to have their fees taxed as costs, as is authorized in an action for partition.—*Everett v. Croskrey* (Iowa) 69 N. W. 1125.

PARTNERSHIP.

I. WHAT CONSTITUTES, §§ 1-7.

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III. FIRM PROPERTY, §§ 11, 12.

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1. In General, §§ 20, 21.

2. Dissolution, Settlement, and Accounting, §§ 22-33.

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See, also, "Associations."

Assignment by, see "Assignment for Benefit of Creditors," § 8.

Assumption by corporation of debts of prior firm, see "Corporations," § 24.

Liability of incorporators as partners on failure to perfect incorporation, see "Corporations," § 11.

Limited partnership associations, see "Associations," §§ 1, 2.

To deal in lands, operation of statute of frauds, see "Frauds, Statute of," § 15.

I. WHAT CONSTITUTES.

§ 1. Creation of relation.

[a] (Iowa: 1895.)

The proceeds of a sale of corporate stock owned by plaintiff, having been paid to defendants, in whose names the shares stood, were, with plaintiff's consent, put into a partnership formed by defendants and third persons, the latter having no knowledge of plaintiff's interest therein. *Held*, that plaintiff was a partner of defendants as to their interest in the firm. — *Henry v. Evans* (Iowa) 63 N. W. 687.

[b] (Neb.: 1896.)

Evidence that two farmers, purchasing a threshing machine, paid for the same with their joint and several notes, secured by a chattel mortgage on the machine purchased, and jointly took possession of and used the machine in threshing grain for others, will not support a finding that the threshing machine was partnership property, nor that a copartnership relation existed between the farmers. — *State Bank of Lushton v. O. S. Kelley Co.* (Neb.) 66 N. W. 619. 47 Neb. 678.

[c] (S. D.: 1897.)

Defendant authorized plaintiff to solicit loans for him, the commissions being divided between them, and a second mortgage to defendant being taken to secure such commissions. Each application for a loan, when accepted by defendant, was returned with a separate letter of instructions, and the sum necessary to make the loan; and when it was made all papers were sent to defendant. The parties lived in different states, had no partnership name, and each carried on other business. *Held* that, as between themselves, there was no partnership. — *Grigsby v. Day* (S. D.) 70 N. W. 881.

[d] (S. D.: 1897.)

It was agreed that plaintiff should look up farm lands for defendant to purchase, and that on a sale of the lands by defendant the profits should be equally divided. Plaintiff had no authority to contract for either purchase or sale. The parties lived in different states, had no partnership name, and each carried on other business. *Held* that, as between themselves, there was no partnership. — *Grigsby v. Day* (S. D.) 70 N. W. 881.

§ 2. — Sharing profits and losses.

[a] (Iowa: 1896.)

To constitute a partnership there must be an agreement to share not only in the profits of a joint venture, but in the losses as well. — *McBride v. Ricketts* (Iowa) 67 N. W. 410; *Martin v. Same*, *Id.*

[b] (Mich.: 1895.)

A partnership having assigned to P. a contract for the purchase of timber land, it was agreed between P. and one of the partners, who had paid P. \$5,000 on the contract, and received from P. \$500, that such partner should lumber the land at a yearly salary, and receive a certain price per 1,000 for delivering logs at the boom; that P. should receive a certain price per 1,000 for sawing the logs, should make advances for carrying on the lumbering, and that, after being reimbursed for such advances, with interest, he should receive two-thirds of the profits, said partner taking the balance. An account was kept by P. in the name of "P. and [said partner]," whereon money expended for

purchase of the land, taxes, and marketing the lumber was charged, and money received from the lumber was credited, and settlements were made on the basis of one-third and two-thirds interests. *Held*, that it constituted a partnership. — *Loveland v. Peter* (Mich.) 65 N. W. 748.

[c] (Mich.: 1895.)

An agreement whereby a corporation appointed a certain person as its agent in connection with the general business, in consideration of which the corporation was to pay said person one-half of the net profits, and the parties were to share the losses equally, and the corporation was to furnish the material and labor, did not constitute a partnership inter se, there being nothing to indicate that said person was to own any share in said materials, or that he was obliged to make any cash investment. — *McGrath, C. J., and Montgomery, J., dissenting.* — *Canton Bridge Co. v. City of Eaton Rapids* (Mich.) 65 N. W. 761.

[d] (Minn.: 1896.)

Where an option on mineral lands was purchased in defendant's name, with the agreement that plaintiff should have a one-eighth interest therein; that the few hundred dollars which might be necessary to conduct explorations and tests should be furnished by defendant, who owed plaintiff between \$300 and \$400, and that plaintiff's proportion thereof should be charged to his account; that defendant should take charge of the preliminary work upon the ground, and bear seven-eighths of the expense, and plaintiff give his time in attempting to find a purchaser for the property, and pay one-eighth of the expense; that each should share, if a sale was made, and there came a profit, according to his interest; and that any losses should be borne proportionately, — there was a partnership. — *Baldwin v. Eddy* (Minn.) 67 N. W. 349.

64 Minn. 425.

[e] (Minn.: 1896.)

Where parties agreed to pay the amounts set opposite their names for the establishment of a business, to be not less than a certain amount in all, and to sign notes to borrow money, not to exceed a certain amount, for the carrying on of the business, and that the management was to be conducted by certain persons selected by them, and that the subscriptions should be in shares of \$25 each, each share of which should entitle the holder to one vote, and to a proportion of the net profits, and that in case of loss assessment should be made not to exceed in all the amount subscribed by each, they were general partners. — *McKasy v. Huber* (Minn.) 67 N. W. 650.

§ 3. — Sharing profits but not losses.

[a] (Iowa: 1895.)

A contract under which two persons are to share the profits of a business, but which fails to provide for a sharing of the losses, does not constitute a partnership inter se. — *Winter v. Pipher* (Iowa) 64 N. W. 663.

[b] (Iowa: 1896.)

A contract reciting that in consideration of a salary of a certain amount per annum paid by the party of the first part (a firm) to the party of the second part, and a further consideration of a certain share in the net profits of the business of the firm, the party of the second part agreed to devote his time to their business as engineer, is a contract of employment, not of partnership. — *Porter v. Curtis* (Iowa) 65 N. W. 824.

[c] (Mich.: 1896.)

Where a merchant employs a person in his business, and agrees to pay him a stated salary, and, in addition, a certain percentage of the profits of the business, the contract does not constitute such merchant and the person so employed co-partners, as a matter of law. — *Stockman v. Micheli* (Mich.) 67 N. W. 236.

[d] (Mich.; 1896.)

A lease of a farm, by which the landlord furnished the stock on the farm and one-half the seed grain, the profits to be equally divided, does not constitute a partnership, but the parties are co-tenants in the products.—*Williams v. Rogers* (Mich.) 68 N. W. 249.

[e] (Neb.; 1891.)

If there is a community of interest in the profits, as such, of the business, and not by way of compensation for services rendered or capital loaned towards the prosecution of the business, it is sufficient to constitute a partnership.—*Waggoner v. First Nat. Bank* (Neb.) 61 N. W. 112, 43 Neb. 84.

[f] (Neb.; 1891.)

The receipt by a party of a share of the profits of a venture merely as compensation for services, such party having no interest in the property made the subject of the venture, and no power in the management of such property, does not constitute such person a partner.—*Strader v. White* (1873) 2 Neb. 348, overruled.—*Waggoner v. First Nat. Bank*, 61 N. W. 112, 43 Neb. 84.

[g] (Neb.; 1896.)

The receipt by a party of a share of the profits of a venture merely as compensation for services, such party having no interest in the property made the subject of the venture, and no power in the management or control of such property, other than that of an ordinary retail salesman thereof, does not constitute such person a partner.—*Aetna Ins. Co. of Hartford, Conn., v. Bank of Wilcox* (Neb.) 67 N. W. 449, 48 Neb. 544.

[h] (Neb.; 1897.)

The receipt by a salesman, as compensation, of a share of the profits of the business, does not render him a partner.—*Whitney v. Gretna State Bank* (Neb.) 69 N. W. 933.

§ 4. Subpartnership—Misrepresentation. (Minn.; 1896.)

Where one of several persons contemplating the formation of a partnership was authorized by the others to purchase a horse for \$1,800, on his representation that a third party owned the horse and would sell him for no less, when in fact he had previously purchased the horse for \$1,200, he was liable to the others for the difference between the price actually paid and the amount given him to be used in the purchase.—*Bloom v. Lofgren* (Minn.) 65 N. W. 960, 64 Minn. 1.

§ 5. As to third persons.

(Wis.; 1895.)

The firm of J. D. P. & Co. gave plaintiff a note, after which a notice was published, and seen by plaintiff, stating that the partnership formerly existing between J. D. P. and A. J. G., under the firm name of J. D. P. & Co., is dissolved, and that the business will be carried on under the firm name of J. B. G. & Co., who will settle all claims of the late partnership. Afterwards plaintiff surrendered such note, and took a note signed "J. B. G. & Co.," believing that J. B. G. & Co. was a firm consisting of J. B. G. and A. J. G.; but there was in fact no such firm, the business being conducted under such name by J. B. G. alone. *Held*, that A. J. G. was liable on the new note.—*Thayer v. Goss* 64 N. W. 312, 91 Wis. 90.

§ 6. — Holding out as partner.

[a] (Iowa; 1895.)

In an action on a note signed in the name under which defendant carried on business, without his knowledge, by one in his employ, it appeared that the business was conducted under a contract providing for an equal sharing in the profits, but not providing for a sharing in the losses. Before the execution of the note, plaintiff knew that the signer thereof was drawing merely a stated sum monthly from the business, and that he was conducting it for de-

fendant. *Held*, that in the absence of evidence that plaintiff did not know the terms of the contract, or was induced by defendant's acts to believe that a partnership existed, she could not hold defendant to a partnership liability.—*Winter v. Pipher* (Iowa) 64 N. W. 663.

[b] (Iowa; 1896.)

The intention with which words are spoken holding the speaker out as a member of a partnership is immaterial. Such statements are obligatory, in favor of one who acts upon their reasonable import.—*Wallerich v. Smith* (Iowa) 66 N. W. 181.

[c] (Wis.; 1896.)

Defendant, Joseph H., having carried on a business under the style of "Joseph H." and "J. H.," indifferently, sold out to his son's wife, Julia P. H., and her mother, who carried on the business, with his knowledge and without his dissent, in the name of "J. H. & Co." *Held* that, as against plaintiff, who dealt with defendant before the sale, and thereafter with the firm without notice that he was not a member of it, he was estopped to deny that he was one of the firm.—*Evans & Howard Fire-Brick Co. v. Hladfield* (Wis.) 68 N. W. 408, 93 Wis. 665.

§ 7. Question for jury.

(Neb.; 1891.)

Where there is a dispute as to whether a partnership exists, and as to the existence of facts which are necessary to constitute a partnership, the question is for the jury under instructions.—*Waggoner v. First Nat. Bank* 61 N. W. 112, 43 Neb. 84.

II. EVIDENCE.

Burden of proof as to firm property, see post, § 12.

In action by or against firm, see post, § 56.

§ 8. Admissibility.

[a] (Mich.; 1891.)

The fact that one person introduced another as his partner is evidence of their partnership.—*Armstrong v. Potter* (Mich.) 61 N. W. 657, 103 Mich. 409.

[b] (Minn.; 1896.)

On an issue whether defendant was a partner in the running of an hotel to which plaintiff furnished the supplies in suit, evidence that defendant had paid for supplies furnished the hotel by a third party was relevant.—*Couch v. Steele* (Minn.) 65 N. W. 946, 63 Minn. 504.

§ 9. Declarations or admissions of alleged partner.

[a] (Mich.; 1894.)

The admission of one of several persons, sued as copartners, that the partnership existed, is admissible as against himself.—*Armstrong v. Potter* (Mich.) 61 N. W. 657, 103 Mich. 409.

[b] (Mich.; 1894.)

In an action against persons as copartners, the statements of one are not competent to prove the partnership as against the other.—*Armstrong v. Potter* (Mich.) 61 N. W. 657, 103 Mich. 409.

[c] (Minn.; 1895.)

The declarations of one alleged partner that an alleged partnership exists, though not admissible against the other alleged partners, are properly admitted against the one making them.—*Boosalis v. Stevenson* (Minn.) 64 N. W. 380, 62 Minn. 193.

[d] (Neb.; 1895.)

A partnership cannot be shown merely by statements of one claiming to act for and as a

member of a firm.—*Weeks v. Palmer Deposit Bank (Neb.)* 62 N. W. 874.
44 Neb. 684.

[c] (Neb.: 1896.)

Where it is sought to hold the defendant liable as a member of a partnership firm, the mere statements of one who claimed to be acting for and as a member of such firm are not competent to establish the disputed partnership relation.—*Weir v. Illinois Nat. Bank (Neb.)* 67 N. W. 792.

48 Neb. 791.

§ 10. Sufficiency.

[a] (Mich.: 1894.)

There being evidence that each of two defendants who were sued as copartners had admitted the partnership, the question of the partnership's existence was properly submitted to the jury, though both defendants denied the admissions, and testified to facts inconsistent with the existence of the partnership.—*Armstrong v. Potter (Mich.)* 61 N. W. 657.

103 Mich. 409.

[b] (Mich.: 1897.)

That sons working with their father contemplate that they will eventually succeed to the business, and use the words "we" and "our" in connection therewith, and after transfer of the business to them conduct it to all appearance as before, is not enough to prove that they were partners with their father.—*Hill v. Mallory (Mich.)* 70 N. W. 1016.

[c] (Neb.: 1895.)

Evidence that plaintiff sold goods to one who represented himself to be in partnership with defendant, that defendant refused to receive the goods or pay for them, and that they were received and paid for by the one with whom the contract of sale was made, is insufficient to hold defendant to a partnership liability.—*McDonald v. Jenkins (Neb.)* 62 N. W. 444.

44 Neb. 163.

[d] (Wis.: 1895.)

In an action against one as sole owner of a banking business conducted in a firm name, it appeared that another, who was active manager, was shown by the bank books to be a partner and contributor to the capital; that, in sworn reports to the state treasurer, he declared himself a partner, and paid and canceled certificates of deposit, and signed the names of himself and defendant as partners. He also testified that he was not, and defendant that he was, a partner. *Held*, a partnership shown.—*Voshmik v. Hartmann*, 65 N. W. 60, 91 Wis. 513.

III. FIRM PROPERTY.

Determination in partnership accounting, see post, § 28.

Assessment of taxes on firm property, see "Taxation," § 25.

§ 11. What is.

[a] (Mich.: 1894.)

Where each member of a firm holds in his individual name an undivided interest in land, which is held for the benefit of the firm, and used for partnership purposes, it is subject to firm debts.—*Childs v. Pellett (Mich.)* 61 N. W. 54.

102 Mich. 553.

[b] (Mich.: 1894.)

Where land is bought in the individual names of two partners and two other persons, under an agreement that each is to own a fixed undivided interest, and that, as between themselves, the liability of the buyers under the contract and on all notes given for purchase money shall be in proportion to the interest of each in the land, and that, if any of them should pay any money on behalf of any of

the others, he should have a lien on the interest of the one for which the payment was made, and none of the firm money was used in the purchase, a strong presumption arises that the partners did not mean to treat the land as partnership property.—*Lindsay v. Race (Mich.)* 61 N. W. 271.

103 Mich. 28.

[c] (Mich.: 1894.)

Two partners bought land in their individual names, the first payment being made out of the proceeds of a note signed by each of them. An account describing the land was opened in the firm books, in which the purchase price of the land was debited, and the seller was credited with a like amount. The bank which discounted the note was charged with its proceeds, and the proceeds were credited to bills payable, with a memorandum that the contract of sale had been assigned to the bank as collateral security. Other payments on the purchase price to the seller were charged to him. Interest paid on deferred payments was charged to the land account. One of the partners was credited with traveling expenses incurred on a trip relating to the land. *Held*, that an intention to treat the land as firm property was shown.—*Lindsay v. Race (Mich.)* 61 N. W. 271.

103 Mich. 28.

[d] (Mich.: 1895.)

While complainant and defendant were jointly interested in the lumber business, defendant purchased certain lands which complainant asserted, belonged to the partnership. The evidence, though conflicting, tended to show that the payments on the land in controversy were made with funds secured on defendant's individual credit, and realized on the lands themselves, which were lumbered by other parties on shares with defendant. The firm business was conducted by defendant alone, in his name, but complainant's son acted as book-keeper, and no complaint was made of defendant's management. After complainant knew of the purchase of the lands, he neither approved nor objected thereto, nor inquired into the terms of the defendant's lumbering contract with said other parties. Defendant made no attempt to conceal the transaction, and offered the books for complainant's inspection. *Held*, that the lands did not belong to the partnership.—*Hake v. Coach (Mich.)* 65 N. W. 209.

[e] (Minn.: 1895.)

Where one partner purchases land with partnership funds, and takes the title in his own name, he will be deemed a trustee of such title for the benefit of the partnership.—*Hardin v. Jamison (Minn.)* 62 N. W. 394.

60 Minn. 348.

§ 12. Burden of proof.

(Minn.: 1895.)

Where partnership property is traced to the possession of an individual partner, the burden is on him to show that it is not partnership assets.—*Hardin v. Jamison (Minn.)* 62 N. W. 394.

60 Minn. 348.

IV. POWER OF PARTNER TO BIND FIRM.

Power to execute mortgage after dissolution, see post, § 42.

Right of partner to draw out funds, see post, § 29.

— to claim homestead, see "Homestead," § 3.

§ 13. In general.

[a] (Iowa: 1897.)

A member of a firm of real-estate brokers is authorized to contract with agents to act for it in making sales.—*Boyd v. Watson (Iowa)* 70 N. W. 120.

[b] (Neb.; 1896.)

Where a corporation purchased property for \$1,200 of a partnership, and paid \$700 in cash, and credited the balance due in payment of the subscription of one of the partners to its capital stock, without authority of the partnership, the \$500 payment was not a payment to the partnership.—*Columbia Nat. Bank v. Rice* (Neb.) 67 N. W. 165.
48 Neb. 428.

§ 14. Scope of firm business.**[a] (Iowa; 1894.)**

A member of a firm engaged in the cattle commission business has authority to enter into an agreement whereby a bank is to furnish a customer money to purchase cattle with, in consideration that the firm accept drafts drawn on it to the extent of the net proceeds of the cattle shipped to it.—*First Nat. Bank v. Rowley* (Iowa) 61 N. W. 195.
92 Iowa, 530.

[b] (Minn.; 1896.)

In an action against H. & D., as partners, for the price of a machine delivered to a third party on an order given by D. in the firm name, defendant H. denied that defendants were co-partners in the machine business, and testified that they merely owned some land together; that he did not authorize D. to purchase any machinery, and that he never ordered or received any; that the firm was not in the habit of ordering machines; that the person to whom the machine was delivered had no connection with the firm or its business; and that witness knew nothing of the order being given. *Held*, that the question whether D.'s act in giving the order in the firm name was within the scope of the partnership business was properly submitted to the jury.—*Lynch v. Hillstrom* (Minn.) 67 N. W. 636.
64 Minn. 521.

§ 15. Authority to borrow money and execute or indorse notes.**[a] (Iowa; 1896.)**

One partner has the same right to execute in the firm name a note in settlement of a claim arising out of the firm business as he would have to pay the amount due in cash out of the firm funds.—*Dickson v. Dryden* (Iowa) 66 N. W. 148.

[b] (Iowa; 1896.)

As corroborative of evidence to show power in a managing partner to borrow money, it may be shown that one of the other partners wrote him that she could not furnish more money then, without sacrifice, and requesting him to ascertain if he could not borrow of one of the banks.—*Baxter v. Rollins* (Iowa) 68 N. W. 721.

[c] (Iowa; 1896.)

The clause in a partnership agreement that the partners, other than the one intrusted with the general superintendence and control of the business, shall furnish \$25,000 for the purpose of carrying it on, does not prohibit the borrowing of money by him under all circumstances, but puts persons having knowledge of it, and of the fact that the money had not been furnished, on inquiry to ascertain his power to supply by borrowing what had not been furnished.—*Baxter v. Rollins* (Iowa) 68 N. W. 721.

[d] (Iowa; 1897.)

A firm contracted to sell goods for plaintiff on commission, and take notes therefor; it being agreed that plaintiff might refuse to accept said notes, in which case the firm should either cash them within a specified time, or replace them with other notes bearing the firm's guaranty. *Held* that, on plaintiff's refusal to accept the sales notes, one of the partners might elect to pay cash, and bind the firm by executing its notes for the amount.—*Milwaukee Harvester Co. v. Crabtree* (Iowa) 70 N. W. 794.

[e] (Iowa; 1897.)

Defendant's knowledge that the notes so received by him were sales notes was for the jury, where said notes were on blanks furnished by plaintiff, as provided in the contract, and it did not appear that the firm had transacted any other business for plaintiff.—*Milwaukee Harvester Co. v. Crabtree* (Iowa) 70 N. W. 794.

[f] (Iowa; 1897.)

Where defendant's firm contracted to sell goods for plaintiff on commission, and take notes therefor, and, on plaintiff's refusal to accept the notes, defendant's partner gave the firm notes in settlement, retaining the sales notes, the fact that defendant thereafter accepted some of the sales notes in payment of a debt due him from the firm, knowing them to be such, was evidence of ratification.—*Milwaukee Harvester Co. v. Crabtree* (Iowa) 70 N. W. 794.

[g] (Mich.; 1895.)

Defendant was one of a banking firm which suspended payment while indebted to plaintiff on commercial paper. At request of plaintiff's cashier for some writing which would hold defendant on renewals, defendant wrote: "I hereby authorize L. M. [the other member of the firm] to use my name as one of the firm of L. M. & Co., as indorsers on paper sent you for renewals." *Held*, that the instrument gave authority to use the firm name.—*First Commercial Bank v. Talbert* (Mich.) 61 N. W. 888.
103 Mich. 625.

[h] (Mich.; 1895.)

An authority given by one member of a suspended banking firm to another member to use the firm name on renewals of its notes held by another bank should not be construed to limit its use to renewals of the particular notes in the possession of such other bank, but to continued renewals until the paper is paid.—*First Commercial Bank v. Talbert* (Mich.) 61 N. W. 888.
103 Mich. 625.

[i] (Mich.; 1897.)

B. gave his partner \$300 in money, and a note for \$200, with which to pay the tax on the firm's liquor business. The partner also conducted a business of his own, and at the county treasurer's office paid \$400 in cash, and made the partnership note for \$600, which he borrowed, and paid both taxes, of \$500 each. In an action on the note, he testified that he never talked the matter over with B., and never told him he was going to make the firm note; and B. testified that he never authorized the making of the note, and first learned of it at maturity. *Held*, that a finding that B. authorized the making of the note was not sustained.—*Hatch v. Reid* (Mich.) 70 N. W. 889.

[j] (Minn.; 1896.)

A partnership carrying on the business of boring wells, and buying material for pumps and windmills, which it puts together and places in wells bored by it or by others, is not, as a matter of law, a trading partnership, each member of which has implied authority to borrow money for the use of the firm, and to execute and deliver negotiable paper therefor in the firm name; hence the authority of one of its members to do so is a question for the jury.—*Vetsch v. Neiss* (Minn.) 69 N. W. 315.

[k] (Minn.; 1896.)

Whether a partner can bind his co-partners by making notes in the firm name is a question of authority to execute the notes, and does not depend on whether the partnership receives the benefit of them.—*Vetsch v. Neiss* (Minn.) 69 N. W. 315.

§ 16. Execution of drafts—Payment of private debts.**(S. D.; 1895.)**

A draft, ostensibly made by a partnership engaged in the banking business, payable to

the cashier, though sufficient on its face to raise a presumption that he is attempting to appropriate to his private use money belonging to the bank, is not conclusively void; and in an action thereon against the partnership by a creditor of the cashier, who has paid him full value therefor, evidence that the partner of the cashier had authorized such officer to pay his individual debts to plaintiffs out of partnership funds, or had sanctioned such conduct by habitually permitting him to make drafts to their order for that purpose, is admissible.—*Noyes v. Crandall* (S. D.) 61 N. W. 806.
6 S. D. 460.

§ 17. Transfer or lease of firm property.

[a] (Minn.: 1895.)

Where there are more than two partners, one of them cannot convey or lease to another partner firm property without the consent of the other members of the firm.—*Hardin v. Jamison* (Minn.) 62 N. W. 394.
60 Minn. 348.

[b] (Neb.: 1896.)

One who knowingly receives partnership property with knowledge that its proceeds are passing to the individual use of one partner is charged with notice of such partner's want of authority to dispose of the property for his individual benefit.—*Columbia Nat. Bank v. Rice* (Neb.) 67 N. W. 165.
48 Neb. 428.

§ 18. Making assignment for benefit of creditors.

[a] (Minn.: 1895.)

An assignment for the benefit of creditors by one partner only is void as to partnership creditors, though made in the presence of the other partner.—*Crittenden v. Hill* (Minn.) 63 N. W. 1030.
61 Minn. 462.

[b] (Wis.: 1895.)

Where a partner, in contemplation of insolvency, absconds, a voluntary assignment by his copartners on finding the business insolvent is valid.—*Voshmik v. Hartmann* (Wis.) 65 N. W. 60, 91 Wis. 513.

§ 19. Fraudulent representations.

[a] (Mich.: 1896.)

When one partner procures goods by false representations, and fraudulently disposes of them, all the partners are jointly liable.—*Banner v. Schlessinger* (Mich.) 67 N. W. 116.

[b] (N. D.: 1895.)

One partner is liable for the fraudulent representations of another partner in the sale of partnership property.—*Brundage v. Mellon* (N. D.) 63 N. W. 269.
5 N. D. 72.

V. RIGHTS AND REMEDIES INTER SE.

1. IN GENERAL.

§ 20. Dealings between partners.

[a] (Mich.: 1896.)

In assumptio on a sale of a one-third interest in a partnership it appeared that plaintiff claimed to have bought it from her husband, who was indebted to her, and that in a subsequent transfer of the whole partnership assets to a corporation she was to receive one-third of the proceeds; that defendant, the other partner, claimed that plaintiff's husband had no real interest, that the partnership was insolvent, and that the proceeds of the transfer to the corporation were to be used to pay partnership debts. *Held*, that the jury should have been instructed as to the effect of a sale of partnership property to pay individual debts.—*Fountain v. Hutchinson* (Mich.) 66 N. W. 477.
4 N. W. DIG.—47

[b] (Mich.: 1896.)

Plaintiff and defendant, being partners, agreed to dissolve; defendant to buy out plaintiff's interest, for a price to be determined by arbitration. While proceedings to arbitrate were pending, plaintiff executed to defendant a bill of sale of the firm property, the bill of sale stating that it was subject to the submission for arbitration. *Held*, that, on failure of the arbitrators to agree, plaintiff could not maintain assumptio against defendant for the value of the property.—*Norton v. Hayden* (Mich.) 67 N. W. 909.

§ 21. Actions between partners—Previous accounting or settlement.

[a] (Wis.: 1895.)

Where R., a member of a firm owing no debts, made a balance sheet showing the amount due each partner, and submitted it to R. and S., the other members, who made no objection thereto, and it was agreed that S. should collect the accounts, and pay to each his share, and S. collected all except some collected by B., and, after deducting the amount due him, S. paid to the others their shares of the balance, there was such a settlement as would sustain an action at law by R. against B. for his share of the sum collected by B.—*Rose v. Bradley* (Wis.) 65 N. W. 509, 91 Wis. 619.

[b] (Wis.: 1895.)

On an issue as to whether there was such a settlement between partners as would sustain an action at law by one against the other for a share of firm money collected by the latter, it was error to charge that "where one makes out an itemized statement of his accounts with another, and mails or hands him a copy, and such person retains the same, making no objection thereto, then, in law, it constitutes a settlement of the accounts between them."—*Rose v. Bradley*, 65 N. W. 509, 91 Wis. 619.

[c] (Wis.: 1895.)

It was error to charge that if a trial balance was presented to defendant, and no objection was made, the mere fact of silence raised an inference of acquiescence sufficient to warrant a finding that there was a settlement.—*Rose v. Bradley*, 65 N. W. 509, 91 Wis. 619.

2. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

Accounting as condition precedent to action between partners, see ante, § 21.

Dissolution as releasing sureties on firm bond, see "Principal and Surety," § 11.

— by death of partner, see post, § 49.

Right to equitable set-off in accounting after dissolution, see post, § 44.

§ 22. Notice of dissolution.

[a] (Iowa: 1896.)

In an action on notes, it appeared that defendant was a member of the firm of D. Bros., cattle dealers, and that in 1885 his partner D. went away, the business being continued by defendant and his father in the old firm name; that D. returned in a few months, and formed a partnership with M., under the style of M. & D., for dealing in cattle; that though defendant claimed the partnership between himself and D. was dissolved when the latter left, in 1885, no notice of dissolution was ever given to plaintiffs or published, but that, long after the alleged dissolution, defendant and his father drew drafts on plaintiffs against consignments of stock shipped in the name of D. Bros. Plaintiffs testified that, after 1886, the accounts of the two firms, both of which shipped stock to plaintiffs, were, by mutual arrangement, all kept in the name of M. & D., and his testimony was supported by the fact that, though drafts were drawn by D. Bros. against plaintiffs as late as the fall of 1887, no settlement was made,

nor any statement rendered D. Bros. by plaintiffs. The notes in suit were given in September, 1887, for a balance due on the M. & D. account, and bore that firm's signature and the signature of D. Bros, the latter being signed by D., without any express authority from defendant. *Held*, that D. Bros. and defendant were liable on the notes.—*Dickson v. Dryden* (Iowa) 66 N. W. 148.

[b] (Wis.: 1895.)

A firm composed of A. J. G. and J. D. P., doing business as J. D. P. & Co., dissolved, and published a notice reciting dissolution, and that the business would be carried on under the firm name of J. B. G. & Co. The notice contained no statement that A. J. G. had withdrawn, and business was conducted without further notice of any change in the firm. *Held*, that A. J. G. was estopped to deny membership in the new firm, in order to come in as a general creditor after its dissolution.—*Gibbs v. Humphrey*, 64 N. W. 750, 91 Wis. 111.

§ 23. Private accounting and settlement—Operation and effect.

[a] (Mich.: 1895.)

By the terms of partnership between a logger and a mill owner the former was to receive a yearly salary and a certain price per 1,000 for delivering logs at the boom, and the latter was to receive a certain price per 1,000 for sawing the logs, and, after reimbursing himself for advances for carrying on the business with interest, was to receive two-thirds of the profits, the former taking the balance. Mill culls, being worth no more than the saw bills, were not mentioned. *Held* that, settlements having been made from time to time for 20 years, in which the mill owner was not charged with culls retained by him, and in which interest on advances was charged to the logger individually, and not to the firm, an accounting between the partners should be made on the same basis.—*Loveland v. Peter* (Mich.) 65 N. W. 748.

[b] (Mich.: 1897.)

In accounting the cost of the plant is not limited to the amount shown by vouchers only, but includes any amounts the payment of which can be proved by legal evidence.—*Feige v. Babcock* (Mich.) 70 N. W. 7; *Babcock v. Feige*, *Id.*

§ 24. Right to accounting.

[a] (Mich.: 1897.)

The right of a partner to an accounting from the other partners upon the sale by them of the partnership business without her consent is not affected by the fact that such sale was made subject to her interest in the business.—*Feige v. Babcock* (Mich.) 70 N. W. 7; *Babcock v. Feige*, *Id.*

[b] (Mich.: 1897.)

Complainant entered into partnership with defendant, purchasing a third interest, the contract providing that the amount to be paid therefor should be adjusted on the cost of the plant, as shown by defendant's vouchers. Both parties subsequently sold their interests to another. *Held*, that the sale did not relieve defendant from liability to account to complainant under the contract of purchase, and for the business done during the existence of the partnership.—*Feige v. Babcock* (Mich.) 70 N. W. 7; *Babcock v. Feige*, *Id.*

[c] (Mich.: 1897.)

The release of plaintiffs' premises from the lien of certain mortgages, and the sale thereof by foreclosure of another mortgage held by defendant, being the only relief that can be afforded as between plaintiffs and defendant, adjustment of plaintiffs' partnership affairs should not be made in a suit between such parties.—*Beardslee v. Citizens' Commercial & Savings Bank* (Mich.) 70 N. W. 1027.

§ 25. Actions for dissolution and accounting.

[a] (Iowa: 1894.)

In an accounting between partners, in which plaintiff claims the business resulted in a profit, and it appears there was a loss instead, defendant cannot recover of plaintiff the latter's share of such loss, where he simply denies plaintiff's right to recover, and asks no affirmative relief.—*Helmner v. Yetzer* (Iowa) 61 N. W. 206.

92 Iowa, 627.

[b] (Mich.: 1895.)

The fact that defendant in an action for an accounting denied his partnership with complainants did not deprive him of the right to a just statement of the account on his being found to be a partner.—*Thompson v. Noble* (Mich.) 65 N. W. 563.

[c] (Mich.: 1896.)

In a suit in a foreign court for the dissolution of a partnership and the settlement of its affairs, a complaint alleging that certain lands situated in this state were partnership assets, and an answer denying the same, were sufficient to authorize the court to find that the lands belonged to the partnership, and to direct a receiver to sell the same, though they were not specifically described in the pleadings.—*Dunlap v. Byers* (Mich.) 67 N. W. 1067.

[d] (Mich.: 1896.)

A bill against an insurance agent and the insurance company alleged that complainant made a contract of partnership with such agent, by which complainant was to receive one-half of all renewal commissions on all business secured through the agency during the partnership; that the company approved of such contract; that it was the custom, in the life insurance business, to allow general agents a percentage of the renewal premiums, and that the above contract was made with reference to such custom; that the company thereafter wrongfully directed the agent to dissolve complainant's "relations with said company"; and that the agent has in his possession renewal premiums belonging to complainant, and prayed for a discovery of the amount of renewal premiums received during the continuance of the contract, and for dissolution and accounting. *Held*, that the bill was good as against a demurrer by the company.—*Houghton v. State Mut. Life Assur. Co.* (Mich.) 68 N. W. 142.

[e] (Mich.: 1896.)

The insurance company was a proper party defendant to such bill.—*Houghton v. State Mut. Life Assur. Co.* (Mich.) 68 N. W. 142.

§ 26. — Judgment.

[a] (Mich.: 1897.)

A decree for accounting between partners, providing that defendant should not be credited with disbursements made by him after the sale of the partnership business to a third person, should not apply to disbursements in payment of debts of the firm not assumed by the purchaser.—*Feige v. Babcock* (Mich.) 70 N. W. 7; *Babcock v. Feige*, *Id.*

[b] (Wis.: 1895.)

In a suit for the dissolution and settlement of a partnership, a personal judgment should not be rendered against one partner for the amount supposed to be due to the other as his share of the profits until the assets are reduced to cash and the debts paid, there being no agreement to the contrary.—*Green v. Stacy* (Wis.) 62 N. W. 627.

90 Wis. 46.

§ 27. Items considered and allowed.

[a] (Mich.: 1895.)

Plaintiff became general agent of defendant company under a contract dated November, 1888, providing that when a premium note or loan was allowed by the company in payment of any of the first year's premium on any policy no

commissions should be allowed on such premium note or loan until the policy has been in force five full years. In February, 1891, plaintiff transferred to P. one undivided half of all commissions due or to become due after March, 1891, under the above agreement, and they became partners in future commissions under a new agreement between plaintiff, defendant, and P., providing that "on first year's premiums, or deferred portions thereof, collected on and after March, 1891, on policies issued prior" thereto, commissions should belong exclusively to plaintiff. *Held*, that the latter agreement entitled plaintiff to all commissions on premiums represented by premium notes, and thereafter paid on policies issued prior to March, 1891.—*Thomson v. Massachusetts Mut. Life Ins. Co. (Mich.)* 63 N. W. 643.

105 Mich. 358.

[b] (Wis.: 1895.)

In an action to dissolve a partnership and settle its affairs, where claims of one partner for sums advanced to the other individually, and by him invested in the partnership business, have been submitted to the referee, and also passed on by the court, there being but the two partners interested, and no injustice having been caused, the consideration of such claims will not justify a reversal.—*Green v. Stacy (Wis.)* 62 N. W. 627.

90 Wis. 46.

[c] (Wis.: 1895.)

In an accounting between partners, a claim by one partner for goods purchased on his own account, and put into the business at the suggestion of the other partner, whose duty it was, under the agreement, to furnish all the goods, is a proper charge against the latter, it being shown that he did not become responsible in any way to the one from whom they were purchased.—*Green v. Stacy (Wis.)* 62 N. W. 627.

90 Wis. 46.

§ 28. What is firm property.

(Mich.: 1894.)

Where a firm allows one member to retire, and take his undivided interest in the firm real estate as security for a debt due him from the firm, the continuing members, in adjusting accounts inter se, cannot treat such real estate as partnership property without satisfying his lien.—*Childs v. Pellett (Mich.)* 61 N. W. 54.

102 Mich. 558.

§ 29. Right of partner to draw out funds.

(Iowa: 1895.)

Where the articles of copartnership of a banking firm provide that each party shall provide a certain amount of capital for the firm in the form of a deposit, a partner who frequently overdraw his account cannot complain that his copartner violated the partnership agreement by doing the same thing.—*Coldren v. Clark (Iowa)* 61 N. W. 1045.

93 Iowa, 352.

§ 30. Right to interest.

[a] (Iowa: 1895.)

Where a partner advances his own funds to meet firm obligations, he is entitled, on an accounting with his copartners, to be credited with interest from the date of the advancement.—*Coldren v. Clark (Iowa)* 61 N. W. 1045.

93 Iowa, 352.

[b] (Mich.: 1895.)

Interest is not recoverable on an excess of capital contributed to a partnership by one partner on the ground that he devoted his time and money to carrying on the partnership business, whereas the other partner contributed nothing in the way of time or labor.—*Thompson v. Noble (Mich.)* 65 N. W. 563.

§ 31. Estimating profits.

(Iowa: 1894.)

A firm agreed to furnish plaintiff money with which to buy hogs for its packing house,

and that he should receive for his services one-half of a certain member's share of the profits of the firm. Nothing was said as to how the money should be obtained, and no representation was made as to the firm's capital. It had no money of its own, and all the money it furnished to plaintiff was borrowed. *Held* that, in determining plaintiff's compensation, the interest paid for such money must be considered as an expense of conducting the business, and not as a profit in which plaintiff was to share.—*Helmer v. Yetzer (Iowa)* 61 N. W. 206.

92 Iowa, 627.

§ 32. Mistake in settlement—Remedy.

(Neb.: 1895.)

Where a partnership business was settled according to the books kept by one partner, on discovering errors in the books, in that such partner failed to enter receipts of partnership money by himself, the other partner may sue at law to recover the damage which he was caused thereby in the settlement.—*McAuley v. Cooley (Neb.)* 63 N. W. 871.

45 Neb. 582.

§ 33. Review.

(Mich.: 1896.)

A decree in a partnership accounting will not be disturbed on appeal where it appears that the settlement was just, and was made on a consideration of all the partnership affairs.—*Eames v. Miller (Mich.)* 66 N. W. 338.

VI. FIRM AND PRIVATE CREDITORS.

§ 34. Firm liabilities.

(Neb.: 1896.)

The giving of a note and mortgage by a firm to secure payment of a debt of one of the individual members, when not violative of the rights of creditors of the firm, is valid, and rests upon a sufficient consideration.—*Miller v. Gunderson (Neb.)* 67 N. W. 769.

48 Neb. 715.

§ 35. Rights of private creditors.

[a] (Iowa: 1895.)

Where an insurance agent, who was indebted to his company, took in a partner, and the partnership thereafter represented the company, and opened new books, and kept its business separate from that formerly done by the agent, payments made to the company during the existence of the partnership could not be applied to the agent's individual debt, as against his copartner.—*Hoffman v. Smith (Iowa)* 63 N. W. 182.

[b] (Neb.: 1895.)

Partnership assets may be levied on and sold for the payment of the debts of all the individual members of the firm.—*Richards v. Le Veille (Neb.)* 62 N. W. 304.

44 Neb. 38.

§ 36. Rights of firm creditors.

[a] (Iowa: 1895.)

A disposition by an insolvent firm, with the consent of all the members, of its assets in payment of an individual debt of one of its members, is good as against firm creditors.—*Sylvester v. Henrich (Iowa)* 61 N. W. 942.

93 Iowa, 489.

[b] (Neb.: 1895.)

The assets of an insolvent partnership are not held in trust by the members of the firm for the payment of firm debts.—*Richards v. Le Veille (Neb.)* 62 N. W. 304.

44 Neb. 38.

§ 37. — Lien.

(Neb.: 1895.)

The creditors of a partnership, merely because they are creditors, are not given a lien

on its assets, whether the firm be solvent or not.—*Richards v. Le Veille* (Neb.) 62 N. W. 391, 44 Neb. 38.

§ 38. Priorities between firm and private creditors.

[a] (Neb.; 1895.)

On the dissolution of an insolvent firm, the creditors of one partner cannot divert the assets for the payment of their claims to the prejudice of the firm creditors.—*Perkins v. Butler County* (Neb.) 62 N. W. 308.

44 Neb. 110.

[b] (Neb.; 1895.)

Where a partnership is insolvent, a court of equity, in a suit either by a member of the firm or by a firm creditor, will apply the assets to the payment of the firm debts to the exclusion of the debts of the individual partners.—*Richards v. Le Veille* (Neb.) 62 N. W. 394.

44 Neb. 38.

[c] (Neb.; 1895.)

A. and B., as partners, had a contract for the construction of a courthouse. During the progress of the work, the partnership was dissolved, it being agreed that A. should complete the contract and receive any profits thereon, but that A. might use the firm name in completing the same. A. borrowed money which he used in completing the contract. On a note signed by A. individually, and indorsed by plaintiffs, and to secure them, A. made in the firm name an order on the county directing the payment to them of 15 per cent. of the contract price, which was by the contract reserved until the courthouse was finished. Thereafter A., in the firm name, gave orders against the same fund to various persons who had performed work or furnished material for the building. Plaintiffs were compelled to pay A.'s note. *Held* that, as between A. and B., the county, and laborers and material men, the fund was partnership assets; and that the laborers and material men were entitled to be paid therefrom prior to plaintiffs.—*Perkins v. Butler County* (Neb.) 62 N. W. 308.

44 Neb. 110.

§ 39. — Transactions fraudulent as to firm creditors.

[a] (Iowa.)

Where the wives of members of a mercantile firm buy goods of such firm, and credit their value on the individual notes of their husbands, given for bona fide debts due such wives, the transfer is not void as to the creditors of such firm, though it is insolvent.—(1894) *John V. Farwell Co. v. Stiek*, 61 N. W. 565; (1895) *Id.*, 64 N. W. 614.

[b] (Neb.; 1895.)

Where members of a firm mortgage the firm property to secure a creditor of another firm, of which they are sole members, such mortgage is a fraud on the creditors of the first-named firm, and the rights of the mortgagee are subordinate to those of such creditors.—*Bonwit v. Heyman* (Neb.) 61 N. W. 716, 43 Neb. 537.

[c] (Neb.; 1897.)

That part of the consideration for a conveyance by a partnership was the cancellation of a debt of one of the partners, incurred prior to the partnership, and secured by a mortgage on the property before it became firm property, does not render the sale fraudulent as to firm creditors.—*Wilson v. Gamble* (Neb.) 69 N. W. 945.

§ 40. Application of assets to liabilities.

[a] (Iowa; 1896.)

Where an assignment for the benefit of creditors has been made by a firm, and also by the partners as individuals, the holder of a note executed by the firm and the members individually is entitled to have the estates of the partnership and of each partner kept separate, and to receive a dividend from each, though the note was given for a firm liability.—*In re Car-*

ter (Iowa) 67 N. W. 239; *State Bank of Keokuk v. Irwin*, *Id.*

[b] (Mich.; 1896.)

Where a partner, in his own name, sold partnership lands, with the consent of the other partner, and the proceeds of sales were credited on the books of the firm, it was proper for the court, in a suit to dissolve the partnership and settle its affairs, to determine that said lands were partnership assets, for the purpose of paying its debts, and therefore the heirs of the latter partner could not equitably claim any interest therein.—*Dunlap v. Byers* (Mich.) 67 N. W. 1067.

[c] (Neb. 1895.)

Two partners had a contract to build a courthouse. Before the work was completed the partnership was dissolved, and it was agreed that one partner should complete the contract and receive the profits, and that he might use the firm name in completing the same. Thereafter such partner borrowed money on a note signed by him individually, and indorsed by plaintiffs, and to secure plaintiffs he made in the firm name an order on the county, directing payment to plaintiffs of a certain per cent. of the contract price, which by the contract was reserved until the courthouse was finished; and subsequently he gave, in the firm name, orders against the same fund to persons who had performed work or furnished material for the building. Plaintiffs were compelled to pay the note which they indorsed. *Held*, that as between the two partners, the county, and the laborers and material men, the fund drawn on constituted partnership assets, and the laborers and material men were entitled to be paid therefrom prior to plaintiffs.—*Perkins v. Butler County*, 64 N. W. 975, 46 Neb. 314.

[d] (Neb.; 1896.)

The assets of an insolvent partnership will, in equity, be treated as a trust fund for the payment of the firm creditors, and cannot be applied in satisfaction of the personal obligations of the individual partners, to the prejudice of those to whom it equitably belongs.—*Steele v. Kearney Nat. Bank* (Neb.) 66 N. W. 841.

47 Neb. 724.

[e] (Wis.; 1895.)

A member of a partnership, created by holding out, cannot, on dissolution of the firm, prove a claim of his own against the firm assets, in competition with the firm creditors.—*Gibbs v. Humphrey*, 64 N. W. 750, 91 Wis. 111.

[f] (Wis.; 1895.)

Where one of the members of an insolvent firm sells out his interest, and a new firm is formed, which assumes the debt of the old firm, and continues the business with the same assets, and makes an assignment for benefit of creditors, the creditors of the old and new firms may prove their claims *pari passu*, and be preferred over individual creditors of such new firm.—*Thayer v. Humphrey*, 64 N. W. 1007, 91 Wis. 276; *Davies v. Same*, *Id.*

[g] (Wis.; 1895.)

Where one of the members of an insolvent firm sells out his interest under a promise that the firm debts shall be paid out of the firm assets, creditors of the old firm and a creditor of the new firm cannot prove *pari passu* with the individual creditors of a partner in the first firm, who did not continue in the new firm on an assignment by such partner.—*Thayer v. Humphrey*, 64 N. W. 1007, 91 Wis. 276; *Davies v. Same*, *Id.*

§ 41. — Transactions affecting rights of creditors.

[a] (Neb.; 1896.)

A chattel mortgage given by a firm to secure certain of its creditors was not rendered void as to the creditors in general by reason of the fact that among the preferred claims was a note individually made by one of the part-

ners, where the note represented money borrowed by such partner for the firm, and used in the partnership business, and was in fact not his individual indebtedness, but the debt of the firm.—*Steele v. Kearney Nat. Bank* (Neb.) 66 N. W. 841.

47 Neb. 724.

[b] (Neb.; 1896.)

A co-partnership does not hold its property in trust for its creditors, nor have its creditors a lien upon its property by reason of being such, so as to preclude it from preferring one of its creditors in good faith.—*Aetna Ins. Co. v. Bank of Wilcox* (Neb.) 67 N. W. 449.

48 Neb. 544.

[c] (Neb.; 1896.)

A co-partnership, even though in failing circumstances, has the right to pay a part of its creditors in full, to the exclusion of others, provided such payments are made with an honest purpose.—*Campbell v. Farmers' & Merchants' Bank* (Neb.) 68 N. W. 344.

VII. RIGHTS AND POWERS AFTER DISSOLUTION.

§ 42. Rights of partner.

(Mich.; 1895.)

In the absence of fraud, a solvent partner could, on the dissolution of the partnership by the assignment of his insolvent copartners, mortgage the entire property of the partnership to a creditor of the firm, without rendering himself liable to the other partners for the difference between the actual value of the firm property and the amount for which it was sold under the mortgage.—*Thompson v. Noble* (Mich.) 65 N. W. 563.

§ 43. Of limited partnership.

(Mich.; 1896.)

When a limited partnership expires, the partners become general partners if the business is continued; and therefore, where articles of limited partnership had expired, it was proper to bring an action in the name of the individual partners, and not in the name of the partnership.—*Sarmiento v. The Catherine C.* (Mich.) 67 N. W. 1085.

§ 44. Equitable set-off.

(Wis.; 1896.)

While individual claims existing in favor of one member of a partnership against another after dissolution are not a subject of statutory set-off or counterclaim in an action by the debtor for an accounting and settlement of the partnership business, yet, where the plaintiff asks judgment against the defendant for the amount found due him on such settlement, and plaintiff is shown to be insolvent, the court may, under its general equity powers, independently of statute, permit the defendant to plead his demands as an equitable set-off, and apply any sum found due plaintiff from the partnership to their payment.—*Pendleton v. Beyer* (Wis.) 68 N. W. 415.

VIII. LIABILITIES AFTER RETIREMENT OF PARTNER OR COMING IN OF NEW MEMBER.

§ 45. Rights of retiring member.

(Mich.; 1894.)

A firm whose members own equal undivided interests in its real estate may allow one member to retire and take his portion of the real estate as security for a debt due him from the firm.—*Childs v. Pellett* (Mich.) 61 N. W. 54.

102 Mich. 558.

§ 46. Transfer of partner's interest.

(Iowa; 1895.)

On sale by a partner of his interest, and an agreement by the purchaser to pay a certain portion of the selling partner's indebtedness to the firm, such selling partner is liable for any other amount due by him to such firm.—*Mueller v. Sutter* (Iowa) 64 N. W. 665.

§ 47. Rights and obligations of old firm.

[a] (Iowa; 1895.)

Where one firm succeeds another, one who, as partner, is individually liable for the indebtedness of each firm, will be liable to account for sales by either firm of property held by them as successors in interest of a firm to which the property was delivered for sale on commission.—*Waite v. High* (Iowa) 65 N. W. 397.

[b] (Mich.; 1894.)

Where a new firm assumes the debts of the old firm which it succeeded in business, and afterwards allows one of its members, who was also a member of the old firm, to retire discharged from all liability for the firm debts, and to take part of the firm real estate as security for a debt due him from the firm, such real estate is subject to the debts of the old firm after the other partnership property has been exhausted.—*Childs v. Pellett* (Mich.) 61 N. W. 54.

102 Mich. 558.

[c] (Wis.; 1895.)

Where one member of an insolvent firm sells his interest with the agreement that the new firm shall assume the debts of the old, the assets of the new firm are charged in equity with a trust for the payment of the debts of the old, which may be enforced by a creditor of the old firm who has not consented to accept the new firm as his creditor instead of the old. *Pinney and Newman, JJ., dissenting.*—*Thayer v. Humphrey* (Wis.) 64 N. W. 1007, 91 Wis. 276; *Davies v. Same*, *Id.*

[d] (Wis.; 1896.)

A parol contract by an incoming partner to assume, along with the other member, the debts of the old concern, is binding.—*J. & H. Claguen Co. v. Silber* (Wis.) 67 N. W. 1122.

93 Wis. 579.

§ 48. Actions after change of membership.

(Iowa; 1895.)

Where one firm succeeds another, a statement of indebtedness of each of the firms, rendered to third persons during the existence of the new firm, is as to each firm binding on one who, as a partner, is individually liable for the debts of both firms, when such statement is made by one acting as his managing agent in both firms during their existence.—*Waite v. High* (Iowa) 65 N. W. 397.

IX. DISSOLUTION BY DEATH OF PARTNER—SURVIVING PARTNER.

§ 49. Rights and powers of survivor.

[a] (Iowa; 1896.)

Where, on the death of one partner, the surviving partner continues the business just as he had done before her death, no steps being taken to wind up the business or ascertain the share of the deceased, and it is impossible to determine with accuracy the condition of the firm at the time of the partner's death, the surviving partner cannot object to an accounting as if the partnership had continued to the time of the commencement, by the representatives of the deceased partner, of the suit therefor.—*Young v. Scoville* (Iowa) 68 N. W. 670.

[b] (Iowa; 1896.)

A surviving partner is not entitled to compensation for closing up the business, his services having been originally rendered under an agreement that they should be offset by the

services of the husband of the deceased partner. — *Young v. Seoville* (Iowa) 68 N. W. 670.

[a] (Mich.: 1897.)

A surviving partner, unless authorized in writing by the heirs of the deceased partner, cannot renew a lease executed by the firm for a term of years. — *Oliver v. Ojmstead* (Mich.) 70 N. W. 1036.

[d] (Neb.: 1896.)

Where, after the death of a partner, firm property was sold under decree of foreclosure, and a surplus was left in court, the surviving partner had power, in the absence of fraud, to dispose of the fund. — *Lindner v. Adams County Bank* (Neb.) 68 N. W. 1028.

X. ACTIONS.

After change of membership, see ante, § 48. Between partners, see ante, § 21.

§ 50. By partner.

[a] (Mich.: 1895.)

Where a landlord, knowing that his store is wanted by a firm of four persons in which to carry on their business, makes a lease to one of them, and two of the others sign as sureties, and the other is in no way a party to the lease, only the one named as lessee can sue for breach of the lease. — *Burwitz v. Jeffers* (Mich.) 61 N. W. 784.

103 Mich. 512.

[b] (Mich.: 1895.)

One partner cannot maintain an action at law for damages against a vendee for partnership goods sold him by a copartner in fraud of plaintiff's rights. — *Reed v. Gould* (Mich.) 63 N. W. 415.

105 Mich. 368.

[c] (S. D.: 1896.)

A partner, being a tenant in common with his co-partner, may recover possession of the whole of the firm real estate, as against one holding the same without title. — *Brady v. Kreuger* (S. D.) 66 N. W. 1083.

§ 51. By firm.

(Neb.: 1897.)

A petition alleged that plaintiffs, M. & W., were a firm composed of M. and W. The caption was in the firm name, and the summons did not appear in the record. Held, that the action was not brought under Code Civ. Proc. § 24, authorizing partnerships to sue without setting forth the names of the partners, and hence did not abate on the death of one partner. — *Union Pac. R. Co. v. Metcalf* (Neb.) 69 N. W. 961.

§ 52. Process and service.

[a] (Neb.: 1895.)

Since a suit against H. and S., members comprising the firm of H. & S., was a suit against the individual members, service of summons was not governed by Code, §§ 24, 25, relating to service of summons in actions against partnerships and associations. Overruling *Morrissey v. Schindler* (1886) 18 Neb. 672, 26 N. W. 476. — *Hanna v. Emerson*, 64 N. W. 229, 45 Neb. 708.

[b] (Wis.: 1896.)

A return on a summons in an action against a firm, reciting a service on both partners by reading the summons to one of them, and by leaving with him a copy thereof for "each" of them, shows a valid service on the partner to whom the summons was read, and therefore authorizes, under Rev. St. § 3663, on default, a judgment against both. — *Young v. Krueger* (Wis.) 66 N. W. 355.

92 Wis. 361.

§ 53. Pleading.

[a] (Neb.: 1896.)

Where a note payable to a partnership purported to be indorsed by the partners individu-

ally, a general denial by one partner, in an action against the partners individually on their several indorsements, puts in issue the validity of his indorsement. — *Graves v. Norfolk Nat. Bank* (Neb.) 68 N. W. 612.

[b] (Neb.: 1896.)

Code Civ. Proc. § 21, providing that any unincorporated company or association formed to carry on trade or to hold property in Nebraska may sue and be sued in the associate name without pleading or proving the names of its members, requires a petition by a partnership in the firm name to allege that the firm was formed for the purpose of carrying on trade or for holding property in Nebraska. — *Church v. Callahan* (Neb.) 68 N. W. 932.

[c] (Neb.: 1897.)

That the name of the defendant partnership against which judgment is sought is followed in the petition by the words "consisting of" and the names of the members of the firm does not make the members defendants. — *Winters v. Means* (Neb.) 69 N. W. 753.

§ 54. — Allegations of partnership.

[a] (Minn.: 1895.)

In an action by a partnership for goods sold, where the complaint alleged that on a certain day defendants became indebted to plaintiffs for goods furnished by plaintiffs to defendants, at their special instance and request, for the sum sued for, no part of which was paid, a judgment for plaintiffs was authorized by the pleadings, though the complaint failed to allege that plaintiffs were partners at the time the goods were sold. — *Boosalis v. Stevenson* (Minn.) 64 N. W. 380.

62 Minn. 193.

[b] (Minn.: 1896.)

A general denial in an answer puts in issue an allegation of the complaint that defendants are partners; Gen. St. 1894, § 5255, referring to allegations as to the partnership of plaintiffs only. — *McKasy v. Huber* (Minn.) 67 N. W. 650.

[c] (Minn.: 1896.)

The fact that a complaint against persons who are partners does not allege the partnership, is waived by litigating the issues without objection. — *Keene v. Masterman* (Minn.) 68 N. W. 771.

[d] (S. D.: 1895.)

When, in an action against partners, the partnership, the names of the members composing the same, and the partnership name are fully set out in the body of the complaint, the omission in the title of the complaint of the statement that defendants are partners does not render the complaint open to the objection that it does not state facts sufficient to constitute a cause of action. — *Van Brunt & Davis Co. v. Harrigan* (S. D.) 65 N. W. 421.

§ 55. Evidence.

(Neb.: 1896.)

Where one accepts partnership property in payment of an individual debt of one of the partners, and the partnership sues for the price, evidence that, at the time of the transfer, such partner declared that he had authority to so use the firm property, was not admissible, on the principle that the authority of an agent cannot be proved by the declarations of the agent himself. — *Columbia Nat. Bank v. Rice* (Neb.) 67 N. W. 165.

48 Neb. 428.

§ 56. — Proof as to partnership.

[a] (Mich.: 1895.)

In an action by partners on a contract made by defendant with one of plaintiffs only, plaintiffs need not prove that defendant understood that they were partners. — *Philpott v. Bechtel* (Mich.) 62 N. W. 174.

104 Mich. 79.

[b] (Neb.: 1895.)

Where it is sought to charge a defendant as a copartner, the allegations of the petition being put in issue by the answer, plaintiff must prove either a partnership in fact, or that defendant permitted himself to be held out as a partner in such way as to cause third persons to rely on his credit.—*McDonald v. Jenkins* (Neb.) 62 N. W. 444.

44 Neb. 163.

PART PAYMENT.

See "Accord and Satisfaction."

Of debts barred by limitations, see "Limitation of Actions," § 33.

What constitutes accord and satisfaction, see "Accord and Satisfaction," § 2.

PART PERFORMANCE.

Of agreement within statute, see "Frauds, Statute of," § 17.

Of contract, see "Contracts," § 49.

Of parol contract, right to specific performance, see "Specific Performance," § 5.

PARTY WALLS.**§ 1. Statutory regulations.**

(Iowa: 1896.)

Code, § 2019, providing that the owner of a lot in a city or town, and being "about to build" thereon contiguous to his neighbor's lot, may, if there is no wall between them, rest one-half the wall for his building, if of brick or stone, on the neighbor's lot, does not authorize the building and maintenance of a stone wall, half on the lot of a neighbor, by one who simply "intends" to build a brick superstructure thereon.—*Switzer v. Davis* (Iowa) 66 N. W. 174.

§ 2. Rights and liabilities of adjoining owners.

[a] (Iowa: 1897.)

Under McClain's Code, § 3195, providing that, where a person builds a partition wall, the adjoining owner "may make it a wall in common by paying one-half of the appraised cost at the time of using it," the erection of a temporary shed, 10 feet high, and open on two sides, with one end of its batten roof resting on a 2x6 scantling, nailed to a two-story partition wall on the adjoining lot, is not such an appropriation of the wall as will charge the owner of the shed with contribution, or justify his grantee in assuming that such contribution has been paid, so as to entitle him to make permanent use of the partition wall without contributing to its cost.—*Beggs v. Duling* (Iowa) 70 N. W. 732.

[b] (Iowa: 1897.)

Under said statute, an appropriation of but 5 feet of a two-story partition wall 90 feet long, by the erection of a one-story stable, will not justify charging the owner of the stable with one-half the cost of the entire wall.—*Beggs v. Duling* (Iowa) 70 N. W. 732.

[c] (Neb.: 1896.)

An agreement for the construction of a wall in common by joint property owners, to the height of three stories on the land of one, does not justify the assumption that the other party may, of his own motion, and for his own sole benefit, extend said wall upward still another story, irrespective of a therefrom threatened easement ripening, or of injury likely to result to the property adjacent.—*Calmelet v. Siehl* (Neb.) 67 N. W. 467.

48 Neb. 505.

§ 3. Covenants running with land.

[a] (Minn.: 1895.)

A duly-recorded agreement between adjoining owners, reciting that one was given the right to erect a wall partly resting on the other's land, and was to be sole owner of the wall until the other paid one-half the cost of its erection, when it was to become a party wall, constitutes a covenant running with the land so burdened, and subsequent purchasers take subject thereto.—*First Nat. Bank v. Security Bank* (Minn.) 63 N. W. 264.

61 Minn. 25.

[b] (Minn.: 1896.)

A sealed agreement under which a party wall was built by one of the parties provided that, when the other should build and use the wall, he should pay one-half its cost; that it should be kept in repair at their joint expense; that, in all conveyances of the lots by either party, the wall should be reserved as a partition wall; and that these stipulations should bind their heirs, assigns, etc. *Held*, that these covenants ran with the land.—*Kimm v. Griffin* (Minn.) 69 N. W. 634.

§ 4. Rights of purchasers.

(Wis.: 1895.)

One who, in constructing an addition to his building, using the south wall thereof as the north wall of the addition, conveyed the portion of the lot on which the addition stood, describing it as the "south 26 feet, more or less," of the lot, with "the undivided one-half of the wall on the north side of the above-described premises." *Held*, that the grantee took only an easement in the wall, and not any part of the land on which it stood.—*Duncan v. Rodecker* (Wis.) 62 N. W. 533.

90 Wis. 1.

PASSENGERS.

See "Carriers."

PASTURE.

See "Agistment."

PATENTS.

Exemption of patent rights, see "Exemptions," § 7.

To public lands, see "Public Lands," § 14.

PATENTS FOR INVENTIONS.

[a] (Mich.: 1897.)

The inventor of a device may make a valid contract for its manufacture, use, or sale, before issuance of a patent, where the parties understand that no patent has been issued, and the contract is made with reference to that fact.—*Hamilton v. Park & McKay Co.* (Mich.) 70 N. W. 436.

[b] (Mich.: 1897.)

The inventor of an unpatented device granted a manufacturer the exclusive license to construct and sell the article for a stated royalty. The time when the royalty should begin was definitely fixed at one year from the date when the article should be modeled and ready to put in the market. The contract provided that if the patent, for which an application was pending, should not be granted, or be found invalid when granted, the manufacturer might declare the contract ended. *Held*, that the royalty was to begin when the article was ready for the market.—*Hamilton v. Park & McKay Co.* (Mich.) 70 N. W. 436.

[*cl*] (Mich.: 1897.)

Where a contract of license to manufacture and sell water-closets provides for a royalty of \$1 for each closet sold, and that the manufacturer "shall pay royalty on not less than one thousand closets for each year," the manufacturer is bound to pay a royalty of at least \$1,000 a year, regardless of the number of closets sold.—*Hamilton v. Park & McKay Co.* (Mich.) 70 N. W. 436.

[*cl*] (Mich.: 1897.)

Where a contract in consideration of a royalty grants a license to manufacture and sell a certain article, accounts to be rendered at certain times, and reserves a right to terminate the contract for default, the rescission of the contract by the licensor does not destroy the right to recover royalty already earned.—*Hamilton v. Park & McKay Co.* (Mich.) 70 N. W. 436.

PAUPER.

See "Poor and Poor Laws."

PAWN.

See "Pledge."

PAWNBROKERS.

Police power to regulate, see "Constitutional Law," § 44.
Power of city to exact license fee, see "Municipal Corporations," § 29.

PAYMENT.

- I. REQUISITES AND SUFFICIENCY, §§ 1-4.
- II. PLEADING AND EVIDENCE, §§ 5-8.
- III. PRESUMPTION, §§ 9, 10.
- IV. VOLUNTARY PAYMENT, §§ 11-17.
- V. APPLICATION, §§ 18-20.

See, also, "Accord and Satisfaction"; "Compromise"; "Release and Discharge."

Authority of agent to receive, see "Principal and Agent," § 8.

Effect of release as evidence of payment, see "Chattel Mortgages," § 36.

Medium of payment of collections, see "Banks and Banking," § 22.

Of alimony, see "Divorce," §§ 33, 34.

Of assessments for public improvements, see "Municipal Corporations," § 155.

Of bills and notes, see "Negotiable Instruments," §§ 68-74.

Of checks, see "Banks and Banking," § 16.

Of corporate stock, see "Corporations," §§ 47, 78.

Of freight, see "Carriers," §§ 30, 31.

Of judgment, see "Judgment," §§ 81-88.

Of loss under policy, see "Insurance," §§ 72-91.

Of mortgage, see "Mortgages," §§ 38-45.

Of taxes, see "Taxation," §§ 58-62.

Part payment as accord and satisfaction, see "Accord and Satisfaction," § 2.

—of debts barred by limitation, see "Limitation of Actions," § 33.

Recovery back by county of claim erroneously paid, see "Counties," § 53.

—of overcharges of freight, see "Carriers," § 31.

—of usury paid, see "Usury," § 19.

Terms in contract of sale, see "Sale," § 13.

I. REQUISITES AND SUFFICIENCY.

§ 1. What constitutes.

[*cl*] (Mich.: 1895.)

In an action on a note secured by chattel mortgage, it appeared that defendant sold the mortgaged property to one L., who assumed payment of the mortgage. On the foreclosure there was some question as to whether some of the property seized was covered by the mortgage, and plaintiff returned the disputed property to L., who sold it, with defendant's approval. *Held*, that defendant could not claim a credit on the note for the value of the disputed property.—*Cole v. Shaw* (Mich.) 61 N. W. 869.

103 Mich. 595.

[*b*] (Mich.: 1896.)

Where purchasers of goods give an acceptance for the price, and neither party regards it other than evidence of the amount to be paid, it will not be considered as payment.—*Marquette Iron Works Co. v. Cody* (Mich.) 66 N. W. 331.

[*cl*] (Mich.: 1897.)

A father held certain money from his wife's estate in trust for his daughter, but was not otherwise indebted to her. He offered to deed to her certain property, to be applied on her interest in such estate. In answer to a letter from her, a deed was sent to her, with a request for receipt. She accepted the deed, and sent a receipt, reciting that it was to be applied on "my share in my father's estate." *Held*, that she should be charged with the value of the land to apply on her interest in her mother's estate.—*Hebard v. Reeves* (Mich.) 70 N. W. 418.

[*cl*] (Neb.: 1897.)

In the absence of an express agreement or other circumstances avoiding the operation of the rule, the remittance of a bank draft is not a payment in fact until the draft has been received, presented, and honored.—*National Life Ins. Co. v. Goble* (Neb.) 70 N. W. 503.

[*cl*] (Neb.: 1897.)

Where a mortgagor had been in the habit of paying interest coupons to a bank, which remitted the proceeds to the mortgagee, which bank was not in fact, nor had ever been, held out as the agent of the holder of the note and mortgage, the payment of the principal to such bank, to be forwarded to the mortgagee, did not constitute a payment, on failure of such bank to forward the same when paid.—*Greenman v. Swan* (Neb.) 70 N. W. 504.

[*cl*] (Wis.: 1895.)

A wife joined with her husband in a mortgage to secure a debt of the husband, as security for which he had previously given the creditor a bill of sale of certain seed stored by him with a third person, who sold the same, not having knowledge of the bill of sale, and applied the proceeds on a debt due from the husband to him. The mortgagee, at the husband's request, sued to recover such proceeds, but failed. *Held*, that the wife could not claim that, as against her, the husband's debt should be diminished by the amount of the proceeds of the seed.—*Bertschy v. Bank of Sheboygan* (Wis.) 61 N. W. 1115, 89 Wis. 473.

§ 2. Who authorized to receive.

[*cl*] (Minn.: 1895.)

One of two joint obligees to a contract has a right to receive payment thereon, and such payment discharges the obligation, to the amount paid.—*Moore v. Bevier* (Minn.) 62 N. W. 281.

60 Minn. 240.

[*b*] (Minn.: 1895.)

A payment of a sum due to two joint obligees to a third person, without authority from both, does not discharge the obligation.—*Moore v. Bevier* (Minn.) 62 N. W. 281.

60 Minn. 240.

[c] (Minn.: 1895.)

Payment of a debt due an intestate, made in good faith to the sole heir and distributee before administration was granted, discharged the debtor from liability to the subsequently appointed administrator, where the estate was sufficient to pay all claims against it, including expenses of administration, without resort to the debt so paid, though, after payment, the heir and distributee died insolvent, and his estate would be entitled to the amount of the debt if a second time paid.—Vail v. Anderson (Minn.) 64 N. W. 47.

61 Minn. 552.

[d] (Minn.: 1896.)

The maker of a note paid it, before maturity, to defendant, who held it for the payee, and on whose representation that he had authority to receive payment the maker relied, and the note was delivered to the maker and destroyed. The payee neither authorized the collection nor ratified the same, and never received the money, and at the time of payment had bequeathed the note to the maker. Subsequently the payee died, and defendant was appointed her administrator, and paid the money collected to himself as such. *Held*, that the maker was entitled to the payment on demand.—Braithwait v. Bain (Minn.) 69 N. W. 4.

§ 3. Acceptance of negotiable paper.

[a] (Iowa: 1896.)

It appeared that the defendant corporation and an improvement company employed the same secretary and treasurer, though in no other wise connected. Plaintiff contracted with the improvement company and a third person to construct a tile drain on property belonging to the improvement company. Plaintiff also contracted with the defendant to construct a tile drain on its land, adjoining that of the improvement company. The bills were presented to the secretary of both companies, who, in payment thereof, gave a note signed by the improvement company for the amount due for the construction of both drains. The order issued by the defendant corporation upon its contract with plaintiff was indorsed by plaintiff, and surrendered to the secretary as an officer of the improvement company, and was subsequently paid by the treasurer of the defendant to the improvement company. It appeared that in all these transactions the plaintiff supposed that there was but one company, the defendant, with which it was dealing; but it did not appear that there was any misrepresentation, deceit, or fraud on the part of the defendant or its officers. *Held*, that a verdict for defendant was properly directed.—Scoville Plumbing Co. v. Highland Park Land Co. (Iowa) 68 N. W. 684.

[b] (Mich.: 1894.)

In replevin of property alleged to have been conditionally sold defendant it is competent to show that a note given plaintiff by defendant, and alleged by him to have been in full payment, was not so in fact, and that title remained in plaintiff.—Hutchinson v. Hutchinson (Mich.) 61 N. W. 60.

102 Mich. 635.

[c] (Minn.: 1895.)

The acceptance of the note of the debtor for an antecedent debt is presumed to be a conditional, and not an absolute, payment of the debt.—Washington Slate Co. v. Burdick (Minn.) 62 N. W. 285.

60 Minn. 270.

[d] (Minn.: 1896.)

A finding that the agent of the owner of mortgage notes, and the mortgagor, "settled and adjusted" the debt represented by the notes, and that the mortgagor gave other notes "in compromise, settlement, and cancellation" of the debt, amounts to a finding that the new notes were given and accepted in payment of the mortgage debt.—Wiley v. Dean (Minn.) 69 N. W. 629.

[e] (Wis.: 1894.)

In the absence of an agreement to that effect, a note given for interest due on a mortgage does not operate as a payment of such interest.—Nash v. Meggett, 61 N. W. 283, 89 Wis. 486.

[f] (Wis.: 1895.)

In an action against contractors and a school district for lumber furnished to such contractors for a school building by plaintiff's assignor, it appeared that the contractors gave such assignor a nonnegotiable order on the school district for a certain sum, and there was evidence that such assignor received the order as payment, and in discharge pro tanto of his claim. *Held*, that the question whether such assignor accepted the order as payment was for the jury.—Bank of Iron River v. Board of School Directors of Town of Iron River 65 N. W. 368, 91 Wis. 596.

§ 4. — Of third persons.

[a] (Mich.: 1896.)

One who receives, in part payment of the price of land, a note and mortgage executed by a third person, is not precluded from recovering from the vendee, without surrendering said mortgage, that part of the purchase price represented by said note and mortgage, on proof that the mortgage is worthless and that the mortgagor is insolvent.—Gillett v. Knowles (Mich.) 66 N. W. 497.

[b] (N. D.: 1895.)

Where a debtor paid part of the debt in cash, and turned over to the creditor notes of third persons which were to be accepted in payment of the balance, if approved by the creditor, and the creditor failed for over 40 days to notify the debtor of his disapproval of the notes, it was a question for the jury whether the creditor had not waived his right to disapprove.—Acme Harvester Co. v. Axtell (N. D.) 65 N. W. 680.

5 N. D. 315.

[c] (Wis.: 1895.)

The acceptance by a vendor from his vendee of the note of a third person operates as a payment of the purchase price.—Challoner v. Boyington, 64 N. W. 422, 91 Wis. 27.

II. PLEADING AND EVIDENCE.

§ 5. Pleading and proof.

(S. D.: 1896.)

In an action to recover the proceeds of a sale of property intrusted to defendant by plaintiff for sale, defendant could prove under a plea of payment that he advanced money to the owner with the express understanding that it should be deducted from the proceeds of the sale when consummated, or that the owner directed him to pay a portion of the proceeds thereof to a third person, from whom the owner had obtained money on account of the delivery and prospective sale of the property, and that payment was made to such person pursuant thereto.—Fall v. Johnson (S. D.) 65 N. W. 909.

§ 6. Evidence.

[a] (Iowa: 1895.)

On an issue as to whether plaintiff had overpaid defendant in a final settlement, where there was no dispute as to a prior payment, but defendant's agent was allowed to testify that he kept the amount thereof in his pocket until the final settlement, it was error to allow him to be questioned as to his financial condition, in order to show his poverty, and the improbability of his having so kept the money.—Ryan v. Conway (Iowa) 61 N. W. 924.

93 Iowa, 513.

[b] (Iowa: 1895.)

In an action to recover an overpayment to defendant on the price of land, where defendant testified that she received a certain sum,

and later in the day handed it to her daughter, testimony by the daughter as to the amount she received is inadmissible in the absence of evidence that it was identical with the amount received by her mother.—*Ryan v. Conway* (Iowa) 61 N. W. 924.

93 Iowa, 513.

[c] (Iowa; 1897.)

A receipt "in full of all claims to date" is only prima facie evidence of its contents, and may be shown by oral evidence not to include the claim in suit.—*Mounce v. Kurtz* (Iowa) 70 N. W. 119.

[d] (Minn.; 1896.)

On an issue between a wife and levying creditors of the husband as to the ownership of a grain crop, where the wife testified that she bought the twine for the crop and paid for it, and produced a receipt for the price which she testified was given for the twine, it was proper to admit the receipt in corroboration of her testimony.—*Cain v. Mead* (Minn.) 68 N. W. 840.

[e] (N. D.; 1896.)

On an issue of payment of the price of wheat delivered by plaintiff to defendant, plaintiff could show that defendant's agent refused payment, assigning as a reason therefor that the wheat had never been delivered.—*Benjamin v. Northwestern Elevator Co.* (N. D.) 69 N. W. 296.

[f] (Wis.; 1897.)

A receipt in full of all demands includes a contract, and hence is not open to explanation under the rule applicable to mere receipts.—*Conant v. Kimball's Estate* (Wis.) 70 N. W. 74.

[g] (Wis.; 1897.)

In a suit for services, evidence that defendant gave to plaintiff an order on a third person for money is not admissible to show a settlement if the order was not paid.—*Cliver v. Heil* (Wis.) 70 N. W. 346.

§ 7. — Burden of proof.

[a] (Mich.; 1895.)

Where, in an action for money had and received, defendant acknowledges the receipt of the money for plaintiff, but claims that he accounted to plaintiff therefor, the burden is on defendant to prove such payment.—*Liesemer v. Burg* (Mich.) 63 N. W. 999.

[b] (S. D.; 1895.)

One who claims that an order was received in full payment of an antecedent indebtedness must establish the fact that it was expressly agreed that it should be so accepted, or that the order has been paid.—*Estey v. Birnbaum* (S. D.) 68 N. W. 290.

§ 8. — Weight and sufficiency.

[a] (Iowa; 1897.)

Testimony of a mortgagee, suing to foreclose, that the debt for which the mortgage was given existed at the execution of the latter, corroborated by testimony of an attorney who had been authorized to collect the debt, is not overcome by evidence of statements made by the mortgagee prior to taking the mortgage that the debt was paid, and that he and the debtor were "square."—*Johnson v. Johnson* (Iowa) 70 N. W. 598.

[b] (Neb.; 1897.)

A written acknowledgment or receipt of payment is not conclusive, when the draft upon which it was based was not paid.—*National Life Ins. Co. v. Goble* (Neb.) 70 N. W. 503.

III. PRESUMPTION.

§ 9. Possession of evidence of debt.

(Iowa; 1895.)

In an action on a note signed by a husband and wife, defendant husband testified that the note was paid by another note signed by him, his wife, and his father-in-law, and that the

note in suit was not surrendered because plaintiffs claimed that they had lost it. This evidence was corroborated by that of the wife and the father-in-law, but their knowledge of English was very imperfect, and it did not appear that the transaction involving the payment was not in English. The note in suit was amply secured, and the one alleged to have been given in payment thereof was not secured. A witness testified that he heard one of the defendants ask plaintiff "about that note," and that they replied that they "had not found the note yet," but what note was referred to did not appear. *Held*, that the presumption of nonpayment arising from the fact of plaintiffs' possession of the note in suit was not overcome.—*Mulhall v. Berg* (Iowa) 63 N. W. 573.

§ 10. Failure to produce evidence of debt.

[a] (Mich.; 1895.)

Where the bond secured by a mortgage is not produced, or its loss accounted for, the presumption of the payment of the mortgage debt is conclusive.—*Ward v. Munson* (Mich.) 63 N. W. 498.

105 Mich. 647.

[b] (Mich.; 1895.)

Where, in an action by an administrator to foreclose a mortgage, the bond secured by the mortgage is not produced, evidence that the administrator and a former executor were directed to search for it, without showing that they did so, is insufficient proof of its loss to rebut the presumption of payment of the mortgage.—*Ward v. Munson* (Mich.) 63 N. W. 498.

105 Mich. 647.

[c] (Mich.; 1895.)

In an action to foreclose a mortgage assumed by a grantee, the fact that the grantor agreed in the deed to warrant and defend against all incumbrances except this mortgage, will not rebut the presumption of payment of the mortgage arising upon nonproduction of the bond secured.—*Ward v. Munson* (Mich.) 63 N. W. 498.

105 Mich. 647.

IV. VOLUNTARY PAYMENT.

§ 11. Recovery in general.

[a] (Mich.; 1895.)

Payment by a consumer of a charge for gas in excess of the rate fixed by ordinance (the average rate in five certain cities) is not voluntary, where he is ignorant that the charge is excessive, though he be negligent in not ascertaining the fact.—*Pingree v. Mutual Gas Co.* (Mich.) 65 N. W. 6.

[b] (Wis.; 1895.)

Though Rev. St. § 1549, providing that a liquor license shall not be issued till the license fee is paid, does not require that the fee shall accompany the application, one who, on applying for a license, pays a portion of the fee, and opens his saloon, cannot, on a license being denied and his saloon closed because of his failure to pay the balance, recover the amount paid.—*Hague v. City of Ashland* (Wis.) 65 N. W. 508, 91 Wis. 629.

§ 12. Mistake of fact.

[a] (Iowa; 1895.)

Where a city brought an action against the county in which it was situated, to recover overcharges for the collection of taxes retained by the county treasurer through ignorance of the fact that the law regulating such compensation had been altered, the court has jurisdiction to give the relief appropriate to equity, as in a case of money paid under a mistake.—*Iowa City v. Johnson County* (Iowa) 61 N. W. 995.

[b] (Iowa; 1896.)

Where insured property is destroyed by fire negligently set out by a railroad company, and the owner settles with the railroad com-

pany, and afterwards, without informing the insurance company of such fact, receives from the insurance company payment for the loss, the latter may recover from him the money so paid.—*Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller* (Iowa) 68 N. W. 443.

[c] (Mich.: 1895.)

Where illegal payments of salary are made to a state officer on account of the act under which the payments were made being unconstitutional, money so paid, though paid under a mistake of law, may be recovered, as, the act of the officer in making the payment being beyond the scope of his duty, the state is not bound thereby. McGrath, C. J., dissenting.—*Ellis v. Board of State Auditors* (Mich.) 65 N. W. 577.

[d] (Neb.: 1895.)

To defeat a suit to recover money voluntarily paid under mistake of fact, it is not sufficient that plaintiff might have known the facts had he availed himself of all the means of knowledge at his command.—*Douglas County v. Keller*, 62 N. W. 60, 43 Neb. 635.

[e] (Wis.: 1894.)

An assignee in insolvency, who obtained possession of his insolvent's goods by virtue of a bond given by him to the sheriff, in whose hands they were as the subject-matter of an action of replevin instituted by a chattel mortgagee thereof against the insolvent, cannot recover money, purporting to be the proceeds from a sale of the goods, paid by him to such mortgagee, after a termination of the replevin suit in the latter's favor, under a mistake as to his legal duty so to do, and thinking that he and his sureties on the unwarranted replevin bond would be liable for a failure on his part to pay over such proceeds.—*Gage v. Allen* 61 N. W. 361, 89 Wis. 98.

[f] (Wis.: 1897.)

The fact that one signing a receipt in full of all demands was not fully aware of the legal effect of the writing, does not permit him to avoid it, in the absence of fraud.—*Conant v. Kimball's Estate* (Wis.) 70 N. W. 74.

§ 13. Fraud.

(N. D.: 1895.)

One who paid part of the price due under a contract for plastering his house, without knowledge of the worthless quality of the plastering used, could recover the amount so paid, it not being a voluntary payment.—*Nollman v. Evenson* (N. D.) 65 N. W. 686.
5 N. D. 344.

§ 14. Duress.

[a] (Mich.: 1896.)

Plaintiffs contracted to do certain paying for defendant city, the work to be completed by September 30th, with a stipulation that plaintiffs should pay \$25 per day for each day after the specified time. The work was not completed until November 8th, and the board of public works refused to certify the acceptance of the work until the penalty was paid. Plaintiffs paid the penalty under protest, and brought an action for recovery of the amount so paid under duress. *Held* that, the plaintiffs having had full knowledge of the facts, and of their rights under the contract, there was no duress.—*Laidlaw v. City of Detroit* (Mich.) 67 N. W. 967.

[b] (Minn.: 1894.)

The payment of excessive rent to prevent the termination of a tenancy at will is not a payment under duress.—*Minneapolis Stock-Yards & Packing Co. v. Cunningham* (Minn.) 61 N. W. 329; *Cunningham v. Minneapolis Stock-Yards & Packing Co.*, 1d.
59 Minn. 325.

[c] (Neb.: 1895.)

One who pays a wrongful demand, merely because of threats of a civil action, cannot

maintain an action to recover the payment.—*Weber v. Kirkendall* (Neb.) 63 N. W. 35.
44 Neb. 766.

[d] (Wis.: 1896.)

The payment of a license fee imposed by an ordinance of a city, and exacted by its police officers, to avoid threatened arrest, is not voluntary, and the amount may be recovered from the city where the ordinance is void.—*Neumann v. City of La Crosse* (Wis.) 68 N. W. 654.

§ 15. Duress of goods.

(Neb.: 1895.)

Payments exacted from the owner of property wrongfully withheld, in order to obtain possession, where the detention results in irreparable injury, may be avoided on the ground of compulsion, though not amounting to duress.—*Weber v. Kirkendall* (Neb.) 63 N. W. 35.
44 Neb. 766.

§ 16. Payment to avoid effect of judgment—Subsequent reversal.

(Iowa: 1895.)

Where a decree adjudging that property conveyed to a third person by a judgment debtor is liable for the payment of the judgment, as having been conveyed in fraud of creditors, is reversed, the person to whom the property was conveyed cannot recover money paid by him to redeem from a sale thereof, made before the reversal of the decree.—*Weaver v. Stacy* (Iowa) 62 N. W. 22.
93 Iowa, 683.

§ 17. Payment of taxes and assessments.

[a] (Mich.: 1894.)

Payment of illegal land taxes by the owner under protest, in order that a deed by him to a prospective purchaser may be recorded, does not constitute payment under duress, so as to entitle the owner to recover the same, though he would otherwise have lost a chance to sell the land to advantage.—*Weston v. Luce County* (Mich.) 61 N. W. 15.
102 Mich. 528.

[b] (Mich.: 1896.)

Payment of an illegal tax under written protest, after levy by an officer, is involuntary, though the taxpayer himself pointed out to the officer property on which the levy could be made.—*Roedel v. Village of White Cloud* (Mich.) 66 N. W. 386.

[c] (Minn.: 1897.)

A payment is not voluntary when made under protest to the county treasurer in redemption of mortgaged premises from tax sales, the certificates being held by the mortgagor's grantee, whose relation to plaintiff's title did not appear of record.—*American Baptist Missionary Union v. Hastings* (Minn.) 69 N. W. 1078.

See, also, "Taxation," § 51.

V. APPLICATION.

§ 18. By creditor.

[a] (Iowa: 1896.)

Where a wife furnishes the husband with money to buy lumber for her house, and he purchases the same with such money from plaintiff, with whom he has a general account for lumber, without directing on whose account the money paid should be applied, plaintiff cannot apply the payment on the husband's general account, in order to claim a mechanic's lien on the property of the wife.—*Young v. Swan* (Iowa) 69 N. W. 566.

[b] (S. D.: 1895.)

One holding an open account of \$100 and a past-due unsecured note for \$175 against the same debtor could apply a payment of \$100 on the account, in the absence of direction by the debtor.—*Fargo v. Jennings* (S. D.) 65 N. W. 433.

§ 19. In absence of application by either party.

(Minn.; 1895.)

Where payment is made on an indebtedness consisting of principal and interest, which is not applied by either of the parties to any part of the indebtedness, the law applies the payment first to satisfy the interest, and then the principal.—*Weide v. City of St. Paul* (Minn.) 64 N. W. 65.

62 Minn. 67.

§ 20. Rights of sureties.

(Mich.; 1897.)

Payments made by a debtor without directions as to their application, and which are credited generally on his account by the creditor, will be applied to the first item in the account for the benefit of a surety who is liable for such item.—*Grasser & Brand Brewing Co. v. Rogers* (Mich.) 70 N. W. 445.

(Minn.; 1897.)

A bank designated as a depository of county funds for a second term was, at the time, indebted to the county for deposits made during the first term. The transactions between the bank and the county were kept in the form of a running account, deposits being credited to the county, and payments being made on its checks. The bank failed during the second term, indebted to the county. *Held*, that payments made by the bank should be applied on the account according to the general rule as between debtor and creditor,—the first item on the credit side in discharge of the first on the debit; and the sureties could not demand that the payments be first applied to the deposits made during the second term.—*Board of Com'rs of Redwood County v. Citizens' Bank of Redwood Falls* (Minn.) 69 N. W. 912.

(Wis.; 1894.)

M. agreed to sell goods for plaintiff on commission, and gave him a bond for faithful performance. At the time he was indebted to plaintiff \$209 on account of previous sales of the same kind of goods. At the close of business there was a balance due plaintiff of \$255, after deducting his credits, which amounted to \$624. *Held*, that the debt of \$209 was extinguished by such credits, and the sureties on M.'s bond were liable for the entire balance of \$255.—*Zinn's Manuf'g Co. v. Mendelson* (Wis.) 61 N. W. 302, 89 Wis. 133.

PEDDLERS.

See "Hawkers and Peddlers."

PENAL ACTIONS.

See "Qui Tam and Penal Actions."

PENALTIES.

Actions for, see "Qui Tam and Penal Actions." Constitutionality of act authorizing, see "Constitutional Law," § 70.

Effect of repeal of penal statute, see "Statutes," § 22.

Extraterritorial force of penal laws, see "Conflict of Laws," § 1.

For delay in transmission or delivery of telegram, see "Telegraph Companies," § 4.

For exacting usury, see "Usury," §§ 13-16.

For failure to pay assessment, see "Municipal Corporations," § 158.

—to record satisfaction of mortgage, see "Mortgages," § 45.

—to satisfy mortgage, see "Chattel Mortgages," § 27.

For nonpayment of tax, see "Taxation," § 81.

For taking down railroad fences, see "Railroad Companies," § 18.

Imposed on corporate stockholders in case of defective incorporation, see "Corporations," § 79. Limit of recovery on bonds, see "Bonds," § 10. Penalties and liquidated damages, see "Damages," §§ 7-9.

PENITENTIARY.

See, also, "Jail and Jailer."

§ 1. Management in general.

(Neb.; 1896.)

The board of public lands and buildings is by Const. art. 5, § 19, and by Act Feb. 13, 1877, invested with the general management and control of all the public institutions of the state, except those for educational purposes, and may, in its discretion, lease the convict labor, penitentiary grounds, shops, and machinery therein, together with any property connected therewith.—*State v. Holcomb* (Neb.) 65 N. W. 873, 46 Neb. 612.

(Neb.; 1896.)

A contract whereby the board of public lands and buildings appointed one nominally a contractor, as agent of the state, to lease the convict labor to third parties, and to disburse the funds appropriated for the support of the penitentiary, and surrendered to him the management of that institution, was invalid.—*State v. Holcomb*, 65 N. W. 873, 46 Neb. 612.

§ 2. Procurement of supplies.

(Neb.; 1896.)

Except when furnished by the contractor pursuant to an agreement with the state, the method prescribed by Act Feb. 15, 1877, for procuring supplies for the support of the penitentiary, is exclusive, and the board of public lands and buildings cannot delegate to an agent of its own selection the disbursement of money appropriated for that purpose.—*State v. Holcomb*, 65 N. W. 873, 46 Neb. 612.

(Neb.; 1896.)

Independent of statute an action may be maintained on the relation of the warden of the penitentiary against the board of purchase and supplies to require the latter to provide necessities for the support of the penitentiary, in accordance with Act Feb. 15, 1877.—*State v. Holcomb*, 65 N. W. 873, 46 Neb. 612.

§ 3. Powers and duties of warden.

(Neb.; 1896.)

The powers and duties of the warden of the penitentiary as defined by Act March 4, 1870, were not affected by Const. 1875, art. 5, § 19, or by Act Feb. 13, 1877, relating to the board of public lands and buildings, and he hence continues to be merely the keeper of the prison, subject to the control of the board of public lands and buildings, as the successor of the board of inspectors.—*State v. Holcomb*, 65 N. W. 873, 46 Neb. 612.

PENSION.

Surrender on admission to soldiers' home, see "Army and Navy."

PERCOLATING WATERS.

See "Waters and Water Courses," § 13.

PER DIEM.

Of public officer, see "Office and Officer," § 12.

PERFORMANCE.

Of agreement within statute, see "Frauds, Statutes of," § 17.

Of contract, see "Contracts," §§ 37-50.

PERJURY.

As ground for equitable relief from judgment, see "Judgment," § 109.

§ 1. What constitutes offense.

[a] (Mich.; 1896.)

The parties agreed, with the consent of the judge, that the testimony should be taken, and the case argued and submitted, before the judge in the adjoining county of the same circuit, where the judge resided. *Held*, that a prosecution for perjury could be predicated on false testimony given in such case.—*In re Smith* (Mich.) 68 N. W. 228.

[b] (Wis.; 1895.)

An affidavit by a creditor, that the sum mentioned in a judgment note was due him, was not perjury, where by consent he was to take and enforce the note for the claims of himself and others.—*Sommers v. Hamburger* (Wis.) 64 N. W. 880, 91 Wis. 107.

§ 2. — Materiality of testimony.

[a] (Iowa; 1895.)

On trial for perjury, the question of the materiality of testimony given on the trial in which the perjury is alleged to have been committed is for the court.—*State v. Caywood* (Iowa) 65 N. W. 385.

[b] (Iowa; 1896.)

Where defendant is charged with perjury in a certain action, the question as to what testimony of defendant was material in such action is for the court, and not for the jury.—*State v. Swafford* (Iowa) 67 N. W. 284.

[c] (Iowa; 1896.)

A petition alleged that on or before September 1, 1893, plaintiff was an unmarried woman of previously chaste character, and that on or about said day defendant seduced her. Defendant answered by general denial only. She gave birth to a child April 4, 1894. *Held*, that testimony of a witness that on July 4, 1893, he had sexual intercourse with the plaintiff was material on the question of damages, and if false, constituted perjury.—*State v. Swafford* (Iowa) 67 N. W. 284.

[d] (Mich.; 1896.)

On a murder trial, P., a state's witness, confessed that he and defendant committed the crime, and that on the night preceding the same they slept together at the home of defendant's mother. W., defendant's brother, testified that another person slept with defendant that night, and that P. was not there. *Held*, that W.'s testimony was material, within the law of perjury.—*People v. Macard* (Mich.) 67 N. W. 968.

[e] (Wis.; 1896.)

Such witness' willfully false circumstantial account of what he had done at 1., where he claimed to have remained on the night of the murder, given on cross-examination, to lend an air of truth and probability to his testimony on direct examination, also constituted perjury, though such facts were not primarily material to the determination of defendant's guilt.—*Hanscom v. State* (Wis.) 67 N. W. 419. 93 Wis. 273.

[f] (Wis.; 1896.)

Where defendant was charged with having testified falsely in denial of a statement made out of court, and with having given a false circumstantial account of his doings to lend probability to his denial, it was not error to refuse to compel the state to elect on which

separate statement it would stand; any separation of statements composing the story told on the stand and that related out of court being practically impossible.—*Hanscom v. State* (Wis.) 67 N. W. 419. 93 Wis. 273.

§ 3. Indictment or information.

[a] (Wis.; 1895.)

Rev. St. § 4471, defines two crimes under the general name of "subornation of perjury," one applying to false swearing in a prosecution for a capital crime, and the other applying to false swearing in other cases, and fixes a different punishment for each crime. *Held*, that an information which fails to show the nature of the cause in which the alleged perjury was committed is defective.—*Thompson v. State*, 61 N. W. 565, 89 Wis. 253.

[b] (Wis.; 1895.)

An information for perjury must state directly that defendant was sworn and testified, and an allegation that defendant, "being lawfully required to depose the truth on his oath legally administered, and being required to testify, did willfully, and corruptly commit the crime of perjury," is insufficient.—*Brown v. State*, 64 N. W. 749, 91 Wis. 245.

§ 4. — Materiality of testimony.

[a] (Mich.; 1896.)

Where an indictment for perjury charged that defendant had sworn falsely in a trial for larceny, and alleged that it was a material issue of such trial whether defendant had paid the accused money on September 11, 1894, "at his place in M. township," and that defendant had testified, "I paid it on the 11th of September," it was sufficient to allege by innuendo that defendant, by such testimony, meant that he had paid the accused money on September 11, 1894, it being for the jury to say whether such in fact was the meaning of the testimony.—*People v. German* (Mich.) 68 N. W. 150.

[b] (Mich.; 1896.)

It was not necessary to allege that the accused owned "the place" where defendant said he had paid the money.—*People v. German* (Mich.) 68 N. W. 150.

§ 5. — Allegations and proof.

(Iowa; 1895.)

An indictment charging that defendant, during a trial, was sworn by "the court," is sustained by evidence that the oath was administered either by the presiding judge or the clerk under his direction; Code 1873, § 277, providing that the judge or a clerk of a district court may administer an oath.—*State v. Caywood* (Iowa) 65 N. W. 385.

§ 6. Evidence.

[a] (Iowa; 1896.)

On a trial for perjury, defendant was charged with having testified falsely in a civil action for seduction, that prior to the alleged date of such seduction, on the night of July 4, 1893, he had intercourse with plaintiff in such action. In the criminal case, she testified that defendant did not have intercourse with her at such time, and defendant testified that he did. *Held*, that it was not error to exclude evidence by defendant that he afterwards had intercourse with her.—*State v. Swafford* (Iowa) 67 N. W. 284.

[b] (Iowa; 1896.)

It was error to exclude evidence that she and defendant were together alone on the night of July 4, 1893, and had opportunity to have such intercourse. Given, J., dissenting.—*State v. Swafford* (Iowa) 67 N. W. 284.

[c] (Iowa; 1896.)

In a prosecution under Code, § 3938, providing that "if any person endeavor to incite or procure another to commit perjury, though no

perjury be committed, he shall be punished," etc., the state need not show that there was in fact a case pending.—*State v. Waddle (Iowa)* 69 N. W. 270.

[d] (*Iowa*; 1896.)

In a prosecution under Code, § 3358, providing that "if any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be punished," etc., the state need only prove the falsity of the matter to which defendant attempted to procure the oath by the testimony of one witness.—*State v. Waddle (Iowa)* 69 N. W. 270.

[e] (*Mich.*; 1896.)

On a murder trial, P., a state's witness, confessed that he and defendant committed the crime, and that on the night preceding the same they slept together at the home of defendant's mother. W., defendant's brother, testified that another person slept with defendant that night, and that P. was not there. *Held*, that P.'s testimony was admissible on the trial of W. for perjury to show the materiality of the latter's testimony.—*People v. Macard (Mich.)* 67 N. W. 968.

[f] (*Mich.*; 1896.)

It was not error to admit the files of the case in which the perjury was alleged to have been committed, for the purpose of showing the regularity of the proceedings in that case.—*People v. Macard (Mich.)* 67 N. W. 968.

[g] (*Mich.*; 1896.)

It was proper to permit the stenographer to read from his notes, taken at the trial in which the perjury was alleged to have been committed, he having testified that by the aid of his minutes he could "give the testimony just as it was given in court, question and answer."—*People v. Macard (Mich.)* 67 N. W. 968.

[h] (*Mich.*; 1896.)

On a prosecution for perjury alleged to have been committed at the trial of defendant's brother for murder, testimony that defendant had endeavored to prevent witnesses from testifying against his brother was admissible to show corrupt motive.—*People v. Macard (Mich.)* 67 N. W. 968.

[i] (*Wis.*; 1896.)

Where there was evidence that on the night of the homicide, soon after the firing of shots, defendant left town with a team and one companion, and drove towards the village of L., the willfully false testimony of a witness in denial of a statement made out of court to the effect that he was in town on the night of the murder, had heard shots fired while awaiting defendant, and had immediately been driven by defendant to L., where witness lived, was a denial of material facts, and constituted perjury.—*Hanscom v. State (Wis.)* 67 N. W. 419.

93 Wis. 273.

§ 7. — Sufficiency.

[a] (*Iowa*; 1896.)

Defendant was charged with perjury in swearing, in a seduction case against another, to the material fact that at a certain time he had intercourse with the woman seduced; and he testified that he swore to the truth. She testified positively that it was false, and was corroborated by admissions made to her attorney, and other admissions made in the presence of herself, her attorney, and her father. *Held*, that a verdict of guilty was not against the clear weight of evidence.—*State v. Swafford (Iowa)* 67 N. W. 284.

[b] (*Mich.*; 1896.)

On a trial for perjury committed on a trial for burglary, where there was evidence tending to show a conspiracy by defendant with others to assist the defendant in the burglary case by false testimony, the question whether

there was such conspiracy was for the jury.—*People v. Ostrander (Mich.)* 67 N. W. 1079.

§ 8. Instructions.

(*Mich.*; 1896.)

On trial for perjury, where the fact that the testimony charged had been given, and that it was false, was conceded, the contention being that the defendant, when testifying, was honestly mistaken, it was sufficient to instruct that the only question of fact was whether the defendant testified honestly in the belief of his statement; and that, if the jury had a reasonable doubt that defendant testified willfully to a falsehood, they should acquit.—*People v. German (Mich.)* 68 N. W. 159.

PERPETUITIES.

Rule against, see "Wills," § 52.

PERSONAL INJURIES.

See "Assault and Battery"; "Bridges"; "Carriers"; "Counties"; "Damages"; "Death by Wrongful Act"; "Highways"; "Horse and Street Railroads"; "Landlord and Tenant"; "Malpractice"; "Master and Servant"; "Municipal Corporations"; "Negligence"; "Railroad Companies"; "S. duction"; "Torts."

Action by parent for injuries to child, see "Parent and Child," § 7.

Assignability of verdict, see "Assignment," § 1. Evidence as to nature and extent, see "Damages," §§ 41-43.

Excessive damages, see "Damages," §§ 35-37. Expert testimony as to permanence, see "Evidence," § 64.

Garnishment of verdict, see "Garnishment," § 1. Instructions as to damages, see "Damages," § 48.

Measure of damages, see "Damages," §§ 26-32. Res geste in personal injury cases, see "Evidence," §§ 31-33.

Right to exemplary damages, see "Damages," § 5.

Survival of cause of action, see "Abatement and Revival," § 11.

Variance between pleading and proof, see "Pleading," § 84.

Venue of action, see "Venue in Civil Cases," § 2.

PETITION.

See "Pleading," §§ 5-15.

For change of county seat, see "Counties," §§ 11, 12.

For creation of new county, see "Counties," §§ 4-7.

For drain, see "Drainage," § 3.

For sale of ward's land, see "Guardian and Ward," § 14.

For writ of error, see "Error, Writ of," § 3.

—of habeas corpus, see "Habeas Corpus," § 2.

In condemnation proceedings, see "Eminent Domain," §§ 11, 12.

In error, see "Error, Writ of," § 1.

Nomination by petition, see "Elections and Voters," § 7.

To vacate attachment, see "Attachment," §§ 50-56.

PHYSICAL EXAMINATION.

Of person injured, see "Damages," § 44.

PHYSICIANS AND SURGEONS.

See, also, "Malpractice."

Contracts not to practice medicine, public policy, see "Contracts," § 19.

Degree of skill and care required, see "Malpractice," § 1.

Privileged communications by patient, see "Witness," § 12.

Testimony as to nature and extent of personal injuries, see "Damages," § 42.

§ 1. Contract of employment.

(Minn.; 1894.)

The fact that a physician was unable, from illness, to render future professional services for which a note was given, is a complete defense to an action on the note.—*Powell v. Newell* (Minn.) 61 N. W. 335.
59 Minn. 406.

§ 2. Registration, certificate, or license.

[a] (Iowa; 1895.)

McClain's Code, § 2532, providing that any itinerant vendor of any drug, who shall by writing or printing profess to cure diseases by any drug, shall pay a license fee, does not apply to a regular physician advertising himself as a specialist in certain diseases, and undertaking to effect cures for a certain consideration, because he uses his own medicine, instead of writing prescriptions to be put up by a druggist.—*State v. Bonham* (Iowa) 65 N. W. 154.

[b] (Neb.; 1896.)

Comp. St. 1893, c. 55, art. 1, § 15, providing that no person shall recover for medical or surgical services unless he has complied with the provisions of the act as to registering his certificate, etc., precludes a physician to whom a certificate has been issued at the time services were rendered by him from recovering therefor where the certificate had not been registered as required by the act, though it was registered before suit brought.—*Maxwell v. Swigart* (Neb.) 67 N. W. 789.
48 Neb. 789.

[c] (Neb.; 1897.)

Proof that a person practiced as a physician raises the presumption, in an action between other persons, that he was licensed to practice.—*Golder v. Lund* (Neb.) 70 N. W. 379.

§ 3. Practicing without authority.

[a] (Neb.; 1895.)

An information against a physician for practicing medicine without the certificate prescribed by Act March 27, 1891 (Comp. St. 1895, 707-709), filed more than six months after the passage of the act, need not aver that defendant is not within the exceptions of section 11 of the act, providing that physicians, engaged in practice at the passage of the act, who shall, within six months thereafter, present their diplomas and affidavits, or, not being graduates, shall show themselves entitled to practice under Act March 3, 1881, shall be entitled to certificates, and shall not be prosecuted within such six months. *Gee Wo v. State* (1893) 54 N. W. 513, overruled.—*O'Connor v. State*, 64 N. W. 719, 46 Neb. 157.

[b] (Neb.; 1895.)

Act March 27, 1891 (Comp. St. 1895, 707-709), regulating the practice of medicine, after providing for the punishment for violation of its provisions, recites that any person shall be regarded as practicing medicine, within the meaning of the act, who shall operate or profess to heal, or prescribe for or otherwise treat, any physical or mental ailment of another. *Held* that, in charging the crime of practicing medicine in violation of the act, facts must be stated showing that one or more of the acts included in the definition were committed

by defendant.—*O'Connor v. State* (Neb.) 64 N. W. 719, 46 Neb. 157.

§ 4. Actions for compensation.

[a] (Iowa; 1896.)

That a physician was guilty of negligence in the treatment of his patient, resulting in damages to the latter, does not necessarily preclude him from recovering any compensation whatever for his services; the amount of his recovery, if anything, depending on the amount of damages suffered because of his negligence.—*Whitesell v. Hill* (Iowa) 66 N. W. 894.

[b] (Iowa; 1896.)

Though a physician was guilty of negligence in the treatment of a patient, he can recover for the value of his services, less the amount of damage suffered because of his negligence.—*Whitesell v. Hill* (Iowa) 70 N. W. 750.

[c] (Mich.; 1895.)

In an action to recover for professional services as a veterinary surgeon, plaintiff must prove his qualification in such profession, where the statute imposes no restrictions or qualifications upon a person practicing such profession.—*Conkey v. Carpenter* (Mich.) 63 N. W. 990.

PLANK ROADS.

See "Turnpikes and Toll Roads."

PLATS.

Designation of streets dedicated, see "Dedication," § 3.

PLEADING.

I. GENERAL PRINCIPLES, §§ 1-4.

II. DECLARATION, PETITION, COMPLAINT, AND STATEMENT, §§ 5-15.

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1. In General, §§ 46, 47.

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Admissibility of admissions in, see "Evidence," § 29.

Allegations as to damages, see "Death by Wrongful Act," § 2.

— as to execution of deed, see "Deed," § 4.

— as to powers of agent, see "Principal and Agent," § 11.

— of insurable interest, see "Insurance," § 112.

— of partnership, see "Partnership," § 54.

Amount claimed as determining jurisdiction on appeal, see "Appeal," § 40.

Annexing interrogatories to pleadings, see "Discovery," § 4.

Appealable orders relating to, see "Appeal," § 27.
 Assignments of error as to rulings on, see "Appeal," § 92.
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In particular actions and proceedings.

See "Account"; "Assault and Battery," § 3; "Assumpsit," § 6; "Attachment," § 38; "Breach of Marriage Promise," § 1; "Death by Wrongful Act," § 2; "Divorce," § 13; "Ejectment," § 4; "False Imprisonment," § 4; "Libel and Slander," §§ 22, 25; "Malicious Prosecution," §§ 12, 13; "Replevin," §§ 10-17; "Trespass," §§ 4, 5; "Trove and Conversion," §§ 12-18.

I. GENERAL PRINCIPLES.

§ 1. Rules of construction.

[a] (Iowa: 1896.)

Where the construction of a pleading, after giving to the language a reasonable interpretation, is doubtful, it should be resolved against the pleader.—*J. Thompson & Sons Manuf'g Co. v. Perkins* (Iowa) 66 N. W. 874.

[b] (Minn.: 1897.)

When the special facts pleaded do not sustain the general result pleaded, the facts control and the pleading is bad.—*Carlson v. Presbyterian Board of Relief for Disabled Ministers* (Minn.) 70 N. W. 3.

§ 2. Entitling action.

(Mich.: 1896.)

The provision of Const. art. 6, § 35, that the style of all process shall be "In the Name of the People of the State of Michigan," applies only to process issued by the courts; and where an action is commenced by service of the declaration, with rule to plead indorsed, it is not necessary that either the declaration or rule should be so entitled.—*Penfold v. Slyfield* (Mich.) 68 N. W. 226.

§ 3. Alleging conclusions instead of facts.

[a] (Iowa: 1896.)

An answer alleging, as a breach of warranty, that the machine, "with proper management, would not and could not and did not do as much or as good work as other machines of similar size for the same purpose," is not bad, as alleging legal conclusions.—*Robinson & Co. v. Berkey* (Iowa) 69 N. W. 434.

[b] (Neb.: 1895.)

A general averment in the answer that the mortgage was prior to all other liens, coupled with a general denial in the reply of "each and every allegation of new matter," does not put the date of delivery of the mortgage in issue, since the averment is merely a conclusion of law.—*First Nat. Bank v. Myers* (Neb.) 62 N. W. 459.

44 Neb. 306.

[e]l (S. D.: 1895.)

Allegations in a complaint against a county, under Comp. Laws, § 1629, to recover money paid for land wrongfully sold at a tax sale, that the land was neither assessed nor subject to taxation, and that no tax was due thereon, and that the land was sold for taxes by the mistake and wrongful act of the county treasurer, are statements of traversable facts, and not conclusions of law.—*Boynnton v. Faulk County* (S. D.) 64 N. W. 518.

§ 4. Pleading matters in confession and avoidance—Effect.

(Neb.: 1895.)

In an action on an insurance policy, in a reply, certain matters were alleged, which it was claimed constituted either waiver, estoppel, or avoidance of the effect of matters of defense contained in the answer to which they were directed. The reply also contained a general denial of each and every allegation of the answer. *Held*, that any allegations of the answer to which the reply pleaded a waiver, an estoppel, or matter to avoid its effect must be treated as admitted.—*Dwelling House Ins. Co. v. Brewster* 61 N. W. 746, 43 Neb. 528.

II. DECLARATION, PETITION, COMPLAINT, AND STATEMENT.

See, also, "Death by Wrongful Act," § 2; "Forcible Entry and Detainer," § 6; "Injunction," § 19; "Libel and Slander," §§ 22, 23; "Malicious Prosecution," § 12; "Quieting Title—Removal of Cloud," § 5; "Specific Performance," § 10; "Trespass," § 4; "Trove and Conversion," § 13.

Alleging conclusions, see ante, § 3.

Amendment, see post, §§ 58–60.

Motion to strike out, see post, § 49.

Supplemental complaint, see post, § 73.

Waiver of objections, see post, § 87.

In actions for fraud, see "Fraud," § 4.

— for injuries to servants, see "Master and Servant," § 46.

— on bonds, see "Bonds," § 7.

— on contracts, see "Contracts," §§ 65, 66.

— on guardians' bonds, see "Guardian and Ward," § 17.

— on policies, see "Insurance," §§ 111–115.

— to foreclose, see "Mortgages," § 59.

— to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 40.

In condemnation proceedings, see "Eminent Domain," §§ 11, 12.

§ 5. In general.

[a] (Mich.: 1894.)

As the bill of particulars is no part of the declaration, it cannot affect sufficiency of the declaration on demurrer.—*Weston v. Luce County* (Mich.) 61 N. W. 15.

102 Mich. 528.

[b] (Neb.: 1895.)

Where a petition states a case entitling plaintiff to judgment for any amount, it is sufficient on demurrer or objection to the introduction of evidence.—*Western Union Tel. Co. v. Mullins* (Neb.) 62 N. W. 880.

44 Neb. 732.

[c] (N. D.: 1895.)

In an action by a sheriff against his deputy for conversion of property levied on under attachment, the complaint sufficiently shows that the court issuing the attachment had jurisdiction of the subject-matter, and that the writ was regular on its face, where it alleges that defendant was deputy sheriff of a certain county, that a writ of attachment issued out of the district court of said county in a certain action, and was delivered to defendant for service, and that under such writ defendant seized certain person-

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al property in that county.—*Linn v. Jackson* (N. D.) 63 N. W. 208.

5 N. D. 46.

[d] (S. D.: 1895.)

A complaint alleging that plaintiff is a duly-organized school township, and that, as such, it incurred indebtedness, which is unpaid; that, after the incurring of such indebtedness, an attempt was made to set off a part of its territory, and erect therefrom a new school township, which attempt was never accomplished, but left the territory so attempted to be set off an undivided part of the plaintiff township,—does not state a cause of action against the territory so attempted to be set off, to compel it to pay its proportion of such indebtedness, as it shows such territory to have no corporate existence against which a judgment could be rendered.—*Fordham School Tp. v. Darlington School Tp.* (S. D.) 61 N. W. 1128.

6 S. D. 489.

§ 6. Setting out documents.

(Minn.: 1896.)

A complaint on an interest installment note alleged that plaintiff, on default in payment of an installment, elected to, and did, declare due the whole principal sum and accrued interest, and attached the note as an exhibit. *Held*, that the note was made part of the complaint.—*Elliott v. Roche* (Minn.) 67 N. W. 539.

64 Minn. 482.

§ 7. Theory and form of action.

(Neb.: 1895.)

Where the petition alleged that defendant received money for plaintiff's use, and refused to pay it over after demand, and that he did not come into possession of the same under any contract with plaintiff, and defendant admitted the receipt and retention of the money, and alleged that it, with other money, was paid in satisfaction of a judgment in plaintiff's favor against a third party in an action wherein defendant was plaintiff's counsel, and that the money sued for was the amount of defendant's agreed compensation to be retained out of the judgment, the jury should not allow defendant such amount for his services as they believed a fair consideration.—*Wigton v. Smith* (Neb.) 64 N. W. 1080, 46 Neb. 461.

§ 8. Designation of parties.

(Neb.: 1896.)

In an action upon an account, the plaintiff should sue in his Christian name, instead of his initial letters.—*Small v. Sandall* (Neb.) 67 N. W. 156.

48 Neb. 318.

§ 9. — Descriptio personæ.

(Neb.: 1896.)

Where the pleadings disclose a cause of action against a defendant personally, superadded words, such as "agent," "executor," "trustee," or "director," should be rejected as descriptive personæ.—*Thomas v. Carson*, 65 N. W. 899, 46 Neb. 765; *Andres v. Kridler*, 66 N. W. 649, 47 Neb. 585.

§ 10. Uncertainty and indefiniteness.

(Neb.: 1895.)

Where a county bridge was being constructed from June 16, 1887, to the following November, an allegation in the petition of the contractor for extra materials and services, that, "during the execution of said contract," defendant county agreed to pay for the extra work and materials, did not warrant the presumption that such agreement was made subsequent to July 1, 1887, on which day Laws 1887, c. 72, making counties liable for the erection and repair of bridges, for which they were not before liable, went into effect.—*Thillock v. Webster County*, 64 N. W. 705, 46 Neb. 211.

§ 11. Inconsistent counts.

(Mich.: 1896.)

Suities on the bond of a contractor were allowed to complete work left unfinished at his death. In an action on the contract they joined a count to recover, as assignees, the value of the materials and labor furnished by their principal, with one reciting that they had contracted with defendant to complete the contract for the unpaid part of the consideration named therein. *Held*, that plaintiffs were entitled in any event to recover the amount called for by the contract, and the counts, if inconsistent, were without prejudice.—*Rohde v. Biggs* (Mich.) 66 N. W. 331.

§ 12. Anticipating defenses.

(Iowa: 1891.)

One suing on a contract need not negative the performance by defendant of an act by the performance of which defendant's liability would be defeated.—*Wallace v. Ryan* (Iowa) 61 N. W. 395.
93 Iowa, 115.

§ 13. Separate statement and numbering of causes of action.

(Neb.: 1896.)

Where a petition contains several causes of action, the trial court should, on motion of the defendant, require them to be separately stated and numbered. *Bank v. Bollong* (1888) 40 N. W. 411, 21 Neb. 821, followed.—*Building & Loan Ass'n v. Cameron*, 66 N. W. 1109, 48 Neb. 124.

§ 14. Joinder of causes.

(Iowa: 1895.)

A complaint does not contain inconsistent causes of action because it asks that a deed be canceled as having been procured by fraud, and that, in case it is found to be valid, plaintiff may recover the contract price, and have a vendor's lien.—*Humphrey v. Ringler* (Iowa) 62 N. W. 685.

§ 15. Defects cured by other pleading.

(Iowa: 1896.)

A complaint for personal injuries, alleging that plaintiff "believes" her injuries to be permanent, is sufficient to sustain a recovery for permanent injuries, especially where defendant denies in his answer the permanency of the injuries.—*McFarland v. City of Muscatine* (Iowa) 67 N. W. 233.

III. PLEA IN ABATEMENT.

§ 16. Objections reached by plea in abatement.

(Wis.: 1897.)

In an action to recover land conveyed to the state by a county holding a tax title thereto, and afterwards sold by the state, the failure of plaintiff to pay into the county treasury the taxes assessed after the sale, payment of which is made a condition precedent to recovery by Laws 1883, c. 287, must be taken advantage of by plea in abatement where the failure does not appear on the face of the complaint.—*Lombard v. McMillan* (Wis.) 70 N. W. 673.

§ 17. Sufficiency.

[a] (Mich.: 1895.)

A cestui que trust filed a bill against the trustee and all but one of the other cestuis que trustent to compel an accounting for money received by the trustee on a judgment recovered as trustee, and to compel payment to complainant of a certain share of the fund, alleging, as the reason for not making the other cestui que trust a party, that he consented to the payment of such share to complainant. Defendants filed pleas in abatement alleging that one of the defendant cestuis que trustent had filed a bill

against the trustee and all the cestuis que trustent for an accounting, respecting the same judgment, and that the bill in such suit prayed relief in the same manner and for the same matters as the present bill. *Held*, that the pleas sufficiently showed the identity of the two suits.—*O'Brien v. Alpena* Circuit Judge (Mich.) 63 N. W. 597.

[b] (Mich.: 1895.)

A plea in abatement alleging that plaintiff decayed defendant, a non-resident, into the county for the purpose of service of process will be treated as a meritorious and not a dilatory plea, and as such is sufficiently certain.—*Campbell v. Hudson* (Mich.) 64 N. W. 483.

IV. DEMURRER.

Waiver of objections by failure to demur, see post, § 90.

Harmless error in rulings on, see "Appeal," § 246.

In equity, see "Equity," § 51.

Raising defense of statute of frauds, see "Frauds. Statute of," § 31.

§ 18. Nature, scope, and sufficiency of demurrer.

[a] (Neb.: 1896.)

A judgment upon demurrer must be against the party whose pleading was first defective in substance.—*West Point Water-Power & Land Imp. Co. v. State* (Neb.) 63 N. W. 507.

[b] (N. D.: 1896.)

A demurrer to a purely defensive answer "on the ground that said answer is insufficient in law, upon the face thereof, to constitute a defense," is sufficient, under Rev. Codes, § 5277, declaring simply that plaintiff may demur to an answer containing new matter, when on its face it does not constitute a defense.—*Van Dyke v. Doherty* (N. D.) 69 N. W. 200.

[c] (Wis.: 1895.)

On demurrer only the pleadings can be considered.—*Northwestern Iron Co. v. West Superior Iron & Steel Co.* (Wis.) 64 N. W. 323.
90 Wis. 570.

§ 19. Objections reached by demurrer.

[a] (Mich.: 1896.)

A failure to aver a consideration cannot be raised by demurrer, but notice of such defense must be given with the general issue, as required by 2 How. Ann. St. § 7521.—*Boyer v. Sowles* (Mich.) 67 N. W. 530.

[b] (Mich.: 1897.)

In an action on a bond, a failure to aver a consideration cannot be raised by demurrer, but notice of such defense must be given with the general issue, as required by 2 How. Ann. St. § 7521.—*Robson v. Dayton* (Mich.) 69 N. W. 834.

[c] (Minn.: 1895.)

In an action against a surety on the bond of an insurance agent, the fact that the bond recited that the agent was appointed for the town of M. and vicinity, while the transaction for which the surety was sought to be held was performed by the agent at the town of P., without its appearing whether P. was in the vicinity of M., was a matter of defense, which could not be raised on demurrer to the answer.—*Royal Ins. Co. v. Clark* (Minn.) 63 N. W. 1029.

61 Minn. 476.

[d] (Neb.: 1896.)

Objections that the petition in an action by a partnership did not state that the firm was organized to do business in Nebraska, and did not give the individual names of the members of the firm, could not be raised on general demurrer. *Sanborn v. Hale* (1882) 11 N. W. 302, 12 Neb. 318, followed.—*Andrews v. School Dist. of City of McCook*, 68 N. W. 631.

[c] (S. D.; 1896.)

A demurrer on the ground that a complaint does not state facts sufficient to constitute a cause of action does not raise the question of jurisdiction.—*Woods v. Sheldon* (S. D.) 69 N. W. 602.

[f] (Wis.; 1896.)

A question of misjoinder of plaintiffs, or whether the complaint, as to one or more of several plaintiffs, states a cause of action against defendants, cannot be raised by demurrer, under Rev. St. § 2649.—*Wunderlich v. Chicago & N. W. Ry. Co.* (Wis.) 66 N. W. 1144.
93 Wis. 132.

§ 20. — Want of capacity to sue.

[a] (Neb.; 1896.)

A petition by a partnership, in the firm name, which does not allege that the firm was formed to carry on business in Nebraska, or to hold property therein (Code Civ. Proc. § 24), is open to demurrer, under section 94, on the ground that plaintiff has no legal capacity to sue.—*Church v. Callahan* (Neb.) 68 N. W. 932.

[b] (S. D.; 1895.)

A complaint is not demurrable on the ground that "plaintiffs have no legal capacity to sue," unless it shows on its face that plaintiffs are under legal disability which would prevent them from bringing the action in their own names.—*Bem v. Shoemaker* (S. D.) 64 N. W. 544.

§ 21. — Remedy by motion.

[a] (Iowa; 1895.)

Where defendant in the same division of his answer sets up matters in separate paragraphs which might have constituted separate defenses, he cannot complain that plaintiff treated the paragraphs as a single defense, and assailed them by notice to strike out, instead of demurrer.—*Reed v. Lane* (Iowa) 65 N. W. 380.

[b] (S. D.; 1896.)

Surplusage in a pleading may subject it to a motion to strike out the redundant and irrelevant matter, but does not render the pleading demurrable.—*McGillivray v. McGillivray* (S. D.) 68 N. W. 316.

§ 22. Filing both motion and demurrer.

(Iowa; 1894.)

Under Code, § 2639, providing that but one motion and one demurrer assailing a pleading shall be filed, unless the pleading be amended after the filing of a motion or demurrer, both a motion and a demurrer may be filed to a pleading, though it is not amended.—*Gross v. Miller* (Iowa) 61 N. W. 385.
93 Iowa, 72.

§ 23. General demurrer.

[a] (Neb.; 1896.)

It was not ground for general demurrer to a declaration that the prayer for relief was defective.—*Fox v. Graves* (Neb.) 65 N. W. 887.
46 Neb. 812.

[b] (Neb.; 1897.)

On general demurrer, a pleading will be construed to charge what can, by reasonable and fair intendment, be implied from its statements.—*Roberts v. Samson* (Neb.) 70 N. W. 384.

§ 24. Specification of grounds of objection.

[a] (Iowa; 1895.)

A demurrer that the allegations of the petition are contradictory and inconsistent, if a ground of demurrer, should point out wherein the statements are contradictory.—*First M. E. Church in Ft. Madison v. Donnell* (Iowa) 64 N. W. 412.

[b] (S. D.; 1894.)

Under Comp. Laws, § 4910, providing that, unless the demurrer "distinctly specify the

grounds of objection," it may be disregarded, a demurrer on the ground that the "answer does not state facts sufficient to show that this plaintiff is estopped from maintaining the said action" is insufficient.—*Hill v. Walsh* (S. D.) 61 N. W. 440.

6 S. D. 421.

§ 25. To whole or part of pleading.

(Minn.; 1896.)

Paragraphs of a pleading consisting of allegations of special or consequential damages growing out of wrongful acts alleged in previous paragraphs of the pleading cannot be demurred to as a separate cause of action.—*Steenerson v. Great Northern Ry. Co.* (Minn.) 66 N. W. 723.
64 Minn. 216.

§ 26. Joint demurrer.

[a] (Minn.; 1896.)

If a complaint states a cause of action against any one of several defendants jointly demurring, an order overruling the demurrer must be affirmed.—*Palmer v. Bank of Zumbrota* (Minn.) 67 N. W. 893; *Same v. George, Id.*; *Thacher v. Woodbury, Id.*

[b] (S. D.; 1896.)

Under Comp. Laws, §§ 4909, 4910, 4913, a general joint demurrer to a complaint in an action instituted by several parties jointly must be overruled if the facts alleged are sufficient to constitute a cause of action in favor of either of such parties against any of the demurrants.—*Evans v. Fall River County* (S. D.) 68 N. W. 195.

[c] (Wis.; 1896.)

A complaint which states a cause of action against one of several defendants is good against a joint demurrer.—*Mark Paine Lumber Co. v. Douglas County Imp. Co.* (Wis.) 68 N. W. 1013.

§ 27. Ore tenus.

(Wis.; 1897.)

The rule that every reasonable intendment will be made in favor of the sufficiency of a pleading should be applied with strictness when the pleading is challenged by a demurrer ore tenus.—*Egan v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 997.

§ 28. Frivolous demurrer.

(Minn.; 1895.)

A demurrer should not be stricken out as frivolous unless it be manifest from mere inspection, without argument, that there is no reasonable ground for interposing it.—*Olson v. Cloquet Lumber Co.* (Minn.) 63 N. W. 95.
61 Minn. 17.

§ 29. Effect of demurrer as admission.

[a] (Neb.; 1895.)

A demurrer does not admit the correctness of conclusions of law alleged in the pleading demurred to.—*American Waterworks Co. v. State*, 64 N. W. 711, 46 Neb. 194.

[b] (Wis.; 1895.)

An allegation that it was defendant's duty to adopt certain precautions to avoid injury to others is a conclusion of law, which is not admitted by a demurrer.—*Peake v. Buell* (Wis.) 63 N. W. 1053.
90 Wis. 508.

§ 30. Effect of decision on demurrer.

[a] (Iowa; 1895.)

In an action by the owner of a judgment which had ceased to be a lien, to redeem from a sale under a prior mortgage lien, plaintiff alleged that his assignors, the judgment plaintiffs, were not made parties to the mortgage foreclosure suit; that the plaintiff in that suit was a nonresident of the state, and had no agent therein upon whom notice of an action to redeem could be served; that the mortgagor was also a nonresident; and

that the foreclosure suit was continued for service on certain defendants therein, and was still pending. Defendants demurred on the grounds that, since it did not appear that plaintiff's judgment was a lien on the land, he was not entitled to redeem, and that plaintiff's cause of action was shown to be barred. *Held*, that the overruling of the demurrer did not determine that plaintiff might redeem solely upon the strength of his expired judgment.—*Long v. Mellet* (Iowa) 63 N. W. 190.

[b] (Iowa; 1895.)

Under Code, § 2651, which provides that "upon a decision of a demurrer, if the unsuccessful party fail to answer or plead over the same consequences shall ensue as though a verdict had passed against the plaintiff or the defendant had made default," the court, upon overruling a demurrer, may grant a decree upon the pleadings without proof when the defendant fails to answer or plead.—*Miner v. Hogg* (Iowa) 63 N. W. 411.

[c] (Iowa; 1895.)

An order overruling a demurrer to the petition does not preclude the court from directing a verdict for defendant on evidence answering to the allegations in the petition.—*Littleton v. People's Bank* (Iowa) 63 N. W. 666.

[d] (Iowa; 1896.)

The overruling of a demurrer to a paragraph of an answer in an action on an insurance policy pleading a breach of condition as a defense, and which incorrectly recites the condition in a material respect, is not conclusive as to the issue presented, though the petition sets out a copy of the policy, and the plaintiff may join issue by a reply.—*Des Moines Ice Co. v. Niagara Fire Ins. Co.* (Iowa) 68 N. W. 600.

[e] (Iowa; 1896.)

Where a demurrer to a petition is sustained, and plaintiff files an amended and substituted petition, which does not differ in any essential particular from the original, and to which in turn a demurrer is filed, the court must rule on the questions raised by the demurrer, regardless of its former holdings.—*Van Werden v. Equitable Life Assur. Soc. of United States* (Iowa) 68 N. W. 892.

[f] (Iowa; 1897.)

Where a demurrer is sustained generally, the ruling will be sustained if any of the grounds of demurrer are well taken.—*Kranse v. Lloyd* (Iowa) 69 N. W. 1062.

[g] (Wis.; 1896.)

The decision of the trial court in sustaining a demurrer is not res adjudicata of the same questions on a second demurrer after amendment.—*Schoenleber v. Burkhardt* (Wis.) 69 N. W. 343.

V. ANSWER.

Alleging conclusions of law, see ante, § 3

Amendment, see post, §§ 61, 62.

Anticipating defenses, see ante, § 12.

Matters admissible under general denial, see post, § 82.

Motion to strike out, see post, § 50.

Necessity of denial or of verifying denial, right to deny execution or validity of instrument, see post, § 77.

Waiver of objections, see post, §§ 93, 99.

Of garnishee, see "Garnishment," § 23.

Plea to the jurisdiction, see "Abatement and Revival," § 3.

Time of filing, see "Practice in Civil Cases," § 27.

§ 31. In general.

[a] (Iowa; 1895.)

Where an answer in an action at law purports to be an equitable answer, defendant cannot object that it was so treated for the purpose of demurrer.—*Reed v. Lane* (Iowa) 65 N. W. 380.

[b] (Minn.; 1895.)

The defense to an action for goods sold and delivered, that the goods were sold on credit, the term whereof had not expired at the commencement of the action, is new matter, to be specially pleaded.—*Leslin v. Simon* (Minn.) 64 N. W. 143.

62 Minn. 128.

[c] (Minn.; 1895.)

Defendant is not bound to answer anew on amendment of the complaint after answer, except as to new matter alleged in the amendment.—*Ermentraut v. American Fire Ins. Co.* (Minn.) 65 N. W. 270.

63 Minn. 194.

[d] (S. D.; 1897.)

A motion to set aside the service of a summons does not extend the statutory time within which to answer.—*Garvie v. Greene* (S. D.) 70 N. W. 847.

[e] (Wis.; 1897.)

Defendant may join with a defense of rescission for fraud of the contract sued on, and a counterclaim for payments made under the contract, a second counterclaim for damages for breach of the contract by plaintiff; Rev. St. § 2657, permitting him to set forth as many defenses and counterclaims as he may have.—*South Milwaukee Boulevard Heights Co. v. Harte* (Wis.) 70 N. W. 821.

§ 32. Sufficiency.

[a] (Iowa; 1895.)

In an action on a note given for the purchase price of an animal, the answer set up that the animal when purchased was lame, that the note was to be returned if it failed to get well under proper treatment, and that it did not get well. *Held*, that it was error to sustain a motion to make the answer more specific showing the medical treatment given to the animal.—*Newcom v. Dubois* (Iowa) 63 N. W. 677.

[b] (S. D.; 1894.)

An answer which contains an unqualified denial of at least one material allegation of the complaint, without proof of which plaintiff cannot recover is not demurrable as not stating facts sufficient to constitute a defense.—*Hill v. Walsh* (S. D.) 61 N. W. 440.

6 S. D. 421.

[c] (Wis.; 1895.)

A clause in an answer, that as to everything "in said complaint contained, and not thereafter admitted, it denies the same, and the whole thereof," will be restricted to matter not expressly referred to or covered by the specific allegations of the answer.—*Althouse v. Town of Jamestown*, 64 N. W. 423, 91 Wis. 46.

§ 33. Sufficiency of denial.

(S. D.; 1895.)

Where a complaint stated that plaintiff furnished to defendant, during July and August, certain mining timbers at a certain amount, for which defendant agreed to pay, and that no part of such sum was paid, a verified answer denying that during such months defendant purchased or received, or agreed to purchase or receive, any mining timbers from plaintiff, then or at any time subsequent thereto, and that, prior to July, defendant purchased and received from plaintiff mining timbers, for which it had fully paid, was equivalent to a general denial, and should not have been stricken out as sham.—*Loranger v. Big Missonri Min. Co.* (S. D.) 61 N. W. 686.

6 S. D. 478.

§ 34. — Negative pregnant.

(Wis.; 1896.)

The complaint in an action to recover of an assignee a note which prior to the assignment the assignor, as agent of petitioner, had in his possession, alleged that "the same came to the hands of the assignee." *Held*, that the answer, alleging, on information and belief, that

"he has not the note demanded, but it is in the hands of a former agent" of the assignor, admitted that the note came to the hands of defendant, and did not show that it was not still within his control; the allegation, as a denial, being evasive, in that it was a negative pregnant.—*Carpenter v. Momsen* (Wis.) 66 N. W. 692, 92 Wis. 449.

§ 35. — On information and belief.

[a] (N. D.; 1896.)

In an action to foreclose a mortgage, where plaintiff seeks to be reimbursed for taxes which he alleges he has paid, defendant cannot deny such payment on information and belief merely.—*Van Dyke v. Doherty* (N. D.) 69 N. W. 200.

[b] (Wis.; 1896.)

The complaint in an action to recover of an assignee a note which prior to the assignment the assignor, as agent of petitioner, had in his possession, alleged that "the same came to the hands of the assignee." *Held*, that the answer, alleging, on information and belief, that "he has not the note demanded, but it is in the hands of a former agent" of the assignor, admitted that the note came to the hands of defendant, and did not show that it was not still within his control; the allegation, as a denial, being evasive, because it attempted to deny on information and belief what was presumptively within defendant's personal knowledge.—*Carpenter v. Momsen* (Wis.) 66 N. W. 692, 92 Wis. 449.

§ 36. Frivolous or sham answer or plea.

[a] (Minn.; 1895.)

In an action for rent, plaintiff alleged that the rent agreed on was \$200, and that only \$90 had been paid. Defendant's answer denied that there was any more than \$85 due, and alleged that plaintiff had been paid in cash and other personal property, consisting of hay, in the aggregate the sum of \$115. It appeared by affidavit of plaintiff that only \$3 worth of hay had been delivered to him by defendant. *Held*, that striking out the plea as a sham was proper.—*White v. Moquist* (Minn.) 63 N. W. 255, 61 Minn. 103.

[b] (N. D.; 1895.)

A plea of the general issue in an action on a written contract, wherein the complaint alleged performance by plaintiff of conditions precedent to a recovery, was erroneously stricken out as frivolous.—*Sifton v. Sifton* (N. D.) 65 N. W. 670.

5 N. D. 187.

[c] (S. D.; 1894.)

In an action by a bank on a note, where defendant, surety, alleges that, after maturity, plaintiff held on deposit unappropriated moneys of the maker, which it failed to apply, the answer is not frivolous, as Comp. Laws, § 4443, provides that "a banker has a general lien on all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."—*Bank of Commerce v. Humphrey* (S. D.) 61 N. W. 441, 6 S. D. 415.

[d] (S. D.; 1897.)

The striking out of such an answer is not justified by the fact that defendant's affidavit on the motion to strike out makes admissions which are inconsistent with the answer, and seem to support plaintiff's case.—*King v. Waite* (S. D.) 70 N. W. 1056.

[e] (S. D.; 1897.)

A verified answer, unqualifiedly denying essential allegations of the complaint, cannot be stricken out as sham, defendant having a constitutional right to a trial on the issue.—*King v. Waite* (S. D.) 70 N. W. 1056.

[f] (Wis.; 1896.)

Under Rev. St. § 2682, providing that a sham answer, whether by way of denial or avoidance, may be stricken out, but no defense shall be deemed sham, the truth of which shall

he supported by the affidavit of a single witness, either by way of verification, or in opposing a motion to strike out, a verified answer is not open to a motion to strike out as sham.—*Pfister v. Wells* (Wis.) 65 N. W. 1041, 92 Wis. 171.

[g] (Wis.; 1896.)

It is error to strike out as sham a properly verified answer which puts in issue a material allegation of the complaint. *Pfister v. Wells* (Wis.) 65 N. W. 1041, 92 Wis. 171, followed. *Pearson v. Neeves* (Wis.) 66 N. W. 357, 92 Wis. 319.

§ 37. Admissions.

[a] (Minn.; 1896.)

Hypothetical statements or admissions may be made in an answer for the purpose of enabling a defendant to plead all of his defenses.—*McKasy v. Huber* (Minn.) 67 N. W. 650.

[b] (Neb.; 1896.)

Where the petition alleges the delivery of the official bond declared on, the allegation in the answer of a surety, following an averment therein that he signed upon condition the principal should also sign, that "if it [the bond] was ever delivered, it was done in violation of the express condition aforesaid upon which defendant signed said instrument," constitutes an admission of the delivery of the bond.—*State v. Hill* (Neb.) 66 N. W. 541, 47 Neb. 456.

[c] (Neb.; 1896.)

Code Civ. Proc. § 134, providing that allegations of value in a petition shall not be considered true without proof, merely because not controverted in the answer, does not require proof of value which is specifically admitted by the answer.—*Best v. Stewart* (Neb.) 67 N. W. 881, 48 Neb. 859.

[d] (S. D.; 1896.)

In an action on a promissory note, where defendants have set out in their answer an agreement under which they received the note, the agreement is a part of defendants' admissions, and may be considered by the court in determining whether plaintiff has made out his case.—*Kirby v. Scanlan* (S. D.) 67 N. W. 828.

[e] (S. D.; 1897.)

An averment that certain notes were held by plaintiff as collateral security, in an answer to a complaint alleging that plaintiff owned them, is not available to plaintiff to dispense with proof that the notes were held as collateral.—*Commercial Bank v. Jackson* (S. D.) 70 N. W. 846.

§ 38. Defense or set-off—Election.

(N. D.; 1895.)

The same facts may constitute a defense to a claim, and at the same time entitle defendant to affirmative relief in excess of the amount demanded by plaintiff, and hence a defendant so pleading facts could not be required to elect whether he would rely on the set-off or the defense.—*Nollman v. Evenson* (N. D.) 65 N. W. 686.

5 N. D. 344.

VI. REPLY.

See, also, "Trover and Conversion," § 14.

Motion to require reply to new matter, see post, § 46.

Waiver of failure to reply, see post, § 94.

In criminal cases, see "Criminal Law," § 29.

Time of filing, see "Practice in Civil Cases," § 27.

To counterclaim, see "Set-Off and Counterclaim," § 12.

§ 39. When required.

[a] (Iowa; 1891.)

Where a complaint in an action to foreclose a mortgage alleges that a defendant has some interest in the property junior to plaintiff's, and the defendant denies in his answer that his interest is junior, and alleges that it is paramount, the issue as to priority is complete, and plaintiff need not reply.—Taylor v. Gilbert (Iowa) 61 N. W. 203.
92 Iowa, 587.

[b] (S. D.; 1896.)

The discretion given to a trial court by Comp. Laws, § 4918, to require a reply to an answer which contains new matter constituting a defense by way of avoidance, will not be reviewed except in cases of abuse.—Cornwall v. McKinney (S. D.) 68 N. W. 333.

§ 40. — Admission by failure to reply.

[a] (Iowa; 1895.)

If the facts pleaded in defendant's cross bill were put in issue by the allegations of the petition, a failure to reply does not have the effect of admitting its allegations.—Medland v. Walker (Iowa) 64 N. W. 797.

[b] (Neb.; 1896.)

When a cause is decided by the court on the petition and answer, without evidence, such matters of defense in the answer as are well pleaded, in the absence of a reply, are to be considered as established.—Van Etten v. Kusters (Neb.) 66 N. W. 1106.
48 Neb. 152.

[c] (Neb.; 1896.)

In the absence of a replication, the answer must be taken as true.—Scotfield v. Clark (Neb.) 67 N. W. 754, 48 Neb. 711.

[d] (Neb.; 1897.)

Where, to a counterclaim well pleaded, the plaintiff interposes no reply, a verdict in his favor in excess of the amount claimed in his petition, less the amount of such counterclaim, should be set aside.—Ashland Land & Live-Stock Co. v. Woodford (Neb.) 69 N. W. 769.

§ 41. Sufficiency.

[a] (Iowa; 1896.)

Where a reply in confession and avoidance, by reasonable implication, admits the facts sought to be avoided, it is sufficient.—Runkle v. Hartford Ins. Co. (Iowa) 68 N. W. 712.

[b] (Minn.; 1896.)

A reply in these words, "The plaintiff denies that it has any knowledge, or information sufficient to form a belief, as to the truth of the allegations contained in the answer," is sufficient, where the objection to it was first made after trial and verdict.—Trustees of Macalaster College v. Nesbitt (Minn.) 67 N. W. 652.

§ 42. Admissions.

[a] (Iowa; 1895.)

In an action for injury to stock shipped, defendant pleaded a condition requiring plaintiff to file claim for damages within a certain time, and his failure to do so. Plaintiff alleged that the condition was void. *Held* that, the admission in the reply of the existence of such a stipulation not being express, its existence must be taken as denied by the general denial implied by law to declarations in an answer.—Nichols v. Chicago G. W. Ry. Co. (Iowa) 62 N. W. 769.

[b] (Iowa; 1895.)

Denials in an answer of the execution by defendant's intestate of the note sued on, and of any indebtedness to the payee in an action thereon by an indorsee of the note, are not admitted by a reply denying all the allegations of the answer, and averring that plaintiff purchased the note in good faith before maturity, and for a full consideration.—Schulte v. Coulthurst (Iowa) 62 N. W. 770.

§ 43. Departure.

(Minn.; 1896.)

A complaint, in an action by a carrier on a policy insuring it as such for loss by fire on grain, set out the contract and a common-law contract for carriage of grain of certain shippers, with the obligation to deliver it to a connecting carrier, and a loss and payment thereof by it to the shippers. The answer alleged that the contract of carriage was evidenced by a bill of lading containing stipulations modifying plaintiff's common-law liability, and that the fire was not caused by plaintiff's negligence. *Held*, that a reply admitting the bill of lading, and alleging that the fire was caused by plaintiff's negligence, was not a departure.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 66 N. W. 132.
64 Minn. 61.

VII. VERIFICATION.

Condition precedent to right of service by publication, see "Writs and Notice of Suits," § 17. In action against corporation, see "Corporations," § 42.

§ 44. Sufficiency.

(Mich.; 1895.)

3 How. Ann. St. § 4161d9, provides that in suits to wind up mining corporations there shall be annexed to the bill an affidavit that the facts therein stated are true. *Held*, that it was error to dismiss a bill because, having been verified two months before, it did not show that complainants were stockholders at the time it was filed, as the defect was not jurisdictional and could have been cured by amendment.—Brown v. Mesnard Min. Co. (Mich.) 63 N. W. 1000, 105 Mich. 653; Same v. Pontiac Min. Co., Id.; Same v. Houghton Circuit Judge, Id.

§ 45. Excuse for failure to verify.

(Minn.; 1895.)

The fact that the managing officer of a corporation defendant was unable to verify the answer within the required time does not justify vacating a default judgment for want of an answer, when the answer could have been verified by another officer.—John T. Noye Manufacturing Co. v. Wheaton Roller-Mill Co. (Minn.) 61 N. W. 910.
60 Minn. 117.

VIII. MOTIONS.

Remedy by, see ante, § 21.

Filing both motion and demurrer, see ante, § 22.

Waiver of ruling on, see post, §§ 91, 92.

1. IN GENERAL.

§ 46. To require reply to new matter.

(S. D.; 1896.)

Usually a motion by defendant for the court to require plaintiff, under Comp. Laws, § 4918, to reply to new matter contained in the answer, should be granted, because the system of practice in use is designed to limit and define issues so far as practicable.—Cornwall v. McKinney (S. D.) 68 N. W. 333.

§ 47. Judgment on pleadings.

(Minn.; 1895.)

The burden of proof being on plaintiff, where a case is submitted for trial of the merits on the pleadings, without evidence, *held*, that a judgment for defendant is proper, all of the allegations of the complaint being denied by the answer.—White Sewing-Mach. Co. v. Behrens (Minn.) 62 N. W. 1127.

2. TO STRIKE OUT.

Answer as frivolous, see ante, § 36.
Demurrer as frivolous, see ante, § 28.

§ 48. Sufficiency of motion.

[a] (Neb.; 1896.)

A motion to strike out portions of a pleading should designate with particularity the averments which it attacks.—*Stuht v. Sweesy* (Neb.) 67 N. W. 748.

48 Neb. 767.

[b] (Neb.; 1897.)

A motion to strike matter out of a pleading should refer specifically to the alleged objectionable statement.—*Chicago, B. & Q. R. Co. v. Spirk* (Neb.) 70 N. W. 926.

§ 49. Complaint or petition.

[a] (Neb.; 1895.)

Where a petition states identical causes of action, defendant's remedy is by motion to strike, and not by motion to compel plaintiff to elect on which cause he will proceed.—*Pollock v. Whipple*, 64 N. W. 210, 45 Neb. 844.

[b] (Neb.; 1896.)

Where a petition contains inconsistent counts, the proper practice is to move to strike out all but one, or that plaintiff be required to elect on which one he will stand.—*Fox v. Graves*, 65 N. W. 887, 46 Neb. 812.

§ 50. Answer.

[a] (Iowa; 1895.)

Counts in an answer setting up fraud, want of consideration, and noncompliance by plaintiff with the terms of the contract in suit cannot be attacked for irrelevancy and insufficiency by a motion to strike out.—*Wattels v. Minehen* (Iowa) 61 N. W. 915.

93 Iowa, 517.

[b] (Iowa; 1895.)

A motion to strike out paragraphs of an answer on the ground that they were "incompetent, irrelevant, immaterial, and no defense," is sufficiently specific.—*Reed v. Lane* (Iowa) 65 N. W. 380.

3. TO MAKE MORE DEFINITE.

Remedy by, see post, § 55.

Waiver of objections by failure to make motion, see post, § 87.

§ 51. When motion denied.

[a] (Neb.; 1896.)

A complaint in an action against a telegraph company for failure to deliver a message alleged that, because of the failure, an exchange of property between plaintiff and a third party was never perfected, and that plaintiff thereby lost the profit he would have made in the exchange, to his damage in the sum of \$1,500. *Held*, that a motion to make the complaint more definite was properly overruled.—*Western Union Tel. Co. v. Wilhelm* (Neb.) 67 N. W. 870.

48 Neb. 910.

[b] (Wis.; 1895.)

Where an allegation in the answer is redundant, a motion to make it more definite is properly denied.—*McCarville v. Boyle* (Wis.) 62 N. W. 517, 89 Wis. 651.

§ 52. Discretion of court.

(Wis.; 1896.)

An order requiring defendant in an action for libel to make portions of his answer more definite is within the discretion of the court.—*Adamson v. Raymer* (Wis.) 68 N. W. 1000.

§ 53. Remedy by bill of particulars.

(Wis.; 1895.)

Items of damages demanded in a personal injury suit will not be required to be set out

on motion to make the complaint more definite, defendant's remedy being by demand for a bill of particulars.—*Hanson v. Anderson* (Wis.) 62 N. W. 1055.

90 Wis. 195.

4. TO COMPEL ELECTION.

§ 54. When motion proper or necessary.

[a] (Neb.; 1896.)

When a petition contains inconsistent counts, the proper practice is to move to strike out all but one, or that plaintiff be required to elect on which one he will stand.—*Fox v. Graves* 65 N. W. 887, 46 Neb. 812.

[b] (N. D.; 1895.)

Where the complaint contained one cause of action on the policy, and another on a promise to pay a specified amount in settlement of the loss thereunder, and defendant put in issue the allegations of both causes, without moving that plaintiff should be compelled to elect on which cause he would stand, it was proper, on plaintiff's establishing an undisputed liability under the policy, to direct a verdict in his favor, though he failed to prove the alleged promise.—*Purcell v. St. Paul Fire & Marine Ins. Co.* (N. D.) 64 N. W. 943.

5 N. D. 100.

§ 55. Remedy by motion to make definite.

(S. D.; 1894.)

Where several causes of action are stated in the complaint, but not separately, as required by Comp. Laws, § 4932, a motion to require the plaintiff to elect on which cause of action he will proceed to trial cannot be sustained, as the remedy is to move to make the complaint more definite.—*Austin, Tomlinson & Webster Manuf'g Co. v. Heiser* (S. D.) 61 N. W. 445.

6 S. D. 429.

IX. AMENDMENTS AND SUPPLEMENTAL PLEADINGS.

Waiver of objections by amendment, see post, § 88.

—relating to amendments, see post, § 96.

Amendment in action for divorce, see "Divorce," § 13.

—on appeal from justice, see "Appeal," § 170.

—to enforce maritime lien, see "Maritime Liens," § 2.

Discretion of court as to amendments, see "Appeal," § 204.

Surprise by amendment, ground for continuance, see "Continuance," § 2.

§ 56. In general.

[a] (Iowa; 1897.)

The court may permit an amendment to a pleading to remain on file, though it contain substantially the same matter as did an amendment which had been stricken out.—*Martin v. Shannon* (Iowa) 70 N. W. 720.

[b] (Mich.; 1895.)

A statement by the court during the trial that a certain amendment has been allowed by it operates as an amendment.—*Johnston v. Farmers' Fire Ins. Co. of York* (Mich.) 64 N. W. 5.

[c] (Neb.; 1895.)

Amendments to pleadings will not be allowed where they would prejudice the rights of the adverse party.—*First Nat. Bank v. Myers* (Neb.) 62 N. W. 459.

44 Neb. 306.

§ 57. Request for leave to amend.

[a] (Neb.; 1895.)

It was not error to refuse to permit an amendment where the motion to amend did not

disclose the nature of the proposed amendment. —Camp v. Pollock, 64 N. W. 231, 45 Neb. 771.

[b] (Neb.; 1897.)

Overruling a motion to strike an amended petition is equivalent to granting leave to file the petition. —Grotte v. Nagle (Neb.) 69 N. W. 973.

§ 58. Of declaration, petition, or complaint.

[a] (Mich.; 1895.)

In an action on a fire insurance policy, requiring suit to be brought within a certain time, the declaration may be amended after that time so as to allege the performance by plaintiff of the conditions of the policy. —Johnston v. Farmers' Fire Ins. Co. of York (Mich.) 64 N. W. 5.

[b] (Mich.; 1896.)

In an action brought by D. and G., as co-partners for services rendered as attorneys, where it appeared on the trial that the services had been rendered by the firm of D., W. & G., it was proper to permit an amendment to the declaration, stating such fact, and that the claim had been assigned to plaintiffs. —Dawson v. Peterson (Mich.) 68 N. W. 246.

[c] (Minn.; 1895.)

In an action on a bond given by defendants to a receiver, conditioned that, if the receiver would deliver property to a third person on credit, defendants would pay the price, it was proper to permit an amendment of the complaint so that, instead of alleging that plaintiff accepted the bond in lieu of the price, it alleged that he accepted it as security therefor. —O'Gorman v. Sabin (Minn.) 64 N. W. 84.

62 Minn. 46.

[d] (Minn.; 1895.)

It was proper to permit a complaint for the value of cut stone delivered to be amended by alleging that the stone was cut and delivered under a contract set up by defendant, and to be paid for when accepted by the superintendent of the building, and not when accepted by the architect, as alleged by defendant. —Nevin v. Craig (Minn.) 65 N. W. 86.

63 Minn. 20.

[e] (Neb.; 1895.)

In an action for conspiracy to defraud plaintiff out of goods, it was alleged that defendant M. procured the delivery of the goods by giving security, which defendant S. agreed to cash on the following day; that the goods were delivered on that representation; that on delivery they were secreted, to defraud plaintiff; that defendant S. refused to cash the security; and that the security was worthless. *Held*, that it was not error to permit plaintiff to amend on the trial by alleging that S. did not intend to cash the securities at the time he agreed to do so, and that M. knew of that fact. —Stratton v. Wood (Neb.) 63 N. W. 917.

45 Neb. 620.

§ 59. — Changing form of action.

[a] (Neb.; 1895.)

Where defendant in ejectment pleaded a contract entered into by plaintiff for the sale of the premises, and demanded affirmative equitable relief, it was not error, after the evidence was in, to permit plaintiff to amend by changing the form of the action to that of foreclosure of the contract, so as to conform to the proof. —Scroggin v. Johnston (Neb.) 64 N. W. 236, 45 Neb. 714.

[b] (Wis.; 1896.)

It is not an abuse of discretion for the trial court to refuse to allow plaintiff to amend in an action to enforce a mechanic's lien for material alleged to have been furnished a principal contractor, so as to allege a promise on the part of the owner of the building to pay for the materials, and thereby change the action from one to enforce a subcontractor's lien into one to enforce a principal contractor's lien, after the

time in which a lien as a principal contractor could have been filed. —Seelke & Kohlhaus Manuf'g Co. v. Hulberg (Wis.) 68 N. W. 653.

§ 60. — Adding new cause of action.

[a] (Iowa; 1897.)

An answer stated that plaintiff had transferred his cause of action to his attorneys, and was not the real party in interest. The reply denied any assignment except as security for attorney's fees, and averred that such assignment was after action brought. *Held*, that a reply filed at the trial, containing only a denial, did not present a new issue. —Kreuger v. Sylvester (Iowa) 69 N. W. 1059.

[b] (Iowa; 1897.)

Where a decree in partition, fixing the respective interests of the parties, and, as incidental relief, allowing plaintiffs for rents and profits up to the time of trial, was modified on appeal, as to said interests, and remanded for proceedings in accordance with the opinion, a supplemental petition filed in the lower court, alleging defendant's continued possession of the property after the trial, and requiring him to account for rents and profits accruing since that time, did not set up a new cause of action, and the relief so demanded was properly given on final decree. —Leach v. Germania Bldg. Ass'n (Iowa) 70 N. W. 1090.

[c] (Mich.; 1895.)

Where a declaration alleges plaintiff's injury by reason of an unsafe place in which to work, an amendment alleging that he was in the exercise of due care does not introduce a new cause of action. —Pratt v. Montcalm Circuit Judge (Mich.) 63 N. W. 506.

105 Mich. 499.

[d] (Mich.; 1896.)

An amended declaration which seeks to recover on the same contract as the original, and for the same property, though the breach is differently alleged, does not state a new cause of action. —Strang v. Branch Circuit Judge (Mich.) 65 N. W. 969.

[e] (Mich.; 1896.)

In assumpsit for breach of warranty on sale of a horse, brought in justice court, the bill of particulars set out three items,—the price of the horse, the amount paid for medical treatment, and the expense of care and keeping. On appeal to the circuit court plaintiff was permitted to add an item of expense for taking the horse to a neighboring town for treatment. *Held*, that the additional item was not a new cause of action, but was admissible under the declaration for breach of warranty. —Connell v. McNett (Mich.) 67 N. W. 344.

[f] (Minn.; 1896.)

A complaint in assumpsit for services of the reasonable value of a certain sum could be amended so as to set up two causes of action for services performed between the dates named on express agreements, and a cause for labor performed between the same dates on a quantum meruit, the total demand therefor being the amount named in the original complaint. —Swank v. Barnum (Minn.) 65 N. W. 722.

63 Minn. 447.

[g] (Neb.; 1896.)

It was not an abuse of discretion to refuse to permit an amendment on the trial inserting a new cause of action. —Murray v. Loushman (Neb.) 66 N. W. 413.

47 Neb. 256.

[h] (S. D.; 1896.)

It is not an abuse of discretion for a court to refuse to permit the filing of an amended pleading, tendering new issues, a month after the trial of the action, when the facts pleaded were known to the party and his counsel during the trial. —Brown v. Edmonds (S. D.) 68 N. W. 734.

[i] (Wis.; 1896.)

In an action against a railway company for damages caused by a fire started by an en-

gine on its right of way, it is an abuse of discretion to allow an amendment of the complaint, three years after limitations would have run against the action, so as to include a recovery for damages from burning vegetation on other land than that included in the original complaint, and situated a mile therefrom.—*O'Connor v. Chicago & N. W. Ry. Co. (Wis.)* 66 N. W. 795. 92 Wis. 612.

§ 61. Of answer or plea.

[a] (Iowa; 1897.)

Where the complaint in an action on a subscription sets out a copy of the instrument, and the answer admits the signing of "a paper similar to the one set out in the petition," but states that defendant has no knowledge as to whether the one set out is the one signed, and plaintiff thereafter puts in evidence the original subscription list apparently signed by defendant, it was error to refuse to allow defendant to amend the answer by denying that it signed the alleged subscription paper, or that the signature thereon is its signature, on the ground that the original answer admitted such signature, though the proposed amended answer did not deny that the paper was not executed "for" defendant.—*Corn Palace & Interstate Fair Ass'n v. Hornick, Hess & More (Iowa)* 69 N. W. 1018.

[b] (Mich.; 1896.)

In an action for trespass against a highway commissioner, it was not error, after the case was certified from a justice to the circuit court, to permit the notice attached to the plea, and alleging that the locus in quo was a highway, "and used as such," to be amended by substituting the words, "and a public highway by dedication and use."—*Alton v. Meeuwenberg (Mich.)* 66 N. W. 571.

[c] (Neb.; 1895.)

In an action on a note, allowing defendant to amend his answer so as to deny the genuineness of his indorsement thereof is within the discretion of the court.—*Central City Bank v. Rice (Neb.)* 63 N. W. 60. 44 Neb. 594.

[d] (Wis.; 1896.)

In an action upon a fire policy containing a provision that the company will not pay any loss on a dwelling which has remained unoccupied for seven days, the court, in its discretion, can allow defendant, at the trial, to amend its answer, setting up an affirmative allegation of nonoccupancy.—*Thompson v. Caledonia Fire Ins. Co. (Wis.)* 66 N. W. 801. 92 Wis. 664.

§ 62. — Changing defense.

(Iowa; 1896.)

Where plaintiff claimed land by a deed from his father to himself, which had been delivered to a third person until his father's death, and by an oral agreement whereby he was put in possession of the land, and defendant claimed part of the land as grantee of the other heirs, alleging that said deed to plaintiff was void for want of delivery, it was proper to refuse to permit defendant to amend her pleadings at the trial to allege that the land was the homestead of plaintiff's father and his wife, and that the deed and oral agreement were void for that reason, as Code, § 2689, permits amendments only when they do not substantially change the claim or defense.—*Denzler v. Rieckhoff (Iowa)* 66 N. W. 147.

§ 63. To conform to proofs.

[a] (Minn.; 1896.)

Where plaintiff raised no question, when defendant rested, of the sufficiency of the evidence to establish an issue, but voluntarily proceeded to introduce evidence on the issue, which, together with that introduced by defendant, was sufficient to establish it, the propriety of a subsequent amendment allowed de-

fendant to make the pleading conform to the proof was immaterial, since the court had a right to find the facts as presented by plaintiff.—*Martini v. Christenson (Minn.)* 67 N. W. 1019.

[b] (N. D.; 1895.)

In an action against a bank to recover a balance of the proceeds of a sale made by it of notes left with it for sale at a specified price by the owner, where it appeared that defendant had always represented that it sold the notes to a third person, and that plaintiff had no reason for believing otherwise, and defendant's evidence showed that the notes were sold to the bank itself, it was an abuse of discretion not to permit the plaintiff to amend by inserting a cause of action for a conversion of the notes, or by inserting allegations entitling him to recover such of the notes as were still retained by defendant, and the proceeds of those which had been collected by it.—*Anderson v. First Nat. Bank (N. D.)* 64 N. W. 114. 5 N. D. 80.

[c] (Wis.; 1896.)

Where, in a complaint for services rendered to intestate, plaintiff claimed under an express agreement on the part of intestate to bequeath to him all her property, as compensation, and the proof showed a mere agreement for compensation, it was proper to allow, after trial, an amendment to the prayer for relief asking the recovery for the value of his services, in case he was adjudged not entitled to the whole estate.—*Slater v. Cook's Estate (Wis.)* 67 N. W. 15. 93 Wis. 104.

§ 64. — By appellate court.

[a] (Mich.; 1895.)

Where plaintiff alleged a contract by a railway company to furnish "cars" whereon plaintiff was to load gravel, and proved a contract to furnish "flat cars," and no objection was made thereto until after the introduction of the proof, it having been the trial court's duty to permit an amendment of the declaration to conform to the proof, the supreme court will treat the declaration as amended.—*Robinson v. Lake Shore & M. S. Ry. Co. (Mich.)* 61 N. W. 1014. 103 Mich. 607.

[b] (Neb.; 1895.)

Code Civ. Proc. § 144, allowing pleadings to be amended, either before or after judgment, so as to conform to the facts proven, does not authorize such an amendment in the appellate court, in the absence of a proper bill of exceptions containing the evidence on the trial.—*Scott v. Spencer (Neb.)* 62 N. W. 312. 44 Neb. 93.

§ 65. As to parties.

(Minn.; 1895.)

A complaint for personal injuries alleged to have been caused by the negligence of defendant's servants in the operation of his railroad cannot be amended so as to allege that the injury occurred while defendant was operating a railroad as receiver, and that such injury was caused by the negligence of his servants in so operating the same.—*Erskine v. McIlrath (Minn.)* 62 N. W. 1130. 60 Minn. 485.

§ 66. Time of amendment.

[a] (Iowa; 1897.)

Plaintiff may amend without leave of court at any time before the answer is filed (Code, § 2647), though a motion to change the venue has been filed by defendant.—*Kay v. Pruden (Iowa)* 69 N. W. 1137.

[b] (Mich.; 1896.)

In an action on a note, refusal to permit an amendment during trial, setting up an additional claim of set-off for the reasonable value of pasturing a horse, is not ground for re-

versal. *Rawlings v. Fisher* (Mich.) 67 N. W. 977.

[c] (Minn.; 1895.)

A motion, in an action on an insurance policy covering grain in plaintiff's elevator, made a year and a half after issue was joined, for leave to amend the answer by setting up an alleged breach of warranty, in that at the time the policy was issued a feed mill was being operated in the elevator, and the elevator was not then in plaintiff's actual possession, was properly denied, where it appeared that the loss was not occasioned by the alleged breach, and defendant's only excuse for the delay in setting up the alleged breach was that, since there were other policies on the property as an elevator risk, plaintiff supposed it was all right, and discovered the facts by accident.—*Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Fireman's Ins. Co.* (Minn.) 64 N. W. 902.

62 Minn. 315.

[d] (Wis.; 1895.)

It was within the court's discretion to refuse to allow the defendant, after plaintiff had rested, to amend his answer so as to change the burden of proof, and secure the opening and closing of the case.—*Studebaker Bros. Manuf'g Co. v. Langson*, 61 N. W. 773, 89 Wis. 200.

[e] (Wis.; 1895.)

An amended pleading may, by consent of the parties, be filed after the expiration of the 20 days allowed by Rev. St. § 2685, for such amendments.—*Whitefoot v. Leffingwell* (Wis.) 63 N. W. 82.

90 Wis. 182.

§ 67. — After verdict.

[a] (Minn.; 1895.)

Where the amendment of a complaint after verdict was not necessary to sustain the verdict, there was no error in permitting the amendment.—*Nichols & Shepard Co. v. Dedrick* (Minn.) 63 N. W. 1110.

61 Minn. 513.

[b] (Minn.; 1897.)

A complaint by "G. in her own behalf and as guardian of A." may be amended after verdict so as to read "G. in her own behalf, and A., by G., his guardian."—*Beckett v. Northwestern Masonic Aid Ass'n* (Minn.) 69 N. W. 923.

§ 68. — After judgment.

[a] (Minn.; 1896.)

Where a cause of action is stated in the complaint as upon a joint obligation, and a judgment for want of answer has been entered against one of the defendants, the district court may allow, as against another defendant, an amendment to the complaint whereby the cause of action is alleged to be upon a joint and several obligation.—*Pfefferkorn v. Haywood* (Minn.) 65 N. W. 68.

[b] (Neb.; 1895.)

Amendments to pleadings will not be allowed after judgment, where their effect would be to substantially change the cause of action or defense.—*First Nat. Bank v. Myers* (Neb.) 62 N. W. 459.

44 Neb. 306.

§ 69. Taxing costs against party opposing motion.

(Wis.; 1895.)

In an action in a justice's court, defendants set up nonjoinder of defendants. On appeal to the superior court by defendants, plaintiff, on his motion, was permitted to amend by bringing in another defendant, and the court taxed \$10 costs against defendants on the motion. *Held*, that such taxation was an abuse of discretion.—*Marlett v. Doctor* (Wis.) 61 N. W. 1125, 89 Wis. 347.

§ 70. Effect.

[a] (Iowa; 1895.)

It was error to dismiss plaintiff's amended petition, where the demurrer thereto, which was sustained, was filed prior to his second amendment, and plaintiff elected to stand on his petition as amended.—*Kelly v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 957.

93 Iowa, 436.

[b] (Iowa; 1897.)

Where plaintiff sues to set aside a conveyance as fraudulent, and in an amendment to his reply, filed with the answer, which alleges that the conveyance was a mortgage, he avers such fact, and alleges a willingness to pay the amount thereof, it constitutes an abandonment of the claim that the transaction was fraudulent.—*Roane v. Hamilton* (Iowa) 70 N. W. 181.

§ 71. How far original pleading superseded.

[a] (Iowa; 1897.)

Where an amended and substituted petition is filed, the issues embodied in it are the only ones tendered by plaintiff.—*Mowry v. Wareham* (Iowa) 69 N. W. 1128.

[b] (Neb.; 1895.)

Where an amended pleading has been filed, the original loses its force as a pleading, and the adverse party may not read it to the jury, or comment upon it in argument, without first offering it in evidence.—*Woodworth v. Thompson* (Neb.) 62 N. W. 450.

44 Neb. 311.

§ 72. Withdrawal of amendment.

(Iowa; 1896.)

The withdrawal of plaintiff's amendment to his answer does not preclude him from giving evidence in support of a counterclaim set up in his first answer to a petition in intervention.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

§ 73. Supplemental complaint.

[a] (N. D.; 1896.)

The fact that judgment has been rendered on notes in another state pending an action on them in North Dakota cannot be presented by supplemental complaint, since the judgment, if pleaded, would bar a further prosecution of the action.—*Swedish-American Nat. Bank v. Dickinson Co.* (N. D.) 69 N. W. 455.

[b] (S. D.; 1895.)

An order denying a motion to file a supplemental complaint will not be reviewed on a record showing neither prejudice to the moving party nor abuse of discretion.—*Schouweiler v. Hough* (S. D.) 63 N. W. 776.

X. BILL OF PARTICULARS.

As part of complaint, see ante, § 5.

Remedy by bill instead of motion, see ante, § 53.

Setting out documents, see ante, § 6.

Waiver of objections to bill, see post, § 97.

§ 74. Who entitled to bill.

(Minn.; 1897.)

In an action for money paid to defendant for plaintiff's use defendant is not entitled under Gen. St. 1894, § 5246, to a bill of particulars, as a matter of right.—*In re Citizens' Bank* (Minn.) 69 N. W. 1108; *Jones v. Northern Trust Co.*, 1d.

§ 75. Sufficiency.

[a] (Mich.; 1895.)

A bill of particulars describing generally the character of plaintiff's claim is sufficient to admit testimony of the contents thereof, unless defendant calls for a more specific bill.—*Tanner v. Page* (Mich.) 63 N. W. 993.

[b] (Mich.: 1897.)

A bill of particulars claiming "damage done to lots" in lowering same below grade, and leaving surface of same uneven, is sufficient to admit proof of damage to lots in two different parts of the city under separate contracts for the sale of gravel therefrom, and to permit a recovery for breach of a contract to level the lots to grade, and for the cost of filling the lots to grade.—Grady v. Sullivan (Mich.) 70 N. W. 1040.

XI. PLEADING AND PROOF—VARIANCE.

See, also, "Assumpsit," § 6; "Libel and Slander," § 25; "Malicious Prosecution," § 13; "Replevin," §§ 13, 14; "Set-Off and Counterclaim," § 13.

Amending pleading to conform to proof, see ante, §§ 63, 64.

Waiver of variance, see post, § 98.

As to damages, see "Damages," § 39.

— negligence, see "Negligence," § 36.

— payment, see "Payment," § 5.

— usury, see "Usury," § 23.

Ground for reversal, see "Appeal," § 285.

In actions against sureties, see "Principal and Surety," § 22.

— for commissions, see "Factors and Brokers," §§ 19-21.

— for injuries to servant, see "Master and Servant," § 47.

— for price of goods, see "Sale," § 65.

— on bills and notes, see "Negotiable Instruments," § 81.

— on contracts, see "Contracts," §§ 67-69.

— on policies, see "Insurance," § 118.

— under civil damage laws, see "Intoxicating Liquors," § 58.

In election contest, see "Elections and Voters," § 29.

To sustain judgment, see "Judgment," § 25.

Variance between affidavit and declaration in attachment, see "Attachment," § 39.

§ 76. Issues raised.

(Iowa: 1896.)

A petition in replevin alleged that the property was claimed by defendant under a mortgage from a third person, and that defendant did not own the property; but there was no allegation as to value, or that plaintiff had demanded or was entitled to possession, and no attack was made therein on the validity of defendant's mortgage. *Held*, that the claim that defendant took the mortgage with actual notice of plaintiff's rights, and that the description of the property was inserted after the mortgage was executed, was not in issue.—Creamery Package Manuf'g Co. v. Union Bank of Wilton (Iowa) 69 N. W. 676.

§ 77. Necessity of denial or of verifying denial—Right to deny execution or validity of instrument.

[a] (Iowa: 1895.)

The introduction by the indorsee thereof of a note purporting to have been executed by defendant's intestate, together with prima facie proof of the genuineness of the signature, raises the legal presumption that the note is unpaid, and entitles plaintiff to recover the amount thereof, in the absence of rebutting evidence, under Code, § 2410, providing that all claims against an estate not expressly admitted in writing shall be considered as denied without any pleading, and section 2730, providing that the signature to a written instrument upon which an action is based shall be deemed admitted unless the genuineness is denied under oath.—Schulte v. Coulthurst (Iowa) 62 N. W. 770.

[b] (Iowa: 1895.)

In an action on a written contract, a copy of which was attached to the petition, and

the signature is not disputed under oath, as required by Code, § 2730, it was error to require the plaintiff to prove the genuineness of the signature.—Thompson v. Lenth (Iowa) 62 N. W. 842.

[c] (Iowa: 1895.)

Code, § 2730, providing that the genuineness of the signature to any written instrument made a part of a pleading shall be presumed, unless denied by the other party under oath, has no application to an issue as to whether an instrument made a part of the answer was, in fact, a limitation of the powers of defendant's agent.—Sawin v. Union Bldg. & Sav. Ass'n of Des Moines (Iowa) 64 N. W. 401.

[d] (Minn.: 1895.)

In an action on a note purporting to be signed by defendant, a special denial that defendant signed the note, verified on information and belief, is not a denial under oath, within Gen. St. 1894, § 5751, requiring plaintiff, in such case, to show execution in the first instance.—McCormick Harvesting Mach. Co. v. Doucette (Minn.) 63 N. W. 95.

61 Minn. 40.

[e] (Minn.: 1895.)

Gen. St. 1894, § 5751, providing that every written instrument purporting to be signed by any person shall be proof that it was so signed until such person denies the signature under oath, applies to instruments purporting to be executed by a corporation.—First Nat. Bank v. Compo-Board Manuf'g Co. (Minn.) 63 N. W. 731.

61 Minn. 274.

[f] (Minn.: 1897.)

Gen. St. 1894, § 5751, provides that every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until the purported signer shall deny the signature or execution of the same by his oath or affidavit. *Held*, that a special denial in the answer that the defendant signed the note sued upon, which answer was verified upon information and belief by the defendant's attorney, is not such a denial under oath of the signature or execution of the instrument as is contemplated by the statute, so as to put the plaintiff to the proof of the execution of such instrument.—Moore v. Holmes (Minn.) 70 N. W. 872.

§ 78. Pleading express contract—Recovery on quantum meruit.

(Neb.: 1895.)

Under a petition alleging a special contract and performance by plaintiff there could be no recovery on a quantum meruit for part performance.—Mayer v. Ver Bryck (Neb.) 64 N. W. 691, 46 Neb. 221.

§ 79. Evidence admissible.

[a] (Iowa: 1896.)

In replevin by a father to recover property attached in an action by his daughter-in-law against her husband for support, all the issues raised being on the question of plaintiff's ownership, it was reversible error to admit in evidence for defendant the petition in her action for support, alleging neglect and ill treatment by her husband, her poverty, and her husband's failure to support her.—Alborn v. Alborn (Iowa) 69 N. W. 678.

[b] (Iowa: 1897.)

Under an allegation that plaintiff had full knowledge of a certain contract, and was thereby estopped to assert a claim in opposition thereto, defendant may prove either direct notice to plaintiff or facts from which knowledge may be inferred.—De Lay v. Carney Bros. (Iowa) 69 N. W. 1053.

[c] (Iowa: 1897.)

After pleading that a note was void, one cannot seek to exclude evidence of an oral agreement on the ground that it contradicted the note.—Murdy v. Skyles (Iowa) 70 N. W. 714.

[d] (Mich.; 1894.)

In an action to recover a balance due for slabs, edgings, etc., trimmed from lumber cut at plaintiff's mill, it appeared that by the contract plaintiff was to deliver them, properly piled, on scows alongside defendant's mill dock, and that defendant was to pay a specified price per cord, and that they were to be piled in condition for measurement, and there measured. The contract did not specify the length of such material. Defendant filed a full and explicit notice of recoupment for failure of plaintiff to perform his contract, in which no claim was made for material in excess of four feet for any reason other than that it could not, for that reason, be correctly piled, and could not be unloaded without loss of time, because the carriers choked and chains broke, but gave no evidence that such carriers choked and chains broke. *Held*, that it was proper to refuse to permit plaintiff to testify on cross-examination how much of the entire quantity of slabs, edgings, etc., was four feet long.—Taylor v. Butters & Peters Salt & Lumber Co. (Mich.) 61 N. W. 5.

103 Mich. 1.

[e] (Mich.; 1896.)

In an action for injuries to certain parts of the body, evidence of pain in other parts of the body by reason of such injuries is admissible in evidence.—Will v. Village of Mendon (Mich.) 66 N. W. 58.

[f] (Minn.; 1895.)

Under a complaint charging defendant with dealing in "second-hand furniture, carpets, stoves, and divers other articles and things," without a license, evidence is admissible that defendant dealt in second-hand tools. Canty, J., dissenting.—State v. Segel (Minn.) 62 N. W. 1134.

60 Minn. 507.

[g] (Minn.; 1895.)

The fact that the agreement sued on was made by plaintiff in order to defraud his creditors must be pleaded, in order to constitute a defense.—Anderson v. Rockwood (Minn.) 63 N. W. 1023.

62 Minn. 1.

[h] (Minn.; 1896.)

In an action on a written lease, evidence that after its execution it was altered by adding the name of a second witness and a certificate of acknowledgment, is inadmissible under a mere denial of the execution of the instrument.—Roberts v. Nelson (Minn.) 68 N. W. 14.

[i] (Neb.; 1895.)

In a suit on a note by a pledgee thereof, evidence that the pledgee had taken other security, and agreed to release the note, is inadmissible under an answer pleading payment of the debt for which the note was pledged.—First Nat. Bank v. Chilson (Neb.) 63 N. W. 362.

45 Neb. 257.

[j] (Wis.; 1897.)

In an action by an attorney on an oral contract for services rendered a third person, plaintiff alleged and contended that defendant alone retained him. Defendant denied any contract, and claimed that the most that plaintiff's evidence showed was a joint retainer by defendant and one B. *Held*, that it was error to admit in evidence a statement of B., made in defendant's absence, that he and defendant had employed plaintiff.—James v. Carson (Wis.) 69 N. W. 1004.

§ 80. — As to notice.**(Iowa; 1895.)**

Where recovery is sought on the ground that the recording of a chattel mortgage gave constructive notice to third persons, and no actual notice is alleged, proof of the latter is inadmissible.—King v. Howell (Iowa) 62 N. W. 738.

§ 81. As to contracts.**(Neb.; 1895.)**

Where, in an action on a contract of warranty, the petition is silent as to whether the contract is in writing, there is no presumption that it exists in parol, and the written warranty is admissible in evidence. 46 N. W. 491, 30 Neb. 261 (1890) affirmed.—Watson v. Roode, 61 N. W. 625, 43 Neb. 348.

§ 82. Matter admissible under general denial.**[a] (Mich.; 1895.)**

The bar of an action for conversion by an election to sue in assumpsit can be shown under the general issue.—Thomas v. Watt (Mich.) 62 N. W. 345.

104 Mich. 201.

[b] (Neb.; 1896.)

Evidence that the contract sued on was rescinded is not admissible under a general denial.—Home Fire Ins. Co. v. Berg (Neb.) 65 N. W. 780, 46 Neb. 600.

[c] (Neb.; 1896.)

Under a general denial, a defense in the nature of a confession and avoidance cannot be proved.—Keens v. Robertson (Neb.) 65 N. W. 897, 46 Neb. 837.

[d] (Neb.; 1896.)

In an action against a bank for money deposited by plaintiff's agent to his own account, evidence that the bank paid out the money in good faith on checks subsequently drawn against it by the agent is not admissible under a general denial.—Cady v. South Omaha Nat. Bank, 65 N. W. 906, 46 Neb. 756.

[e] (Neb.; 1896.)

In an action by a stockholder against the corporation to rescind a subscription, the facts constituting a waiver of the cause of action are admissible under the general denial.—American Building & Loan Ass'n v. Rainbolt (Neb.) 67 N. W. 493.

48 Neb. 434.

[f] (Neb.; 1896.)

Evidence tending to impeach an award actually made and published in accordance with the agreement of submission is inadmissible under a general denial.—Connecticut Fire Ins. Co. v. O'Fallon (Neb.) 69 N. W. 118.

See, also, "Replevin," § 14.

§ 83. Variance.**[a] (Iowa; 1894.)**

A petition alleged in one count injury to plaintiff's wagon, and in another count injuries to his person, by a collision with defendant's train at a highway crossing, and also alleged three separate grounds of negligence. *Held*, that it was error to charge that a general denial put in issue all the allegations of the petition except defendant's corporate character, and plaintiff must establish all the other allegations so made, etc.—Winey v. Chicago, M. & St. P. Ry. Co. (Iowa) 61 N. W. 218.

92 Iowa, 622.

[b] (Iowa; 1895.)

Where plaintiffs alleged a special contract price for the services rendered, but proved the value thereof, under a promise to pay their claim, without specifying its amount, the variance is fatal.—Walker v. Irwin (Iowa) 62 N. W. 785.

[c] (Iowa; 1896.)

In an action on notes given for goods sold defendants alleged that the notes were invalid, because the consideration was, in whole or in part, intoxicating liquors sold by plaintiff in violation of law. The evidence failed to show any such sales by plaintiff, but showed such sales by W. to defendants, and an assignment of accounts of such sales by W. to plaintiff. *Held*, that there was a fatal variance.—Hurlbut v. Bagley (Iowa) 68 N. W. 585.

[d] (Mich.: 1895.)

In an action on account of an unprotected approach to a bridge, where the declaration alleged that plaintiff's horse backed off 12 feet east of the east end of the bridge, and the proof showed that it backed off about 8 feet east of the bridge, the variance was not fatal.—*Ross v. Ionia Tp.* (Mich.) 62 N. W. 401.

104 Mich. 320.

[e] (Mich.: 1895.)

A determination by the trial judge that the declaration in an action on a justice's judgment did not vary from the proof as to its date, as evidenced by the fact that the case evidently proceeded upon the theory that the date was correctly pleaded, will be treated on appeal as equivalent to an amendment, if it were necessary to obviate the objection of a variance.—*Waldron v. Palmer* (Mich.) 62 N. W. 731.

104 Mich. 556.

[f] (Mich.: 1895.)

In an action for fraud in the sale of corporate stock, where the declaration avers that the stock belonged to defendant, while the evidence shows that it belonged to the company, the variance is fatal.—*Hubbard v. Long* (Mich.) 63 N. W. 644.

105 Mich. 442.

[g] (Mich.: 1895.)

In an action for maliciously suing out a writ of attachment, an allegation in the declaration that defendant caused the affidavit to be filed and the writ of attachment to be issued will preclude plaintiff from asserting that the affidavit was not made and filed before the writ was issued.—*Wiesinger v. First Nat. Bank* (Mich.) 64 N. W. 59.

[h] (Mich.: 1895.)

In an action on a note, a defense setting up an agreement for the delivery of the note to defendant by the payee and plaintiff's indorser is not sustained by proof of such an agreement on the part of plaintiff's indorser alone.—*Hudson v. Emmons* (Mich.) 65 N. W. 542.

[i] (Mich.: 1896.)

In an action by A. B. against a village to recover personal taxes paid by plaintiff under protest, it appeared that plaintiff carried on a mercantile business under the name of "Mrs. S. P. B."; that the assessment was in the latter name, and that the protest was signed "Mrs. S. P. B." *Held*, that the variance in the names would not prevent recovery by plaintiff without amendment of the declaration, defendant not being misled.—*Barnhard v. Village of White Cloud* (Mich.) 66 N. W. 387.

[j] (Mich.: 1896.)

Where the declaration alleges an agreement for a commission on "sale" of real estate, proof of an exchange of the property is not a fatal variance, if defendant was not misled.—*Whitaker v. Engle* (Mich.) 69 N. W. 493.

[k] (S. D.: 1896.)

The complaint alleged that the damage to plaintiff's building was caused by the negligent excavation by defendants of land "adjacent" to plaintiff's land. *Held*, that recovery could not be had from the defendant contractor, on the theory that the fall of plaintiff's wall was caused by his negligence in excavating "beneath" plaintiff's wall, to lower plaintiff's foundation, under a contract with plaintiff.—*Novotny v. Danforth* (S. D.) 68 N. W. 749.

§ 84. — Action for personal injuries.**(Mich.: 1895.)**

Plaintiff alleged that as he was making a coupling he stepped between the cars, and was injured by reason of defendant's neglect to ballast the track. On the trial he testified that he was standing with his arm against the stationary car, where it was caught by the moving car, between the deadwoods. *Held* a variance.—*Muel-*

ler v. Lake Shore & M. S. Ry. Co. (Mich.) 63 N. W. 416.

105 Mich. 487.

§ 85. Effect of demanding excessive relief.**(S. D.: 1895.)**

A demand for excessive relief does not defeat a recovery of that to which a party is, under the pleadings and proof, found to be entitled.—*Laird-Norton Co. v. Herker* (S. D.) 62 N. W. 104.

6 S. D. 509.

XII. WAIVER OF OBJECTIONS AND AIDER BY VERDICT AND JUDGMENT.

See, also, "Equity," § 53.

Defective complaint cured by other pleading, see ante, § 15.

§ 86. In general.**[a] (Iowa: 1895.)**

The objection that questions involved in a demurrer which has been overruled cannot be afterwards raised by answer is waived if not taken in the court below.—*Tyler v. Coulthard* (Iowa) 64 N. W. 681.

[b] (Iowa: 1896.)

The objection that a pleading was not signed by plaintiff or his attorney cannot be urged for the first time on appeal.—*Moore v. Graves* (Iowa) 65 N. W. 1608.

[c] (Neb.: 1895.)

Defects in a pleading may be waived by a failure to object to them in the lower court.—*O'Donohoe v. Polk* (Neb.) 63 N. W. 829.

45 Neb. 510.

§ 87. Objections to complaint.**[a] (Iowa: 1894.)**

When a complaint joins both an equitable and a law cause of action in the same paragraph it is not error, after issue is joined, without objection being made to the complaint, to refuse to send the whole cause to the law calendar to be tried before a jury.—*First Nat. Bank v. Rowley* (Iowa) 61 N. W. 195.

92 Iowa, 530.

[b] (Iowa: 1896.)

In an action to recover land sold for taxes, that the petition does not allege that plaintiff has paid all the taxes due on the land, as required by Code, § 897, cannot be raised for the first time on appeal.—*Shelley v. Smith* (Iowa) 66 N. W. 172.

[c] (Mich.: 1895.)

In an action for damages caused by defendant's runaway horses, one count of the declaration alleged that the "defendant carelessly and negligently allowed a team of his horses to be insecurely fastened," and another that the horses were "left unguarded and improperly fastened." *Held*, that an objection that no recovery could be had for negligence in leaving them "unhitched" cannot be sustained on appeal, as leave to amend the complaint would have been granted if the objection had been raised below.—*Doyle v. Detroit Omnibus Line Co.* (Mich.) 62 N. W. 1031.

105 Mich. 195.

[d] (Mich.: 1896.)

An objection to the sufficiency of the declaration cannot be raised for the first time on appeal.—*Tyler v. Nelson* (Mich.) 66 N. W. 671.

[e] (Minn.: 1895.)

Where the objection that the complaint does not state a cause of action is raised for the first time on appeal from a judgment by default, the judgment will be sustained if sufficient facts to support it can be inferred by any reasonable intendment from the complaint.—

Northen Trust Co. v. Markell (Minn.) 63 N. W. 735.

61 Minn. 271.

[f] (Minn.; 1895.)

As against an objection first made at the trial, an allegation in a complaint in an action on a contract that plaintiff duly demanded that estimates and payments be made was a sufficient allegation that such demand was reasonably and properly made according to the provision in the contract for estimates and payments.—Newton v. Highland Imp. Co. (Minn.) 61 N. W. 1146.

62 Minn. 436.

[g] (Neb.; 1895.)

A petition alleging an indebtedness from defendant to plaintiff; that it has been the custom of defendant to pledge notes as security for such indebtedness; and that at a certain time there were in plaintiff's hands, in pledge as collateral security, certain notes, is, after answer, a sufficient averment of the pledge of such notes.—Sharmer v. Johnson, 61 N. W. 727, 43 Neb. 509.

[h] (Neb.; 1895.)

Where the objection that a pleading does not state sufficient facts to constitute a cause of action or defense was not raised in the trial court, nor in the petition in error, it will not be reviewed.—Pearce v. McKay (Neb.) 63 N. W. 851.

45 Neb. 296.

[i] (Neb.; 1896.)

Objection to the sufficiency of a complaint may be made for the first time in the supreme court.—Sage v. City of Plattsmouth, 67 N. W. 455, 48 Neb. 558.

[j] (S. D.; 1895.)

Where an objection to the sufficiency of the complaint is taken at the trial after an issue of fact has been raised by the answer, greater latitude of presumption may be indulged in to sustain the complaint than when the objection is taken by demurrer interposed at the proper time.—Anderson v. Alseth (S. D.) 62 N. W. 435.

6 S. D. 566.

[k] (S. D.; 1896.)

Though a complaint contain redundant matter and allegations relating to more than one cause of action, where no attack was made on it in the court below, the appellate court will sustain the pleading if sufficient facts can be found to constitute any cause of action.—Bright v. Ecker (S. D.) 68 N. W. 326.

[l] (Wis.; 1897.)

Objection to complaint for misjoinder of causes of action or of parties defendant can be taken only by demurrer to complaint on that ground.—John R. Davis Lumber Co. v. Home Ins. Co. of New York (Wis.) 70 N. W. 59.

§ 88. Waiver of demurrer or ruling thereon.

[a] (Iowa; 1896.)

Error in sustaining a demurrer to one division of an answer is not ground for complaint, where defendant amends the pleading after the ruling, and no attack, by demurrer or otherwise, is made on the division as amended.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 66 N. W. 157.

[b] (Iowa; 1896.)

A stipulation, made after the submission of the evidence, providing that the demurrers to the answer should be decided with the main case, and, if the court should hold that such demurrers ought to be overruled, "then the reply now on file shall be deemed * * * as filed," and a final decree rendered, waives any error involved in overruling the demurrers.—District Tp. of Viola v. Bickelhaupt (Iowa) 68 N. W. 914.

[c] (Iowa; 1896.)

Error, if any, in sustaining a demurrer to a substituted answer, is waived where an amendment to such answer is filed, and issue

joined thereon.—Gager v. Payne (Iowa) 69 N. W. 551.

§ 89. — By pleading over.

[a] (Iowa; 1895.)

Error involved in the ruling on a demurrer to an answer is waived by the subsequent filing of a reply.—Wyland v. Griffith (Iowa) 64 N. W. 673.

[b] (Iowa; 1896.)

Defendant, by pleading over, waives error in sustaining a demurrer to his pleading.—Bartlett v. Northwestern Mut. Life Ins. Co. (Iowa) 68 N. W. 906.

[c] (Iowa; 1897.)

Acts 25th Gen. Assm. c. 96, providing that answering over after a demurrer is overruled does not make the ruling on the demurrer an adjudication of any question raised by the demurrer, does not change the ruling as to waiver by answering over after demurrer is sustained.—Krause v. Lloyd (Iowa) 69 N. W. 1062.

[d] (Neb.; 1897.)

That the party answers over after his general demurrer to a petition is overruled is not a waiver of the defect that the petition fails to state a cause of action.—Hopewell v. McGrew (Neb.) 70 N. W. 397.

§ 90. Rights of party refusing to plead over.

(Mich.; 1896.)

Where a party stands on a demurrer, and interposes no further defense, he thereby waives the right to a trial on the merits.—Boyer v. Sowles (Mich.) 67 N. W. 530.

§ 91. Waiver of ruling on motion.

[a] (Iowa; 1895.)

A defendant who answers a complaint after his motion to make it more specific has been overruled waives the objection.—Wattels v. Minchen (Iowa) 61 N. W. 915.

93 Iowa, 517.

[b] (Iowa; 1895.)

Error involved in a ruling on a motion to strike matters from an answer is waived by the subsequent filing of a demurrer to such answer.—Wyland v. Griffith (Iowa) 64 N. W. 673.

[c] (Iowa; 1896.)

Where a defendant, after the overruling of a motion for a more specific statement of certain matters, sets out such matters in an answer, and a hearing is had thereon, the right to object on appeal to the ruling on the motion is waived.—Manatt v. Shaver (Iowa) 67 N. W. 264.

[d] (Iowa; 1897.)

A ruling denying a motion to require a plaintiff to make his petition more specific cannot be reviewed where defendant took no exception, and answered over.—Kelly v. Incorporated Town of West Bend (Iowa) 70 N. W. 726.

[e] (Neb.; 1897.)

Defendant, by pleading to the merits of an amended petition, after his motion to strike it from the files as introducing a new cause of action has been overruled, waives that objection.—Grotte v. Nagle (Neb.) 69 N. W. 973.

§ 92. — Effect of electing to plead over.

(Iowa; 1895.)

Under Code, § 2634 providing that, when a motion to strike out for misjoinder of causes of action is sustained, the court may permit plaintiff, on motion, to file separate petitions, each including the causes of action stricken out, which shall be docketed and proceeded in without further service, plaintiff, after electing to file separate petitions, though he does not do so, cannot appeal from the order granting the motion to strike.—Weaver v. Stacy (Iowa) 62 N. W. 22.

93 Iowa, 683.

§ 93. Objections to answer or pleas.**[a] (Iowa: 1894.)**

If matter pleaded as a defense is not attacked by motion or by demurrer, and there is testimony to sustain it, it will defeat the action, though it may not amount to a legal defense.—*First Nat. Bank v. Zeims* (Iowa) 61 N. W. 483.

93 Iowa, 140.

[b] (Iowa: 1896.)

Where defendants do not specially plead a certain defense, but the case is tried without objection on the theory that there is such an issue, and plaintiff asks a number of instructions with reference to it, the case will be treated on appeal as if the answer set out the defense.—*Humbert v. Larson* (Iowa) 68 N. W. 703.

§ 94. Waiver of failure to reply.**[a] (Iowa: 1896.)**

In an action for breach of a contract to transfer to plaintiff certain land and a stock of goods in exchange for land to be conveyed by plaintiff to defendant, defendant answered that plaintiff took and converted certain of said goods, and asked judgment for the amount of the same. On the trial, evidence was introduced, without objection, as to the amount of goods taken from and added to said stock by plaintiff. *Held*, that defendant could not, for the first time on appeal, assert error in submitting the counterclaim to the jury, because of plaintiff's failure to reply.—*Warren v. Chandler* (Iowa) 67 N. W. 242.

[b] (Wis.: 1895.)

An objection that there was no reply to defendant's counterclaim cannot be made for the first time on appeal.—*Killman v. Gregory* 65 N. W. 53, 91 Wis. 478.

§ 95. Waiver of joinder of issue.**[a] (Iowa: 1895.)**

Where all the parties have proceeded on the theory that the facts stated in a cross bill were properly in issue, it cannot, on appeal, be contended that they were not.—*Ware v. Delahaye* (Iowa) 64 N. W. 640.

[b] (Iowa: 1895.)

Where parties proceed to the trial of an equity case as if the matters pleaded in defendant's cross bill had been denied, and evidence is taken upon the matters set out therein, it is too late, on appeal, to claim the benefit of Code, § 2712, which provides that material allegations of an unanswered cross bill will be deemed admitted.—*Medland v. Walker* (Iowa) 64 N. W. 797.

§ 96. Objections relating to amendments.**[a] (S. D.: 1895.)**

Where the court allowed an amendment of a pleading at the trial, and thereafter the trial proceeded as if the amendment were made, it could not be objected for the first time on appeal that the pleading was not in fact amended so as to present the issue it was treated as presenting.—*Connor v. National Bank* (S. D.) 64 N. W. 519.

[b] (Wis.: 1896.)

The court ordered that a demurrer to the complaint "be, and the same is hereby, sustained, with \$10 costs." Afterwards, an amended complaint was served on defendants' attorneys, and \$10 costs was paid them. *Held*, that, by retaining the amended complaint and the costs paid, they waived objection that no leave to amend had been given.—*Schoenleher v. Burkhardt* (Wis.) 69 N. W. 343.

§ 97. Objection to bill of particulars.**(Mich.: 1896.)**

Under a rule of the circuit court providing that where plaintiff's bill of particulars is insufficient the court may, in its discretion, nonsuit him, or require a more complete bill to be de-

livered, a defendant who has made no objection, by motion, to the bill delivered, cannot object to the introduction of any evidence under it, on the trial, on the ground of its insufficiency.—*Strutz v. Brown* (Mich.) 68 N. W. 981.

§ 98. Objection on ground of variance.**[a] (Minn.: 1896.)**

A variance between the pleading and the proof is waived by a failure to seasonably object to the evidence on that ground.—*Adams v. Castle* (Minn.) 67 N. W. 637.

64 Minn. 505.

[b] (N. D.: 1895.)

It could not be objected for the first time on appeal that the complaint in an action on an insurance policy alleged performance of the condition as to notice of loss, while the proof showed a waiver by defendant of such performance, where such proof was admitted without objection.—*Purcell v. St. Paul Fire & Marine Ins. Co.* (N. D.) 64 N. W. 943.

5 N. D. 100.

[c] (N. D.: 1896.)

Where a complaint avers that plaintiff purchased the note in suit, and was at the commencement of the action the holder and owner thereof, and the evidence disclosed that plaintiff was an accommodation indorser, and as such was compelled to take up the note, the variance will be deemed cured by amendment, no objection having been made to the evidence on account thereof.—*Ashe v. Beasley* (N. D.) 69 N. W. 188.

§ 99. Waiver by failure to demur or answer.**[a] (Iowa: 1895.)**

The objection that parol evidence varies a written contract is waived in an action on the contract by failure to demur to a petition which alleges the facts established by such evidence.—*Wiseman v. Thompson* (Iowa) 63 N. W. 346.

[b] (Iowa: 1895.)

Where the petition in an action to be allowed to redeem from a tax sale, after the execution to the purchaser thereof of a treasurer's deed, is demurrable for failure to allege that all the taxes on the property have been paid, defendant's failure to interpose an objection by demurrer or motion in arrest of judgment, instead of attempting to take advantage of it by answer, operates as a waiver.—*Medland v. Walker* (Iowa) 64 N. W. 797.

[c] (Iowa: 1896.)

Insufficiency of a pleading is waived by failure to demur.—*Zundelowitz v. Webster* (Iowa) 65 N. W. 835.

[d] (Iowa: 1896.)

Code, c. 2650, as amended by Acts 25th Gen. Assem. c. 96, provides that when a "demurrer shall be overruled and the party demurring shall answer or reply * * * the sufficiency of the pleading thus attacked shall be determined as if no demurrer had been filed. No pleading shall be held sufficient on account of a failure to demur thereto." *Held*, that the overruling of a demurrer to a petition by one judge did not preclude another from holding the petition insufficient, by granting defendant's motion for judgment at the close of plaintiff's evidence.—*McClain v. Capper* (Iowa) 67 N. W. 102.

[e] (Iowa: 1897.)

Failure of the petition against the guarantors of a note to allege demand and notice could not be raised by answer before the passage of the act of the 25th general assembly, and was waived by failure to demur.—*Desellem v. Iowa City Bank* (Iowa) 70 N. W. 702.

§ 100. Aider by verdict or judgment.**(Iowa: 1895.)**

In an action against a druggist for negligently giving plaintiff an injurious medicine, failure to aver an absence of contributory negli-

gence on plaintiff's part may be taken advantage of by motion in arrest of judgment.—*Habe v. Sommerbeck* (Iowa) 63 N. W. 458.

PLEDGE.

Garnishment of property pledged, see "Garnishment," § 7.

Of stock, see "Corporations," § 61.

§ 1. What constitutes—Sale or pledge.

(S. D.; 1896.)

The owner of a stock of goods, mortgaged for \$3,000, agreed with the mortgagees that, to secure payment of said debt, and enable them more readily to procure its payment, such owner pledged and delivered the goods to the mortgagees, to hold in trust, and not otherwise, "with privilege to sell and dispose of the same, and out of the proceeds of said property, after deducting the sum of \$3,000 so owing, as aforesaid, to return and deliver to the 'owner' the surplus of such sale of such property." *Held*, that there was a transfer of title to, and not a mere pledge of, the goods to the mortgagees.—*Jensen v. Bowles* (S. D.) 67 N. W. 627.

§ 2. — Evidence.

[a] (Iowa; 1896.)

It being contended by plaintiff bank that certain stock was sold to it by defendant, and by defendant that the stock was merely deposited as collateral security, and was afterwards converted by plaintiff to its use, it is proper for plaintiff to show that, at a time when, according to defendant's theory, plaintiff held it as security or had converted it, plaintiff's claims against defendant were figured up, new notes given by him, further collaterals put up by him, the collaterals which he then had up called for, and a list of the entire lot made and signed by him, and that the stock did not appear, and nothing was said about it.—*Iowa City State Bank v. Novak* (Iowa) 66 N. W. 186.

[b] (Iowa; 1896.)

In an action on a note which plaintiff alleged had been indorsed to it as collateral by another bank, in which the makers claimed plaintiff was not the owner, it appeared that such bank was indebted to plaintiff, and inclosed such note, indorsed by it, in a package of currency sent to plaintiff by express, with a letter saying it was sent to be used as collateral; that plaintiff never found the note; that such bank then wrote plaintiff, inclosing another note indorsed to plaintiff as collateral, and a copy of the note in suit; that plaintiff in reply acknowledged the receipt of the last note sent, and stated that "the other note we cannot find." Plaintiff said nothing in regard to the copy of such note. *Held*, that the burden was on plaintiff to show that it received and accepted such copy to be held as collateral, and that whether it was thus received and accepted was a question of fact for the jury.—*Corn Exch. Bank v. Schuttleworth* (Iowa) 68 N. W. 827.

[c] (Neb.; 1895.)

Proof merely that defendant was indebted to plaintiff, and that plaintiff had in his possession notes payable to the order of defendant, and not indorsed, is insufficient to show that such notes were pledged to secure such debt.—*Sharmer v. Johnson*, 61 N. W. 727, 43 Neb. 509.

§ 3. Requisites—Delivery and change of possession.

[a] (Minn.; 1896.)

An agreement for a pledge of notes owned by an insolvent bank having been made, the pledgee picked out notes from among all those held by the bank, inclosed them in rubber bands, and placed them in a drawer in the bank safe, where they were accessible at all times to the officers of the bank, but could not be reached by

the pledgee without the bank's consent. They were not indorsed, and it was agreed that the bank might renew any of them in its discretion, and might collect and receive payment, and retain the proceeds for its own use. *Held* that there was no change of possession.—*Mahoney v. Hale* (Minn.) 69 N. W. 331.

[b] (Minn.; 1896.)

There can be no valid pledge without a delivery, and a continued actual possession by the pledgee.—*Mahoney v. Hale* (Minn.) 69 N. W. 334.

[c] (Wis.; 1897.)

S., the owner of a majority of the stock of a mining company and of a furnace company, caused the furnace company to issue, without consideration, but with no fraudulent intent, storage warrants in the usual form of warehouse receipts on the iron in its yards in favor of the mining company, but there was no actual delivery of nor agreement to purchase the iron. *Held*, that the delivery of the warrants by S., as president of the mining company, to a bank, which took them in good faith, as collateral security for a loan, gave the bank no rights superior to a creditor who sold the iron under a judgment for advances to the furnace company, the warrants being insufficient as contracts of pledge because of nondelivery of the iron.—*Geilfuss v. Corrigan* (Wis.) 70 N. W. 306.

§ 4. Pledge of invalid note.

(Neb.; 1895.)

When a note is invalid as between the original parties, a bona fide pledgee thereof may recover only the amount of his advances.—*Barnby v. Wolfe* (Neb.) 62 N. W. 318.

44 Neb. 77.

§ 5. Rights of pledgee.

[a] (Minn.; 1897.)

The claim that the payee of a note has rendered worthless the notes and stock of a corporation held as collateral, by taking possession of, and misappropriating, the property of the corporation, is not sustained by proof merely that the corporation conveyed its property for benefit of its creditors by a trust deed to which the payee was a party; the other creditors being preferred, and there being no evidence that the trustee acted for the payee or that the latter received any of the property.—*Mahoney v. Barber* (Minn.) 69 N. W. 886.

[b] (Neb.; 1896.)

So long as a debt remains unpaid, the creditor has the right to hold all the property pledged to him to secure its payment; and equity will not award to other creditors a part of the property pledged solely on the ground that the remainder would probably be sufficient to pay the debt secured.—*Aetna Ins. Co. of Hartford, Conn., v. Bank of Wilcox* (Neb.) 67 N. W. 449.

48 Neb. 544.

[c] (Neb.; 1896.)

A pledgee of a note which is valid between the parties may recover from the maker the whole amount thereof, irrespective of the amount of the debt secured by the pledge.—*Sceley v. Wickstrom* (Neb.) 68 N. W. 1017.

[d] (Neb.; 1896.)

The pledgee of a note may, on its maturity, sue thereon, or enforce security thereto, though the debt for which it was pledged is not due.—*Sceley v. Wickstrom* (Neb.) 68 N. W. 1017.

§ 6. Duties and liabilities of pledgee.

[a] (Neb.; 1896.)

A pledgee is responsible to the pledgor as bailee after as well as before the maturity of the debt secured by the pledge.—*Butler v. Greene* (Neb.) 68 N. W. 496.

[b] (Neb.; 1896.)

An instruction, in an action by pledgor against pledgee for conversion, that it is the

duty of the pledgee "to safely keep" the property pledged, was harmless error, where, over and over again in other instructions, the jury was told that the pledgee was liable only for a failure to exercise ordinary care.—*Butler v. Greene* (Neb.) 68 N. W. 496.

[c] (Neb.: 1896.)

An instruction, in an action by pledgor against pledgee for conversion, that it is the duty of the pledgee to keep the property pledged without using it, unless such use is necessary to its preservation, was not ground for reversal, where it appeared that the pledgee agreed to keep the property in a vault, but that he carried the same publicly on his person, and thereafter left it within reach of thieves, by whom it was taken.—*Butler v. Greene* (Neb.) 68 N. W. 496.

[d] (S. D.: 1896.)

A bank with whom notes secured by mortgage on land in another state are left as collateral, without any express agreement on the part of the bank to collect the collateral notes when due, is not liable for the negligence of the lawyer employed by it to collect the notes, provided it selected an attorney having the reputation of being competent and reliable.—*Plymouth County Bank v. Gilman* (S. D.) 68 N. W. 735.

§ 7. Lien.

(Minn.: 1896.)

Where a wife transferred policies of insurance on the life of her husband, which were payable to her, to secure the husband's debt, on the agreement that, by paying their surrender value, she might redeem the same, and thereafter, without qualification, gave a note and mortgage to secure the debt, for a valuable consideration, the sale of the mortgaged premises for a greater amount, above expenses, than the surrender value of the policies, did not operate to release the pledge.—*Winston v. Hart* (Minn.) 68 N. W. 72.

§ 8. Sale by pledgee and liability for conversion.

[a] (Minn.: 1895.)

Where a mortgage and note were assigned as collateral security with authority in the assignee on default to sell the mortgage, the pledgee was authorized to sell the note or debt.—*Watson v. Smith* (Minn.) 62 N. W. 265.

60 Minn. 206.

[b] (Minn.: 1896.)

Where the pledgee of stock put it out of his control, by canceling the certificates and re-issuing the stock to a third party to hold as security for the consummation of another and different contract, without the pledgor's consent, he was guilty of conversion.—*Upham v. Barbour* (Minn.) 68 N. W. 42.

[c] (Neb.: 1895.)

One to whom securities have been pledged to secure the payment of a note may, on negotiating the note, transfer the securities without being liable to a suit for conversion by the pledgor.—*Waddle v. Owen* (Neb.) 61 N. W. 731, 43 Neb. 489.

[d] (Neb.: 1895.)

The fact that the transferee of pledged securities converts them does not render the original pledgee liable in trover.—*Waddle v. Owen*, 61 N. W. 731, 43 Neb. 489.

[e] (Wis.: 1895.)

The transfer by one of the property of another, with which he has been intrusted, without authority from the owner, with or without a wrongful intent, constitutes a conversion thereof.—*Boldewahn v. Schmidt* (Wis.) 62 N. W. 177, 89 Wis. 444.

§ 9. Remedies of pledgor.

(Minn.: 1896.)

Where a pledgee, having an option to purchase the property pledged at a specified price, converts the property, the pledgor may

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elect to consider the conversion as an exercise of the option, and sue for the price.—*Upham v. Barbour* (Minn.) 68 N. W. 42.

§ 10. Action for purpose of realizing—Allegations as to ownership.

(Wis.: 1895.)

In an action to foreclose a lien on stock held as security for a note made by defendant A., and indorsed to plaintiff by defendant L., the complaint alleged that defendant F. owned the stock, which "was by him duly indorsed in blank, and thereafter duly delivered, so indorsed, to the" plaintiff bank, "in the usual course of business, by defendant L."; that plaintiff is the owner of the stock; and that defendants A. and F. claim some lien thereon, but that such lien, if any, is subordinate to plaintiff's claim. *Held*, that plaintiff's interest and title in the stock are sufficiently alleged, although it is not stated to whom defendant F. indorsed the stock, nor how defendant L. obtained the same.—*Plankinton v. Hildebrand*, 61 N. W. 839, 89 Wis. 209.

POINTING FIREARMS.

§ 1. Civil liability.

[a] (Mich.: 1897.)

Under How. Ann. St. §§ 9110-9113, relating to the careless use of firearms, and providing for an action by the party injured against the party offending, the pointing of a gun towards another is negligence per se.—*Babel v. Manning* (Mich.) 70 N. W. 327.

[b] (Mich.: 1897.)

In an action for injuries received by the discharge of a firearm negligently pointed at plaintiff by defendant, that defendant used ordinary means of unloading the gun, and satisfied himself that it was unloaded, is no defense.—*Babel v. Manning* (Mich.) 70 N. W. 327.

§ 2. — Contributory negligence.

[a] (Mich.: 1897.)

Where plaintiff had seated himself by defendant, who was repairing his gun, within range of the gun, and knew defendant was about to snap the gun and try the lock, and neither protested nor got out of the way, and was injured by the discharge of the gun, he was guilty of contributory negligence.—*Babel v. Manning* (Mich.) 70 N. W. 327.

[b] (Mich.: 1897.)

Where plaintiff had seated himself near defendant, who was repairing his gun, but out of the range of the gun, he was not guilty of contributory negligence, where defendant suddenly shifted the position of the gun so that it was pointed towards plaintiff and discharged, thereby injuring him.—*Babel v. Manning* (Mich.) 70 N. W. 327.

§ 3. Criminal prosecution—Evidence.

(Mich.: 1895.)

How. Ann. St. § 9111, provides that any person who shall discharge, without injury to any person, any firearm, while intentionally, "without malice," aimed towards any person, shall be guilty of a misdemeanor, etc. *Held* that, on a trial for violation of such statute, where the evidence showed that a feud existed between prosecuting witness and defendant, that the shooting was accompanied by threats, and that the weapon was deliberately aimed at such witness, and deliberately fired, the court should have directed a verdict for defendant, on the ground that the evidence tended to show that there was malice.—*People v. McCully* (Mich.) 65 N. W. 234.

POISONS.

(S. D.: 1895.)

An indictment for the malicious exposure of poison, direct and certain as to time, place,

and party charged, and describing the offense substantially in statutory language, and fully apprising defendant of the nature and particular circumstances of the charge, was sufficient. *State v. Isaacs* (S. D.) 65 N. W. 430.

POLICE DEPARTMENT.

See "Municipal Corporations," §§ 51, 52.

POLICE POWER.

See "Constitutional Law," §§ 44, 45.

Of city, see "Municipal Corporations," §§ 29-34.

POLLUTION.

Of water courses, see "Waters and Water Courses," § 4.

PONDS.

See "Waters and Water Courses."

POOR AND POOR LAWS.

§ 1. Care and maintenance—Power of county board.

[a] (Neb.; 1896.)

Where the county board has established and opened a poorhouse under Comp. St. c. 67, and spread that fact on its records, the jurisdiction, under said chapter, of the various justices of the peace of the county over paupers therein ceases, and the superintendence, care, and maintenance of the paupers devolve on the county board.—*Red Willow County v. Davis* (Neb.) 69 N. W. 138.

[b] (Neb.; 1896.)

A county board which has established and maintains a poorhouse may employ a physician to furnish medical services for paupers either by the year or for each case as it arises.—*Red Willow County v. Davis* (Neb.) 69 N. W. 138.

§ 2. Compelling support by relatives.

(Neb.; 1896.)

Under Comp. St. 1895, c. 67, providing that the support of a dependent poor parent devolves upon the children, if they, or either of them, be of sufficient ability, the question of a child's liability for the support of the parent depends, not upon his age, but upon his ability.—*Fitzgerald v. Donohoe* (Neb.) 67 N. W. 880.

48 Neb. 852.

§ 3. Recovery for supplies, services, and expenditures.

[a] (S. D.; 1895.)

A county which, by direction of law, furnished necessities to an indigent and helpless father, could recover therefor in an action against the children who failed in their duty to furnish the same, though Comp. Laws, § 2612, imposing the duty on children of poor persons to maintain the latter, prescribes no procedure for enforcing that duty.—*McCook County v. Kamnoss* (S. D.) 64 N. W. 1123.

[b] (Wis.; 1895.)

Where there is evidence that the chairman of the supervisors knew that the physician was attending a pauper family, a question of an agreement to pay for such services was for the jury.—*Beach v. Town of Neenah* (Wis.) 64 N. W. 319, 90 Wis. 623.

§ 4. Liability as between town and county.

[a] (Wis.; 1896.)

The fact that a dependent person to whom supplies were furnished by a town reimbursed by plaintiff county was received by defendant town as a public charge before the commencement of the action for the supplies, under Rev. St. §§ 1513, 1514, was not a waiver of the provisions of those sections in regard to notice, required to charge defendant for the supplies furnished.—*Milwaukee County v. City of Sheboygan* (Wis.) 68 N. W. 387.

[b] (Wis.; 1896.)

Rev. St. § 1512, provides that when a non-resident, not having a legal settlement in any town, shall be taken sick or be otherwise disabled, without means, the supervisors shall provide necessary assistance, and that the county shall reimburse the town, and may recover therefor against the town in which the person so relieved has a legal settlement. In an action by a county which had reimbursed a town for the support of a person who had no legal settlement therein, against the town in which he had, the complaint alleged that he was sick, weak, and lame, and otherwise disabled, and without means at the time of his removal into the town which supported him; that he was provided for as a pauper from July, 1887, till August, 1892; that he was then turned over to defendant as a pauper, and received as such by its superintendent of the poor. *Held*, that the complaint showed a case of a nonresident pauper, supported as such, and not one of the special cases requiring immediate, temporary relief, under section 1512.—*Milwaukee County v. City of Sheboygan* (Wis.) 68 N. W. 387.

POSSESSION.

See "Adverse Possession."

Admissibility of declarations or admissions accompanying possession, see "Evidence," §§ 34-37.

Change of, see "Fraudulent Conveyances," §§ 10-12.

Of stolen property, see "Burglary," §§ 6, 8.

Writ of assistance to put mortgagee in possession, see "Assistance, Writ of."

POST OFFICE.

Presumption as to receipt of matter sent by mail, see "Evidence," § 5.

POSTPONEMENT.

See "Continuance."

POWERS.

Delegation of legislative powers, see "Constitutional Law," §§ 10-15.

Extinguishment of dower rights by power of attorney, see "Dower," § 3.

Of agent, see "Principal and Agent," §§ 5-14.

Of corporation, see "Corporations," §§ 1-5.

Of eminent domain; see "Eminent Domain," §§ 1-9.

Of judge, see "Judge," §§ 4-7.

Of justice, see "Justices of the Peace," §§ 3-10.

Of sale in mortgage, see "Mortgages," §§ 82-93.

Of trustee, see "Trusts," § 17.

§ 1. Power of attorney.

[a] (Minn.; 1895.)

A power of attorney, executed by plaintiff and wife, authorizing their attorney, to convey any land which "we may hereafter acquire

or become seised of, or in which we may hereafter be in any way interested, under Act Cong. March 3, 1873 granting additional lands as homesteads to honorably discharged soldiers," held to authorize the sale of land afterwards entered by plaintiff under such act.—*Tuman v. Pillsbury* (Minn.) 63 N. W. 104.
60 Minn. 520.

[b] (Wis.: 1895.)

A power of attorney authorizing the attorney to convey land, and directing him to pay the proceeds to a creditor of the grantor, empowers him to convey the land directly to the creditor, in satisfaction of the debt.—*Bertschy v. Bank of Sheboygan*, 61 N. W. 1115, 89 Wis. 473.

§ 2. Testamentary powers—Who may execute.

[a] (Mich.: 1895.)

Testatrix vested in "my executor, herein after named," as full power to dispose of her real estate as she had when living. Held, that the power was not a personal one, but that the administrator with the will annexed could execute it, under 2 How. St. § 5840, providing that such administrator shall proceed, in all things, to execute the trust in the same manner that an executor would be required to do.—*Green v. Russell* (Mich.) 61 N. W. 885.
103 Mich. 638.

[b] (Mich.: 1896.)

Under power to an executrix and the executors to sell real estate, and a provision that such power is "conferred upon * * * a majority at any time of such executors and executrix," a contract for the sale of land, signed by one executor only, is not enforceable against the estate, and hence, before ratification by a majority of the executors, may be repudiated by the grantee for fraud committed in procuring his signature.—*Dodge v. Tullock* (Mich.) 68 N. W. 239.

PRACTICE IN CIVIL CASES.

I. IN GENERAL, §§ 1-3.

II. DISMISSAL AND NONSUIT, §§ 4-10.

III. NOTICES, MOTIONS, ORDERS, AND DOCKETS, §§ 11-21.

IV. STIPULATIONS, §§ 22-26.

V. FILING AND SERVICE OF PAPERS AND PLEADINGS, §§ 27-29.

See, also, "Abatement and Revival"; "Appeal"; "Appearance"; "Certiorari"; "Continuance"; "Costs"; "Error, Writ of"; "Exceptions, Bill of"; "Execution"; "Garnishment"; "Interpleader"; "Judgment"; "Jury"; "Justices of the Peace"; "New Trial"; "Parties"; "Pleading"; "Reference"; "Removal of Causes"; "Trespass"; "Trial"; "Venue in Civil Cases"; "Witness"; "Writs and Notice of Suits."

Before justice of the peace, see "Justices of the Peace," §§ 15-29.

Calling adversary for cross-examination, see "Witness," § 40.

Conduct of trial, see "Trial," §§ 1-8.

Docketing judgment, see "Judgment," § 35.

Examination of adverse party before trial, see "Discovery," § 3.

In equity, see "Equity," §§ 57-62.

Joining proceedings against corporation and stockholders, see "Corporations," § 84.

Receiving evidence after parties have rested, see "Trial," § 18.

Right to open and close, see "Trial," § 38.

Submitting issues to jury in equity, see "Equity," § 59.

Taking papers to jury room, see "Trial," § 94.

Taxation of costs, see "Costs," §§ 20-26.

Transfer from justice of causes involving title to land, see "Justices of the Peace," § 8.

— of causes from one court to another, see "Courts," § 22.

I. IN GENERAL.

§ 1. Time of trial.

(Neb.: 1895.)

Under Code Civ. Proc. § 281a, providing that actions shall be triable at the first term after issue is joined or should have been joined, and that the clerk shall place on the trial docket for the current term actions in which issue should have been joined before or during such term, an action in which the issues have been joined during term time may be placed on the trial docket, and tried, at such term of court.—*Osgood v. Grant* (Neb.) 62 N. W. 894.
44 Neb. 350.

§ 2. Order of trial of cases.

(Neb.: 1895.)

Causes are to be tried in the district court in the order in which they are entered on the trial docket, unless the court shall direct otherwise.—*Osgood v. Grant* (Neb.) 62 N. W. 894.
44 Neb. 350.

§ 3. Assertion and adjustment of rights between co-defendants.

[a] (Mich.: 1895.)

Where the owner of property on which complainant seeks to enforce a mechanic's lien is served with answers in the nature of cross bills by other claimants of liens, and it stipulates that all the causes shall be heard together, and its attorneys are present at the hearing, it cannot thereafter claim that the answers were filed without leave of court, or that process was not issued or that service was not made in time.—*Hannah & Lay Mercantile Co. v. Mosser* (Mich.) 62 N. W. 1120.
105 Mich. 18.

[b] (Wis.: 1895.)

In an action by judgment creditors of an insolvent corporation against it and attachment creditors for the appointment of a receiver and the sequestration and equal distribution of the insolvent's property, on the ground that the attachments were fraudulent, and with a knowledge of such insolvency, the first class of creditors denied any fraud, and claimed a first lien. The second class did not answer. The third class, by answer, denied collusion and knowledge of such insolvency, and claimed their attachment was the first lien. They alleged fraud between the corporation and the first and second classes of creditors. The answer was not in the form of a counterclaim or cross complaint, and was served only on plaintiffs. Plaintiffs afterwards abandoned the claim of fraud. Held, that such third class of creditors were not in a position to litigate the good faith of the attachment levied by the first class of creditors.—*Ballin v. Merchants' Exch. Bank* (Wis.) 61 N. W. 1118, 89 Wis. 278.

II. DISMISSAL AND NONSUIT.

Denying motion to dismiss, appealable order, see "Appeal," § 31.

Directing verdict for insufficiency of evidence, see "Trial," §§ 90, 91.

Discontinuance as res judicata, see "Judgment," § 41.

— of suit in equity, see "Equity," § 60.

— of tax proceedings, see "Taxation," § 76.

Dismissal of action before justice, see "Justices of the Peace," § 17.

— for specific performance, see "Specific Performance," § 13.

— of replevin, see "Replevin," § 20.

Dismissal of action to enforce lien, see "Mechanics' Liens," § 57.

Effect of judgment as res judicata, see "Judgment," § 41.

For insufficiency of evidence, see "Trial," § 89.

Harmless error, see "Appeal," § 255.

Right to costs on dismissal, see "Costs," § 5.

Voluntary dismissal of appeal from justice, see "Appeal," § 169.

— of divorce suit, see "Divorce," § 16.

§ 4. Voluntary nonsuit or dismissal.

[a1] (Neb.: 1896.)

The plaintiff may, as a matter of right, under Code Civ. Proc. § 430, dismiss his action without prejudice at any time before its final submission to the court or jury.—*Sharpless v. Giffen* (Neb.) 66 N. W. 285.

47 Neb. 146.

[b1] (S. D.: 1894.)

In an action to quiet title, defendant alleged title in himself, and asked to have it quieted, and also, in opposition to plaintiff's subsequent motion to dismiss, alleged that he had not sued to quiet his title because of the pendency of plaintiff's action, and that an original action by himself is barred by limitation. *Held* error to allow plaintiff to unconditionally dismiss his action.—*Axiom Min. Co. v. Little* (S. D.) 61 N. W. 411.

6 S. D. 438.

[c1] (S. D.: 1895.)

After the entry of judgment, and while such judgment remains in full force and effect, the court has no power, on the simple motion of plaintiff, to dismiss the action.—*Todd v. Todd* (S. D.) 63 N. W. 777.

§ 5. — Payment of costs.

[a1] (Mich.: 1895.)

Where, in an action for divorce, defendant's application for alimony is pending before a referee, the plaintiff is not entitled, as a matter of course, on payment of costs, to have his bill dismissed.—*Clutton v. Clutton* (Mich.) 64 N. W. 744; *Same v. Donovan*, *Id.*

[b1] (Neb.: 1895.)

The right of plaintiff to dismiss his action is subject to conditions imposed by the court, such as payment of costs.—*Sheedy v. McMurtry*, 63 N. W. 21, 44 Neb. 499.

§ 6. Compulsory dismissal and nonsuit.

[a1] (Iowa: 1896.)

The dropping of a cause from the judge's calendar does not necessarily operate as a dismissal, and whether intended as such or not is a question of fact, as to which the finding of the trial court, made on a motion to reinstate, will not be disturbed where the evidence is conflicting.—*Barber v. Scott* (Iowa) 68 N. W. 919.

[b1] (S. D.: 1894.)

Where a complaint against two defendants alleges a cause of action against one only, such defendant cannot have the action dismissed as to him on such ground, or because of variance between the summons and complaint, when both have the same title.—*Austin, Tomlinson & Webster Manuf'g Co. v. Heiser* (S. D.) 61 N. W. 445.

6 S. D. 429.

[c1] (Wis.: 1895.)

Judgment of nonsuit is proper only in strictly legal actions.—*Dietz v. City of Neenah* 64 N. W. 299, 91 Wis. 422.

§ 7. — Motion based on want of jurisdiction.

(Neb.: 1895.)

For the purpose of ascertaining its jurisdiction on service by publication, the court may hear evidence on a motion to dismiss.—*Welch v. Ayres*, 61 N. W. 635, 43 Neb. 326.

§ 8. What constitutes discontinuance.

(Mich.: 1896.)

In an action against several defendants who were severally liable, an order of discon-

tinuance as to one of them not served, entered upon the common rule book, though inadvertently not signed by the attorney at the time of the entry, is nevertheless valid, and operates to discontinue the action as to such defendant.—*Steele v. Grove* (Mich.) 67 N. W. 963.

§ 9. Effect of dismissal—Rights of intervenor.

(Minn.: 1895.)

In an action by the receiver of a partner to set aside a conveyance of partnership property, the other member of the partnership intervened, and claimed the property. *Held* that, upon the dismissal of plaintiff's case as to defendant for want of evidence, it was proper to try the issues made by the pleadings in intervention.—*Masterman v. Lumberman's Nat. Bank* (Minn.) 63 N. W. 723.

61 Minn. 299.

§ 10. Reinstatement.

[a1] (Iowa: 1896.)

The reinstatement of an action dismissed by an attorney without authority is in the discretion of the trial court.—*Rhutasel v. Rule* (Iowa) 65 N. W. 1013.

[b1] (Iowa: 1896.)

Where an order reinstating an action limits the time for answering, and defendant appeals from the reinstatement, it is in the discretion of the trial court, pending the appeal, to deny plaintiff judgment by default on defendant's failure to answer within the time prescribed.—*Rhutasel v. Rule* (Iowa) 65 N. W. 1013.

III. NOTICES, MOTIONS, ORDERS, AND DOCKETS.

See, also, "Notice."

Motions, see, also, "Pleading," §§ 46-55.

— to dismiss, see ante, §§ 6, 7.

— for change of venue, see "Criminal Law," § 41; "Venue in Civil Cases," §§ 11-23.

— for judgment by default, see "Judgment," § 18.

— for new trial, see "Criminal Law," § 192; "New Trial," §§ 7-15.

— in arrest of judgment, see "Judgment," § 93.

— review of rulings, see "Appeal," § 240.

— to direct verdict, see "Trial," § 91.

— to dissolve injunction, see "Injunction," § 27.

— to retax costs, see "Costs," §§ 25, 26.

— to strike out evidence, see "Trial," §§ 23, 25, 31, 32.

— to vacate attachment, see "Attachment," §§ 50-56.

Notice before settlement of bill of exceptions, see "Exceptions, Bill of," § 7.

— of application for judgment by default, see "Judgment," § 12.

— of application for security for costs, see "Costs," § 16.

— of cross bill, see "Equity," § 57.

— of his pendens, see "Lis Pendens."

— of motion for new trial, see "New Trial," § 9.

— of motion to discharge attachment, see "Attachment," § 51.

— of taking of deposition, see "Deposition," § 1.

— of taxation of costs, see "Costs," § 23.

— to vacate judgment, see "Judgment," § 93.

§ 11. Notice of trial.

[a1] (Minn.: 1894.)

Gen. St. 1878, c. 66, § 123, provides that any pleading may be once amended of course, without prejudice to the proceedings already had, at any time before the period for answering it expires. Defendants served their answer by mail, to which plaintiffs replied, and served notice of trial. Subsequently, and within 40

days from the service of their original answer, defendants served an amended answer, to which plaintiffs also replied. *Held* that, conceding, without deciding, that defendants had the full period of 40 days in which to amend their answer, because of its service by mail (section 76), their doing so did not annul plaintiffs' previous notice of trial.—*Griggs v. Edelbrock* (Minn.) 61 N. W. 555.
59 Minn. 485.

[b] (Minn.; 1896.)

Where, after the commencement of the action, the defendants and their attorney removed from the state, it was proper, under Gen. St. 1894, § 5217, to serve the notice of trial on the attorney at his place of residence in the state to which he removed.—*Olmstead v. Firth* (Minn.) 66 N. W. 988.
64 Minn. 243.

§ 12. — On change of venue.

(Wis.; 1896.)

Where the supreme court reversed a case, with orders to change the venue to another county, a notice of trial in the latter county before the record had been transmitted thereto, though premature and irregular, did not affect the jurisdiction.—*Mills v. National Fire Ins. Co.* (Wis.) 65 N. W. 730.
92 Wis. 90.

§ 13. Notice of filing of pleadings.

[a] (Neb.; 1895.)

In a suit to foreclose a mortgage, where the owner of the equity of redemption answered within the time fixed by statute, denying the material allegations of the petition, it was error to permit plaintiff to file a supplementary petition, after answer day, to recover moneys paid out to insure the mortgaged property after bringing suit, without notice to such defendant owner.—*Havemeyer v. Paul* (Neb.) 63 N. W. 932.
45 Neb. 373.

[b] (Neb.; 1895.)

In a suit to foreclose a mortgage, an owner of the equity of redemption, who answered within the time prescribed by statute, was entitled to notice of answers subsequently filed by other defendants claiming liens on the mortgaged property.—*Havemeyer v. Paul* (Neb.) 63 N. W. 932.
45 Neb. 373.

§ 14. Motions.

[a] (Mich.; 1894.)

An issue which arises on a motion may be framed by the court, and tried without formal pleadings thereon.—*Turner v. St. Clair Tunnel Co.* (Mich.) 61 N. W. 72.
102 Mich. 574.

[b] (Neb.; 1895.)

A second motion should not be entertained where one for the same purpose has been overruled, unless leave to file a second one is specially given.—*Stutzner v. Printz* (Neb.) 61 N. W. 620, 43 Neb. 306.

[c] (S. D.; 1895.)

It was not error to deny an application for an order under Comp. Laws, § 5324, subd. 5, compelling persons to attend before a referee appointed for that purpose, and make affidavits to be used in resisting a motion to discharge an attachment, where it did not appear that such persons refused to make affidavits, or that they possessed knowledge of material facts.—*Pirie v. Berg* (S. D.) 64 N. W. 1130.

§ 15. Matters determined on motion—
Fraud.

(Mich.; 1894.)

The question of fraud in the procurement of a discontinuance of an action cannot be tried on affidavits in support of a motion to set it aside.—*Voigt Brewery Co. v. Donovan* (Mich.) 61 N. W. 343.
103 Mich. 190.

§ 16. Notice of motion.

[a] (Minn.; 1895.)

Where an order in an action to sequester a corporation's property provided that other creditors might become parties on filing their complaints and serving copies of the same on the receiver of the corporation, a notice of motion by a creditor, attached to and served with the complaint on the receiver after the filing of the complaint, was not made before the creditor became a party to the action, so as to render the service of the notice invalid.—*National German-American Bank v. St. Anthony Park North Real-Estate Co.* (Minn.) 63 N. W. 1068.
61 Minn. 359.

[b] (S. D.; 1895.)

A notice of motion, in an action in which there are several defendants, which names the first defendant, with the abbreviation "et al.," is sufficient, where the adverse party was not misled by the failure to insert the names of all the defendants.—*Jerauld County v. Williams* (S. D.) 63 N. W. 905.

§ 17. Consolidation of motions.

(Wis.; 1897.)

It is proper to consolidate motions by one judgment creditor to have the proceeds of executions issued by another judgment creditor applied first in payment of movant's judgment, on the ground that he was, by fraud, induced to release a prior levy.—*Marks v. Auerbach* (Wis.) 69 N. W. 1001.

§ 18. Orders.

(Wis.; 1895.)

An order that a motion for a continuance, on the ground that an amended answer has been filed after service of the notice of trial, be denied, and declaring that the amended answer "is not properly a part of the record herein," did not have the effect of striking out such answer.—*Whitefoot v. Leffingwell* (Wis.) 63 N. W. 82.
90 Wis. 182.

§ 19. Transfer from one docket to another—
From equity to law docket.

(Iowa; 1895.)

Plaintiff petitioned in equity to rescind a contract for the purchase of land, and defendant set up a counterclaim for the balance of the purchase price, and asked the foreclosure of a vendor's lien. Plaintiff then filed a substituted petition, pleading fraud and asking damages, and moved to transfer the cause to the law docket for trial by jury. Defendant filed substantially the same answer and cross petition, in reply to which plaintiff offered to pay any balance found due defendant after deducting said damages. Defendant then filed a general denial. *Held*, that plaintiff's motion to transfer the cause was thereupon properly overruled, though in his reply he consented to the establishment of a vendor's lien for the balance of the price due defendant, and the issuance of a special execution by the law court.—*Wilkinson v. Pritchard* (Iowa) 61 N. W. 965.
93 Iowa, 308.

§ 20. — From law to equity docket.

[a] (Iowa; 1894.)

Under Code, § 2903, a court of law is vested with concurrent jurisdiction with a court of equity over the appointment of a receiver; and, if the plaintiff wishes a cause transferred to the equity side of the docket, he must make a motion to that effect at the time of his application for the appointment of a receiver, and before a court of law makes the appointment.—*Raeb v. Albright* (Iowa) 61 N. W. 402.
93 Iowa, 50.

[b] (Iowa; 1895.)

Where the parties to an action commenced as one at law stipulate, after issue has been taken as in such proceedings, as to the

facts, upon which it is agreed that the court shall enter such judgment as shall be warranted, equity acquires jurisdiction to grant its appropriate relief.—*Iowa City v. Johnson County* (Iowa) 61 N. W. 995.

[c] (Iowa; 1895.)

In his pleading controverting the answer of a wife, garnishee on execution issued under a judgment against her husband denying indebtedness to him, plaintiff alleged that she was indebted for conveyances made to her by him in fraud of creditors, and by reason of the execution to her of a mortgage on personal property, largely exceeding in value the amount of the debt it was given to secure, and that this mortgage was fraudulently foreclosed, so as to defraud creditors. *Held*, that no equitable issue was raised, and a transfer of the cause to equity was error.—*Kelley v. Andrews* (Iowa) 62 N. W. 853.

[d] (Iowa; 1895.)

Defendant's application to transfer from the law to the equity calendar an action against it to enforce its liability as a stockholder in an insolvent corporation will be denied, where by its answer it has simply alleged that it never subscribed for nor purchased any stock and that none was issued to it, but that it is a corporation, and under its articles has no authority to purchase such stock, that any that may appear in its name is held by it as collateral, and that the judgment which plaintiff attempts to enforce is one against a de facto corporation, while the stock it holds is in the de jure successor thereof.—*Calumet Paper Co. v. Stotts Inv. Co.* (Iowa) 64 N. W. 782.

[e] (Iowa; 1896.)

It was proper to refuse to transfer to equity an action to recover for goods sold, wherein the intervenor demanded judgment against plaintiff on notes for rent, secured by chattel mortgage, but did not ask to foreclose the mortgage nor the establishment of a landlord's lien.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

[f] (Iowa; 1896.)

An action against a bank to recover for failure to pay a check out of certain proceeds deposited with it as agreed is an action at law, and is improperly transferred to the equity calendar as seeking to enforce a trust in the proceeds.—*Hawley v. Exchange State Bank* (Iowa) 66 N. W. 152.

[g] (Iowa; 1897.)

Pending an action by G., by her mother as next friend, against the estate of the latter's father, to enforce an agreement to convey land to G. and pay her \$1,000, the mother agreed to dismiss the suit, and convey her own interest in the estate as heir to her brother. Afterwards the mother died, and her executor, under a decree for specific performance obtained by the brother with the executor's consent, conveyed the mother's interest, but said suit was not dismissed. *Held*, that a proceeding by G.'s guardian to establish a claim against the mother's estate because of its having received the proceeds of the interest so conveyed was not one for equitable relief, transferable to the equity docket.—*Guion v. Giller* (Iowa) 70 N. W. 201.

§ 21. — Waiver of objections to transfer.

(Iowa; 1894.)

Where a plaintiff brings an action at law, and subsequently so changes the issues that upon his application the court transfers the cause to the equity side of the docket, and the defendant joins issue in equity, the defendant does not thereby waive any error in thus transferring the cause.—*Raab v. Albright* (Iowa) 61 N. W. 402.

93 Iowa, 50.

IV. STIPULATIONS.

Admissibility of stipulation made at former trial, see "Evidence," § 104.

As to record on appeal, see "Appeal," § 109.

Authorizing clerk to sign or settle bill of exceptions, see "Exceptions, Bill of," § 4.

Bringing stipulation of facts into record, see "Appeal," § 141.

Effect of stipulation as to change of venue, see "Venue in Civil Cases," § 18.

Extending time of taking appeal, see "Appeal," § 50.

Extinguishing dower rights, see "Dower," § 4.

§ 22. Made out of court.

(Neb.; 1895.)

The court is not bound by, and need not enforce, agreements relating to a cause made out of court by the parties or their attorneys, and not brought to the attention of the court.—*Kent v. Green*, 62 N. W. 71, 43 Neb. 673.

§ 23. Construction and effect.

[a] (Iowa; 1896.)

A judgment reciting, "On condition of the acceptance by plaintiff of \$600 in full for all damages herein, and on the further condition that the defendant also accept same, and agrees not to appeal to the supreme court herein, judgment is hereby entered on verdict for said \$600 and costs against defendant, and motion for new trial is withdrawn," shows an agreement by defendant not to appeal, in consideration of the reduction of the verdict, and a promise by plaintiff not to appeal.—*Lundon v. Waddick* (Iowa) 67 N. W. 388.

[b] (Iowa; 1896.)

An order by an attorney to a sheriff to turn over property attached to a third person for safe-keeping is not an agreement, within Code, § 213, providing that no evidence of an agreement of an attorney shall be received except the statement of the attorney, or his written agreement, or an entry thereof on the records of the court.—*Citizens' Nat. Bank v. Loomis* (Iowa) 69 N. W. 443.

[c] (Mich.; 1895.)

Where complainant in a suit for an accounting stipulates that, in consideration of his release from all liabilities, he will receipt to defendant for a certain sum, and he, being so released, gives such receipt, he cannot compel defendant to account for any part of the amount so receipted for merely because defendant obtained the release of the liabilities at less than their face value.—*Petrie v. Torrent* (Mich.) 65 N. W. 557.

[d] (Mich.; 1896.)

After the stipulation and discharge of the jury, a written stipulation providing that the case might be decided by the justice upon the proofs taken upon the trial, and that all questions raised upon the trial should be saved to the respective parties, was not a waiver of error in the admission of evidence on the trial.—*Drovers' Nat. Bank v. Blue* (Mich.) 67 N. W. 1105.

[e] (Minn.; 1895.)

Where, by a stipulation, parties make the decision of a question before the supreme court conclusive as to rights in controversy between them, the decision is binding on the parties in a subsequent action involving the same rights, though the question decided was not a material one then before such court.—*Abbott v. Anhensers-Busch Brewing Ass'n* (Minn.) 62 N. W. 286.

60 Minn. 266.

[f] (Minn.; 1896.)

Where, at the close of plaintiff's evidence, each party moves for direction of a verdict, and, without waiting for a decision on the motions, "the jury are excused from the case, and it is agreed that it be submitted to the court for determination," the submission is not of the motions, but of the case for determination on the

merits.—*Chezick v. Minneapolis & N. Elevator Co.* (Minn.) 68 N. W. 1093.

[a] (Neb.: 1895.)

The fact that a party stipulated that a proceeding in error might be taken by the adverse party from an order which was not final, and that the supreme court might enter a decree in such proceeding, did not estop him to attack the decree entered by the supreme court pursuant to the stipulation, in an action based thereon.—*Johnson v. Parrotte* (Neb.) 64 N. W. 363, 46 Neb. 51.

[b] (Neb.: 1896.)

A nonresident mortgagee of a stock of goods having by his attorney taken possession, a creditor of the mortgagor attacked the mortgage, and garnished the proceeds of the stock in the hands of the attorney, and stipulated with him that, if the mortgagee would appear in the action, such proceeds might be remitted to him. *Held*, that the creditor could not thereafter deny that the mortgagee, by his attorney, had come lawfully in possession of the goods, but that he was limited to the question whether he was entitled to recover the proceeds as against the mortgage.—*Commercial Nat. Bank of Omaha v. Merchants' Exch. Nat. Bank of New York* (Neb.) 66 N. W. 273.

47 Neb. 217.

[i] (Neb.: 1896.)

In an action against a bank on a deposit, the bank answered by a general denial. During the trial it undertook to prove payment. Objection being made to the relevancy of the proof, an agreement was made in open court, whereby the bank was allowed 20 days to amend its answer "in any manner" with the same effect as if presently filed, and the trial proceeded. The instructions given excluded from the jury the consideration of the issue of payment which was finally tendered by the amended answer, filed after trial, but within the stipulated time. *Held*, that the plaintiff was bound by the terms of his stipulation, and that the judgment must be reversed for failure to submit the issues finally framed to the jury.—*Tecumseh Nat. Bank v. Harmon* (Neb.) 66 N. W. 1128.

48 Neb. 222.

§ 24. — As to evidence.

(Iowa: 1896.)

A stipulation between parties in an action before a justice of the peace in terms: "To save costs in calling witnesses, it is agreed by the parties to this case that this case shall be submitted to the court for decision upon the one question of fact whether or not the defendant B., on or about the 29th day of November, 1894, represented and stated to the plaintiff that one J. E. (having a debt against the defendant's farm) had consented to throw off the interest on his said debt in consideration of payment and settlement; that evidence shall be introduced on this issue alone," etc.—obtains only for the purpose of the trial before the justice of the peace. *Granger and Given, JJ., dissenting.*—*Mills v. Bills* (Iowa) 66 N. W. 881.

§ 25. Who bound by.

(Mich.: 1895.)

One of the defendants in replevin cannot bind other defendants, having interests in the property adverse to his, by an agreement with the plaintiff, to which such other defendants do not consent, to discontinue the action without costs, and turn over the property to such defendants.—*Fowler v. Hosmer* (Mich.) 62 N. W. 1028.

105 Mich. 90.

§ 26. Relief of party from stipulation.

[a] (Minn.: 1896.)

Where defendant stipulated on the trial that, if plaintiff was entitled to recover, she should recover a certain amount, and, by a subsequent stipulation made on the trial, it appear-

ed that plaintiff's damages were of much less amount, but defendant never asked to be relieved from the first stipulation, he could not ask that relief on appeal.—*Warren v. Great Northern Ry. Co.* (Minn.) 66 N. W. 984.

64 Minn. 239.

[b] (Neb.: 1896.)

Written stipulations of counsel in regard to the trial of a cause may be set aside by the court in its discretion when their enforcement would result in serious injury to one of the parties, and the other party would not be prejudiced by their being set aside.—*Keens v. Robertson*, 65 N. W. 897, 46 Neb. 837.

V. FILING AND SERVICE OF PAPERS AND PLEADINGS.

§ 27. Time of filing pleading.

[a] (Iowa: 1895.)

In an action by an assignee for creditors, the defendant may attack the validity of the assignment by a pleading filed after part of the testimony has been introduced.—*Franzen v. Hutchinson* (Iowa) 62 N. W. 698.

[b] (Iowa: 1896.)

It is not error to strike out a counterclaim not filed until near the close of the trial.—*Gilbert v. Adams* (Iowa) 68 N. W. 883.

[c] (Neb.: 1896.)

The granting of permission to file a reply out of time, or during the trial, rests largely in the legal discretion of the trial court.—*Storz v. Finkelstein* (Neb.) 66 N. W. 1020.

48 Neb. 27.

§ 28. Service of pleadings.

[a] (Mich.: 1896.)

Under How. Ann. St. § 7291, authorizing the commencement of actions by declaration, and the service of copy with rule to plead indorsed, such service may be made by the plaintiff in person.—*Penfold v. Slyfield* (Mich.) 68 N. W. 226.

[b] (S. D.: 1895.)

Where an affidavit of merits and a copy of the proposed answer were not served with a notice of motion for leave to serve an answer after expiration of the statutory time, as required by rules of court, the motion was properly denied.—*Searles v. Lawrence* (S. D.) 65 N. W. 34.

§ 29. Pleading served after time—Waiver.

(Wis.: 1894.)

Where defendant receives without objection and retains a reply which is served after the time limited for service, he waives his right to default for want of a reply in time.—*Moore v. Ellis*, 61 N. W. 291, 89 Wis. 108.

PRAIRIE FIRES.

Prosecution for setting, see "Fires."

PRECINCTS.

See "Elections and Voters," § 15.

PREFERENCES.

See "Assignments for Benefit of Creditors," §§ 12-17; "Corporations," §§ 92, 93; "Insolvency," §§ 4-6.

PREJUDICE.

Local prejudice as ground for change of venue, see "Criminal Law," § 43.
 — continuance, see "Criminal Law," § 49.
 Of judge, ground for change of venue, see "Criminal Law," § 42.
 Of juror, see "Jury," § 2.
 Of witness, see "Witness," § 64.

PRELIMINARY HEARING.

See "Criminal Law," §§ 17-21.

PRELIMINARY INJUNCTION.

See "Injunction," §§ 25, 26.

PREMATURE ACTION.

See "Actions," § 3.

PREMATURE APPEAL.

See "Appeal," § 4.

PREMIUMS.

See "Insurance," §§ 45-47.

On loans from building association, see "Building and Loan Associations," § 5.

PRESCRIPTION.

See "Adverse Possession"; "Limitation of Actions."

Creation of highway by, see "Highways," §§ 4, 5.
 Easements by, see "Easements," § 6.
 Right to flowage by, see "Waters and Water Courses," § 9.
 — to maintain nuisance by, see "Nuisance," § 6.

PRESENTATION.

Of claims against assigned estate, see "Assignments for Benefit of Creditors," § 34.
 — county, see "Counties," §§ 46-53.
 — decedent's estate, see "Executors and Administrators," §§ 15-18.
 — insolvent bank, see "Banks and Banking," § 38.
 — school district, see "Schools and School Districts," § 33.

PRESUMPTION.

See "Evidence," §§ 5-7.

Of innocence, see "Criminal Law," § 159.
 Of payment, see "Payment," §§ 9, 10.
 On appeal, see "Appeal," §§ 173, 209-220;
 "Criminal Law," §§ 219-221.

PRICE.

Action for, see "Sale," §§ 60-69; "Vendor and Purchaser," §§ 33-35.

PRINCIPAL AND ACCESSORY.

See "Criminal Law," §§ 11-14.

PRINCIPAL AND AGENT.

- I. WHEN RELATION EXISTS, §§ 1-4.
- II. POWERS OF AGENT, §§ 5-14.
- III. RATIFICATION, §§ 15-18.
- IV. RIGHTS AND LIABILITIES INTER SE, §§ 19-23.
- V. RIGHTS AND LIABILITIES AS TO THIRD PERSONS, §§ 24-27.
- VI. ACTIONS, §§ 28-30.

See, also, "Factors and Brokers"; "Master and Servant"; "Powers."

Agency of husband for wife, see "Husband and Wife," § 2.

Agreement giving exclusive agency, public policy, see "Contracts," § 14.

City agents, see "Municipal Corporations," §§ 38-52.

Contracts by agent relating to land, effect of statute of frauds, see "Frauds, Statute of," § 18.

Corporate agents, see "Corporations," §§ 12-23.
 Declarations of agent as evidence, see "Evidence," § 39.

Embezzlement by agent, see "Embezzlement," § 2.

Insurance agents, see "Insurance," §§ 94-103.

Liability of corporation for torts of agent, see "Corporations," § 38.

Release of surety on agent's bond, see "Principal and Surety," § 11.

Sale of liquor by agents, see "Intoxicating Liquors," § 26.

Usurious transactions through agent, see "Usury," § 7.

I. WHEN RELATION EXISTS.

Construction of contract, agency or sale, see "Sale," § 5.

Deposits creating relation of principal and agent, see "Banks and Banking," § 8.

§ 1. Creation of relation.**[a] (Iowa: 1895.)**

One who, acting under arrangement with a person making farm loans, secured, from a person desiring to borrow, a written application on a blank form prepared by the lender, together with the necessary proofs of title, which he forwarded to the lender, and, upon their acceptance by him, procured the signature of the borrower to a note and mortgage submitted by the lender, recorded the mortgage, received from the lender the proceeds of the loan, and applied it to the discharge of prior incumbrances as directed by him, was the agent of the lender, though the borrower, in his application, named him as his agent to receive the loan.—*McLean v. Fiecke* (Iowa) 62 N. W. 753; *Beach v. Same*, Id.

[b] (Iowa: 1896.)

A contract whereby plaintiff agrees to furnish defendant certain merchandise at a certain price, to be sold by him as agent for plaintiff, the defendant to purchase the merchandise remaining unsold at a certain time, title to remain in plaintiff until the price is paid, is a contract of agency, and not a sale of the goods to defendant, so as to render him absolutely liable for the goods if destroyed by fire without negligence on his part.—*Norton v. Melick* (Iowa) 66 N. W. 780.

[c] (Iowa: 1896.)

A purchaser of land subject to a lease, who permitted the former owner to collect the rents, which he paid over to her from time to time, thereby recognized him as her agent, and was bound by an authority given by him to the tenant to sell grain, and such authority operated as a waiver of her lien for rent on the grain so sold.—*Wilson v. Pones* (Iowa) 68 N. W. 588.

[d] (Mich.: 1896.)

A custom on the part of a mortgagee to send the interest coupons to a mortgage company for collection does not constitute such company her agent to receive payment of the principal debt.—*Wilson v. Campbell* (Mich.) 68 N. W. 278.

[e] (Wis.: 1895.)

A writing signed by defendant, and reciting: "Received of J. B. \$300, paid some days since, and \$1,900, this 27th day June, 1890, on lots 481, 483, 485, 487, on 5th St., Ely Add. to Superior. Deed made to be delivered and grantee named. A mort. for \$3,800, 1 and 2 at 8 per cent.,"—did not create the relation of principal and agent.—*Harney v. Burhans* (Wis.) 64 N. W. 1031, 91 Wis. 348.

§ 2. Evidence of relation—Declarations of alleged agent.**[a] (Iowa: 1895.)**

An agency cannot be shown by declarations of the agent alone.—*Whitam v. Dubuque & S. C. R. Co.* (Iowa) 65 N. W. 403.

[b] (Iowa: 1896.)

The testimony of a supposed agent is admissible to establish his agency and powers, if there is no written evidence of his employment.—*O'Leary v. German American Ins. Co.* of New York (Iowa) 69 N. W. 686.

[c] (Neb.)

Agency cannot be proved by the declarations of one assuming to act in that capacity.—(1895) *Burke v. Frye*, 62 N. W. 476, 44 Neb. 223; (1896) *Anhenser-Busch Brewing Ass'n v. Murray*, 66 N. W. 635, 47 Neb. 627.

[d] (Neb.: 1895.)

Agency cannot be proved by acts and declarations of the alleged agent not brought home to the principal.—*Richardson & Boynton Co. v. School Dist. No. 11, Nuckolls County* 64 N. W. 218, 45 Neb. 777.

§ 3. — Weight and sufficiency.**[a] (Iowa: 1895.)**

Where there was no evidence of a formal termination of an agency for the sale of land before the sale was made, evidence that the purchasers dealt with defendant as an agent of plaintiff, and that defendant had no interest in the land other than the profit he could realize from its sale for plaintiff, will support a finding that the agency existed at the time of the sale.—*Hillebrant v. Green* (Iowa) 62 N. W. 32, 93 Iowa, 661.

[b] (Mich.: 1896.)

In an action on a contract, made with an alleged agent, for the sale of lands belonging to an estate, testimony that such person was paid by the executors, and that the contract was sent to him to be delivered, warrants a finding that he was such agent.—*Dodge v. Tullock* (Mich.) 68 N. W. 239.

[c] (Mich.: 1896.)

Testimony of one to whom defendant had sold his business, that the latter authorized him to buy goods in his name, together with evidence that goods were shipped by plaintiff to defendant, and invoices mailed to him, sustains a verdict against defendant for the price.—*Cleveland Co-operative Store Co. v. Mallory* (Mich.) 69 N. W. 75.

§ 4. Revocation.**[a] (Iowa: 1897.)**

On foreclosure the mortgagor alleged that the loan was procured in part to pay for liquors sold to him by the mortgagee, as agent of S. It appeared that the mortgagor had some talk with the mortgagee about the liquors, but wrote to S. as to the business at the place where he was located, and went to see him; that, as soon as he had completed arrangements for the loan, he telegraphed to S. to turn the goods over to a third person; that the mortgagee retained the sum which the mortgagor had agreed to pay S. for the liquors, and delivered it to S.

Held, that the mortgagee was not the agent of S.—*Gadmer v. Lent* (Iowa) 70 N. W. 732.

[b] (Neb.: 1897.)

An exclusive power to sell may be revoked by the principal at any time before the sale.—*Woods v. Hart* (Neb.) 70 N. W. 53.

II. POWERS OF AGENT.

Authority of cashier of bank, see "Banks and Banking," §§ 26, 27.

—to make affidavit for attachment, see "Attachment," § 15.

Power of partner to bind firm, see "Partnership," §§ 13-19.

Representation of bank by officer, see "Banks and Banking," §§ 24, 25.

§ 5. Express and implied powers.**[a] (Mich.: 1894.)**

Plaintiffs contracted to furnish defendant with a tug for rafting purposes, "commanded by F., a capable and experienced raft tug man." On F.'s reporting for orders, he was handed by one W. two letters, one saying that the bearer was defendant's "log man; any orders from him will be the same as from this office"; and the other ordering him to take a raft in tow to a certain place with "our man"; from there to wire for orders. *Held*, that orders given F. by W., with reference to the transportation of the raft, would, in the absence of evidence as to the meaning of the term "log man," be binding upon defendant.—*Stevenson v. Michigan Log-Towing Co.* (Mich.) 61 N. W. 536, 103 Mich. 412.

[b] (Mich.: 1895.)

Defendant held certain accounts for collection, and from the proceeds thereof was to pay the assignor's creditors. *Held*, that defendant was justified in paying a tax due from the assignor to the state.—*Tanner v. Page* (Mich.) 63 N. W. 993.

[c] (Mich.: 1896.)

Merely holding out a person as agent does not estop the alleged principal from denying such person's authority to contract in his behalf, unless the representations were made under such circumstances that the principal should have expected that they would be relied upon, and unless they were actually relied upon in good faith, to the injury of an innocent party.—*Clark v. Dillman* (Mich.) 66 N. W. 570.

[d] (Mich.: 1897.)

Authority to modify a contract is given to an agent of the assignee of the contract by a letter from the assignee to the other party to the contract, stating that as successor of the original party he was prepared to fulfill all contracts, and that the agent was "fully authorized to do business for me."—*Berry v. Haldeman* (Mich.) 70 N. W. 325.

[e] (Minn.: 1895.)

Under a power of attorney authorizing an agent to act for his principal in all matters relating to a building contract, and the construction of the building, the agent is authorized to make an oral contract with the contractors for the removal of stones which were sunk below the surface of the building lot, and whose existence were unknown to either party when the contract was made.—*Michaud v. McGregor* (Minn.) 63 N. W. 479, 61 Minn. 198.

[f] (Minn.: 1896.)

The law does not impose upon a party who produces an article for sale the duty of exercising diligence and prudence that he may seasonably discover that an agent or clerk specially employed by him to sell his wares, and clothed with no other authority, apparent or real, is so far exceeding his authority to sell as to engage in purchasing from rival concerns, on his employer's account, the very article the latter

is producing and selling.—*Finance Co. of Pennsylvania v. Old Pittsburgh Coal Co.* (Minn.) 68 N. W. 70.

[1g] (Neb.; 1895.)

Where it appeared that the landlord negotiated with the tenant with regard to an immediate delivery of possession of the rented premises, both by letter and by agent, and that the agent had authority to collect rents, and lease and manage the property, a finding that the agent, in agreeing to pay the tenant his moving expenses if the latter would move immediately, acted within the scope of his authority, was warranted.—*Creighton v. Finlayson* 64 N. W. 1103, 46 Neb. 457.

[1h] (Neb.; 1896.)

The fact that a person is authorized to receive installments of interest falling due on a mortgage does not justify an inference that he is authorized to collect the principal sum on its maturity, where the evidence of indebtedness is not and has not been in his possession.—*Richards v. Waller* (Neb.) 68 N. W. 1053.

[1i] (Neb.; 1896.)

The fact that payments to a loan company of interest falling due on a mortgage were forwarded to the holder of the mortgage note did not bind the holder as to a subsequent payment so made which was not forwarded, he not having recognized the company as his agent.—*Richards v. Waller* (Neb.) 68 N. W. 1053.

[1j] (Wis.; 1895.)

An agent employed to purchase tax titles, receiving as compensation a percentage of the net profits, has no authority to convey lands purchased for the principal at a tax sale.—*Jourdain v. Fox* (Wis.) 62 N. W. 936.
90 Wis. 99.

§ 6. — Contracts of employment.

[1a] (S. D.; 1896.)

A nonresident agent, authorized by his principal and charged with the exclusive management of a real-estate loan business in this state, including the examination of titles and foreclosure of mortgages, has implied authority to direct a local subagent, through whom all the business has been transacted, to retain a lawyer, whenever the interests of his principal demand professional attention.—*Davis v. Matthews* (S. D.) 66 N. W. 456.

[1b] (S. D.; 1897.)

An agent authorized to sell machinery in certain designated counties, on commission, has no power to employ counsel to represent his principal generally in legal matters.—*Kirby v. Western Wheeled Scraper Co.* (S. D.) 70 N. W. 1052.

§ 7. — Purchases and sales.

[1a] (Iowa; 1897.)

A written contract under which possession of a stock of goods was transferred, the transferee to pay the owner a certain sum from their proceeds, and to then become the owner of the remainder, but the title not to pass until such payment was made, whether regarded as evidencing a conditional sale or a bailment, does not authorize the transferee to bind the seller or bailor for the price of new goods purchased by him, and added to the stock.—*Bentley v. Snyder* (Iowa) 69 N. W. 1023.

[1b] (Mich.; 1896.)

A canvasser employed by a piano company to solicit customers, but with no authority to make sales, went with one of the firm to defendant's house, where he introduced his companion as the manager and himself as the agent of the company, and offered in the manager's presence to sell a \$500 piano, which had been brought to the house in the hopes of making a sale, for \$400, but the offer was refused, and it was understood that the instrument should be immediately removed. The canvasser subsequently went alone to defendant's house, and told him he would see his employers, and then

make another proposition, and at his next visit offered to sell the piano for \$200, which offer defendant accepted. *Held*, that the canvasser's statement in regard to seeing his employers before making the offer, and his subsequent agreement to sell for half the price demanded in the manager's presence, were notice of his want of authority to make a trade, and that no title passed. *Montgomery, J., dissenting.*—*Clark v. Haupt* (Mich.) 68 N. W. 231.

[1c] (Mich.; 1897.)

Where an agent authorized to make sales treats a consignment of goods made by him as an actual sale, his election is binding on his principal.—*McDonald v. Preston Nat. Bank* (Mich.) 70 N. W. 143.

[1d] (Minn.; 1896.)

The presumption is that an agent selling a threshing machine has authority to sell the same with a warranty.—*Gaar, Scott & Co. v. Patterson* (Minn.) 68 N. W. 69.

[1e] (N. D.; 1896.)

After an agent, having authority to sell personally, sells the same unconditionally, he has no implied authority to rescind the sale, and enter into a new contract of sale with the original purchaser.—*Fletcher v. Nelson* (N. D.) 69 N. W. 53.

[1f] (Wis.; 1896.)

An agent authorized to sell a horse cannot bind his principal by a warranty that the animal is sound, in the absence of express authority or of a usage to warrant on such sale.—*Western v. Page* (Wis.) 68 N. W. 1003.

[1g] (Wis.; 1897.)

The issues were whether Q., who bought sleds and gave plaintiff an order on defendant for the price, had authority to do so, and whether the sleds were in fact sold on defendant's credit. The day after Q. notified defendant of the purchase and the order, defendant wrote plaintiff asking time for payment. Four months later he wrote that he desired plaintiff to take his note for the debt. Four months afterwards he wrote that he would send the money as soon as he could, and two months later he wrote plaintiff to come to his place, if Q. had not paid for the sleds, and they would determine what had best be done. *Held*, that though it was agreed, and the court charged, that the letters did not constitute a contract, they were competent evidence for what the jury deemed them worth, in connection with the other evidence on said issues.—*Miller v. Thompson* (Wis.) 70 N. W. 470.

§ 8. — To settle accounts and receive payment.

[1a] (Iowa; 1895.)

The fact that a general agent for the sale of stock did not have the stock in his possession at the time of sale is not notice of his want of power to collect therefor.—*Sawin v. Union Bldg. & Sav. Ass'n of Des Moines* (Iowa) 64 N. W. 401.

[1b] (Iowa; 1895.)

A general agent for the sale of stock has power to collect the purchase price thereof before or after delivery.—*Sawin v. Union Bldg. & Sav. Ass'n of Des Moines* (Iowa) 64 N. W. 401.

[1c] (Iowa; 1895.)

Where the makers pay interest on their note to a person without production of the note, the fact that the note is payable at such person's office, and that interest thus paid is never again demanded, does not authorize the makers to pay the principal of the note to such person as agent of the holder.—*Klindt v. Higgins* (Iowa) 64 N. W. 414.

[1d] (Mich.; 1895.)

Where a mortgagee, retaining in his own possession the mortgage papers, from time to time, as interest becomes due, forwards the coupon interest notes to a third party for collection, it does not authorize the payment by the mortgagor of future installments of inter-

est and the principal sum to such person as agent of the mortgagee, he not having the note or mortgage in his possession.—*Joy v. Vance* (Mich.) 62 N. W. 140.

104 Mich. 97.

[e] (Mich.; 1895.)

The assignee of a mortgage permitted a company with which the original mortgagee was identified to receive installments of interest thereon, but the company, without the assignee's knowledge, notified the mortgagor as the interest became due, extended the loan, took a bonus and interest coupons therefor from the mortgagor payable to itself, and subsequently, upon the assignee consenting to extend the loan, delivered the interest coupons to him. The coupons were paid as they matured at the company's office. Upon the maturity of the mortgage, notice thereof was sent to the mortgagor by the company, and it was paid to the latter, but never received by the assignee, who, from the date of assignment, had all the securities in his possession. *Held*, that there was not such a holding out of the company as agent of the assignee as to estop the latter from foreclosure.—*Bromley v. Lathrop* (Mich.) 63 N. W. 510.

105 Mich. 492.

[f] (Mich.; 1895.)

Complainants gave a mortgage to defendant to secure a note, both instruments being forwarded to an agent of the mortgagee, who retained the same, and, from time to time, as the interest came due, forwarded the coupons to M., who collected the interest thereon. Subsequently the principal and balance of interest was paid to M. upon his agreement to send for and get a discharge of the mortgage, but instead of so doing he used the money in his own business, and the mortgage was never discharged. *Held*, that the payment of interest to M. did not make it the agent of the mortgagee for the collection of the principal, and afforded the mortgagor no defense to an action of foreclosure. *Joy v. Vance*, 62 N. W. 140, 104 Mich. 97, followed.—*Trowbridge v. Ross*, 63 N. W. 534, 105 Mich. 598; *Ross v. Trowbridge*, *Id.*

[g] (Mich.; 1896.)

On an issue as to the authority of a corporation to receive, as agent of defendant, payment of a mortgage executed by complainant to the predecessor of said corporation, but subsequently owned by defendant, it appeared that said corporation was applied to by defendant to collect the interest on said mortgage and on others. The corporation collected a large part of the interest and the principal on said mortgages, other than complainant's, though the mortgages and notes were in defendant's hands; and, upon notice that the money had been collected, defendant forwarded the notes and mortgages to said corporation, with the necessary discharge papers, and the money was thereupon remitted to defendant. Defendant repeatedly wrote to said corporation, with directions to urge the settlement of said mortgages, including complainant's, and stating that, if discharges of mortgages were sent to her, she would execute them. The corporation replied that they were looking after defendant's interests. The corporation received the principal of complainant's mortgage, and wrote defendant to that effect, and sent the papers discharging the mortgage to be executed; and, though defendant received the same, she did not reply thereto before the corporation's failure. Complainant did not know at the time he paid the principal to said corporation that defendant was the owner of the mortgage, though the assignment thereof was duly recorded. *Held*, that the evidence established the corporation's authority to receive payment of complainant's mortgage.—*Wilson v. La Tour* (Mich.) 66 N. W. 474.

[h] (Mich.; 1896.)

A firm procured from complainant a loan for certain persons, whose mortgage secured the loan and also a note to such firm for \$75, or 1 per cent. for 5 years on the sum loaned, payable one-fifth each year. The interest was paid com-

plainant by the mortgagors through the firm, but complainant did not request or pay for such services, and the firm understood they were paid for such services by the \$75 note. *Held*, that the firm was not complainant's agent to receive payment of the mortgage.—*Van Deusen v. Ingraham* (Mich.) 67 N. W. 914.

[i] (Mich.; 1896.)

In an action to compel defendant to cancel a mortgage, it appeared that defendant, during several years, placed money in the hands of one S., he making loans when opportunity offered, collecting principal and interest, obtaining discharges from defendant as the mortgages were paid, crediting the moneys collected to defendant on his books, and reinvesting them for him; that plaintiff made a loan through S., and executed such mortgage to defendant; and that he afterwards paid S. the whole amount due on it. *Held*, that S. was defendant's general agent, and a decree for plaintiff was proper.—*Ziegan v. Stricker* (Mich.) 68 N. W. 122.

[j] (Neb.; 1896.)

The fact that one to whom money due another is paid is not in possession of the evidence of indebtedness is not conclusive on the question of his authority to receive the money.—*Thomson v. Shelton* (Neb.) 68 N. W. 1055.

[k] (Neb.; 1897.)

A collecting agent has no implied authority to set off a debt due by himself against a debt due his principal.—*Western White Bronze Co. v. Portrey* (Neb.) 70 N. W. 383.

[l] (Neb.; 1897.)

An agent employed to collect a note is authorized to receive in payment thereof only such coin or currency as is by law declared to be legal tender.—*Moore v. Pollock* (Neb.) 70 N. W. 541.

[m] (Neb.; 1897.)

The defendant, desiring to pay a note and mortgage for \$1,000, executed, in favor of a local investment company, a note and mortgage for \$1,500, and received from T., the manager of said company, the sum of \$165, the latter agreeing to pay off the first-mentioned note and mortgage, then held by the plaintiff, in Massachusetts. T. also, without plaintiff's knowledge, charged the local company upon its books with the amount of said note, to wit, \$1,035, and entered a corresponding credit in favor of a Massachusetts corporation authorized to receive payment thereof. No money passed by the transaction except as above stated, and the local company subsequently passed into the hands of a receiver, after having negotiated the \$1,500 note, and without having paid or accounted for the balance of the proceeds thereof. *Held* not to sustain the plea of payment.—*Moore v. Pollock* (Neb.) 70 N. W. 541.

[n] (Neb.; 1897.)

That the party to whom money due another is paid is not in possession of the note and mortgage by which the debt is evidenced is not conclusive of the question as to his authority to collect the money.—*Phoenix Ins. Co. v. Walter* (Neb.) 70 N. W. 938.

[o] (Neb.; 1897.)

That one is authorized to receive interest due on a mortgage does not show authority also to collect the principal sum, where the mortgage note has not been in his possession.—*City Missionary Soc. v. Reams* (Neb.) 70 N. W. 972.

[p] (S. D.; 1897.)

One authorized by the holder of a note to make a proposition to the maker to accept property in payment on certain terms has no authority to employ a subagent to transact the business.—*Fargo v. Cravens* (S. D.) 70 N. W. 1053.

§ 9. Apparent authority.

[a] (Iowa; 1895.)

A railroad company supervised the construction of part of its road, L., its secretary, having general control. The work was after-

wards let to a contractor, who sublet to one who sublet to plaintiff. Thereafter L. continued to supervise the work, pay the men, and use the printed blanks and letter heads of the company. He had no express authority to make contracts for the company or bind it in any way. Plaintiff knew that the work had passed from the control of the company, knew the relations of the contractors, and could have known that L. was acting for the first contractor, and not for the company. *Held*, that the facts were sufficient to put plaintiff on inquiry as to L.'s authority to bind the company to pay for work done, provided plaintiff would refrain from filing a lien.—*Wolf v. Davenport, I. & D. R. Co.* (Iowa) 61 N. W. 847.
93 Iowa, 218.

[b] (Mich.; 1895.)

In replevin for a piano it appeared that defendant paid the price to one acting as agent for plaintiff, but who failed to turn over the money to plaintiff. It also appeared that such person told defendant that he would send up a piano on approval, and that a piano was thereafter sent from plaintiff's store. Defendant thereafter asked plaintiff if the price should be paid to such person, and plaintiff replied that if payment could not be made at the store he would send up an agent for the purpose. Such person thereafter appeared at defendant's house with a printed receipt form signed by himself as plaintiff's agent. *Held*, that defendant was justified in making payment to him, and that defendant could not recover.—*Warren v. Halley* (Mich.) 64 N. W. 1058.

[c] (Minn.; 1895.)

Possession of property by an agent is not evidence that he has authority to sell it.—*Peerless Manufg Co. v. Gates* (Minn.) 63 N. W. 260.

61 Minn. 124.

[d] (Minn.; 1897.)

The sale by a general agent of the property of the principal to pay his own debt is not within his apparent authority.—*Stewart v. Cowles* (Minn.) 69 N. W. 691.

[e] (Neb.; 1896.)

The apparent authority of an agent which will bind his principal is such authority as an agent appears to have by reason of the actual authority which he has.—*Brown v. Eno* (Neb.) 67 N. W. 434.
48 Neb. 538.

[f] (S. D.; 1896.)

Comp. Laws, § 4497, providing that a person paying a negotiable instrument may require as a condition precedent that the same be surrendered, does not prevent a payment to an agent, made without demanding the instrument, who has, through the negligence of the principal, been given ostensible authority to receive payment, from being binding on the principal.—*Reid v. Kellogg* (S. D.) 67 N. W. 687.

§ 10. Of subagents.

(Mich.; 1895.)

The owner of land and her grantor left with an agent, through whom she had procured a loan secured by mortgage on the land, a certain sum to be paid on a prior unmaturing mortgage when it became due, or when the mortgagee would receive it. If there was any surplus, it was to be paid to such grantor. Afterwards such owner, her grantor, and a purchaser met at the agent's office, where it was agreed between them and the agent's clerks, who were in sole charge of his business, that such agent should continue to hold the money for the same purpose for the benefit of such purchaser. *Held*, that the clerks had authority to make the agreement for the agent.—*Havens v. Church* (Mich.) 62 N. W. 149.

104 Mich. 135.

§ 11. Pleading.

(Iowa; 1895.)

An allegation in an answer that plaintiff, by its legally authorized agent, made a new contract, sufficiently alleges the agent's authority to make the new contract, though the old contract, which is set out in the answer, provides that no agent is authorized to add to, abridge, or change the same.—*Esterly Harvesting Mach. Co. v. Bemis* (Iowa) 61 N. W. 980.
93 Iowa, 398.

§ 12. Evidence.

[a] (Neb.; 1895.)

Evidence on an issue of apparent authority of an agent is not restricted to proof of general custom with regard to agencies of the same character, or to proof that the agent had previously performed similar acts to the knowledge of the principal and the person dealing with the agent, or that similar agents had in the past performed such acts.—*Johnson v. Milwaukee & W. Inv. Co.*, 64 N. W. 1100, 46 Neb. 480.

[b] (Neb.; 1896.)

Authority to sign an agreement to arbitrate cannot be inferred from acts as special agent, having no reference to such arbitration, or the subject-matter therein contemplated.—*Manufacturers' & Builders' Fire Ins. Co. v. Mullen* (Neb.) 67 N. W. 445.

48 Neb. 620.

[c] (S. D.; 1896.)

The power of an agent to execute a binding contract for the sale of land may be established by letters and telegrams received from his principal.—*Farrell v. Edwards* (S. D.) 66 N. W. 812.

[d] (Wis.; 1895.)

The authority of an agent, when not in writing, may be proven by the testimony of the agent, even though the principal and agent were also husband and wife.—*Roberts v. Northwestern Nat. Ins. Co.* (Wis.) 62 N. W. 1048.

§ 13. — Presumption and burden of proof.

[a] (Minn.; 1897.)

Proof that the acts of an agent, during a long course of dealing for his principal, have never been repudiated by the latter, raises a presumption that the agent had actual authority for all acts done by him in the line of such dealing.—*Wheeler v. Benton* (Minn.) 69 N. W. 927.

[b] (Neb.; 1895.)

A real-estate agent, having contracted to sell land on commission with one alleged to be the agent of the owner, which agency is denied, cannot recover without showing authority of such agent.—*Funk v. Latta* (Neb.) 62 N. W. 65.
43 Neb. 739.

[c] (Neb.; 1895.)

Agency, with power to discharge a mortgage before maturity, will not be presumed, as against a bona fide holder, from the mere fact that the mortgagee forwards to such agent, at whose office it is payable, funds for the payment of interest.—*Stark v. Olsen* (Neb.) 63 N. W. 37.
44 Neb. 646.

[d] (Neb.; 1896.)

One who makes payment to a third person, not the owner of a note, or in possession of it, of money to be applied in payment of the note, assumes the burden of proving that such person was empowered to collect the money.—*Richards v. Waller* (Neb.) 68 N. W. 1053.

§ 14. — Weight and sufficiency.

[a] (Mich.; 1895.)

Defendant, who had been employed for plaintiff, the contract having been made with A., on a settlement with A., acting as plaintiff's general agent, executed to him a note and mortgage for a balance due. On refusal of defendant to continue the work at A.'s request,

A, contracted with another therefor, and agreed with the defendant that, if he would assist such person, he would turn over to him the note and mortgage. Plaintiff acknowledged the contract made by A, with the third person. *Held* prima facie sufficient to show that A. had authority to contract for the surrender of the note and mortgage.—*Aultman, Miller & Co. v. Dodson* (Mich.) 82 N. W. 708.

104 Mich. 507.

[b] (Mich.: 1895.)

A finding that defendant's traveling agent had authority to employ plaintiff as a salesman will not be disturbed, where it appeared that the agent had authority to establish an agency for the sale of defendant's wares, that the defendant ratified the agent's contracts for advertising, and in referring to his authority admitted that he had "some little leeway."—*Booth v. Majestic Manufacturing Co.* (Mich.) 63 N. W. 524.

105 Mich. 562.

[c] (Minn.: 1897.)

Evidence that the business of the agency had formerly belonged to the agent, who had assigned it for the benefit of his creditors; that the principal, his father, had bought it from the assignee, stating that he was going into the business to help his son to settle his indebtedness; that a large amount of the property had been conveyed by the son to the father without consideration; and that the father had willingly allowed the son, in other transactions, to sign his name to notes, etc., in the settlement of the son's debts,—was sufficient, in the absence of any charge of bad faith or proof of limitations of the agent's authority, to sustain a finding that a sale of the principal's goods by the agent, in payment of his own debt, was authorized; the agent and the principal both being dead at the time of the trial.—*Stewart v. Cowles* (Minn.) 69 N. W. 694.

[d] (Neb.: 1896.)

When the extent of an agent's authority is in issue, no special instructions having been given to him, his actual authority to do a particular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and intrusted to the agent under similar circumstances.—*First Nat. Bank of Wilber v. Ridpath* (Neb.) 66 N. W. 37.

47 Neb. 96.

[e] (Wis.: 1895.)

Evidence that an agent of a mill owner had charge "of all matters in relation to the mill, hired the men and discharged them," and "ran the entire thing," will, in the absence of any proof of usage to the contrary, support a finding that such agent had authority, in contracting for the services of a foreman for a certain time, to agree to take the risk of his competency.—*Roche v. Pennington* (Wis.) 62 N. W. 946.

90 Wis. 107

III. RATIFICATION.

Of contract made by corporate officer or agent, see "Corporations," § 36.

Of unauthorized act of partner, see "Partnership," § 15.

§ 15. Knowledge of facts.

[a] (Neb.: 1895.)

Defendant, as agent, rented plaintiff's property for two months, and collected the rents. He then sold the property, and without authority paid the rent so received to the purchaser. Plaintiff received the proceeds of the sale without knowledge of defendant's disposition of the rents. *Held* not a ratification of defendant's disposition of the rents, and defendant is liable therefor.—*Holm v. Bennett* (Neb.) 62 N. W. 194, 43 Neb. 808.

[b] (Neb.: 1896.)

In order to constitute a ratification of an unauthorized act, the act relied on as such ratification must be performed with knowledge of the material facts, in the absence of circumstances creating an equitable estoppel.—*Columbia Nat. Bank v. Rice* (Neb.) 67 N. W. 165.

48 Neb. 428.

[c] (Neb.: 1896.)

Knowledge by the principal of the material facts is an essential element of a ratification of the unauthorized act of his agent.—*O'Shea v. Rice* (Neb.) 69 N. W. 308.

[d] (S. D.: 1897.)

Under Comp. Laws, § 3972, providing that a ratification can only be made by accepting or retaining the benefit of the act, with notice thereof, where the owner of a note authorized another to make a proposition to the maker to accept hay thereon at a certain price, delivered, the acceptance by him of a quantity of hay, which was delivered, is not a ratification of an agreement made with the debtor, in his behalf, by one without authority, to accept a certain quantity of hay in the stack in full payment; it not being shown that he knew of such agreement.—*Fargo v. Cravens* (S. D.) 70 N. W. 1053.

§ 16. Implied ratification.

[a] (Iowa: 1896.)

That a principal negotiated a chattel mortgage, executed by the business manager of his farm, on cattle described as being on the farm, the mortgage also reciting that they were to be so kept for a certain length of time, it not appearing that the agent owned any cattle, constitutes a ratification of the mortgage.—*Iowa State Nat. Bank v. Taylor* (Iowa) 67 N. W. 677.

[b] (Iowa: 1896.)

In an action for the conversion of certain notes collusively transferred to defendant by plaintiff's agent, it appeared that under the contract of agency all notes were to be taken in plaintiff's name, and that the agent, contrary to his agreement, had taken the notes in his own name. *Held*, that the plaintiff, by bringing the action, sufficiently ratified the act of the agent in taking the notes in his own name to entitle him to recover for their conversion.—*Warder, Bushnell & Glessner Co. v. Cuthbert* (Iowa) 68 N. W. 917.

[c] (Mich.: 1896.)

Ratification of a hiring of a detective by a station agent of a railroad to look up a theft cannot be found from the fact of his acting with a detective of the road, who had no authority to hire, and that the detectives of the road, making use of information furnished by him, had the thief arrested and convicted. *Moore and Montgomery, JJ., dissenting.*—*Somerville v. Wabash R. Co.* (Mich.) 67 N. W. 320.

[d] (Minn.: 1896.)

Where an agent for the sale of property made an unauthorized agreement with the vendee whereby the price was to be paid in boarding the agent, and the principal, after knowledge thereof, acquiesced therein for two years, without demanding the price, and sought to collect the price from the agent after his discharge, a finding of ratification was warranted.—*Singer Manufacturing Co. v. Flynn* (Minn.) 65 N. W. 923.

63 Minn. 475.

[e] (Minn.: 1897.)

The agent of the holder of a mortgage note regularly collected the semiannual interest for eighteen months, but at the end of the next six months, when the principal and last installment of interest fell due, the agent extended the note, and sent to his principal only the interest, and did the same six months later. During this time, and for four years afterwards, neither the principal nor the agent demanded payment of the principal. The principal's distributee, who brought the suit, did not call as a witness the agent, who was her

husband, and hence could not be called by the other party. *Held*, that presumably the agent had authority to extend the time for payment of the principal, or his action in doing so was ratified.—*Wheeler v. Benton* (Minn.) 69 N. W. 927.

[f] (Neb.; 1897.)

Proof that the principal did not give notice of his repudiation of an alleged unauthorized guaranty contract, executed by the agent, until after default of the debtor, that the principal held a mortgage on the debtor's property, and that the agent, before maturity of the mortgage debt, induced the debtor to turn over the property to be sold in satisfaction of the principal's claims, including the debt guaranteed, his authority to do so not being questioned, is sufficient to show a ratification of the guaranty contract.—*Oberne v. Burke* (Neb.) 70 N. W. 387.

§ 17. Acquiescence.

(Mich.; 1895.)

On an issue as to the settlement of a mortgage debt it appeared that the mortgagee gave the attorney who was foreclosing the mortgage a receipt for a certain sum, which recited that it was the balance due on the mortgage, less amount of attorney's fees, disbursements, and expenses, and the mortgagee testified that when he gave the receipt he had been informed that the mortgage had been delivered to the mortgagor, and that he supposed it was true; and the attorney testified that he had talked with the mortgagee about the compromise before it was made, and advised him to make it, and had secured his approval, and that when he reported the settlement, and took the receipt, the mortgagee made no objections. *Held*, that the mortgagee ratified the settlement, even if he did not authorize it in advance.—*Gemberling v. Spaulding* (Mich.) 62 N. W. 342.
104 Mich. 217.

§ 18. Acceptance of benefits of transaction.

[a] (Iowa; 1897.)

A. sold property to B. for \$1,700. Of this amount \$1,450 was to be paid in cash, and \$250 by note, secured by second mortgage on the property. B. paid the \$1,450 when the property was delivered to him, and represented to A. that he obtained the money from C., and had promised to give C. a first mortgage on the property. B. refused to complete the contract with A., claiming that the property was purchased by C., and that he (B.) had no title or interest. A. had no knowledge of any agency, and C. did not know the amount B. agreed to pay A. for the property, but was led to believe that it was \$1,450. A. sued B. and C. for the \$250, with interest, alleging a conspiracy to defraud him, and prayed that the judgment be made a lien on the property. Answering, C. alleged that he purchased the property directly for \$1,450, and prayed judgment for costs, and that he might be decreed to be the absolute owner. *Held*, that, if the sale was to C., it was through B., as the agent of an undisclosed principal; and, having attempted to take advantage of the purchase, C. was charged with all the burdens of the contract, and a judgment for plaintiff could be made a lien on the property.—*Harrison v. Schoff* (Iowa) 70 N. W. 689.

[b] (Neb.; 1896.)

After the commencement of an action of replevin for cattle claimed by defendants under a sale by plaintiff's agent, which plaintiff claimed was unauthorized, but before trial, plaintiff learned that it had received the benefit of a portion of the proceeds of the sale. *Held*, that its failure to then return or tender to defendants such portion constituted a ratification of the sale, which defeated a recovery.—*Johnston v. Milwaukee & Wyoming Inv. Co.* (Neb.) 68 N. W. 383.

[c] (Neb.; 1896.)

Where a principal, sued on an unauthorized contract made by his agent in his name, learns on the trial that he has accepted and retained the benefits of the contract, but fails to return or tender a return thereof to the other contracting party, he ratifies the contract.—*Farmers' & Merchants' Bank v. Farmers' & Merchants' Nat. Bank* (Neb.) 68 N. W. 488.

[d] (S. D.; 1895.)

Where a note was made to a corporation on the strength of representations of an agent of the corporation as to the value of the consideration for the note, the corporation could not, while suing on the note, repudiate such representations, though the agent had an interest in the transaction separate from that of the corporation.—*Union Trust Co. v. Phillips* (S. D.) 63 N. W. 903.

[e] (S. D.; 1895.)

A corporation or an individual cannot adopt and claim the benefit of a contract made in its or his behalf by one assuming to act as agent, and at the same time repudiate the means or representations by which such contract was so procured.—*Union Trust Co. v. Phillips* (S. D.) 63 N. W. 903.

IV. RIGHTS AND LIABILITIES INTER SE.

§ 19. In general.

[a] (Iowa; 1896.)

A provision in a contract for the furnishing of merchandise to an agent for sale, that the agent shall keep the merchandise in "good order," does not render him liable therefor if it is destroyed by fire without negligence on his part.—*Norton v. Melick* (Iowa) 66 N. W. 780.

[b] (Mich.; 1896.)

Where plaintiff, as agent, exchanged property of his principal for a bicycle, but without the principal's knowledge or consent sent him a different bicycle instead, claiming it to be the one received in the trade, the bicycle retained did not become his property, though the other was not returned, and he cannot maintain replevin for it against an officer levying on it under an execution against his principal.—*Carroll v. McKale* (Mich.) 69 N. W. 644.

[c] (Minn.; 1897.)

Plaintiff instructed his agents in Quebec to ship certain merchandise to St. Paul. Under their direction, their clerk made out triplicate invoices, a declaration to be presented to the United States consul, and a consular certificate; the two latter stating that the goods were to be entered at the port of Sault St. Marie. The invoice, also in triplicate, stated that they were to be consigned for entry at that port to F., defendant's agent. The bill of lading specified that goods going to or coming from the United States were subject to customs charges. The invoice, declaration, consular certificate, and bill came into the agent's hands when the goods reached Sault St. Marie. *Held*, that defendant's agent was warranted in entering the goods for "immediate consumption," and in paying the duty fixed by the customs-house officials, and that it was not his duty to enter them for "transportation" to St. Paul.—*Mitchelson v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.) 69 N. W. 1106.

§ 20. Individual interest of agent.

[a] (Mich.; 1895.)

An agent cannot recover commissions for the sale of a boar, where he does not disclose that the company in which he is interested is the actual purchaser, and that the nominal purchaser, who is interested in a contract with the seller dependent on the making of the sale, has offered to give the company a certain amount towards the purchase.—*Humphrey v. Eddy Trausp. Co.* (Mich.) 65 N. W. 13.

[b] (Neb.; 1896.)

An agent who sells his own property to his principal under general instructions which require him to do the best he can for his principal, and which evidence a special trust reposed in him, may be held to account by the principal for the difference between the real value of the property and the price at which it was sold, though the principal, before bringing suit, has mortgaged such property.—*Oliver v. Lansing* (Neb.) 67 N. W. 195.

48 Neb. 338.

[c] (N. D.; 1896.)

Where an agent, without the consent of his principal, sells to himself at the price he was authorized to sell to a third person, the waiver by the principal of his right to proceed as for tort founded on the conversion by the agent of his property in purchasing the same himself, and his electing to sue the agent on an implied contract of purchase by the agent, does not constitute a ratification of the original act of the agent in purchasing himself so as to limit the recovery to the price specified; but it is merely a waiver of the element of tort in the transaction; consequently the agent is liable on the theory of the purchase by him of the property at the time of the conversion at the then value of the property, irrespective of the price for which he was authorized to sell to a third person.—*Anderson v. First Nat. Bank* (N. D.) 67 N. W. 821.

5 N. D. 451.

§ 21. Accounting.**[a] (Wis.; 1895.)**

On accounting with an agent, where it appears that the agent acted in good faith, and that his reports to his principal were approved by her, a judgment allowing him the amount claimed therein for his services and advancements will not be disturbed.—*Warner v. Cuckow* (Wis.) 63 N. W. 238.

90 Wis. 291.

[b] (Wis.; 1896.)

Equity will not require an accounting by a principal for money voluntarily paid by the agent, without knowledge of the principal, in managing real-estate securities intrusted to him, on the theory that enough can be realized on the securities to pay the agent's claim after the principal's claim has been satisfied, on the mere testimony of the agent, based on the opinion of his subagents and his own casual inspection of the property, that "if the lands are properly handled" there will be a surplus.—*Carpenter v. Momsen* (Wis.) 65 N. W. 1027.

92 Wis. 449.

§ 22. Compensation of agent.**[a] (Iowa; 1896.)**

For acting as defendant's agent in the cultivation and lease of a farm for a number of years, and the sale thereof, \$200 was not excessive compensation.—*Cowgill v. Pickerell* (Iowa) 67 N. W. 384.

[b] (S. D.; 1896.)

A contract between principal and agents provided that the principal should furnish the agents with machinery to fill orders which the agents agreed to take, that the agents would deliver no machinery until the orders therefor were accepted by the principal, and that the agents should receive a certain commission on machinery actually sold and delivered. The agents forwarded an order which the principal refused to accept, and the former then sued for their commissions, as for a completed sale of the machinery embraced in the order. *Held* that, assuming that the principal did not have an absolute right to reject any order, it could properly refuse to accept one for cause, and the burden was on the agents to show that the order was one with which the principal should have been satisfied, and, the evidence on that point being conflicting, the agents were not entitled to the

direction of a verdict.—*Sherman v. Port Huron Engine & Thresher Co.* (S. D.) 66 N. W. 1077.

[c] (S. D.; 1896.)

An agent who has an exclusive contract for the sale of machinery in a given territory cannot recover his commission from his principal for a sale made by another in such territory, till he has shown that he himself would have made the sale, or that he performed, in connection therewith, the requirements imposed upon him by the contract.—*Roberts v. Minneapolis Threshing-Mach. Co.* (S. D.) 67 N. W. 607.

§ 23. Purchase of principal's property.**(Iowa; 1895.)**

Plaintiff employed defendant to sell her farm on commission. Defendant submitted to plaintiff a proposition by one P. to pay \$20 per acre for the tract, but did not disclose facts showing a probability that P. would pay more than that sum. Plaintiff then contracted to sell to defendant for \$20 per acre, and defendant afterwards contracted to sell the land to P. at \$22.50 per acre. Plaintiff did not understand that she was dealing with defendant as purchaser, when she made the subsequent contract with him, but thought it was merely to aid a sale. The contract between P. and defendant was subsequently rescinded. *Held*, that plaintiff was entitled to a cancellation of the contract of sale, and to the possession of the land, and to an accounting for the rents and profits.—*Fisher v. Lee* (Iowa) 63 N. W. 442.

V. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Personal liability of agent selling note, see "Negotiable Instruments," § 37.

§ 24. Rights and liabilities of principal.**[a] (Iowa; 1895.)**

The vice president of a bank placed therein to his own credit, and for their face value, depreciated certificates of stock in another company, and, on objection by the state auditor to the nature of the assets, replaced them with notes for equal amounts, signed by his father. The son had complete control of his father's business and that of the bank. No money consideration for the notes passed to the father, but the stock, which had some value, was surrendered either to him or his son. The son canceled the notes at maturity and re-deposited the stock as payment therefor. The other bank officers had no knowledge of any of such transactions. *Held*, that the notes were based on sufficient consideration, and became the property of the bank, and that their subsequent withdrawal, and the substitution of such stock therefor, was a fraud on the bank, and did not constitute payment of the notes.—*Findley v. Cowles* (Iowa) 61 N. W. 998.

93 Iowa, 389.

[b] (Iowa; 1895.)

Where the agent of a lender embezzled the moneys sent him by his principal for the making of a certain loan, the borrower, by bringing suit against the agent to recover the money, alleging that it was received to his use and benefit, elected to treat the payment to the agent as a payment to himself, and lost his right to recover from the principal.—*McLean v. Ficke* (Iowa) 62 N. W. 753; *Beach v. Same*, *Id.*

[c] (Mich.; 1896.)

Where the executors of an estate seek to take advantage of a contract made with their agent, they must take it burdened with the responsibility for his acts.—*Dodge v. Tullock* (Mich.) 68 N. W. 239.

[d] (N. D.; 1895.)

An agent sold a horse belonging to himself, with a warranty, and took a note in pay-

ment, payable to his principal. *Held* that, in an action by the principal on the note, the purchaser could set up a breach of warranty, though the principal received the note in settlement of the agency account. — *McGormick Harvesting Mach. Co. v. Taylor* (N. D.) 63 N. W. 890, 5 N. D. 53.

[c] (N. D.; 1895.)

Parol statements of the agent of a party to a contract, which were not incorporated into the contract, were not binding on the principal, where the contract recited that the principal was not to be bound by the contract until it approved the same. — *William Deering & Co. v. Russell* (N. D.) 65 N. W. 691, 5 N. D. 319.

§§ 25, 26. Liabilities of agent.

[a] (Iowa; 1896.)

One of the joint signers of a contract for the erection of a building, who was authorized to represent the other owners, as well as himself, in dealing with the contractors and in superintending the work, is personally liable for a change made by him in the terms of the contract, though the contractors knew that the change was beyond the scope of his authority, and made without the knowledge of the other owners. — *Gutherless v. Ripley* (Iowa) 67 N. W. 109.

[b] (Mich.; 1896.)

A person contracting with an authorized insurance agent, with knowledge of the fact of agency, cannot recover from the agent the premium paid, for failure of the principal to issue the policy required by the contract. — *Blean v. Wright* (Mich.) 68 N. W. 115.

[c] (Mich.; 1896.)

In an action to recover damages for failure to fulfill an agreement to procure insurance on plaintiff's property, it is no defense that defendant was acting for another person in making the agreement, unless such fact was disclosed to plaintiff. — *Banks v. Cramer* (Mich.) 66 N. W. 946.

[d] (Minn.; 1894.)

Where the complaint to enforce a mechanic's lien alleges that defendant acted as agent for a known principal, there is no cause for personal judgment against him. — *J. D. Moran Manuf'g Co. v. Clarke* (Minn.) 61 N. W. 556.

59 Minn. 456.

[e] (Minn.; 1895.)

Where an agent acts without authority, but fully discloses to the person with whom he is dealing all the facts touching his authority, he is not liable to such person. — *Newport v. Smith* (Minn.) 63 N. W. 734.

61 Minn. 277.

[f] (Minn.; 1895.)

The fact that a physician in charge of a sanitarium, who represented to an invalid, without knowing the truth or falsity of the representation, that if the latter would take treatment at the sanitarium he could be cured, acted merely as agent for the corporation owning and maintaining the sanitarium, was no defense to an action for deceit brought by the invalid against the physician on his failure to recover. — *Hedin v. Minneapolis Medical & Surgical Inst.* (Minn.) 64 N. W. 158.

62 Minn. 146.

[g] (Neb.; 1895.)

Where money was paid to an agent for the use of his principal, the agent was not liable for conversion, as against the party who paid the money, though he did not pay the money to the principal. — *Mathews v. O'Shea* (Neb.) 63 N. W. 820.

45 Neb. 299.

[h] (N. D.; 1894.)

Where one purporting to act as agent for another makes contracts in behalf of the alleged principal in which he is jointly interest-

ed, he will be personally bound by the contract. — *Moore v. Booker* (N. D.) 62 N. W. 607.

4 N. D. 513.

[i] (Wis.; 1895.)

An agent of a corporation whose duty it is to provide employees with safe machinery, and who set an employee to work upon a defective machine, knowing it to be dangerous, is responsible for injuries sustained thereby. — *Greenberg v. Whitcomb Lumber Co.* (Wis.) 63 N. W. 93.

90 Wis. 225.

§ 27. When notice to agent binds principal.

[a] (Iowa; 1895.)

Where the other bank officers were ignorant of the acts of the vice president in his personal dealings with the bank, which were against its interests, the bank is not bound by his knowledge of such dealings. — *Findley v. Cowles* (Iowa) 61 N. W. 998.

93 Iowa, 389.

[b] (Mich.; 1895.)

Where the state agent of an insurance company is charged with making advances to agents, and has general supervision of them, notice to him, by a subagent, of a termination of the contract, and by the latter's bondsmen that they would no longer be liable on the bond for advances, is notice to the company. — *Union Cent. Life Ins. Co. v. Smith* (Mich.) 63 N. W. 438.

105 Mich. 353.

[c] (Minn.; 1894.)

The president and cashier of a bank, for a consideration, assumed the payment of a note belonging to the bank, and due in 90 days. They subsequently assumed, in behalf of the bank, to extend the time of payment 11 times in succession for 90 days each time, and at each extension paid the interest to the bank. *Held*, that the bank was chargeable with constructive notice of the fact that the president and cashier were interested in the note, and hence ratified their acts in making the extensions. — *St. Paul & M. Trust Co. v. Howell* (Minn.) 61 N. W. 141.

59 Minn. 295.

[d] (Minn.; 1895.)

An agent was authorized to make leases of his principal's real estate, to collect monthly rents, and to care for the property generally. *Held*, that notice to such agent that improvements were being made on the real estate, which were necessary in order to carry on the business for which it was rented, was notice to the principal for the purposes of Laws 1889, c. 290, § 5, providing a lien for improvements on land, unless the owner, within five days after notice that improvements are being made, gives notice to the person making the same that his interest shall not be subject to any lien therefor. — *Jefferson v. Leithanser* (Minn.) 62 N. W. 277.

60 Minn. 251.

[e] (Neb.; 1896.)

A stockholder who for three years acted as director of a corporation, taking an active part in its management, with knowledge of its affairs, cannot thereafter, in an action against the corporation, recover money paid for stock by other stockholders, of whom he was the assignee, on the ground that the subscription was procured by fraud, where the other stockholders were represented by him as agent, and he was bound to protect their interest, since they were charged with his knowledge. — *American Building & Loan Ass'n v. Rainbolt* (Neb.) 67 N. W. 493.

48 Neb. 434.

VI. ACTIONS.

Limitation of action by principal against agent, see "Limitation of Actions," § 9.

Venue of action growing out of agency, see "Venue in Civil Cases," § 9.

§ 28. Pleading.

(Mich.; 1896.)

Where defendant relies on a contract made with plaintiff through a third person, the burden is on him to show such person's authority, or facts estopping plaintiff from denying the same.—*Clark v. Dillman* (Mich.) 66 N. W. 570.

§ 29. Evidence.

[a] (Iowa; 1896.)

In an action for damages caused by a fire negligently set out by defendants' agent, who was also a party defendant, declarations and admissions made by the agent after the fire were admissible as against him.—*Allen v. Barrett* (Iowa) 69 N. W. 272.

[b] (Neb.; 1896.)

Where a lessee, required by the lease to pay for all necessary repairs and improvements, procured repairs to be made during the term by one who sought to recover against the lessor as principal, on the ground that the lessee acted as agent merely, it was error to exclude the lease from evidence in behalf of defendant.—*Davis v. Benedict* (Neb.) 68 N. W. 398.

[c] (S. D.; 1896.)

Where on the issue as to the ostensible authority of an agent to receive payment of a mortgage for his principal, arising from the negligence of the principal in holding the agent out as having such authority, the facts, though not disputed, are such that reasonable minds might draw different conclusions therefrom, the issue is properly left to the jury.—*Reid v. Kellogg* (S. D.) 67 N. W. 687.

§ 30. Trial and instructions.

[a] (Mich.; 1896.)

It is error to exclude evidence of an agent's actual authority to make the contract in suit, on the ground that the only issue involved is one of estoppel on the part of the principal to deny the authority assumed, and then leave the question of actual authority to the jury.—*Clark v. Dillman* (Mich.) 66 N. W. 570.

[b] (Wis.; 1896.)

In an action by one employed to care for defendant's daughter, who was sick, to recover damages on the ground that the daughter was ill of typhoid fever, and that defendant concealed that fact, in consequence of which plaintiff contracted said disease, there was evidence that defendant sent P. to plaintiff's house to ask her to come and care for the daughter, and that P. told plaintiff that the daughter had nervous prostration. *Held*, that a charge that, if P. was defendant's agent, he could bind defendant for anything within the scope of his agency, and that P. claimed he had no authority from defendant to say that the daughter had anything other than typhoid fever, was sufficient as to agency.—*Kliegel v. Aitken* (Wis.) 69 N. W. 67.

PRINCIPAL AND SURETY.

I. SURETYSHIP IN GENERAL. §§ 1-10.

II. RELEASE AND DISCHARGE OF SURETY, §§ 11-19.

III. REMEDIES AGAINST SURETIES. §§ 20-22.

IV. RIGHTS AND REMEDIES OF SURETIES AS TO PRINCIPAL AND THIRD PERSONS. §§ 23, 24.

V. RIGHTS AND REMEDIES OF SURETIES INTER SE, §§ 25-27.

See, also, "Bail"; "Bonds."

Judgment against principal, effect on surety, see "Judgment," § 55.

Justification by sureties on appeal bonds, see "Appeal," § 67.

—on bond of assignee, see "Assignment for Benefit of Creditors," § 27.

—on redelivery bond, see "Replevin," § 33.

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Liabilities of contractor, see "Mechanics' Liens," § 48.

—insurance agent, see "Insurance," § 162.

—sheriff, see "Sheriffs and Constables," § 13.

—sureties on bond of clerk, see "Clerk of Court."

Objections to sureties on appeal bonds, see "Appeal," § 66.

Subrogation to rights of surety, see "Subrogation," § 3.

Sureties on notes, see "Negotiable Instruments," § 59.

—to keep the peace, see "Costs," § 38.

Wife as surety for husband, see "Husband and Wife," § 9.

I. SURETYSHIP IN GENERAL.

§ 1. Who may act as surety.

(Mich.; 1896.)

Pub. Acts 1895, No. 266, relating to bonds required by the law of the state, and permitting them to be executed by a surety company, is constitutional.—*Steel v. Auditor General* (Mich.) 69 N. W. 738.

§ 2. Conditions precedent.

(Neb.; 1895.)

The mere fact that the principal on a proposed bond expressed to an agent of the proposed obligee an opinion as to the capacity of paying off an existing indebtedness by a third person, for which the proposed sureties were then liable, did not constitute such payment a condition precedent to the acceptance of a new bond by the obligee therein named.—*Korty v. McGill* (Neb.) 62 N. W. 1075.

44 Neb. 516.

§ 3. Consideration of suretyship.

(Minn.; 1895.)

An extension of time of payment of a debt is a sufficient consideration for a note executed by a third party to the creditor as collateral security for the debt.—*Nichols & Shepard Co. v. Dedrick* (Minn.) 63 N. W. 1110.

61 Minn. 513.

§ 4. Failure of principal to sign.

(Neb.; 1896.)

When a state officer elect writes his name in the body of a paper prepared by himself as his official bond, and subscribes his oath of office, indorsed thereon, which instrument is delivered, accepted, and approved as his official bond, the same is valid, and binding upon the principal and his sureties, even though such officer inadvertently omitted to attach his final signature at the bottom of the bond.—*State v. Hill* (Neb.) 66 N. W. 541.

47 Neb. 456.

§ 5. Failure of others to sign.

(Minn.; 1895.)

The mere fact that one signing a bond as surety was informed at the time that another person whose name appeared as surety in the body of the bond was to sign the same as such, when in fact that person did not sign the same, did not release the signing surety from liability on the bond.—*Reed v. McGregor* (Minn.) 64 N. W. 88.

62 Minn. 94.

§ 6. — Conditional signing by surety.

[a] (Mich.; 1896.)

Where a surety intrusts an official bond to another to deliver, on condition that others should sign as sureties, he is estopped from denying his liability, on delivery of the bond without obtaining the other sureties, unless the bond on its face shows the official approving the same that it is incomplete; and the fact that after the last signature on the bond there was a vacant line, with the word "surety" following it, is not such notice of incompleteness as would

release the surety. *Crystal Lake Tp. v. Hill* (Mich.) 67 N. W. 121.

[b] (Minn.: 1895.)

In an action on a bond, evidence is admissible to show that the sureties signed the same under an agreement that it would be signed by others, as sureties, before delivery.—*Clarke v. Williams* (Minn.) 62 N. W. 1125.

61 Minn. 12.

[c] (Minn.: 1895.)

Where persons signed a note on condition that other persons would sign it before delivery, and it is delivered without such conditions being complied with, the bond is void as to the persons signing it, unless the obligee had no notice of the conditions, or those signing it afterwards waived the conditions.—*Clarke v. Williams* (Minn.) 62 N. W. 1125.

61 Minn. 12.

[d] (Minn.: 1897.)

The defense that the bond sued on was not to take effect until signed by D., who did not sign it, was sustained by defendant's testimony that, at the time of signing, he stated to plaintiff's agent that he signed on the express condition that the bond should not be binding on him until signed by D., to which the agent consented; that subsequently another of plaintiff's agents telephoned him that D. had signed the bond, and asked him to come to the office and acknowledge it, and that, relying on the agent's statements, he signed the acknowledgment without unfolding and examining the bond.—*William Deering & Co. v. Shumpik* (Minn.) 69 N. W. 1088.

[e] (Neb.: 1895.)

Where a surety signs a bond which is a joint obligation in form, on condition that others will sign the same with him, and it is delivered without such condition having been complied with, the bond is invalid, as to such surety, unless the obligee, prior to the delivery, had no notice of such condition, or the surety, after signing, waives the condition.—*Mullen v. Morris*, 62 N. W. 74, 43 Neb. 596.

[f] (Neb.: 1896.)

A bond of an officer, which is presented to a county board, and approved by it, binds all parties who signed it as sureties, notwithstanding that they may have signed the instrument conditionally, if the bond is perfect on its face, and the board possessed no notice of the conditional signing, and there was nothing to raise the duty of inquiry as to the manner of the execution of the bond.—*Stoner v. Keith County* (Neb.) 67 N. W. 311.

48 Neb. 279.

§ 7. Notice of relation.

(Minn.: 1895.)

To charge the holder of a note, who extended the time of payment, with notice that defendant was merely a surety on the note, it was not necessary that he should have had actual knowledge of the suretyship, or that he should have been guilty of bad faith in not making inquiry.—*Fuller v. Quesnel* (Minn.) 65 N. W. 634.

63 Minn. 302.

§ 8. Scope of liability.

[a] (Mich.: 1895.)

In an action on a bond by which an agent bound himself to pay over to his employer "all moneys" received by him "on account of advances," a charge that the bondsmen were liable only for moneys advanced for hotel and traveling bills, and other expenses incident to the employer's business, was erroneous; it not appearing that the advances sought to be recovered were unreasonable, or made in bad faith.—*Union Cent. Life Ins. Co. v. Smith* (Mich.) 63 N. W. 438.

105 Mich. 353.

[b] (Mich.: 1897.)

The agreement of a surety on a written contract for the purchase of beer in car-load

lots cannot be extended to cover purchases made by his principal in smaller quantities.—*Grasser & Brand Brewing Co. v. Rogers* (Mich.) 70 N. W. 415.

[c] (Minn.: 1897.)

In an action against the sureties on the bond of an agent conditioned that he shall deliver or account for all grain purchased by him for his principal, it is no defense that the scales furnished by the principal for the agent's use had not been tested and sealed, as required by Gen. St. 1891, § 2205.—*Eagle Roller-Mill Co. v. Dillman* (Minn.) 69 N. W. 519.

[d] (Neb.: 1895.)

A bond of guaranty of payment for goods to be purchased, providing that the obligee would give a credit of 60 days therefor, is not rendered inoperative as to sureties by the obligee taking notes in settlement without reference to the 60-days limitation, where the taking of notes was authorized by the bond.—*Korty v. McGill* (Neb.) 62 N. W. 1075.

44 Neb. 516.

[e] (Neb.: 1895.)

Where the principal has paid for all goods bought before the execution of a bond guarantying that he would pay for all merchandise by him purchased, the fact of such purchase before the execution of the bond does not affect the liability of the sureties for goods purchased after the execution of the bond.—*Korty v. McGill* (Neb.) 62 N. W. 1075.

44 Neb. 516.

[f] (Neb.: 1896.)

The bond of a building contractor to pay for all materials furnished under the contract renders the sureties liable to a subcontractor for materials furnished.—*King v. Murphy* (Neb.) 68 N. W. 1029.

[g] (Neb.: 1897.)

The liability of a surety is measured by, and will not be extended beyond, the strict terms of his contract.—*Hopewell v. McGrew* (Neb.) 70 N. W. 397.

[h] (N. D.: 1896.)

Sureties on a bond for the fidelity of a firm as agents for the obligee are not liable for funds misappropriated by one of the firm after the dissolution of the partnership and the retirement of the other partner from the business of such agency, notwithstanding the fact that the obligee knew nothing of such dissolution.—*Standard Oil Co. v. Arnestad* (N. D.) 69 N. W. 197.

[i] (Wis.: 1894.)

M. gave plaintiff a bond for the faithful performance of his contract to sell certain articles on commission. *Held*, that such bond did not cover sums paid by plaintiff for decorating and painting a booth for M. in an exposition, where M. kept the articles on exhibition and sale.—*Zinnus Manuf'g Co. v. Mendelson* (Wis.) 61 N. W. 302, 89 Wis. 133.

§ 9. Right of creditor to share in securities given to surety.

(Neb.: 1895.)

Where a surety receives security as indemnity, the principal creditor is entitled to the benefit of that security.—*South Omaha Nat. Bank v. Wright* (Neb.) 63 N. W. 126.

45 Neb. 23.

§ 10. Estoppel of surety.

(S. D.: 1895.)

The sureties on the bond of a county treasurer were estopped to dispute its recitals as to the election of the principal as treasurer, and that he was about to enter on the discharge of his official duties.—*Custer County v. Albien* (S. D.) 64 N. W. 533.

On appeal bond, see "Appeal," § 307.

II. RELEASE AND DISCHARGE OF SURETY.

On appeal bond, see "Appeal," § 303.

§ 11. What discharges surety.

[a] (Mich.; 1896.)

Sureties on the liquor bond of a co-partnership are discharged by a change in the membership of the firm.—*Mathews v. Garman* (Mich.) 68 N. W. 243.

[b] (Minn.; 1895.)

A surety on a bond given by a mortgagor to the mortgagee, conditioned to rebuild a house on the mortgaged premises, was not discharged by the assignment of the debt, mortgage, and bond.—*Longfellow v. McGregor* (Minn.) 63 N. W. 1032.

61 Minn. 494.

[c] (Minn.; 1895.)

Where the vendor agreed to finish a house on the land sold, and gave the vendee a bond against mechanics' liens, in the absence of an agreement that the vendee should retain the purchase money, and apply it to the payment of the liens, the fact that he paid it to the vendor before any liens were asserted did not release the sureties on the bond.—*Reed v. McGregor* (Minn.) 64 N. W. 88.

62 Minn. 94.

[d] (Minn.; 1896.)

Where the contract of employment of a general manager, salesman, and collector provided for a provisional monthly accounting, and the refunding by the manager of any amount which he had drawn as salary in excess of one-half the profits of the business, sureties on the employee's bond were discharged by the failure of the employer to require an accounting for 13 months, and until the termination of the employment.—*Morrison v. Arons* (Minn.) 68 N. W. 33.

[e] (Minn.; 1896.)

Where a bond given by a bank as a depository of state funds recited that the bank had agreed to pay the state treasurer, as such, interest on such deposits, and was conditioned for the repayment of "all moneys belonging to the state of Minnesota which may be deposited with said bank by said treasurer or other lawful authority," sureties thereon were not discharged by the fact that the deposits were made in the name of the state treasurer, as such, in violation of Gen. St. 1894, § 344, and of Const. art. 9, § 12, which latter provision also makes such violation a criminal offense.—*State v. Farmers' & Merchants' State Bank* (Minn.) 69 N. W. 3.

[f] (Minn.; 1897.)

A withholding, by the principal, of the agent's written "commission," while allowing him to act as agent, does not release the sureties on the agent's bond.—*Traders' Ins. Co. v. Herber* (Minn.) 69 N. W. 701.

[g] (Neb.; 1896.)

A partnership, after taking a contract for the erection of a building, entered into an agreement with plaintiff for the furnishing of material to be used in the building, and thereafter was dissolved, and succeeded by a firm which completed the contract, and to which plaintiff furnished material under the agreement with the original contractor. *Held*, that the dissolution of the partnership did not release the sureties on its bond, conditioned that it should pay for all labor performed and material furnished it in the performance of the contract, as against laborers and material men.—*Kauffmann v. Cooper* (Neb.) 65 N. W. 796. 46 Neb. 644.

[h] (Neb.; 1896.)

Parties who signed the bond of one of the members of a copartnership, conditioned for the

faithful performance of his duties concerning the business in which the firm engaged, were not released from their obligation by an increase in the amount of the capital invested in the business.—*McAuley v. Cooley* (Neb.) 66 N. W. 304. 47 Neb. 165.

[i] (Neb.; 1896.)

Where the name of one of two sureties in a bond was forged, but the obligee had no knowledge thereof at the time the instrument was delivered and accepted, the other surety is not released, though he signed in the belief that the forged signature was genuine.—*Kansas City Terra-Cotta Lumber Co. v. Murphy* (Neb.) 68 N. W. 1030.

[j] (Wis.; 1896.)

Sureties on an administrator's bond are not relieved because it was understood that it should not be delivered until certain other persons had also signed as sureties, where it was delivered by the custodian, who was an agent of the administrator, and approved by the county judge, without knowledge of the condition, and nothing on its face indicated that others were to sign.—*Belden v. Hurlbut* (Wis.) 69 N. W. 357.

§ 12. Change in obligation of principal contract.

[a] (Mich.; 1895.)

In a suit against a lessee to which his surety was not a party the lease was reformed so as to make the rent payable on the first day of each quarter, according to the original written agreement, instead of the last day of each quarter. In an action on the reformed lease against the lessee and surety for rent, plaintiff testified that he never authorized nor agreed that the time for payment of the rent in the lease should be different from that provided in the original written agreement, and the attorney who drew up the lease testified that he knew of no agreement for such change. The lessee testified to an oral agreement for rent to be paid on the last day of each quarter, entered into prior to the original written agreement, but acknowledged that it was to be paid according to the original written agreement, and that there was no subsequent agreement for a change in the time for its payment, unless the clause in the lease showed such an agreement. *Held*, that the direction of a verdict against the surety was proper.—*Stevens v. Pendleton* (Mich.) 63 N. W. 655. 105 Mich. 519.

[b] (Minn.; 1895.)

Where the penal sum of a bond of a county depository was increased after execution, and the assessed valuation of the principal's property was less than one-half the original penal sum, the sureties were discharged.—*Board of Com'rs of Renville County v. Gray* (Minn.) 63 N. W. 635. 61 Minn. 242.

[c] (Minn.; 1895.)

Where sureties on a bond had knowledge that after execution the penalty therein was altered, and made no objection thereto, they were estopped from claiming a release because of such alteration.—*Board of Com'rs of Renville County v. Gray* (Minn.) 63 N. W. 635. 61 Minn. 242.

[d] (Neb.; 1896.)

A contract between an insurance company and its agent provided that the latter should make monthly reports of business transacted, and, on demand, pay over to his principal all moneys due him. The agent's compensation was fixed at 25 per cent. of the business done, and he gave a bond to secure the performance of his contract. After the execution of the bond, and without the knowledge of the surety thereon, the agent's compensation was changed to 28½ per cent., and he was given permission to employ solicitors of insurance, paying them out of his commission. *Held*, that there had been no material alteration in the contract, and that the

surety was not released.—*Taylor v. Standard Life & Accident Ins. Co.* (Neb.) 66 N. W. 647. 47 Neb. 673.

§ 13. — Building contracts.

[a] (Mich.; 1896.)

Sureties on the bond of a contractor for a public improvement requiring payment for all labor and material furnished for the work are not released, by payment of an antecedent debt by the contractor to a material man from the contract price, to the extent of such payment, from liability to such material man for materials furnished.—*People v. Powers* (Mich.) 66 N. W. 245.

[b] (Mich.; 1896.)

Sureties on a contractor's bond conditioned for the principal's faithful performance of a building contract, which provides that the consideration is to be paid to the principal at times therein specified as the work progresses, are released from all liability on the bond, if the payments are made before they are due by the terms of the contract.—*Backus v. Archer* (Mich.) 67 N. W. 913.

[c] (Neb.; 1895.)

The reservation of the right to make changes in the plans of a building implies, as against the guarantor of the contractor, that the changes shall be such as might have reasonably been contemplated by the parties when making the contract.—*O'Rourke v. Burke* (Neb.) 63 N. W. 17.

44 Neb. 821.

[d] (Neb.; 1895.)

Nor that the building was not completed within the time specified by the contract, where the contract provided that if the building was not so completed the owner might take possession, and have the same finished at the contractor's expense, and that the contractor should pay \$10 per day for every day of delay after the specified time, and the owner permitted the contractor to continue to work after the time specified.—*Gallagher v. St. Patrick's Church* (Neb.) 63 N. W. 864.

45 Neb. 535.

[e] (Neb.; 1895.)

Nor that the owner procured insurance to the full amount that any responsible company would cover.—*Gallagher v. St. Patrick's Church* (Neb.) 63 N. W. 864.

45 Neb. 535.

[f] (Neb.; 1895.)

It did not preclude such defense on the part of the sureties, in an action by the owner for the amount of his interest in the burned building, that the fire was occasioned by the negligence of the contractor.—*Gallagher v. St. Patrick's Church* (Neb.) 63 N. W. 864.

45 Neb. 535.

[g] (Neb.; 1895.)

The failure of the owner to observe the condition of a building contract requiring him to keep his interest in the building insured discharged the sureties of the contractor from liability for the amount of such interest, on the building's destruction, though the contractor knew that the condition was not being observed.—*Gallagher v. St. Patrick's Church* (Neb.) 63 N. W. 864. 45 Neb. 535.

[h] (Neb.; 1896.)

The sureties on the bond of a building contractor conditioned that the obligor should pay for all labor performed or material furnished him in completing the contract were not discharged, as against laborers or material men, by the fact that the contractor was paid a greater percentage of monthly estimates, made by the superintendent of construction as the work progressed, than was stipulated for in the building contract.—*Kauffmann v. Cooper* 65 N. W. 796. 46 Neb. 644.

[i] (Neb.; 1896.)

A surety on a contractor's bond is not relieved from liability for the payment of claims of

material men because the contractor was paid at an earlier date than fixed by the contract.—*King v. Murphy* (Neb.) 68 N. W. 1029.

§ 14. Extension of time of payment.

[a] (Iowa; 1891.)

Indorsements upon a note payable in six months, showing that interest had been paid annually on the note for several years, are not proof that an extension had been granted so as to discharge a surety.—*Dyer v. Shenkberg* (Iowa) 61 N. W. 403.

93 Iowa, 154.

[b] (Iowa; 1895.)

Where the consent of the payee in a note to an extension of the time of payment, and a reduction of the rate of interest as named therein, was secured by fraudulent representations by the maker that the surety consented thereto, the latter is not released from liability.—*Dwinell v. McKibben* (Iowa) 61 N. W. 985.

93 Iowa, 331.

[c] (Mich.; 1894.)

Where two partners of a firm since dissolved both signed a note, the time of payment of which was subsequently extended by the payee, with the consent of both makers, the fact that the payee extends the time of payment to one of them, knowing that their partnership had been dissolved, and that this one had assumed the payment of the note, leaving the other in the position of surety, as between them, discharges that other from liability.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Oliver* (Mich.) 61 N. W. 507.

103 Mich. 326.

[d] (Neb.; 1894.)

An extension of time for the payment of a debt will not discharge a surety unless it is for a definite time and on a sufficient consideration; a mere forbearance to sue not being sufficient.—*Watts v. Gantt* (Neb.) 61 N. W. 104. 42 Neb. 869.

[e] (Neb.; 1895.)

An agreement between a creditor and the principal debtor extending the time of payment does not release the surety, where there is no consideration for the agreement.—*Smith v. Mason* (Neb.) 63 N. W. 41.

44 Neb. 610.

[f] (S. D.; 1894.)

An answer, in an action on a note against a surety, alleging extensions to the maker without surety's knowledge, is not frivolous.—*Bank of Commerce v. Humphrey* (S. D.) 61 N. W. 444. 6 S. D. 415.

§ 15. — Burden of proof.

[a] (Minn.; 1895.)

In an action by a creditor against a surety to recover the amount of the debt, the burden is on the surety to plead and prove an extension given to the principal debtor without his consent.—*Washington Slate Co. v. Burdick* (Minn.) 62 N. W. 285.

60 Minn. 270.

[b] (Minn.; 1895.)

Where an extension of the time of payment is given by the creditor to the principal debtor, the burden is on the surety to show that such extension was given without his consent.—*Slate Co. v. Burdick* (Minn.) 62 N. W. 285. 60 Minn. 270, followed.—*Guderian v. Leland* (Minn.) 63 N. W. 175. 61 Minn. 67.

§ 16. Alteration of instrument—By act of co-surety.

(Neb.; 1895.)

Where some of the sureties on an appeal bond, after approval, erased their names therefrom without the obligee's knowledge, held, that the co-sureties are not released thereby.—*Bingham v. Shadle* (Neb.) 63 N. W. 143.

45 Neb. 82.

§ 17. Failure to give notice to surety.**[a] (Mich.: 1896.)**

A corporation principal, to whom an agent has given bond, owes to his sureties the duty of good faith in informing them of facts coming to its knowledge which may affect their future liability; and while more negligence of the agent in accounting will not charge it with such duty of giving notice, if it continues him in his position after knowledge of his embezzlement, or of other acts for which the sureties would be liable, without informing them of the facts, it cannot hold them for losses resulting to it from his subsequent misconduct.—*Aetna Ins. Co. v. Fowler* (Mich.) 66 N. W. 470.

[b] (Minn.: 1897.)

Where an agent, at the time of giving bond, is already in default, but he informs the obligee that he has made arrangements to pay his shortage, and there is no communication between the sureties and the obligee, the question of the obligee's bad faith in failing to inform the sureties of the shortage is for the jury.—*Traders' Ins. Co. v. Herber* (Minn.) 69 N. W. 701.

§ 18. Diligence in pursuing principal.**[a] (Minn.: 1896.)**

Where a husband for whom the wife was surety died, leaving an estate sufficient to discharge all claims against it, and the creditor failed to present his claim for allowance within the period fixed for presentation of claims, the wife was thereby relieved from further liability for the debt.—*Seibert v. Quesnel* (Minn.) 67 N. W. 803.

[b] (Neb.: 1895.)

The mere forbearance by the creditor, enlarging the time of payment, without consideration, or the failure to sue the principal when the debt becomes due, will not alone discharge the surety.—*Smith v. Mason* (Neb.) 63 N. W. 41.

44 Neb. 610.

§ 19. Release of other securities.**(Iowa: 1896.)**

In an action upon a promissory note, where defendant, claiming to be surety only, alleged that, as consideration of a mortgage given by his principal to plaintiff upon property for the purchase of which the notes in suit were given, plaintiff had agreed to release him from his liability as surety, there was no error in an instruction that, if defendant was merely a surety, plaintiff could not release any of the property covered by said mortgage, or appropriate it to his own use, or to any purpose other than payment of the claims secured thereby, without releasing defendant from liability to the extent of the value of such property so released or appropriated.—*De Goey v. Van Wyk* (Iowa) 66 N. W. 787.

III. REMEDIES AGAINST SURETIES.

Measure of damages recoverable against surety, see "Damages," § 13.

§ 20. Conditions precedent.**[a] (Neb.: 1895.)**

The issuing of an execution, and its return unsatisfied, is not a condition precedent to the right of a judgment creditor to maintain an action against the sureties on an appeal bond executed by the judgment debtor.—*Flannagan v. Cleveland* (Neb.) 62 N. W. 297.

44 Neb. 58.

[b] (N. D.: 1894.)

It is no defense to an action against sureties on an appeal bond that plaintiff holds security sufficient to pay the claim for which the sureties have become bound, and that plaintiff has refused on demand to resort to such security for payment, there being no proof that

the sureties were prejudiced by such refusal.—*Bingham v. Mears* (N. D.) 61 N. W. 808.

4 N. D. 437.

§ 21. — Exhausting principal's property.**[a] (Mich.: 1896.)**

Where a mortgage was given to secure the debt of one other than the mortgagor, subsequent lien holders, as such, have no right to insist that the mortgagees shall resort to their action against the principal on the debt secured, before selling the mortgaged property.—*Webber v. Webber* (Mich.) 66 N. W. 960.

[b] (Neb.: 1895.)

In an action against the sureties on an appeal bond, it is no defense that the judgment debtor has property out of which the creditor could satisfy his judgment.—*Flannagan v. Cleveland* (Neb.) 62 N. W. 297.

44 Neb. 58.

§ 22. Action against sureties.**[a] (Mich.: 1896.)**

The amount due the principal for extra work cannot be applied on the claim, where the obligation to pay for such extras did not arise till the architect had given an estimate therefor, and this is not shown.—*Marquette Opera-House Bldg. Co. v. Wilson* (Mich.) 67 N. W. 123.

[b] (Mich.: 1896.)

In an action on a bond collateral to a building contract, the sureties, who are alone served, may show, under a plea of the general issue, that plaintiff has money in his hands due to the principal, sufficient in amount to satisfy plaintiff's demand.—*Marquette Opera-House Bldg. Co. v. Wilson* (Mich.) 67 N. W. 123.

[c] (Minn.: 1895.)

In an action on the bond of a county depository, plaintiff need not show that the board of auditors advertised for proposals for the county deposits, that the proposal made by the depository was in the form required by law, that the depository possessed the requisite qualifications, nor that the bond was deposited with the county treasurer.—*Board of Com'rs of Renneville County v. Gray* (Minn.) 63 N. W. 635.

61 Minn. 242.

IV. RIGHTS AND REMEDIES OF SURETIES AS TO PRINCIPAL AND THIRD PERSONS.

Rights of sureties as to application of payments, see "Payment," § 20.

— interest in action for contribution, see "Interest," § 1.

§ 23. As to principal.**[a] (Mich.: 1896.)**

A mortgage was executed to secure a note of the mortgagor's son, to whom the mortgagor was indebted in almost the amount of the note, upon an agreement that the mortgagor should pay the note, and the son then pay him the difference between the indebtedness and the amount of the note. *Held*, that equity would not require the son to pay the note at the instance of the creditors of the father.—*Webber v. Webber* (Mich.) 66 N. W. 960.

[b] (Wis.: 1897.)

A surety may, in equity, compel his principal to exonerate him, by discharging the debt for which both are liable, without first paying it himself.—*Dobie v. Fidelity & Casualty Co. of New York* (Wis.) 70 N. W. 482.

§ 24. As to third person.**(Iowa: 1896.)**

In an action by a surety, who has paid the debt, upon a contract made by defendant with the principal to pay such debt as part of the

purchase price of certain stock, which had been pledged for a debt of the principal, the surety is not bound to show a delivery of the stock to defendant, the delivery of the stock not having been made a condition of defendant's liability.—*Gilbert v. Adams* (Iowa) 68 N. W. 883.

V. RIGHTS AND REMEDIES OF SURETIES INTER SE.

§ 25. Right to contribution.

[a] (Neb.; 1895.)

The mere refusal of a surety to accept property from the principal as indemnity will not defeat his right to contribution where he has paid the original debt.—*Smith v. Mason* (Neb.) 63 N. W. 41.

44 Neb. 610.

[b] (Neb.; 1895.)

To recover contribution against a cosurety, it is not necessary to show the insolvency of the principal.—*Smith v. Mason* (Neb.) 63 N. W. 41.

44 Neb. 610.

[c] (Neb.; 1895.)

Where one of the sureties discharges the debt of the principal by giving his individual note for part of the sum due, and money for the residue, which is received by the creditor as payment, and the evidence of the original debt surrendered, such surety is entitled to demand contribution from the other joint sureties, though the new note has not been paid.—*Smith v. Mason* (Neb.) 63 N. W. 41.

44 Neb. 610.

[d] (Neb.; 1895.)

Where a note signed by a principal and several sureties was paid by the delivery of a new note, executed by the principal and one surety, the latter could not, on being forced to pay the second note, compel contribution from his cosureties on the first.—*Chapman v. Garber* 64 N. W. 362, 46 Neb. 16.

[e] (Neb.; 1895.)

Where a note, to be executed in payment of a prior note, signed by the principal and two sureties, was presented by the principal to one surety for his signature, after having been signed by the other, the former surety could sign the note so as to limit or modify his liability, in the absence of an agreement with his cosurety to the contrary, and the latter, on paying the second note, could not compel contribution.—*Chapman v. Garber* (Neb.) 64 N. W. 362, 46 Neb. 16.

[f] (Neb.; 1897.)

A. sued B. and others, alleging that they had, with C. and others, named, executed as sureties a bond for the faithful performance of the duties of a county treasurer; that the treasurer had embezzled certain money, which C. and others, not parties to the suit, had paid to the county in discharge of their obligations; that thereafter the county had assigned its rights to A. in trust for C. and the other paying sureties. The petition prayed contribution from the defendants. It did not allege that the assignment by the county to the plaintiff was in pursuance of any agreement with the paying sureties by which A. was constituted their trustee. *Held*, that it stated no cause of action in favor of A.—*Fullerton v. Dilworth* (Neb.) 70 N. W. 931.

§ 26. — Insolvency of some of sureties. (Neb.; 1895.)

In an action by a surety against a cosurety for contribution, insolvent sureties will not be excluded, and the burden will be distributed equally among the sureties remaining solvent.—*Smith v. Mason* (Neb.) 63 N. W. 41.

44 Neb. 610.

§ 27. Action for contribution—Pleading. (Wis.; 1895.)

In an action by sureties on the bond of an insolvent executor, against a cosurety, for contribution, a petition alleging the execution of the bond by plaintiffs and defendant, the insolvency of the executor, the payment of his indebtedness to the estate by plaintiffs upon being threatened with suit, and defendant's failure to contribute to such payment, was good against general demurrer.—*Hardell v. Carroll* (Wis.) 63 N. W. 275.

90 Wis. 350.

See, also, ante, § 23.

PRIORITIES.

Estoppel to assert priority of lien, see "Estoppel," § 29.

Of attachments, see "Attachment," § 30.

—lien over unrecorded deed, see "Attachment," § 29.

Of claims against decedents' estates, see "Executors and Administrators," §§ 25, 26.

—insolvent corporations, see "Corporations," § 94.

Of creditors of fraudulent grantor, see "Fraudulent Conveyances," § 27.

Of execution liens, see "Execution," § 14.

Of firm and private creditors, see "Partnership," §§ 38, 39.

Of judgment liens, see "Judgment," §§ 66, 67.

Of liens for rent, see "Landlord and Tenant," § 55.

—of attorneys, see "Attorney and Client," § 20.

—on corporate stock, see "Corporations," § 48.

Of mechanics' liens, see "Mechanics' Liens," §§ 39–43.

Of mortgage liens, see "Chattel Mortgages," §§ 27, 28; "Mortgages," §§ 20–22.

Of rights of devisees and legatees, see "Wills," § 63.

Of tax liens, see "Taxation," § 56.

Who entitled to priority over unrecorded mortgage, see "Chattel Mortgages," §§ 24, 25.

PRISONS.

See "Jail and Jailer"; "Penitentiary."

PRIVATE NUISANCE.

See "Nuisance," §§ 3–6.

PRIVATE ROAD.

See "Easements."

PRIVATE SALE.

On mortgage foreclosure, see "Chattel Mortgages," §§ 50, 51.

PRIVILEGE.

See "Liens."

Of witness, see "Witness," §§ 43–48.

Right to privileges of citizens of other states, see "Constitutional Law," § 61.

Special privileges, see "Constitutional Law," § 26.

Taxes, interference with interstate commerce, see "Constitutional Law," §§ 50–52.

PRIVILEGED COMMUNICATIONS.

See "Libel and Slander," §§ 16-19; "Witness," §§ 9-14.

PROBABLE CAUSE.

See "Malicious Prosecution," §§ 5-7.

Finding on preliminary examination, see "Criminal Law," § 18.

PROBATE.

Of will, see "Wills," §§ 19-32.

PROBATE COURTS.

See "Courts," §§ 19-21.

PROCESS.

See "Writs and Notice of Suits."

Abuse of process, see "Abuse of Process."

PROCHEIN AMI.

See "Infancy," § 6.

PROHIBITION, WRIT OF.

Original jurisdiction of supreme court, see "Courts," § 15.

(Wis.; 1895.)

A writ of prohibition will not issue to stay a special proceeding for the incorporation of a village on the ground that the statute authorizing the incorporation of villages is unconstitutional.—*In re Schmaker* (Wis.) 63 N. W. 1050.

90 Wis. 488.

PROMISSORY NOTES.

See "Negotiable Instruments."

PROMOTERS.

See "Corporations," § 2.

PROOF.

See "Evidence."

Of claims against assigned estate, see "Assignment for Benefit of Creditors," § 34.

Of loss under policy, see "Insurance," §§ 72-91.

PROPER PARTIES.

See "Parties," §§ 6-10.

PROPERTY.

Deprivation without due process of law, see "Constitutional Law," §§ 41, 42.

Description in indictment, see "Indictment and Information," § 19.

Evidence of ownership, see "Evidence," § 113.

Homicide in defense of, see "Homicide," § 17.

Jurisdiction of action relating to property in another state, see "Courts," § 8.

Of church, see "Religious Societies," §§ 2, 3.

Right of aliens to take land by inheritance, see "Aliens," § 1.

Rights in intoxicating liquors, see "Intoxicating Liquors," §§ 64-67.

Subject to attachment, see "Attachment," §§ 9, 10.

— to execution, see "Execution," §§ 9, 10.

— to garnishment, see "Garnishment," §§ 1-13.

— to lien, see "Mechanics' Liens," §§ 2-8.

— to power of eminent domain, see "Eminent Domain," § 6.

— to prescription, see "Adverse Possession," § 2.

PROSECUTING ATTORNEYS.

See "District and Prosecuting Attorneys."

PROSPECTIVE DAMAGES.

See "Damages," §§ 30, 32.

For failure to deliver telegram, see "Telegraph Companies," §§ 10, 11.

PROSTITUTION.

See, also, "Disorderly House."

[a] (Iowa; 1895.)

An instruction that, if defendant "occupied or inhabited" a place resorted to for purposes of prostitution, she was guilty, was not prejudicial, where it was conceded that defendant was the only occupant of the house.—*State v. Russell* (Iowa) 64 N. W. 281.

[b] (Iowa; 1895.)

McClain's Code, § 5326, provides that if any person, for the purpose of prostitution, resorts to, uses, or occupies or inhabits, any house of ill fame, or place kept for such purposes, such person shall be punished, etc. *Held*, that an indictment alleging that defendant did resort to, use, occupy, and inhabit a certain place for the purpose of prostitution and lewdness, said place being then and there in the possession and under the control of said defendant, is sufficient, though it does not charge that the place was a house of ill fame, or was kept for such purpose.—*State v. Russell* (Iowa) 64 N. W. 281.

PROTEST.

See "Negotiable Instruments," § 66.

PROTHONOTARY

See "Clerk of Court."

PROXIMATE CAUSE.

See "Damages," § 6; "Negligence," §§ 10-16.

PUBLICATION.

Of delinquent taxes, see "Taxation," §§ 67, 68.

Of ordinance, see "Municipal Corporations," § 24.

Of slander, see "Libel and Slander," § 9.

Service of process by, see "Writs and Notice of Suits," §§ 16-19.

PUBLIC IMPROVEMENTS.

See "Municipal Corporations," §§ 109-168.

PUBLIC LANDS.

- I. ENTRIES UNDER FEDERAL LAWS, §§ 1-5.
- II. CONGRESSIONAL GRANTS IN AID OF RAILROADS, §§ 6-9.
- III. SWAMP LANDS, §§ 10, 11.
- IV. SCHOOL LANDS, § 12.
- V. TITLES DERIVED FROM STATES, § 13.
- VI. PATENTS, § 14.
- VII. THE LAND OFFICE, §§ 15-17.
- VIII. RELIEF AGAINST FRAUD AND MIS-TAKE, § 18.
- IX. CONVEYANCES, CONTRACTS, AND EXEMPTIONS, §§ 19, 20.
- X. CUTTING TIMBER, §§ 21, 22.

Appropriation of waters, see "Waters and Water Courses," § 1.

State board of public lands, see "States and State Officers," § 5.

Taxation of railroad grants, see "Taxation," § 7. When entry becomes taxable, see "Taxation," § 21.

I. ENTRIES UNDER FEDERAL LAWS.

Conveyance of homestead entry, see post, § 19.

§ 1. Entry on railroad grant.

(Minn.: 1895.)

After a location has been made of a right of way by a railroad company under Act Cong. March 3, 1857, known as the "Land-Grant Act," one acquiring the land from the United States, with notice of the location, takes subject thereto. *Simonson v. Thompson* (1879) 25 Minn. 450, followed.—*Tuttle v. Chicago, St. P., M. & O. Ry. Co.*, 63 N. W. 618, 61 Minn. 190.

§ 2. Timber culture entry.

(S. D.: 1891.)

A settler on public land previously unoccupied, who has placed a timber culture filing thereon, is entitled, as against third persons, to the possession of all the land that he will ultimately take by his patent; and as against trespassers who have forcibly excluded him therefrom he may recover the treble damages provided for by Comp. Laws, § 4610.—*Olson v. Hantamer* (S. D.) 61 N. W. 479, 6 S. D. 364.

§ 3. Application for homestead.

(Minn.: 1897.)

Where a plaintiff in an action for possession of land claims under foreclosure of a mortgage made by one in possession and claiming through a grantee of the government, a finding that the title is in the government is not sustained by evidence merely that the mortgagor, after giving the mortgage, conveyed to defendant, who has applied to enter the land as a homestead, and that the application is still pending.—*Preiner v. Meyer* (Minn.) 69 N. W. 887.

§ 4. Rights acquired by entry.

(S. D.: 1896.)

Since the passage of Act Cong. July 26, 1866 (Rev. St. U. S. § 2477), declaring that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted"; and the territorial act of January 12, 1871 (Comp. Laws, § 1189), providing that all section lines shall be public highways so far as practicable,—persons filing on public lands take the same subject to the right

of way along section lines for highway purposes. *Wells v. Pennington Co.* (1891) 48 N. W. 305, 2 S. D. 1, followed.—*Keen v. Board of Sup'rs of Fairview Tp.*, 67 N. W. 623.

§ 5. Town sites.

(Neb.: 1896.)

Where property is conveyed under Act Cong. May 23, 1854 (5 Stat. 657), relating to town sites, by the United States to the corporate authorities of a town or city, or trustee designated by law, a deed executed by the trustee, or the party authorized by law to make the transfer, evidences the determination by the party executing it that all the preliminary steps have been taken, and the requirements complied with, and that the person to whom the deed runs is the one entitled to receive it, and the question of the validity of the deed cannot be litigated in a collateral proceeding.—*Green v. Barker* (Neb.) 66 N. W. 1032, 47 Neb. 934.

(Ib.) (Neb.: 1896.)

The designation, in a deed of a town-site trustee, of an act which had been repealed, as the act under which the deed was executed, was equivalent to the mention of no act.—*Green v. Barker* (Neb.) 66 N. W. 1032, 47 Neb. 934.

(Ic.) (Wis.: 1895.)

Laws 1856, c. 95, makes the county judges trustees of lands conveyed under the federal town-site law, and authorizes them to convey to occupants a perfect title to the interest claimed by them in town sites, and to determine conflicting claims, and makes their decision final. *Held*, that the validity of such a conveyance can be questioned only by one interested in the trust on direct proceedings.—*Tucker v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 65 N. W. 515, 91 Wis. 576.

II. CONGRESSIONAL GRANTS IN AID OF RAILROADS.

§ 6. Operation of grant to state.

(Wis.: 1896.)

A grant of land by congress to a state in aid of railroad construction is a grant in present; and the title of the beneficiary, when the lands are earned and selected, relates back to the date of the grant. The federal government cannot subsequently give title to lands covered by such grant, as against the state or its grantees.—*Paige v. Koltman* (Wis.) 67 N. W. 700, 93 Wis. 435.

§ 7. Rights acquired by railroad.

(Minn.: 1895.)

Under Act Cong. March 3, 1857, known as the "Land-Grant Act," and the acts of the territory of Minnesota incorporating the Root River Valley & Southern Minnesota Railroad Company, such corporation was authorized to appropriate a right of way, for the lines of railway to be constructed by it, over the public lands of the United States, except as to lands reserved or disposed of at the time such right of way should be actually located.—*Tuttle v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 63 N. W. 618, 61 Minn. 190.

§ 8. Exceptions.

(Minn.: 1896.)

To entitle one who settled on lands within the grant for the St. Paul & Pacific Railway Company's Extension Lines made by Sp. Laws 1877, c. 201, as amended by Sp. Laws 1878, c. 71, to the protection of section 10 of the original act, excepting from the grant lands previously settled on in good faith, he must have settled upon the land on or prior to March 1, 1877.—*St. Paul, M. & M. Ry. Co. v. Broulette* (Minn.) 67 N. W. 1010.

§ 9. Withdrawal of lands from entry and settlement.

(Minn.: 1896.)

While a land-grant railroad company has no vested right in a mere executive withdrawal from entry and settlement of lands within either its "place" or "indemnity" limits, yet, so long as the withdrawal continues in force, the lands are not subject to entry and settlement, and no lawful settlement on them can be acquired—*Sage v. Swenson* (Minn.) 67 N. W. 544.

64 Minn. 517.

III. SWAMP LANDS.**§ 10. Operation of grant to state.**

[a] (Iowa: 1897.)

Act Cong. Sept. 28, 1850, granting swamp lands to states, was a grant in present, and the act of the Iowa general assembly of 1853, in the same manner, vested title in the respective counties.—*Smith v. Miller* (Iowa) 70 N. W. 123.

[b] (Iowa: 1897.)

The United States, having granted to Iowa swamp lands on the Missouri river, had a legal right to subsequently convey other lands between said grant and the river, which existed at the time of the original survey, and were not afterwards formed by accretion.—*Smith v. Miller* (Iowa) 70 N. W. 123.

§ 11. — Lands included.

(Iowa: 1896.)

Evidence that land, at a remote time, before the prairie sod in the part of the state in which it was situated had been broken, though not as far back as 1850, was swamp land, is sufficient to show that it was swamp land in 1850, so as to pass under the swamp land grant of September 28, 1850.—*Bourne v. Ragan* (Iowa) 65 N. W. 826.

IV. SCHOOL LANDS.

Lease of, see post, § 13.

§ 12. Presumption of title in state.

(Minn.: 1895.)

The fact that the state issued a patent for lands in section 22, which recited the act of congress granting to the state for school purposes sections 16 and 36 in each township, did not raise a presumption that the state ever owned the land covered by the patent.—*Butler v. Drake* (Minn.) 64 N. W. 559.

62 Minn. 229.

V. TITLES DERIVED FROM STATES.**§ 13. Nebraska—School lands.**

[a] (Neb.: 1896.)

The provision in relation to the forfeiture of school-land leases held by nonresidents, in Comp. St. c. 80, art. 1, § 16, that "the forfeiture may be entered by said board after 90 days from the date of such published notice," has the same meaning as though it read "after 90 days from the completion of the publications required by the statute."—*State v. Henton* (Neb.) 67 N. W. 443.

48 Neb. 488.

[b] (Neb.: 1896.)

The forfeiture of a school-land lease upon notice published for less time than required by the statute for that purpose is ineffective.—*State v. Henton* (Neb.) 67 N. W. 443.

48 Neb. 488.

[c] (Neb.: 1896.)

An assignee of a lease of school lands whose assignment has not been recorded in the office of

the commissioner of public lands and buildings, as required by Comp. St. c. 80, art. 1, § 14, is not entitled, under section 16, to redeem from a forfeiture of the lease.—*Langan v. Binfield* (Neb.) 69 N. W. 123.

VI. PATENTS.**§ 14. Collateral attack.**

(Neb.: 1896.)

The presumptions arise, from the existence of a patent, evidencing a grant of land from the United States, that all acts have been performed, and all facts have been shown, which are prerequisites to its issuance, and that the right of the party, grantee therein, to have it issue, has been presented to and passed upon by the proper officers; and such patent is not open to collateral attack.—*Green v. Barker* (Neb.) 66 N. W. 1032.

47 Neb. 934.

VII. THE LAND OFFICE.

Relief from cancellation of entry, see post, § 18.

§ 15. Cancellation of entries.

[a] (Iowa: 1895.)

A decision of the department of the interior canceling a swamp-land claim, made without notice to the claimant, and after service on one purporting to be claimant's attorney, but who was never authorized to act as such, is void.—*Young v. Hanson* (Iowa) 64 N. W. 654.

[b] (N. D.: 1894.)

The power of the commissioner of the general land office to cancel an entry on land is not affected by a transfer of the land by the entryman to a purchaser who had no knowledge of the facts because of which the entry is canceled.—*Parsons v. Venzke* (N. D.) 61 N. W. 1036.

4 N. D. 452.

[c] (N. D.: 1896.)

The fact that a mortgagee of the holder of a patent certificate had no notice of proceedings to cancel the certificate, and no opportunity to be heard therein, does not render void the cancellation by the land department, but merely entitles him to a hearing on the question of the legality of the original entry; hence, in a contest between him and one claiming under a patent issued after the cancellation, the canceled certificate was no evidence of title.—*Guaranty Sav. Bank v. Bladow* (N. D.) 69 N. W. 41.

§ 16. Conclusiveness and effect of decisions.

[a] (Iowa: 1895.)

Where the record of proceedings before the department of the interior resulting in the cancellation of a swamp-land claim fails to show that any notice whatever was served on the claimant, the decision rendered in such proceedings is subject to collateral attack.—*Young v. Hanson* (Iowa) 64 N. W. 654.

[b] (Minn.: 1896.)

A party claiming the right to pre-empt certain government land filed an application to contest, as invalid, a prior entry, and the contest was being heard by the local land officers. He then voluntarily stipulated into the hearing certain evidence as to his qualifications and right to make a pre-emption, although that question had not been ordered to be inquired into at the contest; but the commissioner of the general land office and the secretary of the interior passed upon the evidence, and held that the party was disqualified to pre-empt the land. Held, that by the stipulation he waived his right to object to a consideration of his qualifications and rights as a pre-emption claimant, and the irregular manner in which the officers

of the land department proceeded in adjudicating as to such qualifications and rights, and, there being evidence to sustain a finding that he was disqualified and had not a pre-emptor's rights, such finding is conclusive upon him.—*Bishop Iron Co. v. Webber* (Minn.) 68 N. W. 95.

[C] (N. D.; 1894.)

When a full opportunity to be heard has been afforded the parties in interest, the courts will not disturb the decision of the commissioner in canceling an entry because of errors in regard to the burden of proof, or the competency or weight of evidence.—*Parsons v. Venzke* (N. D.) 61 N. W. 1036.

4 N. D. 452.

[D] (N. D.; 1894.)

The decision of the land department as to matters of fact involved in the cancellation of an entry is binding on the courts where the parties interested had an opportunity to be heard.—*Parsons v. Venzke* (N. D.) 61 N. W. 1036.

4 N. D. 452.

§ 17. Contest—Service of notice.

(N. D.; 1894.)

The failure of the land department to require the filing of an affidavit that the party to be served with notice of a contest of an entry cannot be personally served is not fatal to the power of the department to act on a mere publication of notice, without personal service, where the party does in fact know of the hearing, and has an opportunity to be heard.—*Parsons v. Venzke* (N. D.) 61 N. W. 1036.

4 N. D. 452.

VIII. RELIEF AGAINST FRAUD AND MISTAKE.

§ 18. Cancellation of entry.

[A] (N. D.; 1894.)

One claiming the legal title to land, despite the cancellation of the pre-emptor's entry under which he claims, must prove that the entryman acted in good faith, and fully complied with the law.—*Parsons v. Venzke* (N. D.) 61 N. W. 1036.

4 N. D. 452.

[B] (N. D.; 1894.)

When the power of the commissioner of the general land office to cancel an entry has been exercised under a mistake as to the law, equity will correct the error, and compel the subsequent patentee to convey to the one entitled to the patent.—*Parsons v. Venzke* (N. D.) 61 N. W. 1036.

4 N. D. 452.

IX. CONVEYANCES, CONTRACTS, AND EXEMPTIONS.

§ 19. Homestead entry.

[A] (Mich.; 1895.)

Under Rev. St. U. S. §§ 2290, 2291, providing that a person applying for the entry of a homestead claim shall make affidavit that the application is made for his exclusive use and benefit, and not directly or indirectly for the use of another, and that no part of the land has been alienated except for church or other specified purposes, a contract to convey, for a valuable consideration, the title to land which is at the time in the United States, by a person who contemplates and afterwards does take it as a homestead, is void as against public policy, and cannot be enforced in a court of equity.—*Carley v. Gitchell* (Mich.) 62 N. W. 1003.

105 Mich. 38.

[B] (Minn.; 1895.)

The right given by Rev. St. U. S. § 2306, to enter a "soldier's additional homestead," is assignable. *Webster v. Luther* (1892) 52 N. W. 271, 50 Minn. 77, followed.—*Tuman v. Pillsbury*, 63 N. W. 104, 60 Minn. 520.

§ 20. Exemption of lands from liability for debts.

(Neb.; 1895.)

The fact that the patentee of lands acquired under the federal homestead law conveys the lands, and afterwards reacquires title, does not render the lands subject to debts of the patentee created before the patent was issued.—*Brandhoefer v. Bain* (Neb.) 64 N. W. 213, 45 Neb. 781.

X. CUTTING TIMBER.

§ 21. Sale of timber and permit to cut.

[A] (Minn.; 1895.)

Under Gen. St. 1894, § 4011, providing that before any state pine lands shall be sold the commissioner shall submit an appraisal and estimate of the timber to the governor, treasurer, and commissioner, who shall state thereon that it is for the interest of the state that the timber shall be sold, a sale by the commissioner without the official statement and sanction is unauthorized, and his permit to cut timber void.—*State v. Shevlin-Carpenter Co.* (Minn.) 64 N. W. 81.

62 Minn. 99.

[B] (Minn.; 1895.)

A permit given by the commissioner of the state land office to cut pine timber belonging to the state, void because given without the official statement and sanction of the governor and treasurer in connection with the commissioner, may be attacked collaterally, though it recites facts showing that the law was complied with.—*State v. Shevlin-Carpenter Co.* (Minn.) 64 N. W. 81.

62 Minn. 99.

§ 22. Indictment.

[A] (S. D.; 1897.)

An indictment charging that defendant did willfully, etc., "cut and remove" from school land certain timber then and there growing, charges an offense within Laws 1890, c. 140, § 2, prescribing punishment for any person "who shall remove" any timber standing or growing on such land; the word "cut" being mere surplusage.—*State v. Dorman* (S. D.) 70 N. W. 848.

[B] (S. D.; 1897.)

The statute does not require that the offense shall be "knowingly" committed, and hence it is no defense that defendant did not know that the land from which he removed the timber was school land.—*State v. Dorman* (S. D.) 70 N. W. 848.

PUBLIC NUISANCE.

See "Nuisance," § 1, 2.

PUBLIC POLICY.

Contracts against, see "Contracts," §§ 14-22.

PUBLIC PRINTER.

See "Newspapers."

PUBLIC USE.

See "Eminent Domain," § 1.

PUNISHMENT.

Cruel or unusual punishment, see "Constitutional Law," § 76.

Excessive sentence, see "Criminal Law," § 187.

For assault and battery, see "Assault and Battery," § 10.

For contempt, see "Contempt," §§ 19, 20.

For violation of city ordinance, see "Municipal Corporations," § 37.

For violation of injunction, see "Injunction," § 31.

Instructions as to, see "Criminal Law," § 143.

Of principals and accessories, see "Criminal Law," § 12.

PUNITIVE DAMAGES.

See "Damages," §§ 3-5.

PUPILS.

See "Schools and School Districts," § 28.

Q.

QUALIFICATION.

Of attorneys appointed to assist prosecuting attorneys, see "Criminal Law," § 55.

Of juror, see "Jury," § 1.

Of officer, see "Office and Officer," §§ 6-8.

— to take acknowledgment, see "Acknowledgment," § 3.

Of voter, see "Elections and Voters," § 4.

QUANTUM MERUIT.

See "Assumpsit," § 5.

Allegation of full performance of contract, recovery on quantum meruit, see "Contracts," § 69.

Recovery by servant on, see "Master and Servant," § 13.

— on implied promise when express promise is within statute, see "Frauds, Statute of," § 29.

— where express contract was pleaded, see "Pleading," § 78.

QUASHING.

Attachment, see "Attachment," §§ 57, 58.

Indictment, see "Criminal Law," § 23.

QUIETING TITLE—REMOVAL OF CLOUD.

I. WHEN ACTION LIES, §§ 1-4.

II. PLEADING AND EVIDENCE, §§ 5-7.

III. PRACTICE, §§ 8-10.

Laches of complainant, see "Equity," § 50.

Service of process by publication, see "Writs and Notice of Suits," § 17.

To mining claim, see "Mines and Mining," § 6.

I. WHEN ACTION LIES.

§ 1. By and against whom maintainable.

[a] (Minn.: 1896.)

Where an infant executes a mortgage of land, and on coming of age seeks to disaffirm it, he is not required to set up the execution of the mortgage, and his infancy, and ask that the deed be adjudged void, but may bring a statutory action against the mortgagee to determine adverse claims to the property.—*Alt v. Groff* (Minn.) 68 N. W. 9.

[b] (S. D.: 1895.)

The holder of a certificate of purchase of land at a tax sale claims "an estate or interest" in such land, within Comp. Laws, § 5449, authorizing an action to quiet title against such claimant.—*Clark v. Darlington* (S. D.) 63 N. W. 771.

§ 2. What constitutes cloud.

[a] (Minn.: 1895.)

After the sale of a lot to a mortgagee under the mortgage, the mortgagor, for the sole purpose of extending his time for redemption 500 days, procured his equity to be transferred to a third party, from whom he received 100 independent mortgages, which were recorded at different hours, and filed 100 independent notices of intention to redeem. *Held*, that the mortgages and notices constituted a cloud on the purchaser's title.—*New England Mut. Life Ins. Co. v. Capehart* (Minn.) 65 N. W. 258. 63 Minn. 120.

[b] (Neb.: 1895.)

Judgments against the owner of a homestead, recorded in the county where the homestead is situated, though not based on debts secured by mortgage, mechanic's or vendor's lien, or incurred for laborer's, clerk's, or servant's wages, are apparent liens on the homestead, and constitute a cloud on title, which a court of equity had jurisdiction to remove.—*Corey v. Schuster* (Neb.) 62 N. W. 470. 44 Neb. 269.

[c] (Neb.: 1895.)

It is not an essential prerequisite to the maintenance of an action by the owner of a homestead to remove clouds on his title, consisting of recorded judgments, that the judgment creditors were threatening execution on the homestead.—*Corey v. Schuster* (Neb.) 62 N. W. 470. 44 Neb. 269.

[d] (Neb.: 1895.)

Where plaintiff purchased land without actual knowledge of the existence of a prior contract of sale to another person, and without constructive knowledge of such contract, except the record thereof, though it was not entitled to record because of defects in its execution, *held*, that plaintiff is entitled to a cancellation of such contract as a cloud on his title.—*Warnick v. Latta* (Neb.) 62 N. W. 1097. 44 Neb. 807.

[e] (Wis.: 1896.)

Rev. St. § 3186 (Laws 1893, c. 88), authorizing an action, by the person having the legal title and possession of land, against "any one setting up a claim" to the land, to quiet title, authorizes such action against a person claiming an interest in land under a contract of sale,

though the contract on its face shows that the claim is invalid.—Fox v. Williams (Wis.) 66 N. W. 357.

92 Wis. 320.

§ 3. Title of plaintiff.

1a) (Iowa: 1895.)

A father executed deeds of his realty to his several children, including plaintiff and defendants, in consideration of their written agreement to provide for him and one of his daughters during their lives, but said deeds were not recorded. Defendants resided on the property so deeded to them, and supported father and daughter as agreed for nearly two years, when, without their fault, the father left. Thereafter, with the consent of all his children but defendants, he canceled said deeds and contract, and executed to plaintiff a deed to the property theretofore conveyed to defendants. *Held*, that although the deed to defendants was never delivered, plaintiff having taken the property thereby conveyed with notice of the partly-executed agreement that defendants should have it, he cannot have his title thereto quieted as against defendants.—Decker v. Decker (Iowa) 61 N. W. 921.

93 Iowa, 201.

1b) (Iowa: 1895.)

The testimony of an alleged grantee that he purchased the land, and of another witness that he, as the owner's agent, sold the land to him, and procured a deed for it from the owner, and evidence that, immediately after the alleged purchase, the grantee went into possession, shows a good title in such grantee, as against a person claiming under a quitclaim deed from the same grantor, executed after the prior grantee had been in possession seven years.—Krueger v. Walker (Iowa) 63 N. W. 320.

1c) (Iowa: 1895.)

In an action to recover land and quiet title, plaintiff must show title in himself.—Schlosser v. Crookshank (Iowa) 65 N. W. 344; Caldwell v. Jackson, Id.; McNary v. Same, Id.

1d) (Mich.: 1897.)

How. Ann. St. § 6626, authorizing one having possession and the legal or equitable title to land to sue to quiet title, includes a person claiming title by adverse possession.—Vier v. City of Detroit (Mich.) 70 N. W. 139.

1e) (Minn.: 1896.)

One who conveyed land by warranty deed with full covenants, and delivered possession to the grantee under an agreement that part of the price should be deposited with a third person, and should not be paid to the grantor until a cloud on the title was removed, had sufficient interest to maintain a bill to remove the cloud.—Styer v. Sprague (Minn.) 65 N. W. 659. 63 Minn. 414.

1f) (Neb.: 1895.)

In an action to quiet title, where plaintiff's title is put in issue, he must show that he is the owner of the property, or has some interest therein superior to that of defendant.—McCauley v. Ohenstein (Neb.) 62 N. W. 232.

44 Neb. 89.

1g) (Neb.: 1896.)

An action to quiet title to real property may be maintained by a remainder-man during the continuance of the particular estate.—Hall v. Hooper (Neb.) 66 N. W. 33.

47 Neb. 111.

1h) (Neb.: 1896.)

Where a judicial sale and conveyance of land have been made under a void decree, a court of equity will not give affirmative relief to the person whose estate was sought to be divested, unless he shows some equitable interest in the land.—Hall v. Hooper (Neb.) 66 N. W. 33.

47 Neb. 111.

1i) (S. D.: 1895.)

Under a power of attorney from D., who held the legal title, M. sold for full value, and

attempted to convey to W., a lot located on a 40-acre tract, which had been laid out and platted as a town site. The deed was inadvertently signed by M., as grantor, instead of D., by said attorney in fact. W. immediately erected a business building thereon, and went into and remained in actual possession, and was so occupying the same when a deed to the entire 40 acres was executed to E. in proper form, signed D., by his attorney in fact; and afterwards, for the purpose of correcting the error and to carry out the agreement between the original parties, a proper deed to the lot was executed and delivered to F., a bona fide purchaser, who, claiming title under a deed from W., had been for more than 10 years in actual possession. *Held*, in an action by F. to quiet title, and set aside the deed to E. so far as the same affects said lot, and to restrain a judgment creditor of said E. from selling the premises on execution, that, as against W., the equitable owner or his successor in interest in actual possession, the deed to E. is void under Comp. Laws, § 3303, and that the lien of said judgment creditor is subject to existing equities.—Pitzgerald v. Miller (S. D.) 63 N. W. 221.

1j) (Wis.: 1897.)

The legal owner, whether in possession or not, may sue to remove a cloud from title, where the validity of the adverse claim can only be shown by evidence dehors any record.—Davenport v. Stephens (Wis.) 70 N. W. 661.

§ 4. Compensating defendant.

(Neb.: 1895.)

A mortgagor, in order to remove the cloud cast on his title by a sheriff's deed executed under a void foreclosure proceeding, must offer to pay what was equitably due under the mortgage, though the mortgagee's right to foreclose be barred.—Hall v. Hooper (Neb.) 66 N. W. 33.

47 Neb. 111.

II. PLEADING AND EVIDENCE.

§ 5. Petition, bill, or complaint.

1a) (Neb.: 1895.)

In an action to quiet title, plaintiff alleged that he was owner of the land, and entitled to possession thereof; that defendant claimed an interest therein under a tax deed; that "there was no legal and sufficient levy of taxes" for which said land was sold on which said tax deed is based. He asked that the tax deed be declared void, but made no offer to repay defendant the sum paid at the tax sale, or for taxes subsequently paid. *Held* not to state cause of action.—Weston v. Meyers (Neb.) 63 N. W. 117.

45 Neb. 95.

1b) (Neb.: 1896.)

A petition was not open to the objection of failing to plead plaintiff to be the owner of the land in suit where it averred "that plaintiff was, at the time of the making and execution of the contract hereinafter mentioned [the one sought to have canceled], the owner, and is now, and has been for more than five years last past, in the possession" of the premises in controversy, and there was no averment in the pleading that plaintiff ever parted with title.—Scarborough v. Myrick (Neb.) 66 N. W. 867.

47 Neb. 794.

1c) (S. D.: 1895.)

Where it does not appear in a complaint in an action to quiet title that taxes are due upon the land in suit, the complaint is not rendered insufficient by the fact that it contains no offer to pay taxes.—Clark v. Darlington (S. D.) 63 N. W. 771.

1d) (S. D.: 1895.)

The fact that the complaint in an action to quiet title against a claimant under a tax-sale certificate does not set out the facts on which the invalidity of the certificate is pred-

icated does not render it insufficient.—Clark v. Darlington (S. D.) 63 N. W. 771.

§ 6. Answer.

(Mich.: 1895.)

In a suit to quiet title, where complainant sets up a prima facie valid title under a tax deed, defendant must specifically plead facts tending to defeat the tax sale.—Wagar v. Bowley, 62 N. W. 293, 104 Mich. 38.

§ 7. Issues raised.

(Iowa: 1897.)

In an action to remove a cloud on plaintiff's title to lands, on which defendants claimed a lien by attachment, defendants, by cross petition, asked affirmative relief by reason of their attachment, bringing in grantees of plaintiff as parties. An amendment to plaintiff's original petition contained averments as to the pretended levy of such attachment, and denied that any interest was acquired by it. In their answer to the cross petition plaintiff's grantees denied the levy of the attachment. *Held*, that the issue as to the sufficiency of the levy to affect the title of plaintiff's grantees was thereby raised.—Anderson v. Moline Plow Co. (Iowa) 69 N. W. 1028.

III. PRACTICE.

§ 8. Parties.

(Iowa: 1894.)

The grantor under whom both the parties to an action to quiet title claim is not a necessary party to the action.—Independent School Dist. No. 3, Fremont Tp., v. Gunn (Iowa) 61 N. W. 417.

93 Iowa, 44.

§ 9. Judgment or decree.

(Ia.: 1895.)

In an action, under the statute, to determine an adverse claim to vacant real estate, where the answer denies plaintiff's title, plaintiff is not entitled to judgment on the pleadings, though the answer fails to show that defendant has an interest in the premises. *Donohue v. Ladd* (1883) 17 N. W. 381, 31 Minn. 244, overruled.—*Wheeler v. Winnebago Paper Mills*, 64 N. W. 920, 62 Minn. 429.

(Ia.: 1896.)

In an action quia timet, the question of title between the parties may be fully litigated and determined, and a decree rendered assigning the title to the real estate, or any part of it, to the party entitled thereto.—*Dolen v. Black* (Ia.) 67 N. W. 760.

48 Neb. 688.

§ 10. Costs.

(Iowa: 1895.)

A contract for the sale of lots belonging to plaintiff's assignor stipulated that, on the payment of a fixed sum, any one or more lots were to be conveyed to such person as the purchaser might direct. The purchaser accordingly gave an order to Y. for a number of lots, and plaintiff accepted the order. Afterwards Y. offered to pay for the lots, which offer was refused. Y. conveyed her interest in the lots to G., who conveyed to defendant. Plaintiff asked that the alleged clouds upon the title be removed, and for a decree quieting title in her. *Held*, that the action was one to quiet title, within the meaning of Code, § 3275, providing that in such an action, if defendant appear and disclaim all title adverse to plaintiff, he shall recover costs.—*Deacon v. Central Iowa Inv. Co.* (Iowa) 63 N. W. 673.

QUI TAM AND PENAL ACTIONS.

For exacting usury, see "Usury," 14-16.
Venne, see "Venne in Civil Cases," § 7.

(Ia.: 1895.)

Comp. St. 1893, c. 16, § 104, creating a penalty for the failure of a railroad company to whistle or ring for crossings, one-half of which goes to the state, and the other half to the informer, does not authorize an action by the informer in his own name, for himself and the state, to recover such penalty.—*Omaha & R. V. R. Co. v. Hale* (Ia.) 63 N. W. 849.

45 Neb. 418.

(Ia.: 1896.)

When a party seeks to recover a statutory penalty, the statute which gives the penalty, and which alone is the source of the right to recover, must be specifically counted upon.—*Greenberg v. Union Nat. Bank* (N. D.) 67 N. W. 597.

5 N. D. 483.

QUITCLAIM.

See "Deed," § 19.

QUO WARRANTO.

Mode of testing existence of municipal corporation, see "Municipal Corporations," § 16.

§ 1. Usurpation of corporate powers and franchises.

(Wis.: 1896.)

Under Rev. St. § 2466, which provides, among other things, that proceeding in a quo warranto may be brought "when any person shall usurp, intrude into or unlawfully hold or exercise any * * * franchise within this state," or "when any association or number of persons shall act within this state as a corporation without being duly incorporated," a mere claim to exercise corporate rights, privileges, or franchises is insufficient to confer jurisdiction, but there must be a user or possession of the office or franchise.—*Mylrea v. Superior & St. C. Ry. Co.* (Wis.) 67 N. W. 1138.

93 Wis. 604.

§ 2. Right to office in corporation.

(Mich.: 1897.)

Quo warranto is a proper remedy to determine the right of a relator claiming to have been elected as a director of a corporation.—*Attorney General v. Looker* (Mich.) 69 N. W. 929.

§ 3. To oust county from annexed territory.

(Ia.: 1897.)

Quo warranto will lie by the attorney general against a county to oust it from adjoining territory illegally annexed.—*State v. Board of Comrs of Crow Wing County* (Minn.) 69 N. W. 925.

(Ia.: 1897.)

In quo warranto to oust a county from adjoining territory annexed, a writ admitting the finding by the commission acting under Laws 1895, c. 298, that the petitions were conformable to law, and the governor's proclamation annexing the territory, is insufficient if it does not allege facts to rebut the presumption of the validity of such finding and proclamation.—*State v. Board of Comrs of Crow Wing County* (Minn.) 69 N. W. 925.

§ 4. Filing of information by private person.

(Ia.: 1895.)

The owner of agricultural lands illegally included within the boundaries of a city or vil-

lage, in which he is not a voter, may maintain quo warranto to determine the validity of such inclusion.—*State v. Dimond* (Neb.) 62 N. W. 498.

44 Neb. 151.

[D] (Neb., 1896.)

An owner of lands illegally included within the boundaries of a village can maintain proceedings by quo warranto to determine the validity of the order of incorporation.—*State v. Mote* (Neb.) 67 N. W. 810.

48 Neb. 683.

§ 5. Compulsory filing at instance of private person.

(Mich., 1897.)

A court is not authorized to compel a prosecuting attorney to file an information, against his own judgment, at the instance of a private person, unless upon affidavits made by persons having a knowledge of the facts, so full and positive as to make out a clear case of right, and to subject the affiants to prosecution for perjury in case any material allegation is false.—*Cain v. Brown* (Mich.) 70 N. W. 337.

R.

RAFFLES.

See "Gaming," § 3.

RAILROAD COMPANIES.

- I. IN GENERAL, §§ 1, 2.
- II. RIGHT OF WAY, §§ 3-6.
- III. CONSTRUCTION AND MAINTENANCE OF ROAD, §§ 7-12.
- IV. CONTRACTS—MORTGAGES, §§ 13-15.
- V. ACTIONS, § 16.
- VI. OPERATION OF ROAD—LIABILITY FOR NEGLIGENCE AND TORTS, §§ 17-80.
 1. In General, §§ 17, 18.
 2. Who Liable, §§ 19-22.
 3. Injuries to Licensees and Trespassers on Trains or at Stations, §§ 23-25.
 4. Accidents to Trains, §§ 26, 27.
 5. Accidents at Crossings, §§ 28-44.
 6. Injuries to Persons on Track, §§ 45-53.
 7. Killing and Injuring Stock—Construction of Statutes, §§ 54-67.
 8. Fires, §§ 68-80.
- VII. CRIMES AGAINST RAILROADS, § 81.

See, also, "Carriers"; "Corporations"; "Eminent Domain"; "Horse and Street Railroads."

Employés' relief fund association, see "Benevolent Societies," § 1; "Release and Discharge," § 3.

Entry on railroad grant, see "Public Lands," § 1.

Excessive damages for personal injuries, see "Damages," §§ 35-37.

Liability for interfering with flow of surface water, see "Surface Waters," § 4.

— for street assessments, see "Municipal Corporations," § 139.

Mandamus to, see "Mandamus," § 21.

Public land grant, see "Public Lands," §§ 1, 6-9.

Railroad tickets as subject of larceny, see "Larceny," § 2.

Taxation of railroad grants, see "Taxation," § 7.

I. IN GENERAL.

§ 1. Abandonment of franchise—Waiver.

(Wis., 1896.)

Laws 1895, c. 244, amending the charter of the Superior & St. Croix Railway Company, and expressly confirming its right to exercise the power of eminent domain in the manner prescribed by Rev. St. §§ 1845-1856, in addition to the method pointed out by the original charter, was a waiver by the state of all the

company's acts of nonuser or abandonment.—*Mylrea v. Superior & St. C. Ry. Co.* (Wis.) 67 N. W. 1138.

93 Wis. 604.

§ 2. Commissioners—Procedure before.

[a] (Minn., 1895.)

In proceedings before the railroad and warehouse commission to regulate the rates of a common carrier, the commission, and, on appeal, the court, should be liberal in receiving evidence on the question of what is a reasonable rate, and may hear arguments in behalf of any person or corporation interested in the result.—*Appeal of Great Northern Ry. Co.* (Minn.) 62 N. W. 826, 60 Minn. 461; *Steenerson v. Great Northern Ry. Co.*, Id.

[b] (Minn., 1895.)

In proceedings before the railroad and warehouse commission to regulate the rates of a common carrier, another carrier, not a party to the proceeding, though indirectly affected thereby, cannot intervene as a matter of right.—*Appeal of Great Northern Ry. Co.* 62 N. W. 826, 60 Minn. 461; *Steenerson v. Great Northern Ry. Co.*, Id.

II. RIGHT OF WAY.

Setting fire to burn off right of way, see post, § 69.

Act requiring donation of portion of right for elevator, taking property without due process of law, see "Constitutional Law," § 41.

Power of city to grant use of streets, see "Municipal Corporations," § 55.

§ 3. Acquisition and title acquired.

[a] (Mich., 1897.)

Under How. Ann. St. § 3323, empowering a railroad company to take land by voluntary grant or by condemnation, it cannot acquire lands by dedication.—*Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Marble* (Mich.) 70 N. W. 319.

[b] (Mich., 1897.)

A parcel license to a railroad company to enter on land, and construct its road, is revocable at the will of the owner.—*Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Marble* (Mich.) 70 N. W. 319.

[c] (Neb., 1895.)

A grant of land to a railroad company "for right of way, and for operating its railway only," gave to the grantee a mere easement in the land.—*Blakely v. Chicago, K. & N. R. Co.*, 64 N. W. 972, 46 Neb. 272.

§ 4. Covenants and conditions in grants.

[a] (Minn., 1895.)

In order to induce defendant to construct and operate a railroad on a street in front of their lands, plaintiffs conveyed to it a right of

way therein, the deed providing that, in case the company should sell the right of way to any other company, plaintiffs should receive one-half the proceeds. *Held*, that a lease by defendant to another company of its entire railroad property, including the right of way, for 999 years, reserving rent payable quarterly, was not a sale, within the deed. *Buck, J., dissenting.*—*Morrison v. St. Paul & N. P. Ry. Co. (Minn.)* 65 N. W. 141.

63 Minn. 75.

[b] (Neb.: 1897.)

A clause in a deed conveying land to a railroad company for a right of way, releasing the company from all costs and damages which the grantor has sustained, "or shall at any time hereafter sustain, in any way, by reason of the construction, building, or use of said railroad," is not a release of claims subsequently arising for damages caused by the negligent construction, maintenance, or operation of the road.—*Fremont, E. & M. V. R. Co. v. Harlin (Neb.)* 70 N. W. 263.

§ 5. Abandonment and forfeiture of land or rights.

[a] (Minn.: 1895.)

The erection and operation of a public elevator and warehouse on land acquired by a railway company by condemnation for public purposes, either by itself or its lessee, do not constitute a misuser or an abandonment of its easement therein.—*Gurney v. Minneapolis Union Elevator Co. (Minn.)* 65 N. W. 136.

63 Minn. 70.

[b] (Neb.: 1895.)

A conveyance by a railroad company of part of its right of way, in which it had but an easement expressly limited to the operation of its own road, to an independent railroad company, which built and operated its road over the land, constituted an abandonment of that part of its easement, so that the landowner was entitled to compensation from the grantee company with respect to such part.—*Blakely v. Chicago, K. & N. R. Co.,* 64 N. W. 972, 46 Neb. 272.

§ 6. — Return of subscriptions.

[a] (Mich.: 1895.)

When a railroad has been abandoned in the manner prescribed in Laws 1887, Act No. 275, and no reasonable provision made for traffic between the points abandoned, those who have contributed to its construction are entitled, by Pub. Acts 1891, No. 125, to have their contributions refunded, with interest for five years.—*In re Flint & P. M. R. Co. (Mich.)* 63 N. W. 303.

105 Mich. 289.

[b] (Mich.: 1895.)

Where contributors gave their notes, and afterwards paid them by granting rights of way, the company should not, in refunding contributions on abandonment of the line, be compelled to repay the notes, as the statute requires a reconveyance of the right of way.—*In re Flint & P. M. R. Co. (Mich.)* 63 N. W. 303.

105 Mich. 289.

III. CONSTRUCTION AND MAINTENANCE OF ROAD.

§ 7. Necessity.

[a] (Minn.: 1897.)

A law authorizing a railroad company to construct a road over a public or private way, "if necessary," contemplates the practical, and not an absolute, necessity.—*Village of Wayzata v. Great Northern Ry. Co. (Minn.)* 69 N. W. 1073.

[b] (Minn.: 1897.)

Where a railroad company is authorized by statute to construct its road over a private way, if necessary, the burden is on the company

to prove the necessity, if the right be disputed.—*Village of Wayzata v. Great Northern Ry. Co. (Minn.)* 69 N. W. 1073.

[c] (Minn.: 1897.)

The necessity, once established, is presumed to exist, in proceedings to compel a change of the line from the highway.—*Village of Wayzata v. Great Northern Ry. Co. (Minn.)* 69 N. W. 1073.

§ 8. Crossing private lands.

[a] (Iowa: 1896.)

Code, § 1268, providing that, upon the request of any person owning land on both sides of a railway, the company shall construct and maintain one causeway or other adequate means of crossing, with cattle guards, cannot be construed as entitling the landowner to demand other means of crossing, on the ground of convenience or profit, if the causeway is or may be made adequate.—*State v. Burlington, C. R. & N. Ry. Co. (Iowa)* 68 N. W. 819.

[b] (Iowa: 1896.)

The fact that the causeway so constructed is inconvenient, in that its use requires the landowner to open and close gates in order to cross the railroad, does not render it inadequate.—*State v. Burlington, C. R. & N. Ry. Co. (Iowa)* 68 N. W. 819.

[c] (Iowa: 1896.)

Upon an application to the railroad commissioners for an order requiring a railroad to construct an undergrade crossing in addition to a causeway connecting the two parts of applicant's farm, on the ground that it was inconvenient and inadequate, in that the owner was obliged to open and close gates each time he drove his stock to water, it appeared that in all other respects it was or could be made adequate. *Held*, that an order requiring the railroad company to construct such undergrade crossing was unreasonable.—*State v. Burlington, C. R. & N. Ry. Co. (Iowa)* 68 N. W. 819.

§ 9. — Fences and cattle guards.

[a] (Mich.: 1896.)

While not in terms required by statute, it is proper for a railroad company, if not its duty, to construct a cattle guard at a point on its track where station grounds end and from which it is required to fence the track.—*Fuller v. Lake Shore & M. S. Ry. Co. (Mich.)* 66 N. W. 593.

[b] (Neb.: 1897.)

Comp. St. c. 2, art. 2, § 18, defining a lawful fence, does not apply to the fencing by a railroad company of its right of way; that being governed by Comp. St. c. 72, art. 1, § 1.—*Chicago, B. & Q. R. Co. v. Lyon (Neb.)* 70 N. W. 261.

[c] (Neb.: 1897.)

One who has given a railway company the notice to build a fence between its right of way and his adjoining land, prescribed by Comp. St. c. 72, art. 1, § 1, must, to recover the expense of erecting the fence after failure of the company so to do, show that the fence built by him complies with the requirements of that section.—*Chicago, B. & Q. R. Co. v. Lyon (Neb.)* 70 N. W. 261.

§ 10. Crossing highways — Place and mode of crossing.

[a] (Minn.: 1895.)

Where the necessity of building a bridge at a crossing was in no way affected by the occupancy of the street by defendant's tracks, but had always existed because of natural conditions which would remain if the tracks were removed, the company should not be compelled to pay for the bridge.—*State v. St. Paul, M. & M. Ry. Co. (Minn.)* 64 N. W. 1140.

62 Minn. 450.

[b] (Minn.: 1897.)

Gen. St. 1894, § 2685, providing that railway companies shall build, or cause to be built

and kept in repair, crossings wherever public highways are intersected by railway lines, applies where, in the construction of a railway, a stream has been turned from its natural channel into an artificial one, wholly upon the right of way, making it necessary to build a bridge over the stream, as a part of an approach or highway crossing of the railway tracks. If the bridge is necessarily a part of the approach or crossing, it must be built and kept in repair by the railway company.—*Board of Com'rs of Goodhue County v. Duluth, R. W. & S. R. Co.* (Minn.) 69 N. W. 898.

[c] (Neb.; 1896.)

An ordinance requiring the reconstruction by railroad companies of a viaduct is not void, as against the companies named therein as owners of the railroads, because of the city's failure to proceed against other companies operating on one or more of the tracks as lessees, where the charter imposes the obligation on both owners and lessees.—*Chicago, B. & Q. R. Co. v. State* (Neb.) 66 N. W. 624.

47 Neb. 549.

[d] (Neb.; 1896.)

The provision of the charter of the city of Omaha (Comp. St. c. 12a, § 48) authorizing said city, by ordinance, to require railroad companies to construct and keep in repair viaducts over streets therein crossed by their tracks, is a valid exercise of the police power of the state.—*Chicago, B. & Q. R. Co. v. State* (Neb.) 66 N. W. 624.

47 Neb. 549.

§ 11. — Restoring highway.

[a] (Wis.; 1896.)

Where land is platted as a town site by authority of the state, and a street is thereon designated and dedicated to the public use, such street is within Rev. St. § 1836, requiring every corporation constructing a railroad to restore every street and highway across which such railroad may be constructed to its former condition.—*City of Racine v. Chicago & N. W. Ry. Co.* (Wis.) 65 N. W. 857.

92 Wis. 118.

[b] (Wis.; 1896.)

Until the time arrives when such street is required to be opened for actual public use, no mere nonuser by the city will operate as an abandonment of it, or excuse a railroad corporation from complying with such statutory provision.—*City of Racine v. Chicago & N. W. Ry. Co.* (Wis.) 65 N. W. 857.

92 Wis. 118.

[c] (Wis.; 1896.)

The failure of a railroad company to remove a bank of earth on its right of way, consisting almost entirely of a natural hill through the base of which the track was laid in a cut, and which obstructed the view of an approaching train from travelers on the highway, was not a failure to restore the highway to its former state of usefulness, as required by Rev. St. § 1836.—*Leitch v. Chicago & N. W. Ry. Co.* (Wis.) 67 N. W. 21.

93 Wis. 79.

§ 12. — Change of location of tracks.

[a] (Minn.; 1897.)

In a proceeding to compel a railroad company to remove its tracks from a certain street and elsewhere locate them, there was evidence as to the feasibility of another route 150 feet longer than the existing one, and that the road, as located, greatly interfered with the use of the street; but it was not shown what the proposed change would cost defendant, or how it would affect the operation of the road as a whole, or the property or convenience of residents along the new route. *Held*, that a finding that no route more practicable than the existing one, or which would interfere less with public safety and convenience, could be found in the village, was sustained by the evidence.—

Village of Wayzata v. Great Northern Ry. Co. (Minn.) 69 N. W. 1073.

[b] (Minn.; 1897.)

In such proceedings, the burden is on the party demanding a change of the line to show not only that the original necessity no longer exists, but that there are substantial reasons for holding that the public interests demand the change. Testimony which would warrant a court, on a hearing to locate a line, in finding that the public interests required its location elsewhere than on a particular street, would not uphold a like finding in a proceeding to remove a line already constructed and in operation.—*Village of Wayzata v. Great Northern Ry. Co.* (Minn.) 69 N. W. 1073.

IV. CONTRACTS—MORTGAGES.

§ 13. Contracts—Powers of agents.

[a] (Minn.; 1896.)

A railroad company is not liable on a guaranty made by its general manager and its general freight agent, without express authority, that if an owner of stock would ship the same over the road to a certain party the price thereof should be paid, where the road made no charges for transporting the stock.—*Weikle v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Minn.) 66 N. W. 963.

64 Minn. 296.

[b] (S. D.; 1896.)

It being out of the usual course of business, the presumption is that a local station agent has no power to bind his company by a contract to ship property over connecting lines of railway, and such authority will not be inferred from the mere fact that the freight for the entire distance was collected by such agent.—*Coates v. Chicago, M. & St. P. Ry. Co.* (S. D.) 65 N. W. 1067.

§ 14. — Ultra vires.

(Iowa; 1897.)

A railroad company organized a relief department, solely for its benefit and the benefit of its employes who became members thereof. Each member was required to contribute a fixed amount monthly to the relief fund, to be used to furnish relief to its members in cases of accident or sickness, and, in case of their death, to provide something for their beneficiaries, and to make certain, in cases where the benefits of the department were accepted, the liability of the company for injuries caused by its negligence. *Held*, that an agreement by the company to aid the department by paying its expenses and making up any deficiency in benefits due members was not outside of its powers.—*Maine v. Chicago, B. & Q. R. Co.* (Iowa) 70 N. W. 630.

§ 15. Mortgage foreclosure—Liability of purchaser.

(Iowa; 1894.)

Where a judgment is obtained against a railroad company and a receiver of such company after title to the property of the company has passed to a new company under foreclosure proceedings, the new company is not liable for such judgment, though the receiver did not turn over the property and obtain his discharge until after such judgment was rendered, and, at the time, had in his hands, and turned over to the new company, money sufficient to pay it.—*Brockert v. Iowa Cent. Ry. Co.* (Iowa) 61 N. W. 405.

93 Iowa, 132.

V. ACTIONS.

§ 16. Process and service.

[a] (Minn.; 1896.)

A ticket agent in a union depot, employed by the depot company, and selling the

tickets of the several roads using the depot for general depot purposes, and as a regular station on their respective roads, under contract with the depot company, is the "acting ticket agent" of the several lines of road, within Gen. St. 1894, § 5202, providing for the service of process in civil actions upon railroad companies.—*Hillary v. Great Northern Ry. Co.* (Minn.) 67 N. W. 80.

64 Minn. 361.

[b] (Wis.; 1895.)

Where several railroad companies, distinct and separate from each other, form an association to secure and share freight, a service of summons on an agent of one of the roads, though also an agent of the association, is not a valid service on any other company in the association.—*Kingsley v. Great Northern Ry. Co.* (Wis.) 64 N. W. 1036, 91 Wis. 380.

VI. OPERATION OF ROAD—LIABILITY FOR NEGLIGENCE AND TORTS.

Expert testimony as to operation and running of cars, see "Evidence," §§ 54, 56.

Liability to employes for injuries from defects in tracks and roadbeds, see "Master and Servant," § 43.

Statutory liability in case of injuries by fellow servants, see "Master and Servant," § 66.

1. IN GENERAL.

§ 17. Damages for violations of regulations.

(Minn.; 1895.)

In an action against a railroad company for damages for failure to fence its right of way, the fact that the landowner has a right to join his fence with the fence of the company, whether built on or inside the line of the right of way, may be considered in determining the damages.—*Gould v. Great Northern Ry. Co.* (Minn.) 65 N. W. 125.

63 Minn. 37.

§ 18. Penalties for violation of regulations.

[a] (Wis.; 1896.)

Rev. St. § 1811, providing that any one willfully taking down a fence or cattle guard built by a railroad company as required by section 1810, or failing to replace or close gates therein after having lawfully passed through, shall forfeit not more than \$50, in addition to damages, being penal, should be strictly construed.—*Oefflein v. Zautcke* (Wis.) 66 N. W. 108.

92 Wis. 176.

[b] (Wis.; 1896.)

Defendant's team ran away, and destroyed a gate erected by a railroad company, under Rev. St. § 1810, for defendant's use at a farm crossing, and defendant failed to rebuild the gate. Plaintiff's horse strayed from a highway to defendant's premises, passed through the opening, and was killed by a locomotive. *Held*, that the case was not within Rev. St. § 1811, allowing recovery against one who shall "willfully" take down a fence or cattle guard erected by a railroad company as required by section 1810, or "allow" the same to be taken down, or, having lawfully opened gates therein "for the purpose of passing through the same," shall not immediately replace or close them.—*Oefflein v. Zautcke* (Wis.) 66 N. W. 108.

92 Wis. 176.

4 N.W.DIG.—51

2. WHO LIABLE.

§ 19. Evidence of ownership and operation of road.

[a] (Mich.; 1894.)

In an action against a railroad company for personal injuries received on a railroad not owned by defendant, testimony of plaintiff that she bought a ticket at defendant's station, and that she supposed the ticket was over defendant's road, and that a certain person was the company's agent at that station, and that she supposed the station and platform were on defendant's grounds, is admissible to show defendant's possession of the road when the accident occurred.—*Williams v. Cleveland, C., C. & St. L. Ry. Co.* (Mich.) 61 N. W. 52.

102 Mich. 537.

[b] (Mich.; 1894.)

The testimony of such person, referred to by plaintiff as defendant's agent, that he knew when defendant extended its right of way through there, and that the station, platform, and cattle guard were on defendant's grounds, is admissible to show defendant's possession, although witness did not state that he was defendant's agent.—*Williams v. Cleveland, C., C. & St. L. Ry. Co.* (Mich.) 61 N. W. 52.

102 Mich. 537.

[c] (Mich.; 1894.)

A traffic agreement leasing the road to defendant, and containing a promise to raise a certain sum on bonds, and expend it in equipping the road, and a mortgage executed to secure such bonds, are admissible to show defendant's possession of the road.—*Williams v. Cleveland, C., C. & St. L. Ry. Co.* (Mich.) 61 N. W. 52.

102 Mich. 537.

§ 20. Receivers.

(Iowa; 1896.)

Under Code, § 1289, making "any corporation operating a railway" liable, under certain circumstances, for stock killed on its right of way, a railroad company, while its property remains in the hands of a receiver, cannot be held liable for stock killed during the receivership.—*Schurr v. Omaha & St. L. Ry. Co.* (Iowa) 67 N. W. 280.

§ 21. Purchaser at foreclosure sale.

(Mich.; 1895.)

Under How. Ann. St. § 3323, requiring a railroad constructing its road across a highway to restore the highway to its former state as nearly as may be, and to construct suitable crossings for teams; and Laws 1887, Act No. 35, conferring upon a company acquiring title to a railroad at foreclosure sale all the privileges and franchises enjoyed by the original company,—a company acquiring title to a railroad at foreclosure sale is liable for an injury occurring after the purchase resulting from a failure of its predecessor to restore a highway crossed by its road to its former state, and to provide a suitable crossing for teams.—*Gage v. Pontiac, O. & N. R. Co.* (Mich.) 63 N. W. 318.

105 Mich. 335.

§ 22. Consolidated roads.

(Wis.; 1896.)

A complaint against a railroad company, alleging that defendant acquired by purchase and assignment all the property and franchises of another road, is insufficient to charge defendant with liability for a tort committed by such other road prior to the purchase and assignment, since it fails to show a consolidation of defendant with such other road, under Rev. St. §§ 1833 or 1788, or otherwise, in which case alone defendant would be liable.—*Pennison v.*

Chicago, M. & St. P. Ry. Co. (Wis.) 67 N. W. 702.

93 Wis. 341.

3. INJURIES TO LICENSEES AND TRESPASSERS ON TRAINS OR AT STATIONS.

§ 23. Injuries to persons on trains.

(Mich.; 1896.)

A yardman in the employ of a railroad, whose duty it was to deliver freight cars from his own company to defendant company, and to receive cars from defendant company to his own, and who at the most had only an invitation from defendant to visit its yard from time to time to see if there were cars for plaintiff's road, cannot recover of defendant for injuries received from getting on the side of defendant's train, without invitation, and without the knowledge of any of the crew, for the purpose of going to defendant's yard; plaintiff being a trespasser.—*Grunst v. Chicago & W. M. Ry. Co.* (Mich.) 67 N. W. 335.

§ 24. Trespassers on cars.

(Minn.; 1895.)

Trainmen are not bound to use reasonable care to see that a trespasser does not expose himself to personal injury.—*McNamara v. Great Northern Ry. Co.* (Minn.) 63 N. W. 726.

61 Minn. 296.

§ 25. Injuries to persons at stations.

[a] (Mich.; 1895.)

It is negligence to run a train between a station and a train opposite it, engaged in discharging and receiving passengers, express, and mail, it being necessary for passengers and persons whose business it is to receive the express and mail to cross the intervening track.—*Tubbs v. Michigan Cent. R. Co.* (Mich.) 64 N. W. 1061.

[b] (Mich.; 1895.)

The variance between the allegation of the complaint in an action against a railroad company for injury to one struck by a train while crossing a track from a depot to a train opposite it, to get the mail, that defendant was engaged in transporting mail, and that it was customary for it to deliver the mail to plaintiff, and proof that the mail was thrown from the train by the United States mail agent, is immaterial.—*Tubbs v. Michigan Cent. R. Co.* (Mich.) 64 N. W. 1061.

[c] (Minn.; 1895.)

In an action against a railroad company for damages caused by a defective platform provided for the use of patrons, evidence that the planking on such platform was separated from the tracks by several inches, and that plaintiff's wagon wheel was caught between the planks and the tracks, and that plaintiff was thrown out and injured, coupled with evidence that defendant knew of the dangerous condition of the platform, will support a verdict for plaintiff.—*Christie v. Chicago, M. & St. P. Ry. Co.* (Minn.) 63 N. W. 482.

61 Minn. 161.

[d] (Wis.; 1894.)

Rev. St. § 1811, which makes it unlawful to walk along the track of a railroad, does not apply to a licensed path in and about depot grounds.—*Mason v. Chicago, St. P., M. & O. Ry. Co.*, 61 N. W. 300, 89 Wis. 151.

4. ACCIDENTS TO TRAINS.

§ 26. Wrongful acts of third persons.

(Mich.; 1895.)

Where defendant left its cars securely coupled on a side track for the use of certain licensees whose license allowed them to un-

couple such cars as were needed for immediate use and removal, defendant was not bound to anticipate that such licensees would uncouple any other cars, and leave them standing on such side track.—*Jakoboski v. Grand Rapids & I. R. Co.* (Mich.) 64 N. W. 461.

§ 27. Contributory negligence of person injured.

(Minn.; 1896.)

In an action by a locomotive fireman to recover for personal injuries received in a collision between trains at a railway crossing, against the company with whose train the train on which he was employed collided, an instruction which permitted him to recover though he failed to watch for the coming of a train on defendant's road as his train approached the crossing, as he was required to do, was erroneous.—*Thompson v. Chicago G. W. Ry. Co.* (Minn.) 66 N. W. 265.

64 Minn. 159.

5. ACCIDENTS AT CROSSINGS.

Frightening horses, see "Negligence," § 7.

§ 28. Care in running trains.

[a] (Neb.; 1896.)

The mere running of a train behind its schedule time is not evidence which tends to prove negligence.—*Omaha & R. V. Ry. Co. v. Talbot* (Neb.) 67 N. W. 599.

48 Neb. 627.

[b] (N. D.; 1896.)

The statute regulating the ringing of the bell and blowing of the whistle at crossings, or a city ordinance regulating the speed of trains, and the giving of signals at crossings, within city limits, is not the sole measure of the duty of a railroad company to protect persons and property at crossings, and does not change the company's common-law obligation.—*Coulter v. Great Northern Ry. Co.* (N. D.) 67 N. W. 1046.

5 N. D. 563.

§ 29. Places not public crossings.

(Iowa; 1895.)

In going to the depot of defendant, deceased crossed at a point, not a public street, where there were about 15 lines of track, and was killed, while so doing, by defendant's engine. At either end of the path where she crossed the company had sign boards erected, warning the public of the danger, and forbidding persons to cross there. A short distance further was a public street, leading to the depot, over which but four or five lines of track crossed, and where the danger was comparatively slight, and deceased had ample time to go that way. *Held*, that deceased was negligent.—*Pulley v. Chicago, B. & Q. Ry. Co.* (Iowa) 63 N. W. 328.

§ 30. Defects in crossings and approaches.

[a] (Iowa; 1895.)

A railroad company which fails to maintain an approach at a public crossing sufficiently wide to be safe, and allows obstructions to be placed within the line, but outside of the traveled portion, of the highway, under Code, § 1288, requiring railway companies to construct safe crossings, and making them liable for damages caused by neglect to do so, and providing that the injured party need only prove such neglect to authorize recovery, will be liable for an injury occasioned to one by his horse becoming frightened at the obstructions, and pitching over the embankment.—*Hanson v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 62 N. W. 788.

[b] (Iowa; 1895.)

Code, § 1288, providing that the neglect of a railway company to keep safe highway crossings renders it liable for injuries caused by reason thereof without other proof than of such neglect, does not preclude a railway company

from showing that an injury complained of resulted from plaintiff's negligence.—*Hanson v. Chicago, St. P. & K. C. Ry. Co. (Iowa)* 62 N. W. 788.

[c] (*Iowa; 1895.*)

In an action under Code, § 1288, for injury occasioned by a horse becoming frightened at an obstruction left in a public highway at a crossing, and pitching over the embankment, an instruction that, if the injuries resulted from the frightening of the horse and the defective crossing, the plaintiff could recover, but, if they were the result of some other cause or of plaintiff's own carelessness, he could not recover, is proper.—*Hanson v. Chicago, St. P. & K. C. Ry. Co. (Iowa)* 62 N. W. 788.

[d] (*Mich.; 1894.*)

When a railway company, in constructing its road, cuts through a highway, it is bound to construct and maintain the crossing in a reasonably safe condition.—*Tobias v. Michigan Cent. R. Co. (Mich.)* 61 N. W. 514.
103 Mich. 330.

[e] (*Mich.; 1896.*)

A railroad company will be liable for injuries received by one while necessarily driving a snowplow over a crossing, caused by the plow striking against a rail, if the accident is due to failure to keep the crossing in a reasonably safe condition for ordinary uses.—*Jeffrey v. Detroit, L. & N. R. Co. (Mich.)* 65 N. W. 755.

[f] (*Wis.; 1895.*)

It cannot be said, as a matter of law, that a railroad crossing where the rails are an inch higher than the planking and cinder beds forming the roadway is not defective.—*McDermott v. Chicago, M. & St. P. Ry. Co. (Wis.)* 64 N. W. 430, 91 Wis. 38.

§ 31. Running cars detached from train.

(*Wis.; 1895.*)

In an action against a railroad company for injuries, evidence that the injury was caused from being struck, while crossing defendant's track, by the rear section of a train which had been cut in two, and that defendant had no lookout on the last section, is sufficient to justify a submission of the question of defendant's negligence.—*Schlimgen v. Chicago, M. & St. P. Ry. Co. (Wis.)* 62 N. W. 1045.
90 Wis. 186.

§ 32. Rate of speed and signals.

[a] (*Iowa; 1896.*)

In an action for causing the death of plaintiff's intestate while he was attempting to drive over defendant's tracks, the question of defendant's negligence should have been submitted to the jury on evidence showing the running of the train, through a town of about 1,100 people, at the rate of 40 miles an hour, and faster than the usual rate, without any signals or warning, across a street much used, the view of which, from some directions, was obstructed.—*Pratt v. Chicago, R. I. & P. Ry. Co. (Iowa)* 67 N. W. 402.

[b] (*Mich.; 1894.*)

The running of a passenger train on schedule time across a highway in a city of 17,000 inhabitants at a rate of 25 miles an hour is not, in the absence of an ordinance limiting the speed to a lower rate, negligence per se.—*Tobias v. Michigan Cent. R. Co. (Mich.)* 61 N. W. 514.
103 Mich. 330.

[c] (*Minn.; 1897.*)

The statute requiring the locomotive bell to be rung or the whistle sounded 80 rods from the place where a railway crosses a traveled road or street does not apply to private farm crossings.—*Czech v. Great Northern Ry. Co. (Minn.)* 70 N. W. 791.

[d] (*Neb.; 1895.*)

Comp. St. c. 16, § 104, relating to signals at railroad crossings, applies to the roads used by the public, though not dedicated as public

highways.—*Chicago, B. & Q. R. Co. v. Metcalf (Neb.)* 63 N. W. 51.

41 Neb. 848.

[e] (*Neb.; 1896.*)

In the operation of a railway train outside of towns and villages, no rate of speed, however great, is alone sufficient evidence to establish negligence. *Railroad Co. v. Wendt*, (1881) 10 N. W. 456, 12 Neb. 76, followed.—*Omaha & R. V. R. Co. v. Krayenbuhl*, 67 N. W. 447, 48 Neb. 553; *Same v. Talbot*, 67 N. W. 599, 48 Neb. 627.

[f] (*Wis.; 1894.*)

The statutory requirements as to speed of trains and signals at crossings apply only to grade crossings.—*Barron v. Chicago, St. P., M. & O. Ry. Co.*, 61 N. W. 303, 89 Wis. 79.

§ 33. Signals or lockouts from trains or cars.

[a] (*Neb.; 1896.*)

It is error to instruct a jury that it may consider whether or not statutory highway signals were given by an approaching train, in determining whether the train was in other respects negligently operated.—*Omaha & R. V. R. Co. v. Krayenbuhl (Neb.)* 67 N. W. 447.
48 Neb. 553.

[b] (*Neb.; 1896.*)

The failure of a railroad company to cause a bell to be rung or whistle sounded as its engine approaches a crossing, is evidence which tends to prove negligence on the part of the railroad company, but does not necessarily demand an inference of negligence.—*Omaha & R. V. Ry. Co. v. Talbot (Neb.)* 67 N. W. 599.

[c] (*Neb.; 1896.*)

The failure of a railroad company to cause a bell to be rung or a whistle to be sounded at a crossing, as required by Comp. St. c. 16, § 104, does not of itself constitute negligence. *Railroad Co. v. Metcalf* (1895) 63 N. W. 51, 41 Neb. 848, and *Railroad Co. v. Talbot* (1896) 67 N. W. 599, 48 Neb. 627, followed.—*Missouri Pac. Ry. Co. v. Geist*, 68 N. W. 640.

[d] (*Neb.; 1896.*)

The engine having started from about 70 feet from the crossing, error in instructing that it was defendant's duty to sound the whistle or ring the bell at a distance of at least 80 rods from the crossing (Comp. St. c. 16, § 104) was not of itself ground for reversal.—*Missouri Pac. Co. v. Geist (Neb.)* 68 N. W. 640.

[e] (*Neb.; 1896.*)

In an action for injuries received in a crossing accident, an instruction that a failure of defendant either to ring the bell or blow the whistle at a distance of at least 80 rods from the crossing (Comp. St. c. 16, § 104) rendered it criminally liable was reversible error, the statute merely imposing a penalty.—*Missouri Pac. Ry. Co. v. Geist (Neb.)* 68 N. W. 640.

§ 34. Contributory negligence of person injured.

[a] (*Iowa; 1896.*)

A person, in crossing the tracks of a railway company laid upon a street, is not required to use "extraordinary" care, but only such care as ordinarily careful and prudent persons would have exercised under the circumstances.—*Goodrich v. Burlington, C. R. & N. Ry. Co. (Iowa)* 66 N. W. 770.

[b] (*Iowa; 1896.*)

In an action for injuries received at a railroad crossing, where the negligence charged was the failure of defendant to give the signals required by McClain's Code, § 2003, and which the jury, by their verdict in plaintiff's favor, must have found were not given, there was evidence that the morning was dark and stormy, and that along the highway there was a growth of shrubbery, covered with snow, which obstructed the view of plaintiff, who was approaching the track in a buggy; that he stopped twice

before reaching the crossing, and looked and listened for trains, the last stop being made within 30 feet of the track; and that, when within 10 feet thereof, he glanced up and down the track. *Held* sufficient to warrant a finding that plaintiff was not guilty of contributory negligence.—*Harper v. Barnard* (Iowa) 68 N. W. 599.

[c] (Mich.; 1894.)

Where deceased deliberately drove upon a crossing in front of a train, either because he did not see or hear the train, or, attempting to cross ahead of it, miscalculated its speed, it was proper to charge, in an action for his death, that, though the crossing was improperly constructed, that fact had no bearing on the case.—*Tobias v. Michigan Cent. R. Co.* (Mich.) 61 N. W. 514.

103 Mich. 330.

[d] (Mich.; 1894.)

Where the electric warning bell maintained at the crossing was out of repair at the time of the accident, it was error to refuse to charge that, if deceased was not aware of the bell's faulty condition, such fact might be considered as bearing on the question of his contributory negligence. Grant, J., dissenting.—*Tobias v. Michigan Cent. R. Co.* (Mich.) 61 N. W. 514.

103 Mich. 330.

[e] (Mich.; 1895.)

Deceased went upon railroad tracks crossing a highway, just as the gates in use at that point were going down, and, seeing a train approaching on the second or third track from him, ran in front of the engine when it was about 15 feet from him, stopped in the middle of the next track, and, turning around, watched the passing train. While so engaged, he was struck in the back by another train, approaching on the track where deceased stood, at a faster rate of speed than usual. Deceased was familiar with this crossing, where there were over a dozen tracks. *Held*, that deceased was guilty of contributory negligence.—*Duval v. Michigan Cent. R. Co.* (Mich.) 63 N. W. 437.

105 Mich. 386.

[f] (Minn.; 1896.)

The plaintiff approached a street crossing, and found it blocked by a freight train. It was apparent that the train was liable to start at any moment. After waiting at least 20 minutes, plaintiff attempted to cross by climbing up between the cars, some 250 feet from the engine, and was injured by the sudden backing up of the train, no signal or warning having been given. *Held*, that plaintiff was guilty of contributory negligence, as a matter of law, which would prevent a recovery.—*Wherry v. Duluth, M. & N. Ry. Co.* (Minn.) 67 N. W. 223.

64 Minn. 415.

[g] (Minn.; 1897.)

Proof that defendant was familiar with the crossing at which he was killed, and that the headlight and the lights from the windows of the train might have been seen from the highway 132 feet from the crossing, shows contributory negligence justifying a judgment for the company, notwithstanding a verdict against him.—*Bureau v. Great Northern Ry. Co.* (Minn.) 69 N. W. 1149.

[h] (Wis.; 1894.)

In an action for an injury caused by being struck, while crossing defendant's track, by the rear section of a train, it appeared that when the first section passed plaintiff stood 15 feet south of the track; that he could see down the track 269 feet; that he started slowly across the track, and was struck by the rear section. *Held*, that plaintiff was guilty of contributory negligence.—*Schlimgen v. Chicago, M. & St. P. Ry. Co.* (Wis.) 62 N. W. 1045.

90 Wis. 186.

[i] (Wis.; 1896.)

One who, after dark, approached a crossing with which he was familiar, driving a gen-

tle horse, under control, at a very moderate gait, and who, for a distance of 500 feet before reaching the crossing, could have continuously seen the headlight of the engine by which he was killed from a point three-quarters of a mile away, was chargeable with contributory negligence in attempting to cross the tracks before the train passed.—*Groesbeck v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 1129.

93 Wis. 505.

§ 35. — Duty to stop, look, and listen.

[a] (Iowa; 1894.)

In an action for injuries at a crossing it is error to charge that it was plaintiff's duty, when approaching the crossing, to look and listen "at all points" in his passage, and that a failure to do so was contributory negligence.—*Winey v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 218.

92 Iowa, 622.

[b] (Iowa; 1896.)

The question of the contributory negligence of one who was killed while attempting to drive over defendant's tracks should have been submitted to the jury, on evidence that decedent's horses became frightened by escaping steam from a mill located near the tracks, and that, as decedent approached the tracks, his view thereof to the east being at least partially obstructed, he arose from his seat, and, winding the reins around his hands, endeavored to control the horses, and was struck by a train approaching from the east without giving the usual signals, and that, though deceased knew of the crossing, he did not know the scheduled time of the train.—*Pratt v. Chicago, R. I. & P. Ry. Co.* (Iowa) 67 N. W. 402.

[c] (Mich.; 1894.)

Where the approaching train could be seen for nearly 1,300 feet before reaching the crossing at which deceased was killed, the fact that deceased drove upon the tracks in front of it is conclusive evidence that he did not look.—*Tobias v. Michigan Cent. R. Co.* (Mich.) 61 N. W. 514.

103 Mich. 330.

[d] (Mich.; 1896.)

In an action against a railway company for injuries, it appeared that plaintiff, a motor-man on an electric street railway, stopped his car about 40 feet from the crossing of defendant's railroad, and looked in both directions, but saw no train. At this point, and up to within 10 feet of the track, a train could have been seen 570 feet distant, in a southeasterly direction. Plaintiff started his car, but did not look again until about 5 feet from the track, when he saw a train coming from the south-east, about 290 feet from him, and his car was struck before it got across the track. *Held*, that plaintiff was guilty of contributory negligence precluding a recovery.—*Vreeland v. Cincinnati, S. & M. R. Co.* (Mich.) 67 N. W. 905.

[e] (Mich.; 1896.)

A deaf person, before driving across a railroad track, must look in both directions, though it be necessary to stand up in the vehicle to see over ties so piled as to obstruct the view of the tracks, and though another person has recently passed over the tracks in safety.—*Phillips v. Detroit, G. H. & M. Ry. Co.* (Mich.) 69 N. W. 496.

[f] (Minn.; 1895.)

Plaintiff was riding in a wagon owned and driven by another, at the invitation of the driver. He had no control of the horses, and the wagon was struck by a train at a railroad crossing. *Held* that, in the absence of evidence that plaintiff knew that the driver was incompetent or not keeping a proper lookout for trains, the question of plaintiff's negligence was for the jury, though it appeared that, if plaintiff had looked and listened, he would have discovered the train in time to have avoided the acci-

dent.—Howe v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 64 N. W. 102.

62 Minn. 71.

[g] (Minn.; 1895.)

No recovery could be had for the death of one killed because of his failure to look and listen before attempting to cross the tracks, though the train which killed him was not a regular train.—Judson v. Great Northern Ry. Co. (Minn.) 65 N. W. 447.

63 Minn. 248.

[h] (Minn.; 1897.)

Where plaintiff knew that a train was about due, and the track was in plain sight from a hill about 300 feet from the crossing, and all proper signals were given, he cannot recover for injuries received by a collision with a train because, the hill being icy, his attention was taken up with an attempt to control his team, so that he did not give proper care to the approach of the train.—Lee v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 70 N. W. 857.

[i] (Neb.; 1896.)

The going upon a railroad crossing without first listening and looking for the approach of a train, without a reasonable excuse therefor, constitutes negligence.—Omaha & R. V. Ry. Co. v. Talbot (Neb.) 67 N. W. 599.

48 Neb. 627.

§ 36. — Duty where view or hearing is obstructed.

(Mich.; 1895.)

In an action for the death of plaintiff's intestate, caused by a collision at a railway crossing, it appeared that the railway and the highway upon which plaintiff was driving were both in cuts, and ran parallel for some distance. There was evidence that, due to obstructions, consisting of a fence and vegetation, a train could not be seen from the highway for some distance from the track, until the horse was within two feet of the track, and that no signal was given on approach of the train. *Held*, that the question of decedent's negligence was for the jury.—Crane v. Michigan Cent. R. Co. (Mich.) 65 N. W. 527.

§ 37. — Reliance on precautions on part of railroad company.

[a] (Mich.; 1896.)

A railroad company maintained an electric bell at the crossing, which was rung automatically by passing trains, but was often out of order, and did not work, and was in that condition when plaintiff's intestate was injured. It appeared that a train approaching the crossing could be seen for a long distance. The jury were instructed that it would not have been prudent to have crossed the track without first looking, if there had been no bell; that the presence of the electric bell did not release decedent from the duty of exercising care; that the question was how far decedent, as a prudent man, was entitled to rely on the bell; and that, if he had looked, he could have seen the coming train. *Held*, that the instructions properly presented the issues.—Tobias v. Michigan Cent. R. Co. (Mich.) 68 N. W. 234.

[b] (Minn.; 1895.)

Though it was negligence per se that the engineer of the locomotive failed to give the statutory signals on approaching the crossing, the company was not liable for the death of one who omitted to look and listen.—Judson v. Great Northern Ry. Co. (Minn.) 65 N. W. 447.

63 Minn. 248.

[c] (Wis.; 1896.)

Plaintiff's intestate was killed by a collision with one of defendant's trains at a crossing, in the nighttime, while riding with two others in a buggy. Before reaching the crossing, they had driven a considerable distance parallel with the railway, facing the approaching train, which could have been seen for 40 or 50 rods before it reached the crossing. The

wind was also blowing from the direction of the train. *Held*, that decedent was chargeable with contributory negligence, whether or not the proper signals for the crossing were given by those in charge of the train.—Steinhofel v. Chicago, M. & St. P. Ry. Co. (Wis.) 65 N. W. 852.

92 Wis. 123.

§ 38. — Effect of directions of railroad employes.

(Mich.; 1895.)

There was evidence that, on the down grade approaching a railroad crossing, one of defendant's trains parted about the center, without apparent negligence of defendant; that the flagman at the crossing, after the first section passed, gave a signal to cross, but a second or two afterwards signaled an approaching train; that, immediately on the signal to cross, decedent started his horse forward, which, on reaching the track (about the time the signal of an approaching train was given), shied from the second section, following about 100 feet in rear of the first, and threw the decedent against the train, thereby causing his death. *Held*, that the question of negligence was for the jury. Grant, J., dissenting.—Steele v. Chicago & G. T. Ry. Co. (Mich.) 65 N. W. 573.

§ 39. — Acts in emergencies.

(Mich.; 1896.)

Plaintiff's intestate and another lady, while driving a manageable horse in the daytime, on streets with which they were familiar, were giving no heed at a crossing to the approach of a train, which they did not see until they were within 30 or 40 feet of the crossing, when they attempted to cross ahead of the train, but were killed. The evidence showed they could have heard and seen the train 100 feet from the crossing, and that a man warned them to stop when they first saw it. *Held*, that the rule that where, by defendant's negligence, the party injured is put in a place of danger, and, in an attempt to extricate himself from it, he does not take the best hazard, he will not be charged with contributory negligence, did not apply.—Richfield v. Michigan Cent. R. Co. (Mich.) 68 N. W. 218.

§ 40. Proximate cause of injury.

[a] (Mich.; 1895.)

Where the thills became detached from a buggy upon one side, frightening the horse, and preventing the buggy from being drawn straight, and, before the horse could be stopped, the buggy slid off the planks, and struck the rail at a railway crossing, causing the occupant to be thrown from the buggy, and injured, the railway company is not liable, as the fact that the planking between the rails did not conform to the statute relative thereto was not the proximate cause of the accident at the crossing.—Murphy v. Michigan Cent. R. Co. (Mich.) 65 N. W. 753.

[b] (Neb.; 1896.)

To recover for an injury alleged to have been sustained at a railroad crossing by a collision with an engine on account of the neglect of the railroad company to cause a bell or whistle to be sounded as its engine approached such crossing, it is not enough for the injured party to show that he was injured at the crossing, and that no signal by bell or whistle was given, and that such default of the railroad company was negligence; but he must further show that the default and negligence of the company were the proximate cause of the injury.—Omaha & R. V. Ry. Co. v. Talbot (Neb.) 67 N. W. 599.

48 Neb. 627.

§ 41. Actions for injuries—Pleading.

[a] (Mich.; 1895.)

A declaration which alleges that decedent was negligently signaled by defendant's flagman to cross a track, which the decedent there-

upon attempted to do in a prudent manner, and, on account of defendant's negligence aforesaid, was run over, is not subject to objection—urged for the first time on appeal—that it does not sufficiently allege that the deceased, when run into, was on the track by reason of the said negligence, though on the trial objection was made to certain evidence because the declaration did not show negligence of defendant in giving a signal to cross, or in failing to give one not to cross.—*Steele v. Chicago & G. T. Ry. Co.* (Mich.) 65 N. W. 573.

[b] (N. D.; 1806.)

There is no fatal variance between pleading and proof where the complaint alleges that plaintiff was injured through defendant's negligence at a crossing of the public highway over defendant's railroad track by being there struck by one of defendant's engines, and the evidence shows that the highway was not legally laid out over defendant's right of way, but that defendant, by its acts and its acquiescence in the public use of the crossing as a public highway, had made such crossing a public highway as to the public, so that it was under the same obligations to take precautions against injuring persons or property at that point as would have rested on it had the highway been laid out in strict conformity with law.—*Coulter v. Great Northern Ry. Co.* (N. D.) 67 N. W. 1046.

5 N. D. 568.

§ 42. — Evidence.

[a] (Minn.; 1895.)

In an action for the death of one at a railroad crossing, evidence tending to show that on other occasions, when the train was being backed towards the crossing in the same manner as when the accident occurred, travelers approaching the crossing as did decedent could not or might not hear the train until they were almost upon it, is competent on the question of negligence of decedent.—*Newstrom v. St. Paul & D. R. Co.* (Minn.) 63 N. W. 253.

61 Minn. 78.

[b] (Wis.; 1895.)

Plaintiff was approaching with a team four separate railroad tracks crossing a highway in an unincorporated village. Plaintiff was not familiar with the locality, and his view of the tracks was partially obstructed. He stopped to look and listen at the last place where he could see the tracks before driving across, and, after passing the obstruction, looked, but did not see the train approaching until he was on the track. Only one whistle was sounded, the bell was not rung continuously, and the train was run at a speed of about 35 miles per hour. Held, that the evidence was sufficient to establish defendant's negligence, and that plaintiff had exercised due care.—*Heath v. Stewart* (Wis.) 63 N. W. 1051.

90 Wis. 418.

[c] (Wis.; 1896.)

Evidence that a natural hill existed on a railroad right of way, which interfered with a view of approaching trains, is admissible in an action by one injured at a crossing, as bearing on the alleged failure of the company to give proper signals, but is not an independent ground of negligence.—*Leitch v. Chicago & N. W. Ry. Co.* (Wis.) 67 N. W. 21.

93 Wis. 79.

§ 43. — Verdict.

(Iowa; 1896.)

A general verdict for injuries caused by failure to give signals at a crossing, as required by Acts 20th Gen. Assem. c. 104, § 1, is not overcome by special findings that plaintiff did not look or listen for a train before reaching an opening, 134 feet from the railroad, in a hedge extending along the side of the highway, and that, before reaching such opening, there was a point at which plaintiff could have known of the train if she had looked and listened.—*Case*

v. Chicago, M. & St. P. Ry. Co. (Iowa) 69 N. W. 538.

§ 44. Questions for jury.

[a] (Iowa; 1895.)

Where there was evidence that the engine with which the wagon which plaintiff was driving collided was running across a public street at a rate of speed in violation of a city ordinance, and such that plaintiff's horse was thrown 20 feet, and instantly killed, and that gravel was thrown upon one 20 feet from the engine as it passed, and that the only warning given of its approach was the noise made by its high rate of speed, it was error to direct a verdict for defendant.—*Moore v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 61 N. W. 992.

93 Iowa, 484.

[b] (Mich.; 1896.)

It is a question for the jury whether a railway company was negligent in not keeping a lookout on the rear of a train slowly backing, in the daytime, to a private crossing, used to a considerable extent.—*Green v. Chicago & W. M. Ry. Co.* (Mich.) 68 N. W. 988.

[c] (Minn.; 1897.)

While a railroad owes no duty, under ordinary circumstances, to give signals at private crossings, yet, when the crossing is peculiarly dangerous and the speed of the train great, it is a question for the jury whether a railroad company was not negligent in failing to give a warning at such a crossing.—*Czech v. Great Northern Ry. Co.* (Minn.) 70 N. W. 791.

[d] (Wis.; 1895.)

Though Rev. St. § 4972, subd. 5, limiting the speed of trains in cities and villages, does not apply to unincorporated hamlets, it is for the jury to say whether the speed of a train crossing a street in such hamlet was, under all the circumstances of the case, negligence.—*Heath v. Stewart* (Wis.) 63 N. W. 1051.

90 Wis. 418.

[e] (Wis.; 1897.)

Where a child, in climbing between the cars of a long freight train which had stood on a crossing near the depot in a village for nearly an hour, was killed by the movement of the train, it was for the jury to say whether the trainmen ought to have anticipated that a child might be on the track or the cars, and whether greater precaution should have been taken to guard against accident, it appearing that children frequently climbed over trains at that place under like circumstances, and that on that day the conductor had seen children playing between the tracks and attempting to ride on the cars, and there being a dispute in the evidence as to whether any signals at all were given.—*Carner v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 70 N. W. 560.

6. INJURIES TO PERSONS ON TRACK.

§ 45. Proximate cause of injury.

(Wis.; 1897.)

The failure of a railroad company to fence its tracks within the limits of a city, and near one of its stations, cannot be regarded as the proximate cause of the death of plaintiff's intestate, who was struck by a train at a point some distance from the public crossing.—*Wickham v. Chicago & N. W. Ry. Co.* (Wis.) 69 N. W. 982.

§ 46. Liability to trespassers.

[a] (Iowa; 1895.)

A railroad company is not required to keep a lookout for trespassers on its tracks, and is not liable for injuries to one struck by a train, unless he was actually seen within time to avoid the accident.—*Thomas v. Chicago, M. & St. P. Ry. Co.* (Iowa) 61 N. W. 967. 93 Iowa, 248.

[b] (Iowa; 1895.)

In an action against a railroad company for injuries to a child while trespassing on the company's tracks, it is error to instruct that the company was not required to keep a "constant lookout" to discover children at that place, as the jury might infer therefrom that some effort in that direction was required.—*Thomas v. Chicago, M. & St. P. Ry. Co. (Iowa)* 61 N. W. 967. 93 Iowa, 248.

[c] (Iowa; 1895.)

Persons in charge of a train owe no duty to an employe of the road walking along the track, while off duty, till he is discovered.—*Baker v. Chicago, R. I. & P. Ry. Co. (Iowa)* 63 N. W. 667.

§ 47. Rate of speed, signals, and look-outs.**[a] (Neb.; 1895.)**

A railroad company is not liable for the death of a person on its track, where the only negligence shown is the fact that the train was, at the time, running backwards at the rate of 25 miles an hour.—*Swindell v. Chicago, B. & Q. R. Co. (Neb.)* 62 N. W. 1103. 44 Neb. 841.

[b] (Neb.; 1896.)

That a passenger train was run at the rate of 25 miles per hour outside the limits of a city or town, even in a thickly settled neighborhood, and at a point where some persons were accustomed to walk upon the tracks, is not, in itself and alone, sufficient evidence of negligence.—*Missouri Pac. Ry. Co. v. Hansen (Neb.)* 66 N. W. 1105. 48 Neb. 232.

[c] (Wis.; 1895.)

Laws 1891, c. 467, entitled "An act to limit the rate of speed of railroad trains and locomotives in incorporated villages and cities," does not apply to unincorporated villages.—*Nolan v. Milwaukee, L. S. & W. Ry. Co. (Wis.)* 64 N. W. 319, 91 Wis. 16.

[d] (Wis.; 1897.)

Where a city ordinance limits the speed of trains within the limits to 15 miles per hour, it is not negligence to run the train at a speed of 10 miles an hour, in absence of any peculiar circumstances rendering such speed dangerous.—*Wickham v. Chicago & N. W. Ry. Co. (Wis.)* 69 N. W. 982.

[e] (Wis.; 1897.)

In an action for injuries resulting in death, where four witnesses testified that the train gave the proper signals of its approach, the testimony of two other witnesses, to the effect that they heard no signals, does not warrant a submission of the issue to the jury.—*Wickham v. Chicago & N. W. Ry. Co. (Wis.)* 69 N. W. 982.

[f] (Wis.; 1897.)

Plaintiff's intestate started to cross defendant's tracks about 40 feet from the street crossing. He was detained by a south-bound freight train, and, as the caboose went by him, ran around the rear of the train immediately in front of, and a few feet from, a north-bound passenger train. When he stepped on the track he was so close to the engine that he was concealed from the view of the engineer. *Held*, that the fact that he was not seen did not raise a presumption that a proper lookout was not kept.—*Wickham v. Chicago & N. W. Ry. Co. (Wis.)* 69 N. W. 982.

§ 48. Injury to children.**[a] (Iowa; 1895.)**

Though a child of tender years cannot be guilty of contributory negligence, yet it can become a trespasser on the tracks of a railroad company so as not to render the company liable for injuries to it, unless the company was actually aware of its presence.—*Thomas v. Chicago, M. & St. P. Ry. Co. (Iowa)* 61 N. W. 967. 93 Iowa, 248.

[b] (Mich.; 1896.)

That the mother of a child two years old permitted him to play with other children in the yard, whence he wandered onto railroad tracks, does not, as a matter of law, show contributory negligence; the testimony showing that he was only out of sight for a few minutes.—*Green v. Chicago & W. M. Ry. Co. (Mich.)* 68 N. W. 988.

[c] (Wis.; 1895.)

A complaint alleged that, while plaintiff's ward, a boy seven years old, was walking beside defendant's track, with one hand on the brake rod of a moving train, with the knowledge of defendant's servants, the latter recklessly and wantonly increased the speed of the train, so as to jerk the child from his feet, and throw him under the cars, whereby he was injured. *Held*, that such acts, if proved, constituted actionable negligence, and the complaint was not demurrable.—*McVoy v. Oakes (Wis.)* 64 N. W. 748, 91 Wis. 214.

§ 49. Contributory negligence of person injured.**[a] (Mich.; 1895.)**

One who steps on a railroad track and is run into by a train which he is able, when within five or six feet of the track, to see approaching, is guilty of contributory negligence.—*Brady v. Detroit, G. H. & M. Ry. Co. (Mich.)* 64 N. W. 1056.

[b] (Mich.; 1895.)

Whether the person who, relying on the custom not to run trains between a depot and a train standing opposite it, discharging express and passengers, is guilty of contributory negligence in going on the intervening track, to get mail and express from the train opposite, without looking to see if another train is approaching, is a question for the jury.—*Tabbs v. Michigan Cent. R. Co. (Mich.)* 64 N. W. 1061.

§ 50. — Failure to look or listen.**[a] (Iowa; 1895.)**

One who, while walking along the side of a railway track, neglects to look about for an approaching train, upon his coming to a junction of several tracks, and who is struck, after walking the length of a rail and a half, by a train which approached on another track than that along which he had previously been walking, is guilty of such negligence as will prevent a recovery for his injuries, where those in charge of the train stopped it at once, upon discovering his peril.—*Yeager v. Atchison, T. & S. F. R. Co. (Iowa)* 62 N. W. 672.

[b] (Iowa; 1896.)

It appeared that plaintiff, while crossing defendant's tracks near a station, had been struck by the north-bound train; that the south-bound train was then standing on the track, waiting for the other to pass; that plaintiff saw the south-bound train, and knew that the other train was due; that, before reaching the tracks, plaintiff had looked, but had seen no train coming because of obstructions; that, after reaching the tracks, there was a clear view in the direction of the approaching train, but plaintiff did not again look. *Held*, that plaintiff was guilty of contributory negligence precluding recovery.—*Hinken v. Iowa Cent. Ry. Co. (Iowa)* 66 N. W. 882.

[c] (Wis.; 1895.)

Plaintiff, knowing that a freight train was loading at the depot, went upon the high-way near the tracks to look for a train which he expected from the opposite direction. He looked back, and saw the freight train still at the depot, 200 feet away, and then, after conversing with some one, stepped onto the track, without again looking back, when he was struck by the engine, which was detached from the train. *Held*, that his contributory negligence barred his recovery.—*Nolan v. Milwaukee, L. S. & W. Ry. Co.,* 64 N. W. 319, 91 Wis. 16.

§ 51. Avoiding injury after seeing danger.

[a] (Iowa; 1895.)

Two tracks crossed a high bridge, which, with its approaches, was 400 feet long. The entire space on the bridge between two trains crossing at the same time did not exceed 3 feet. There was a plank walk 12 inches wide between the ends of the ties in the center span. A girl aged 12 and a boy aged 11, crossing on the south track, when near the center of the bridge, saw a train approaching on the north track, and, immediately after, one on the south track, whereupon they ran,—the girl taking the south track, and the boy the plank walk. There was no attempt made to stop the north train, which passed the girl. The south train ran her down, and threw her under the north train, where she was killed. *Held*, that the jury was justified in finding that if the engineer of the north train had stopped his train the accident would have been averted.—*Sutzin v. Chicago, M. & St. P. Ry. Co. (Iowa)* 63 N. W. 709.

[b] (Iowa; 1895.)

The negligence of the deceased in going upon the railroad bridge, on which she was run down, was no defense, if defendant's engineer was negligent in failing to stop after he discovered her dangerous position.—*Sutzin v. Chicago, M. & St. P. Ry. Co. (Iowa)* 63 N. W. 709.

[c] (Iowa; 1895.)

Where the engineer of a train saw children ahead, in a dangerous position, on a railway bridge having two tracks, knew that another train was close behind on the other track, and that the place to stand on the bridge between the two tracks was less than three feet, having a plank walk one foot wide,—the jury is justified in finding him negligent for not stopping his train, when he could have done so, although he thought the children would go on the plank walk.—*Sutzin v. Chicago, M. & St. P. Ry. Co. (Iowa)* 63 N. W. 709.

[d] (Neb.; 1895.)

The engineer in charge of a railroad train may presume that a trespasser on the track, if not young and helpless, is in possession of his senses, and he need not lessen the speed before discovering that such trespasser is in danger of injury.—*Omaha & R. V. R. Co. v. Cook* 62 N. W. 235, 42 Neb. 905.

§ 52. Evidence.

[a] (Iowa; 1895.)

The fact that other persons had occasionally trespassed on the track at the place of the accident cannot be considered in determining whether a trespasser injured was seen by the engineer in charge of the train.—*Thomas v. Chicago, M. & St. P. Ry. Co.*, 61 N. W. 967, 93 Iowa, 248.

[b] (Mich.; 1895.)

In an action for personal injuries, where defendant's negligence was alleged to consist in leaving cars uncoupled on a side track, and the evidence of defendant's trainmen that the cars were securely coupled when left on the track was uncontradicted, and the only evidence that the cars were left uncoupled was the mere fact that they moved away from the others when struck by a train, it was error to submit the question of defendant's negligence to the jury.—*Jakoboski v. Grand Rapids & I. R. Co. (Mich.)* 64 N. W. 461.

[c] (Neb.; 1895.)

The mere fact that a man is found dead under a railroad car does not raise the presumption that he came to his death through the negligence of the railroad company.—*Spears v. Chicago, B. & Q. R. Co.*, 62 N. W. 68, 43 Neb. 720.

§ 53. Question for jury.

(Wis.; 1894.)

In an action against a railroad company for injuries to a child nearly four years old,

which was run over in the daytime by a car on a side track in defendant's yard, there was evidence that, at the place of the accident, there was a well-beaten footpath across the tracks, which had been for years frequently and continuously traveled by grown people and children; that persons living on each side of the tracks used it in going to and from each other's houses; and that children used it in going to and from school. *Held*, that whether there had been such continuous and frequent use of the path, with the acquiescence of defendant, that its employes were bound to anticipate that a child would be on the path, and to keep a lookout on cars to prevent injury, was a question for the jury.—*Mason v. Chicago, St. P., M. & O. Ry. Co.*, 61 N. W. 300, 89 Wis. 151.

7. KILLING AND INJURING STOCK—CONSTRUCTION OF STATUTES.

§ 54. Cave as to animals seen on or near track.

(Iowa; 1896.)

After horses had entered upon a railroad company's inclosed right of way without fault of the company, a brakeman was sent ahead to assist the keeper in removing them. The train was slowly moved forward, with all possible caution, and came to a stop a quarter of a mile from the horses, which broke past the keeper and brakeman, and ran into a bridge. *Held*, that the moving of the train was not negligence.—*Barnhart v. Chicago, M. & St. P. Ry. Co. (Iowa)* 66 N. W. 902.

§ 55. Trespassing animals.

(N. D.; 1895.)

Plaintiff's colt, while attempting to cross the railroad track on a private crossing expressly built by defendant for plaintiff's use in driving stock, was killed by defendant's cars. *Held*, that the animal was not a trespassing animal, but was lawfully on the crossing.—*Bishop v. Chicago, M. & St. P. Ry. Co. (N. D.)* 62 N. W. 605.

4 N. D. 536.

§ 56. Cause of injury.

[a] (Minn.; 1895.)

In an action for killing a horse on a railroad track, evidence that the horse was running at large near a place where the track was not fenced; that it was soon afterwards found lying near the track, about three-quarters of a mile from there, and where the track was fenced; that during the intervening time a train passed in the same direction the horse went; that the tracks of the horse on the roadbed indicated that it was running very fast, and that it jumped over the cattle guard,—justifies the finding that the horse was frightened by the train onto the track where it was killed.—*Green v. St. Paul, M. & M. Ry. Co. (Minn.)* 61 N. W. 1130, 60 Minn. 134.

[b] (Minn.; 1895.)

Where an animal goes on a railroad track where the latter is not fenced, and is driven by a passing train over a cattle guard to where the track is fenced, and is there killed, the company is liable.—*Green v. St. Paul, M. & M. Ry. Co. (Minn.)* 61 N. W. 1130, 60 Minn. 134.

§ 57. Duty to erect and maintain fences.

[a] (Mich.; 1895.)

Grounds at a flag station at which trains are regularly stopped whenever there are passengers, freight, or express to be taken, though no depot building is erected thereon, are depot grounds, which the railroad company is not required to fence.—*Schneekloth v. Chicago & W. M. Ry. Co. (Mich.)* 65 N. W. 663.

[b] (Minn.; 1895.)

Gen. St. 1894, § 2692, requiring railroad companies to maintain fences "on each side of

such roads," means that they shall fence the margin or border of the entire right of way.—*Gould v. Great Northern Ry. Co. (Minn.)* 65 N. W. 125.

63 Minn. 37.

[c] (Neb.; 1895.)

A point a mile from the nearest station grounds, not within the limits of a city or town, remote from any railroad or highway crossing, and not necessary for use in making up trains, though occasionally used for such purpose, is not within the exception of Comp. St. c. 72, art. 1, § 1, requiring railroad companies to fence their tracks.—*Union Pac. R. Co. v. Knowlton* 62 N. W. 203, 43 Neb. 751.

[d] (Wis.; 1896.)

Depot grounds, not required to be fenced, prima facie include all of the right of way left unfenced between the switches and cattle guards, on either side of the platform, including the switches and side tracks, unless they are shown to be unreasonable in extent.—*Mills & Le Clair Lumber Co. v. Chicago, St. P., M. & O. Ry. Co. (Wis.)* 68 N. W. 996.

§ 58. Failure to construct fences.

(Wis.; 1895.)

Whether a distance of half a mile along the track of a railroad which was not fenced was reasonably necessary for depot grounds, so as to absolve the company from liability for damages for cattle killed on such portion of the track, is a question of fact.—*Grosse v. Chicago & N. W. Ry. Co.,* 65 N. W. 185, 91 Wis. 482.

§ 59. Defect in fences or cattle guards.

[a] (Iowa; 1894.)

The repairing of a railroad fence by nailing on loose boards, and putting on others in place of defective ones, using no new materials, does not constitute such "repairs" as are contemplated by Acts 1888, c. 30, providing that, where fences already constructed are rebuilt or repaired, they must conform to the requirements therein made for new fences.—*Moeckley v. Chicago & N. W. Ry. Co. (Iowa)* 61 N. W. 227.

92 Iowa, 748.

[b] (Iowa; 1895.)

The fact that the right of way fence was in a reasonably safe condition in the afternoon before the night the horses were killed does not, as a matter of law, prevent defendant from being liable.—*Anderson v. Chicago, R. I. & P. Ry. Co. (Iowa)* 61 N. W. 1058.

93 Iowa, 561.

[c] (Iowa; 1896.)

The mere fact that a horse ran or jumped over a cattle guard is insufficient to establish that the guard was defective.—*Barnhart v. Chicago, M. & St. P. Ry. Co. (Iowa)* 66 N. W. 902.

[d] (Iowa; 1896.)

In an action under Code, § 1289, to recover double damages for injury to live stock, plaintiff alleged that the stock was given access to defendant's track by reason of defendant's failure to maintain a substantial fence, as required by law. Plaintiff proved only that the stock went on defendant's right of way, and was killed by a locomotive. *Held*, that there could be no recovery on such a showing.—*Schmitt v. Chicago, St. P. & K. C. Ry. Co. (Iowa)* 68 N. W. 715.

[e] (Mich.; 1896.)

Under 3 How. Ann. St. § 3377, providing that any cattle guard which shall be approved by the commissioner of railroads is sufficient, it is not necessary that the railroad commissioner approve every cattle guard in use upon the various railroads, but a railroad company may use a cattle guard which he approves by name where such name applies to one of definite and fixed description.—*La Flamme v. Detroit & M. Ry. Co. (Mich.)* 67 N. W. 556.

§ 60. Private crossings and gates.

[a] (Iowa; 1895.)

In an action against a railroad company for stock killed, it appeared that there was a gate between defendant's road and plaintiff's pasture, through which the stock got on defendant's tracks; that stock had run in the pasture for two years, without opening the gate; that, on the evening before the killing, the gate was "properly closed and fastened"; and that, on the next morning, it was found open in such a way as would require it to have been unhooked, pushed back two feet, and then carried round into the pasture; but there was no evidence as to how it was opened. *Held*, that there was no evidence of defendant's negligence.—*Koenigs v. Chicago, M. & St. P. R. Co. (Iowa)* 65 N. W. 314.

[b] (Iowa; 1897.)

Defendant's section men closed gates opening from D.'s property on the track twice. After closing them the second time, they stopped to repair the track about 50 rods distant. D. passed through the gates, and left them open, and plaintiff's cattle, having escaped from his land onto D.'s land, went through the gates onto the track, and were killed. *Held*, that defendant was not liable.—*Harding v. Chicago, M. & St. P. R. Co. (Iowa)* 69 N. W. 1019.

§ 61. Rate of speed, signals, and lookouts.

[a] (Iowa; 1895.)

The court charged the jury that in determining defendant's negligence they might consider the time and condition of the night, the rate of speed, the condition of the train, whether the bell was rung and the whistle blown, and whether the train might have been stopped. *Held* that, though negligence in running the train too fast was not charged, since the rate of speed was proper to be considered in determining whether the train could have been stopped in time to avoid the accident, the charge was proper.—*Brown v. Sioux City & P. R. Co. (Iowa)* 62 N. W. 737.

[b] (Iowa; 1897.)

An instruction that if the jury found "the car could not be stopped in time to avoid the accident, by reason of the speed it was going," they should find for plaintiff, was erroneous.—*Fullerton v. Cedar Rapids & M. C. Ry. Co. (Iowa)* 70 N. W. 106.

[c] (Minn.; 1895.)

In an action against a railroad company for killing an animal running at large lawfully on the highway, evidence of a failure to give the statutory signals at the crossing is admissible on the question of defendant's negligence.—*Hohl v. Chicago, M. & St. P. R. Co. (Minn.)* 63 N. W. 742.

61 Minn. 321.

[d] (Neb.; 1896.)

It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and if such a precaution would have revealed the presence of trespassing stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them.—*Omaha & R. V. Ry. Co. v. Wright (Neb.)* 66 N. W. 842.

47 Neb. 886.

[e] (Neb.; 1896.)

The mere fact that, had the train which killed a horse been running at a less rate of speed, the horse would have crossed the track in safety, did not show the company guilty of negligence.—*Grand Island & W. C. R. Co. v. Phipps (Neb.)* 67 N. W. 441.

48 Neb. 493.

[f] (Neb.; 1896.)

It cannot be inferred that, had the train given the statutory signals at a cross-

ing, a horse which suddenly ran on the track at the crossing, and was killed, would not have attempted to cross as it did.—*Grand Island & W. C. Ry. Co. v. Phipps* (Neb.) 67 N. W. 441, 48 Neb. 493.

[g] (Wis.; 1896.)

In an action for injury to mules struck by a train on defendant's depot grounds at its station, it was not error to exclude evidence to show the speed of the train and the omission to sound the whistle and ring the bell, there being no statute restricting the rate of speed at which trains might lawfully run past such station.—*Mills & Le Clair Lumber Co. v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 68 N. W. 996.

§ 62. Contributory negligence of owner.

[a] (Iowa; 1895.)

Under Code, § 1289, providing that railway companies shall be liable for injury to stock on account of defects in the right of way fence, unless the same was caused by the willful act of the owner, the fact that plaintiff was negligent in taking care of his horses does not prevent a recovery by him.—*Anderson v. Chicago, R. I. & P. Ry. Co.* (Iowa) 61 N. W. 1058, 93 Iowa, 561.

[b] (Mich.; 1896.)

If plaintiff's tenant knew that plaintiff's horse was in the habit of passing over defendant's cattle guard, and then voluntarily turned said horse onto the street near the crossing, plaintiff cannot recover for the value of the horse killed by defendant on its right of way.—*La Plamie v. Detroit & M. Ry. Co.* (Mich.) 67 N. W. 556.

[c] (S. D.; 1896.)

The owner of live stock who allows them to graze near railroad tracks while in charge of a girl 14 years old is not guilty of contributory negligence as a matter of law.—*Hutchinson v. Chicago, M. & St. P. Ry. Co.* (S. D.) 67 N. W. 853.

§ 63. — Allowing animals to go at large.

[a] (Mich.; 1895.)

A person turning his horse on the highway adjoining unfenced depot grounds is guilty of contributory negligence preventing his recovery for the killing of the horse by a train of the railroad company.—*Schneekloth v. Chicago & W. M. Ry. Co.* (Mich.) 65 N. W. 663.

[b] (Minn.; 1895.)

A colt which escaped from its owner's premises and ran upon a railroad crossing within the limits of a town, and was injured through the negligence of the company, was not wrongfully upon the highway, as against the company.—*Hohl v. Chicago, M. & St. P. R. Co.* (Minn.) 63 N. W. 742, 61 Minn. 321.

§ 64. Actions for injuries to animals.

(Neb.; 1896.)

Under a petition, in an action against a railroad company for stock killed, charging the company generally with negligence, evidence was admissible that the engineer in charge of the train which killed the stock saw, or, by the exercise of due care, could have seen, the cattle in time to have avoided injuring them.—*Railway Company v. Wright*, 66 N. W. 842, 47 Neb. 886, overruled.—*Omaha & R. V. Ry. Co. v. Wright* (Neb.) 68 N. W. 618.

§ 65. — Evidence.

[a] (Iowa; 1895.)

In an action against a railroad company for injury to horses, which, it was claimed, got on the track by reason of a defective cattle guard, plaintiff's witnesses merely testified that the guard consisted of 8 ties, 8 inches wide, laid across the track, 6 or 7 inches apart, the bottom of the pit being 21 inches below the tops of the ties. Defendant's road master testified that iron

cattle guards were not, so far as he knew, in use by all other roads; that they did not turn stock as well as the pit guard; and that he knew of no guard which would absolutely turn live stock. In rebuttal, a witness for plaintiff stated that the pit cattle guard was not the kind in general use by various roads. *Held*, that a verdict for plaintiff was improper.—*Strong v. Chicago & N. W. Ry. Co.* (Iowa) 63 N. W. 699.

[b] (Mich.; 1896.)

In an action against a railway company for killing plaintiff's colts, where the issue was whether the colts had gotten out of the pasture through a defective fence along defendant's right of way or through plaintiff's defective fence along the highway, testimony that within a month of the accident cattle had been driven off the right of way into plaintiff's pasture, through the fence at the point where it was claimed the colts went through, was admissible.—*Bowen v. Flint & P. M. R. Co.* (Mich.) 68 N. W. 230.

[c] (Mich.; 1896.)

It was proper to exclude testimony in answer to the question whether witness knew of plaintiff's colts coming out into the highway and being taken up in consequence, the place where they came out and the time not being designated.—*Bowen v. Flint & P. M. R. Co.* (Mich.) 68 N. W. 230.

[d] (S. D.; 1895.)

In an action against a railroad company for killing animals, evidence tending to show the distance the engineer could have seen animals on the track at the time and place of the accident is competent.—*Sheldon v. Chicago, M. & St. P. Ry. Co.* (S. D.) 62 N. W. 953, 6 S. D. 606.

§ 66. — Instructions.

[a] (Iowa; 1897.)

Where the complaint alleged that the employes of defendant railroad, with knowledge that plaintiff's cows were on the track, negligently and willfully allowed its car to run into the cows, etc., an instruction that, if defendant's employes did not stop the car as soon as they could do so after discovering that the cows were on the track, the jury should find for plaintiff, was erroneous, as submitting an issue not presented by the pleadings.—*Fullerton v. Cedar Rapids & M. C. Ry. Co.* (Iowa) 70 N. W. 106.

[b] (Neb.; 1896.)

Error in quoting from the statute the statement of the liability of a railroad company to the owner of live stock killed or injured because of the negligence of the company's employes, arising from failure of the company to build fences along its right of way, followed by an instruction that if the company neglected to fence its tracks at the place where plaintiff's stock was injured, and that the stock was injured by the employes of the company in permitting the train to run over the stock, the company was liable, was cured by an instruction given for defendant that if the stock got on the track for want of a fence, and was frightened by a passing train, and in its fright was injured by falling through a bridge on the line of the road, and no negligence was chargeable to the employes of the company in charge of the train, and there was no injury to the stock by any actual contact with the train, the company was not liable; the stock having been injured as stated in the last instruction.—*Burlington & M. R. Co. in Nebraska v. Gorsuch* (Neb.) 66 N. W. 831, 47 Neb. 767.

§ 67. Question for court or jury.

[a] (Mich.; 1895.)

The question whether an engineer negligently ran down horses which had escaped through a gate upon the track, or whether he did not, as testified to by him and the fireman, dis-

cover them until he was within 25 feet of them, and too late to avoid the accident, is for the jury, where sufficient to warrant an inference of knowledge of their presence on the part of the engineer and fireman. Grant and Hooker, JJ., dissenting.—*Granby v. Michigan Cent. R. Co.* (Mich.) 62 N. W. 579.
104 Mich. 403.

[b] (Mich.; 1895.)

In a suit against a railroad company for cattle killed on its tracks late in the evening, a witness for defendant testified that he tracked the cattle from certain bars to where they were killed; that he was the defendant's foreman, and it was his duty to see that these bars were kept up; that on the afternoon of the day the cattle were killed he had examined the bars and found them up; that he had passed the place nearly every day for several months preceding the accident and never saw the bars down but once. A witness for plaintiff testified that he passed through the opening on the day before and also on the day the cattle were killed, and on each occasion found the bars down. Several other witnesses for plaintiff testified that they had never seen the bars up until after the cattle were killed. *Held*, that the question whether the cattle entered defendant's right of way at the bars was for the jury.—*McDonald v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Mich.) 63 N. W. 966.
105 Mich. 659.

[c] (N. D.; 1895.)

In an action against a railroad company for killing an animal at a private crossing, put in by the defendant for the plaintiff's use in passing from one part of his farm to another, where the engineer testified that he used all means at his command to stop the train after seeing the animal, the question of negligence is for the jury.—*Bishop v. Chicago, M. & St. P. Ry. Co.* (N. D.) 62 N. W. 605.
4 N. D. 536.

[d] (S. D.; 1895.)

In an action for the death of a horse, the evidence showed that it trespassed on defendant's tracks at night in a deep cut, and that when discovered by the engineer it was so near the engine that the train could not be stopped in time to avoid the injury, and that all precautions at hand were used. *Held*, that it was error to refuse to direct a verdict for defendant.—*Lewis v. Fremont E. & M. V. R. Co.* (S. D.) 63 N. W. 781.

8. FIRES.

§ 68. Care required as to fires.

(Wis.; 1896.)

If actionable negligence on the part of a railroad company caused the fire which spread to plaintiff's land, and did the damage complained of, whether the company exercised ordinary care to quench the fire does not affect plaintiff's right to recover.—*Austin v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 1129.
93 Wis. 496.

§ 69. Setting fire to burn off right of way.

[a] (Mich.; 1895.)

In an action against a railroad company to recover for the burning of a barn, it appeared that, on the day of the burning, a fire was started by the section boss of defendant on its right of way, which was covered with dry grass interspersed with pieces of decayed wood, etc. The wind was very high, and blowing almost directly towards the building, which was 300 feet distant, and had its windows open, and was filled with hay. There was no evidence that the barn was fired in any other manner than from defendant's right of way. *Held*, that it was not error to submit the case to the jury.—*Cole v.*

Lake Shore & M. S. Ry. Co. (Mich.) 63 N. W. 647.

105 Mich. 549.

[b] (Mich.; 1895.)

In an action against a railroad company for damage to a building caused by fire originating on its right of way, an instruction asked by defendant, making defendant's liability dependent upon whether the fire was set under circumstances "customary with prudent railroad men," was properly modified by omitting the word "railroad."—*Cole v. Lake Shore & M. S. Ry. Co.* (Mich.) 63 N. W. 647.
105 Mich. 549.

[c] (Mich.; 1895.)

An instruction making defendant's liability dependent on whether the fire was carefully set and carefully guarded is misleading, as not referring to the question of the propriety of setting the fire at that time.—*Cole v. Lake Shore & M. S. Ry. Co.* (Mich.) 63 N. W. 647.
105 Mich. 549.

§ 70. Defects in construction of engines.

(Wis.; 1895.)

Where the evidence showed that both short and extension front locomotives were in general use, but showed no decided superiority of one over the other, though the jury were convinced that one was the better engine, the company could not be held negligent in using the other.—*Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co.* (Wis.) 65 N. W. 176.
91 Wis. 447.

§ 71. Combustibles on right of way.

(Mich.; 1895.)

A railroad company is not an insurer that fire will not arise from combustible materials on its right of way, but it must keep its track and right of way reasonably free from such materials.—*Briant v. Detroit, L. & N. R. Co.* (Mich.) 62 N. W. 365.
104 Mich. 307.

§ 72. Contributory negligence of owner of property.

[a] (Mich.; 1895.)

It is not negligence per se to build a wooden building in close proximity to a railroad track.—*Briant v. Detroit, L. & N. R. Co.* (Mich.) 62 N. W. 365.
104 Mich. 307.

[b] (Mich.; 1895.)

One who erects a wooden building in close proximity to a railroad track assumes the risks incident thereto, and if the building is destroyed by fire from the engines, through no want of care on the part of the railroad company, he cannot recover.—*Briant v. Detroit, L. & N. R. Co.* (Mich.) 62 N. W. 365.
104 Mich. 307.

[c] (Mich.; 1895.)

Where defendant's servants placed debris gathered from tearing down a wooden platform in a ditch on the right of way between the tracks and plaintiff's planing mill, and partly covered it with sawdust and shavings, and on plaintiff's stating that the material so placed formed a fire trap, defendant promised to cover it up, and did so partly, and plaintiff subsequently visited the premises and saw their dangerous condition, but left town without taking steps to protect his property, and the fire which subsequently destroyed it originated on that part of the debris not covered up by defendant, a charge that plaintiff was negligent was properly refused.—*Briant v. Detroit, L. & N. R. Co.* (Mich.) 62 N. W. 365.
104 Mich. 307.

[d] (Neb.; 1896.)

The facts that plaintiff permitted hay to lie on hay land in windrows, and that the fire break plowed around his farm was insufficient, did not constitute contributory negligence as a

matter of law.—Union Pac. Ry. Co. v. Ray 65 N. W. 773, 46 Neb. 750.

§ 73. Notice of claim.

[a] (Wis.; 1896.)

In Laws 1893, c. 202, requiring a notice in writing to be given to a railway company of a claim for damages occasioned by fire set by a locomotive, within one year after the event causing such damage, the provision that "such notice may be given in the manner required for the service of summons in a court of record" is permissive only, and a delivery of the notice to a general officer of the corporation, or any agent having a general authority to act for it in respect to the subject-matter to which the notice relates, is sufficient.—Atkinson v. Chicago & N. W. Ry. Co. (Wis.) 67 N. W. 703. 93 Wis. 362.

[b] (Wis.; 1896.)

Notice of a claim for damage occasioned by fire set by a locomotive must be served on a railroad company within one year from the time the fire ceased burning on the claimant's property.—Atkinson v. Chicago & N. W. Ry. Co. (Wis.) 67 N. W. 703. 93 Wis. 362.

§ 74. Actions for injuries by fire.

[a] (Minn.; 1895.)

A complaint alleging that defendant, while operating its line of road by its employes, and running over the track thereof a locomotive, negligently permitted the engine to scatter fire, whereby plaintiff's property was damaged, was broad enough to admit evidence of negligence in respect to the condition of the engine and the manner of operating it.—Weber v. Winona & St. P. R. Co. (Minn.) 65 N. W. 93. 63 Minn. 66.

[b] (Wis.; 1895.)

In an action against a railroad company for damages from a fire set by its engine, plaintiff was not prejudiced by the striking out of a special finding that the jury "did not know" whether the engine was properly managed, where the jury found that the company was negligent only in carelessly inspecting the engine.—Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co., 65 N. W. 176, 91 Wis. 447.

[c] (Wis.; 1896.)

Error, in an action against a railway company for damages done to property by fire set by a locomotive, in permitting an amendment of the complaint demanding damages for injuries to a tract of land not included in plaintiff's notice of claim of damages, served under Laws 1893, c. 202, was cured by setting aside the verdict on the motion for new trial so far as the damage to that particular tract was concerned.—Donovan v. Chicago & N. W. Ry. Co. (Wis.) 67 N. W. 721. 93 Wis. 373.

§ 75. — Presumptions and burden of proof.

[a] (Minn.; 1895.)

In an action against a railroad company for damages caused by a fire set by sparks from a locomotive, the burden cast on defendant by Gen. St. 1894, § 2700, was not sustained where it appeared from its evidence that the engine, after having been twice reported for throwing fire, was supplied with a new net, the same as that removed, though, as a witness testified, there was nothing the matter with the netting taken out, and that an engine going down grade, as the engine in suit was when the fire was set, should not throw sparks.—De Camp v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 64 N. W. 392. 62 Minn. 207.

[b] (Minn.; 1895.)

Where plaintiff proved that the fire was set by sparks thrown by defendant's locomotive

in the grass on the outside of the ditch along the road, that there had been no recent rain and the grass was hence dry, that the wind was blowing quite strongly, and that the same locomotive set other fires on the same day, and defendant's witnesses testified that the locomotive was properly inspected, and that it and the appliances used for the extinguishment of sparks and the prevention of their escape were in good order, and the latter of the most modern and approved kind, that the engineer and fireman operated the locomotive skillfully and carefully, that the dampers and fire boxes were closed, and there was no fire on the train other than that in the locomotive, the question whether the statutory presumption of negligence on the part of defendant was rebutted was for the jury.—Burrd v. Great Northern Ry. Co. (Minn.) 64 N. W. 562. 62 Minn. 243.

[c] (Wis.; 1895.)

The inference of negligence arising from the fact that the fire was set by sparks from defendant's engine is overcome by undisputed evidence that the engine was properly constructed and equipped, was carefully inspected the day before the fire, and found to be in proper order, and was properly managed.—Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co. 65 N. W. 176, 91 Wis. 447.

§ 76. — Admissibility of evidence.

[a] (Wis.; 1895.)

It was proper to exclude evidence of fires set from sparks from the engine in August and September, where no dates were fixed, and there was nothing to show that the fires were caused by want of repair or proper management of the engine.—Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co. (Wis.) 65 N. W. 176, 91 Wis. 447.

[b] (Wis.; 1895.)

Where the fire occurred on September 30th, it was proper to exclude evidence of fires caused by the same engine in April, May, and June, the engine having been repaired in July, and sent from the shop in good condition.—Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co., 65 N. W. 176, 91 Wis. 447.

[c] (Wis.; 1895.)

It was proper to exclude evidence that the engine threw sparks in November and December.—Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co., 65 N. W. 176, 91 Wis. 447.

§ 77. — Sufficiency of evidence.

[a] (Minn.; 1895.)

The presumption of negligence on the part of the company arising from the fact that the fire was set by sparks from its locomotive was not conclusively overcome by the fact that the engine was properly equipped and inspected, and evidence of the engineer and fireman that the engine was managed in the usual manner, so as to take the question whether the presumption was rebutted from the jury.—Solum v. Great Northern Ry. Co. (Minn.) 65 N. W. 443. 63 Minn. 233.

[b] (Neb.; 1896.)

In an action against a railroad company for damages from a fire set by a locomotive the undisputed evidence was that a certain engine which passed the place where the fire originated at such a time that it might have set the fire was equipped with the most approved appliances, and was in good condition, but there was no direct evidence that it set the fire, and there was evidence that the fire was set by a different engine. Held, that the issue of negligence in the construction and operation of the engine which set the fire was properly submitted to the jury.—Union Pac. Ry. Co. v. Ray (Neb.) 65 N. W. 773, 46 Neb. 750.

[c] (Neb.: 1896.)

Evidence that the fire started up shortly after defendants' locomotive had passed, and that the reputation of the particular engine for setting fires was bad, did not require a verdict for plaintiff, where there was evidence that the locomotive was equipped with the latest and most approved appliances for the prevention of the escape of fire, that it was in good condition, and properly operated, and that no fire escaped from it, and that the fire originated too far from defendant's right of way to have been started by sparks from an engine.—*Louis v. Union Pac. Ry. Co.* (Neb.) 66 N. W. 1133.
48 Neb. 151.

[d] (S. D.: 1895.)

Where the evidence as to whether the fire set by defendant's locomotive extended $3\frac{1}{2}$ miles, from the point where it originated to plaintiff's premises, was that the wind was blowing in the direction in which plaintiff's premises lay from the point where the fire started, that there was a burned tract between the starting point and plaintiff's premises, that the premises were burned on the day of the fire set by the locomotive, and that there was no other such fire on that day, it warranted a finding in the affirmative.—*Yankton Fire Ins. Co. v. Fremont, E. & M. V. R. Co.* (S. D.) 64 N. W. 514.

[e] (Wis.: 1896.)

In an action against a railway company for negligently setting fire to the grass on its right of way, whereby plaintiff was damaged, where the fire could not be traced to any particular passing engine, it was competent to show defendant's negligence by circumstantial evidence.—*Donovan v. Chicago & N. W. Ry. Co.* (Wis.) 67 N. W. 721.
93 Wis. 373.

[f] (Wis.: 1896.)

Where those in charge of plaintiff's premises, supposing that they had extinguished the fire set by defendant's engine, went away, leaving a boy in charge, and the fire afterwards started up again, and caused the damage complained of, a refusal to direct a verdict for defendant was not error, there being evidence that there was no probable danger to be apprehended at the time plaintiff's servants left the premises.—*Austin v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 1129.
93 Wis. 496.

[g] (Wis.: 1896.)

That a fire, first discovered in the lower floor of a warehouse, was started by sparks from defendant's engine, is not sufficiently shown by evidence that sparks as large as a thumb nail, and in an unusual quantity, were emitted by the engine, and carried by a breeze towards an open upper-story window in the elevator shaft of the warehouse, 25 feet from the engine; that some of the sparks struck the building and disappeared, others passing over it; and that the warehouse, a frame building, was exceedingly dry,—where the evidence showed also that the elevator shaft had been cleaned of rubbish the day before, that the fire did not break out until an hour and a half after the sparks were emitted, and that the day was extremely hot, so that the draft in the elevator shaft would have been probably upward. Winslow and Pinney, JJ., dissenting.—*Finkelston v. Chicago, M. & St. P. Ry. Co.* (Wis.) 68 N. W. 1005.

§ 78. — Damages.**[a] (Mich.: 1894.)**

Where, in an action against a railroad company for damage to timber land by fire, it appears that the only real damage was due to the increased cost of cutting the timber, the value of the stumpage cannot be considered, in assessing damages.—*Gordon v. Grand Rapids & I. R. Co.* (Mich.) 61 N. W. 549.
103 Mich. 379.

[b] (Mich.: 1894.)

In an action against a railroad company for damage to timber land by fire, it is proper to consider the increased cost of cutting the timber, as of the time suit was brought, owing to the blowing down of trees whose roots were burned, though the action was not brought till two years after the fire.—*Gordon v. Grand Rapids & I. R. Co.* (Mich.) 61 N. W. 549.
103 Mich. 379.

[c] (Minn.: 1895.)

In an action against a railroad to recover for growing grass destroyed through fire caused by sparks, the measure of damages is the difference in the market value of the land immediately before the fire, and its value immediately after.—*Ward v. Chicago, M. & St. P. Ry. Co.* (Minn.) 63 N. W. 1104.
61 Minn. 449.

[d] (Minn.: 1895.)

In an action against a railroad to recover for growing grass destroyed through fire caused by sparks, evidence that another crop of a certain value might be grown on the land during the same growing period, of the average yield and market price of like crops, the ordinary expense of harvesting and marketing the same, and of the condition of the particular crop before the fire, is admissible on the question of damages.—*Ward v. Chicago, M. & St. P. Ry. Co.*, 63 N. W. 1104, 61 Minn. 449.

[e] (Minn.: 1895.)

In an action against a railroad for damages to growing grass destroyed by fire caused by sparks, evidence of matters occurring subsequent to the fire is not admissible on the question of damages.—*Ward v. Chicago, M. & St. P. Ry. Co.*, 63 N. W. 1104, 61 Minn. 449.

[f] (Neb.: 1896.)

In ascertaining the damages, in an action for negligently setting out fire destroying trees on the land of plaintiff, the inquiry should not be alone as to the value of the trees before their injury, but should be as to the difference in value before and after the fire.—*Kansas City & O. R. Co. v. Rogers* (Neb.) 67 N. W. 602.
48 Neb. 653.

[g] (Neb.: 1896.)

In an action for negligently setting out fire destroying trees on the land of plaintiff, the measure of damages is the damage to the trees, so that plaintiff, in estimating the value of the trees, could take into consideration what they were worth to him as ornamental trees, and as adding to the value of his land.—*Kansas City & O. R. Co. v. Rogers* (Neb.) 67 N. W. 602.
48 Neb. 653.

[h] (Wis.: 1896.)

In estimating the damage caused by the fire it was not error to allow the admission of testimony tending to show what the land burned over had previously produced.—*Donovan v. Chicago & N. W. Ry. Co.* (Wis.) 67 N. W. 721.
93 Wis. 373.

[i] (Wis.: 1896.)

A railroad company, which negligently sets fire to premises, is not liable for damages which the exercise of ordinary care by the owner of the property might have prevented.—*Austin v. Chicago, M. & St. P. Ry. Co.* (Wis.) 67 N. W. 1129.
93 Wis. 496.

§ 79. — Question for jury.**[a] (Iowa: 1897.)**

Under the rule that proof of damage by fire set by an engine on a railroad is prima facie evidence of negligence of the company, where such proof is made, and evidence is introduced to show that there was no fault in the engine or its management, a conflict of evidence arises on the issue of negligence, which is to be determined by the jury.—*Hemmi v. Chicago G. W. Ry. Co.* (Iowa) 79 N. W. 746.

[b] (Wis.; 1895.)

The questions of the amount and character and the weight and effect of evidence in rebuttal of the inference arising from the fact that the fire was set by defendant's locomotive are questions of law, when the evidence is undisputed. *Menomonee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 65 N. W. 176, 91 Wis. 417.

§ 80. — Instructions.

[a] (Mich.; 1896.)

A declaration alleged that defendant was negligent in permitting combustible material to accumulate on its right of way, in causing a fire to be started thereon, and in permitting it to escape to plaintiff's land. The jury asked a special instruction whether they were obliged to find the origin of the fire, and were instructed that they were not, "if the damage was due to the negligence of the company." *Held*, that the instruction was erroneous, as making defendant liable irrespective of the origin of the fire. — *Osborne v. Chicago & W. M. Ry. Co.* (Mich.) 69 N. W. 86.

[b] (Minn.; 1896.)

In an action brought to recover damages caused by a fire alleged to have resulted from the careless and negligent management and operation of one of defendant's locomotives, there being no direct evidence as to the origin of the fire, the court charged the jury that if, from the evidence, they found that the fire started near defendant's right of way soon after a certain train passed, and that there was no other fire in the vicinity except that in the locomotive, and no other apparent cause for the breaking out of the fire, they would have the right to infer and find that it was set by the locomotive, but that they "would not be bound to so infer or find if there is reasonable ground to believe that it may have been started in some other way." *Held* misleading and prejudicially erroneous. — *Flanagan v. Chicago, M. & St. P. Ry. Co.* (Minn.) 67 N. W. 794.

[c] (Neb.; 1896.)

In an action for negligently setting out fire destroying trees on the land of plaintiff, the court, after reading *Crim. Code*, § 62, making it a misdemeanor to set fire to woods and prairies, charged that every one had a right to presume that no one would be guilty of a misdemeanor, and was therefore under no obligation to anticipate negligence in setting out fires and to guard against it, and that if defendant negligently or carelessly set fire to material on its right of way, which spread, and destroyed plaintiff's property, it would be liable for the damage. *Held* error, since said section applies only to fires set out on the lands of another, and not on one's own land. — *Kansas City & O. R. Co. v. Rogers* (Neb.) 67 N. W. 602.

48 Neb. 653.

VII. CRIMES AGAINST RAILROADS.

§ 81. Displacing tracks.

(Neb.; 1897.)

Crim. Code, § 93, making the willful displacement of a railway track a felony, violates no constitutional provision. — *Davis v. State* (Neb.) 70 N. W. 984.

RAPE.

I. WHAT CONSTITUTES, § 1.

II. INDICTMENT AND INFORMATION, §§ 2, 3.

III. EVIDENCE, §§ 4-11.

IV. INSTRUCTIONS, §§ 12-16.

See, also, "Indecent Assault."

Right to bail, see "Bail," § 1.

I. WHAT CONSTITUTES.

Instructions as to lesser offenses, see post, § 15.
Defining offenses, see post, § 13.

§ 1. Female under age of consent.

[a] (Neb.; 1894.)

In a prosecution for an assault with intent to rape a child under the age of consent (*Cr. Code*, § 12), the fact that the intention of defendant was to have sexual intercourse with her consent, and not otherwise, is immaterial. — *Head v. State*, 61 N. W. 494, 43 Neb. 39.

[b] (Neb.; 1895.)

It is not necessary, in a prosecution for assault on a girl under the age of consent with intent to rape, to prove that defendant intended to use force, if necessary, to overcome the child's resistance. — *Wood v. State* (Neb.) 61 N. W. 355, 46 Neb. 58.

[c] (Neb.; 1895.)

It was error, on a prosecution under *Crim. Code*, § 12, for carnal abuse of a female child, to charge that such abuse did not necessarily mean abuse by sexual intercourse, attempted or accomplished. — *Chambers v. State* 64 N. W. 1078, 46 Neb. 447.

[d] (Neb.; 1896.)

Laws 1887, c. 105, is a valid amendment of *Cr. Code*, § 12, fixing the age of consent in a female, although the repealing clause in the published act purports to repeal section 11, instead of section 12, as theretofore existing; the enrolled act disclosing that the legislature in fact repealed said original section 12. — *Bruce v. State* (Neb.) 67 N. W. 454.

48 Neb. 570.

II. INDICTMENT AND INFORMATION.

Conviction of assault under indictment for rape, see "Indictment and Information," § 27.

Election of counts, see "Indictment and Information," § 28.

Joinder of count for fornication, see "Indictment and Information," § 28.

— for incest, see "Indictment and Information," § 28.

§ 2. Identity of counts.

(Iowa; 1895.)

Where, in an indictment for rape, the first count is in the ordinary form of one for rape of a female over 13 years of age, except that prosecutrix is described as a "female child," and the second count is for carnally knowing a female child under the age of 13 years, the same female being named in each count, the counts do not each charge the same offense, so as to render a dismissal of the first an acquittal of the second. — *State v. Gaston* (Iowa) 65 N. W. 415.

§ 3. Assault with intent to commit.

(Iowa; 1895.)

An indictment charging an assault with intent to rape need not allege that the assault was made feloniously. — *State v. Hutchison* (Iowa) 64 N. W. 610.

III. EVIDENCE.

Admitting evidence of rape on trial for incest, see "Incest," § 3.

§ 4. Admissibility.

[a] (Iowa; 1895.)

Where there is testimony that the child made complaint and expressions of pain after the commission of the offense, testimony as to what part of her person she indicated was painful is admissible. — *State v. Hutchison* (Iowa) 64 N. W. 610.

[b] (Iowa: 1896.)

On a prosecution for rape of a person under the age of consent, it not being claimed that the offense was against her will, the state may show that she went with defendant to different places some time after commission of the alleged offense.—*State v. Forsythe* (Iowa) 68 N. W. 446.

[c] (Mich.: 1895.)

Where the prosecutrix was under the age of consent when the rape was committed, evidence that the defendant had had previous connection with her was incompetent.—*People v. Harris* (Mich.) 61 N. W. 871.
103 Mich. 473.

[d] (Mich.: 1895.)

What became of the child born to the prosecutrix in a rape case as the result of the offense is immaterial on the trial of the alleged offender.—*People v. Duncan* (Mich.) 62 N. W. 556.

104 Mich. 460.

[e] (Mich.: 1895.)

In a prosecution for rape of a child 13 years old prosecutrix testified that she never had intercourse before the alleged offense, that it did not hurt her, that no blood followed, and that she was not sore the next day. *Held*, that it was error to refuse to allow respondent to show that the natural result of intercourse with one of prosecutrix's age would be pain, followed by blood and soreness.—*People v. Duncan* (Mich.) 62 N. W. 556.

104 Mich. 460.

[f] (Mich.: 1895.)

On trial of a father for the rape of his daughter, evidence that defendant was abusive to his wife and other children is admissible to show that prosecutrix yielded under fear of her father.—*People v. Burwell* (Mich.) 63 N. W. 986.

[g] (Neb.: 1895.)

The physical and mental condition of the prosecutrix may be considered by the jury on the question of resistance.—*Thompson v. State* (Neb.) 62 N. W. 1060.
44 Neb. 366.

§ 5. Character of female.

(Iowa: 1895.)

Testimony that the prosecutrix in a trial for rape bore a good reputation for chastity should not be stricken out because the witness stated on cross-examination that he never heard anything about it until after the rape.—*State v. Case* (Iowa) 65 N. W. 149.

§ 6. Acts, declarations, and complaints of prosecutrix.

[a] (Iowa: 1894.)

Evidence that prosecutrix made complaint soon after the injury is admissible to corroborate her testimony.—*State v. Cook* (Iowa) 61 N. W. 185.

92 Iowa, 483.

[b] (Iowa: 1894.)

Testimony by the father of prosecutrix that she had told him that defendant had had intercourse with her without her consent is not within the rule excluding evidence of the particulars of a complaint made shortly after the commission of the offense.—*State v. Cook* (Iowa) 61 N. W. 185.

92 Iowa, 483.

[c] (Iowa: 1895.)

Complaints and expressions of pain made by the child soon after the offense was committed are admissible.—*State v. Hutchison* (Iowa) 64 N. W. 610.

[d] (Iowa: 1895.)

On trial for carnal abuse of a child under 13 years of age, where the defense claimed that prosecutrix, on direct examination, had simply rehearsed a story which her mother had told her to repeat, testimony of prosecutrix on redirect examination, and in response to a ques-

tion as to how her mother knew that defendant had put his hands on her person, that she had told her mother about it, was admissible.—*State v. Hutchison* (Iowa) 64 N. W. 610.

[e] (Mich.: 1895.)

On a prosecution for rape of a child 13 years of age it was error to permit the people to show a conversation between prosecutrix and a friend regarding the offense, five months after its commission, when her only reason for not complaining before was that respondent told her that if she told it would be worse for her, and that she was afraid of him.—*People v. Duncan* (Mich.) 62 N. W. 556.

104 Mich. 460.

[f] (Neb.: 1895.)

Where the state, in a prosecution for rape, asked prosecutrix whether she complained of the injury, defendant could cross-examine her as to the particular facts which she stated in her complaint.—*Wood v. State* (Neb.) 64 N. W. 355.
46 Neb. 58.

[g] (Neb.: 1895.)

The declarations of the female charged to have been assaulted, complaining of the alleged assault, are not admissible when she does not testify as a witness, though her failure to testify is due to the fact that she is an imbecile.—*State v. Meyers*, 64 N. W. 697, 46 Neb. 152.

[h] (Wis.: 1895.)

It was not reversible error, on trial under an indictment charging both rape and fornication with a female 14 years of age, to admit testimony to the effect that prosecutrix made complaint for the first time 17 days after the crime is charged to have been committed, and then to her cousin, it appearing that her mother was absent from home during all that time; defendant having been found guilty of fornication only.—*Jackson v. State* (Wis.) 64 N. W. 838, 91 Wis. 253.

§ 7. — As to identity of defendant.

(Iowa: 1895.)

On trial for carnal abuse of a child under 13 years of age, statements by the child as to the identity of her assailant are admissible.—*State v. Hutchison* (Iowa) 64 N. W. 610.

§ 8. Explaining failure to complain.

(Mich.: 1895.)

The complaining witness may state why she did not make complaint to her mother immediately after the commission of the crime.—*People v. Ezzo* (Mich.) 62 N. W. 407.

104 Mich. 341.

§ 9. Sufficiency.

[a] (Iowa: 1896.)

On trial for rape the fact of intercourse was proved, and the prosecutrix testified positively that defendant forced her into the bed, and, by threats and brandishing a knife, accomplished his designs by force and terror which she was utterly unable to resist. Other evidence tended to corroborate the prosecutrix. *Held*, that the evidence was sufficient to support a verdict of guilty.—*State v. Harlan* (Iowa) 67 N. W. 381.

[b] (Minn.: 1896.)

On an issue whether defendant used force in obtaining intercourse with prosecutrix, his testimony was in direct conflict with hers. Two weeks before the alleged rape, however, he had had connection with her by consent, and they continued friendly afterwards. She complained immediately after the alleged rape, but her testimony that she was crying when complaining was denied, and there was evidence that, on the preliminary examination, she said she made no resistance after defendant had got upon her, and there were no indications of violence upon her person or clothing. After the alleged offense she helped defendant in his work, conversing with

him the while. *Held*, that a conviction was not sustained.—*State v. Iago* (Minn.) 68 N. W. 969.

§ 10. — Assault with intent to commit.

[a] (Iowa: 1894.)

Evidence that defendant went to prosecutrix's house on legitimate business, and while there made indecent proposals to her: that upon her rejection of them he said, if she was not "that kind," to "let the matter drop"; that she started to run away, and he "looked vicious," and "lunged" for her, which he denied; and that he followed, and tried to dissuade her from telling her husband,—is insufficient to sustain a conviction of assault with intent to rape.—*State v. Biggs* (Iowa) 61 N. W. 417.

93 Iowa, 125.

[b] (Iowa: 1895.)

On trial for assault with intent to rape, prosecutrix testified that, while she and defendant were in her sitting room, he suddenly declared he would have intercourse with her, and that, when she ran into the kitchen to reach a door in the back, towards where her husband was working, defendant caught her arm, and threatened her, and forced her to go through another door to a room upstairs, where he attempted to have intercourse with her. In the sitting room there was a door opening on the public road, and though neighbors lived within 50 rods, prosecutrix made no outcry. Her clothing was not torn, but there were marks on her arms which she testified were made by defendant. Defendant denied using any violence towards her, and, though he did not deny that he attempted to have intercourse with her, he said she made no objection to anything he did. *Held*, that a conviction would not be disturbed.—*State v. Delong* (Iowa) 65 N. W. 402.

[c] (Iowa: 1895.)

If defendant acted towards prosecutrix, before going upstairs, as she testified he did, the crime was then complete, though she consented to what transpired afterwards.—*State v. Delong* (Iowa) 65 N. W. 402.

[d] (Iowa: 1896.)

On trial for assault with intent to rape, prosecutrix testified that defendant seized her in the hog house, and tore her clothes; that his trousers were unbuttoned; and that she made a strong resistance. There was also evidence of complaints to her husband and others. *Held* to sustain a verdict of guilty.—*State v. Rudd* (Iowa) 66 N. W. 748.

[e] (Iowa: 1897.)

Evidence that defendant, under pretense of showing to an hotel a girl who arrived on a night train, led her some distance beyond, and then, seizing her and tearing open her coat, declared he would have intercourse; that when she screamed he told her, with a curse, to shut her mouth; and that she finally broke away and reached the station in a half-fainting condition,—justifies a conviction for assault with intent to commit a rape.—*State v. Urie* (Iowa) 70 N. W. 603.

[f] (Neb.: 1894.)

Evidence that defendant attempted to decoy complainant, a child nine years of age, into a barn at midnight, and, finding the barn locked, carried her into a privy, and locked the door, in the meantime placing his hand over her mouth to prevent an outcry, sustains a verdict of assault with intent to rape.—*Head v. State*, 61 N. W. 494, 43 Neb. 30.

§ 11. — Corroboration of prosecutrix.

[a] (Iowa: 1894.)

A conviction for assault with intent to commit rape may be had on the uncorroborated testimony of the prosecuting witness. *State v. Grossheim* (1890) 44 N. W. 541, 79 Iowa, 77, followed.—*State v. Cook*, 61 N. W. 185, 92 Iowa, 483.

[b] (Iowa: 1896.)

Admissions by defendant of intercourse with prosecutrix during the fall preceding the year she became 13 years old, though not fixing the exact time and place, are sufficient corroboration to sustain a conviction of rape.—*State v. Forsythe* (Iowa) 68 N. W. 446.

IV. INSTRUCTIONS.

§ 12. In general.

[a] (Iowa: 1896.)

An instruction that where there is carnal knowledge, and no consent is directly or inferentially shown, there is, in the act itself, all the force necessary to constitute the crime of rape, is not approved, as its tendency was to place the burden of showing consent upon defendant.—*State v. Philpot* (Iowa) 66 N. W. 730.

[b] (Iowa: 1896.)

A charge that, if the jury find that the prosecutrix did not consent to the act of intercourse, directly or by inference, they will be justified in finding that it was by force, while not to be approved, may not constitute prejudicial error when considered with the other charges.—*State v. Beabont* (Iowa) 69 N. W. 429.

[c] (Mich.: 1895.)

On a prosecution for rape, the failure to refer in the charge to a quarrel between prosecutrix and defendant, which occurred after the commission of the offense, and before the making of the complaint, is not ground for reversal, in the absence of a request by defendant, when the court charged the jury to carefully weigh prosecutrix's testimony, her appearance and manner of testifying, and all other things bearing upon her testimony and credibility, and to consider the evidence of defendant, and all the evidence.—*People v. Harris* (Mich.) 61 N. W. 871.

103 Mich. 473.

§ 13. Definition of rape.

[a] (Iowa: 1897.)

It is proper to define rape, in a prosecution for an assault with intent to commit that crime.—*State v. Urie* (Iowa) 70 N. W. 603.

[b] (Iowa: 1897.)

An instruction that rape is a carnal knowledge of a female, forcibly and against her will, "and where threats of personal violence are made to overcome her will, and she believes that her person is in danger from said threats, and [he] has sexual connection with her, the law considers such carnal knowledge as having been forcibly had," etc., is not ambiguous or misleading.—*State v. Urie* (Iowa) 70 N. W. 603.

§ 14. Assault with intent to rape.

(Mich.: 1896.)

In a case of assault with intent to rape, in which the only evidence was that of prosecutrix, it was not error to charge that, if the jury believed her evidence, defendant was guilty of assault and battery at all events; and that, if they believed her evidence, he was certainly guilty of assault and battery, "and really the only question for you to debate and consider in this case is whether or not he is guilty of the more serious offense,"—especially where defendant's attorney stated to the jury that he was probably guilty of assault or assault and battery.—*People v. Ricketts* (Mich.) 66 N. W. 483.

§ 15. As to lesser offense.

[a] (Iowa: 1896.)

Where prosecutrix testified that defendant took hold of her violently, and held her, despite her resistance, so as to inflict injury on her person, it was not error to charge that if the jury failed to find that defendant assaulted prosecutrix with intent to rape, but found that he had taken hold of her as she alleged, they

should find him guilty of assault.—State v. Rudd (Iowa) 66 N. W. 748.

[b] (Iowa; 1896.)

Where the only question contested is as to the consent of the prosecutrix to the act of intercourse, it is unnecessary to instruct the jury that the crime charged includes the offense of assault and battery.—State v. Beabout (Iowa) 69 N. W. 429.

[c] (Mich.; 1895.)

Where defendant, charged with rape, requested an instruction that, "to constitute the offense here charged, actual penetration must be shown," he cannot complain that the theory of a possible conviction of a lesser offense was not submitted to the jury.—People v. Harris (Mich.) 61 N. W. 871.

103 Mich. 473.

§ 16. Corroboration of prosecutrix.

(Iowa; 1895.)

Under Code, § 4560, requiring, to convict one of rape, that the testimony of the person injured must be "corroborated by other evidence tending to connect the defendant with the commission of the offense," complaint cannot be made of an instruction that the corroborating evidence must be evidence tending to strengthen and corroborate the injured person.—State v. French (Iowa) 65 N. W. 156.

RATIFICATION.

See "Estoppel."

By county of void contract, see "Counties," § 42.

By state of unauthorized contract, see "States and State Officers," § 14.

Of alteration, see "Alteration of Instruments," § 5.

Of contract by infant, see "Infancy," § 2.

—made before organization, see "Corporations," § 28.

—made by corporate officer, see "Corporations," § 36.

—made in behalf of city, see "Municipal Corporations," § 65.

Of employment of counsel for city, see "Municipal Corporations," § 40.

Of unauthorized act of agent, see "Principal and Agent," § 15.

—of partner, see "Partnership," § 15.

Validating acts, retrospective legislation, see "Constitutional Law," § 27.

REAL ACTION.

See "Ejectment"; "Forcible Entry and Detainer"; "Quieting Title—Removal of Cloud"; "Waste."

Statutory new trial as of right, see "New Trial," § 37.

REAL ESTATE.

See "Boundaries"; "Deed"; "Easements"; "Mechanics' Liens"; "Mines and Mining"; "Mortgages"; "Public Lands."

Devolution of real property, see "Descent and Distribution," § 5.

REASONABLE DOUBT.

Instructions on, see "Criminal Law," §§ 161, 162.

RECALLING WITNESS.

See "Witness," § 41.

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RECEIPTORS.

Liability of sheriff for negligence of, see "Sheriffs and Constables," § 6.

RECEIPTS.

See "Release and Discharge."

As evidence of payment, see "Payment," § 6.
Warehouse receipts, see "Warehousemen," § 2.

RECEIVERS.

I. APPOINTMENT AND DISCHARGE, §§ 1-11.

II. EFFECT OF APPOINTMENT—PROPERTY RIGHTS, §§ 12-15.

III. MANAGEMENT OF PROPERTY—POWERS AND LIABILITIES OF RECEIVER, §§ 16-20.

IV. ACCOUNTING AND COMPENSATION—EXPENSES OF RECEIVERSHIP, §§ 21-24.

V. ACTIONS, §§ 25-28.

Appealable orders relating to, see "Appeal," §§ 25, 26.

Discretion of court in matters relating to, see "Appeal," § 208.

For railroads, liability for negligence, see "Railroad Companies," § 20.

Garnishing assets, see "Garnishment," § 5.

Of bank, see "Banks and Banking," §§ 31, 37.

Of corporations, see "Corporations," §§ 88-97.

I. APPOINTMENT AND DISCHARGE.

Appointing order, when appealable, see "Appeal," § 26.

Discretion of court, see "Appeal," § 208.

For corporations, see "Corporations," §§ 90, 91.

In action by creditors of assigned estate, see "Assignment for Benefit of Creditors," § 33.

In mortgage foreclosure, see "Mortgages," § 48.

In supplementary proceedings, see "Execution," § 43.

Supersedeas on appeal from order appointing, see "Appeal," § 271.

§ 1. Jurisdiction to appoint.

(Neb.; 1895.)

It is no objection to the appointment of a receiver of a corporation, in an action by a stockholder for an accounting in its behalf against a corporation indebted to it, that the debtor corporation was summoned as garnishee of the first-named corporation in an action against it by attachment, where the attachment proceeding has been abandoned, and judgment entered for damage only, without any reference to the garnishee.—Fitzgerald v. Fitzgerald & Mallory Const. Co. (Neb.) 62 N. W. 899.
44 Neb. 463.

§ 2. When application granted.

(Iowa; 1895.)

When, in an action by a landlord to enforce his lien for rent, other persons claim an interest in the property attached, which consists of live stock, farm produce, and materials, the appointment of a receiver to take charge of it is proper.—Smith v. Dayton (Iowa) 62 N. W. 650.

[b] (Iowa; 1897.)

Where the stock of a corporation is owned by two persons, and the corporation owns stock in a second corporation, and one of the holders of the stock in the first corporation was deposed as an officer in the second corporation by the majority vote of the stockholders therein, a disagreement between him and the other

stockholder, not as to the management of the first corporation, but because of the effect it might have upon the affairs of the second corporation, is no ground for appointing a receiver of the first corporation to take charge of the stock owned by it in the second corporation.—*Wallace v. Pierce-Wallace Pub. Co.* (Iowa) 70 N. W. 216.

[c] (Iowa: 1897.)

Where a corporation owns stock in a second corporation, a dispute as to the management of such second corporation between the two sole stockholders of the first corporation will not authorize the appointment of a receiver for the first corporation to take possession of the stock in the second corporation.—*Wallace v. Pierce-Wallace Pub. Co.* (Iowa) 70 N. W. 216.

[d] (Mich.: 1897.)

Where there can be immediate advertisement and sale of a manufacturing plant under a mortgage, a receiver should not be appointed to sell it, and pay the mortgage debt.—*Beardslee v. Citizens' Commercial & Savings Bank* (Mich.) 70 N. W. 1027.

[e] (Minn.: 1895.)

A receiver will not be appointed where it does not appear that the debtor is insolvent, or has concealed or disposed of his property with intent to defraud creditors, and it does not appear but that there is sufficient property against which the petitioner may proceed directly.—*Adamson v. Meister* (Minn.) 63 N. W. 618.

61 Minn. 166.

[f] (Minn.: 1895.)

It was ground for the appointment of a receiver that a debtor, after permitting a default judgment to be entered against him, did not assign before the judgment became a preference, to protect his other creditors.—*Crittenden v. Hill* (Minn.) 63 N. W. 1030.

61 Minn. 462.

[g] (Neb.: 1895.)

In an action to foreclose mortgages, where the petition prayed for the appointment of a receiver pending the action, but the application was not heard until final hearing, it is error to appoint a receiver on the final hearing, before appeal, or an application for a stay.—*Chadron Banking Co. v. Mahoney* (Neb.) 61 N. W. 594, 43 Neb. 214.

[h] (N. D.: 1895.)

To entitle a judgment creditor to an order appointing a receiver of his debtor's property, it must appear that the creditor has in good faith exhausted his remedies at law.—*Minkler v. United States Sheep Co.* (N. D.) 62 N. W. 594.

4 N. D. 507.

§ 3. Affidavits to support motion.

(Minn.: 1896.)

The court below, after giving the parties ample opportunity to present affidavits on a motion for the appointment of a receiver, did not abuse its discretion in refusing to hear more affidavits, not presented at the proper time.—*Farmers' Nat. Bank v. Backus* (Minn.) 66 N. W. 5, 64 Minn. 43.

§ 4. Appointment pending application in another court.

(Wis.: 1896.)

Where, after the issuance of an order to show cause in a suit why a receiver should not be appointed, and forbidding interference with the assets of the debtor, a like court in another county appointed a receiver for the debtor, the receiver so appointed was a receiver de facto, whose acts and contracts are to be observed, and who is entitled to compensation.—*Northwestern Iron Co. v. Lehigh Coal & Iron Co.* (Wis.) 66 N. W. 515.

92 Wis. 487.

§ 5. Appointment after appeal taken.

[a] (Iowa: 1895.)

Under Code, § 2903, providing that the district court may appoint a receiver during the pendency of an action, it may appoint such a receiver after a cause has been decided and appealed.—*Mitchell v. Roland* (Iowa) 63 N. W. 606.

[b] (Neb.: 1895.)

Under Code Civ. Proc. § 266, providing that "a receiver may be appointed by the supreme court or by the district court or by the judge of either," after decree to preserve the property pending an appeal, in the absence of any special reason therefor, a receiver will not be appointed by the supreme court after a decree and an appeal.—*Eastman v. Cain* (Neb.) 63 N. W. 123.

45 Neb. 48.

§ 6. Who may be appointed.

(Mich.: 1895.)

The appointment of a large judgment creditor and stockholder receiver of a corporation whose property was greatly incumbered will not be disturbed, when the circumstances justified the appointment of a receiver, when the receiver appointed had been acting for three months before the motion to vacate was made, and his conduct had been satisfactory to the lower court, who had given the matter full consideration.—*Gypsum Plaster & Stucco Co. v. Adsit* (Mich.) 63 N. W. 518.

105 Mich. 497.

§ 7. Second application after refusal of first.

(Wis.: 1894.)

An order denying a motion for a receiver in a foreclosure suit, made before judgment, is not a bar to an application for a receiver after judgment.—*Nash v. Meggett* (Wis.) 61 N. W. 283, 89 Wis. 486.

§ 8. Estoppel to attack appointment.

(Iowa: 1895.)

Where creditors of a corporation for several months acquiesce in the appointment of a receiver and pursue their remedies thereunder, they cannot afterwards question the legality of the appointment of the receiver, unless it is absolutely void.—*Dickerson v. Cass County Bank* (Iowa) 64 N. W. 395.

§ 9. Collateral attack on appointment.

(Wis.: 1895.)

Where one has qualified as receiver, the validity of his appointment cannot be collaterally impeached, if the court had jurisdiction of the subject-matter.—*Davis v. Shearer* (Wis.) 62 N. W. 1050.

90 Wis. 250.

§ 10. Setting aside.

(Wis.: 1896.)

Where a corporation, having procured a policy of insurance, makes an assignment, and thereafter a receiver is appointed, the insurance company, or loss by fire, after action on its policy by the receiver, cannot intervene in the original action, and ask that the appointment of the receiver be set aside.—*Barth v. American Ins. Co. of Boston* (Wis.) 65 N. W. 1035.

92 Wis. 225.

§ 11. Discharge.

(Neb.: 1896.)

On a motion to discharge the receiver of a bank, it appeared that the bank was managed by a board of three directors, one of whom, as a stockholder, instituted the proceeding in which the receiver was appointed; that the grounds of appointment were that the bank was grossly mismanaged, and that its officers had wasted and lost part of the capital stock, and had borrowed money for the bank without authority of the directors; that an appearance was entered on behalf of the bank in said proceeding by another of the three directors, who

was president of the bank; and that there was by him a consent entered that the receiver might be appointed, issuance and service of summons being waived. The cashier was the third director, but no attempt was made to substantiate the charges against him, and the affidavits showed all his acts to have been for the bank's benefit. It also appeared that the bank was solvent, and that the receiver was an officer of a rival bank. *Held*, that the motion to discharge should have been granted.—*Neitzel v. Lyons* (Neb.) 67 N. W. 867.
48 Neb. 892.

II. EFFECT OF APPOINTMENT—PROPERTY RIGHTS.

§ 12. In general.

(Mich.: 1895.)

In replevin by a mortgagee of a stock of goods against the mortgagor's receiver, defendant cannot set up the fact that part of the goods replevied were delivered to the mortgagor by a certain company, under agreements that the title should remain in the company.—*Chafey v. Mathews* (Mich.) 62 N. W. 141.
104 Mich. 103.

§ 13. Prosecution of other remedies by creditors.

(Wis.: 1895.)

Sanb. & B. Ann. St. § 4269, providing that when timber has been wrongfully cut on one's land he may recover its highest value "while in the possession of the trespasser or any purchaser from him with notice," authorizes recovery of such value, though a receiver was appointed for the wrongdoer, and a claim for such amount was presented to the receiver before suit.—*Everett v. Gores* (Wis.) 62 N. W. 82, 89 Wis. 421.

§ 14. Rights of foreign receiver.

(Mich.: 1895.)

On July 20, 1892, a suit was commenced in Indiana by members of defendant corporation for the purpose of dissolving it. On August 23d a receiver was appointed, and on the same day plaintiff brought garnishment in Michigan for a matured claim. It was not shown which of the acts of August 23d was done first. *Held*, that the proceedings in Indiana did not deprive plaintiff of his rights.—*Cohen v. Supreme Sitting of Order of Iron Hall* (Mich.) 63 N. W. 304.
105 Mich. 283.

§ 15. Right to attack conveyance of debtor—Receiver of partner or firm.

[a] (Minn.: 1895.)

A receiver in a suit by one partner to dissolve the partnership does not represent creditors, so as to avoid a chattel mortgage lien because the mortgage was not recorded as required by law.—*Berlin Mach. Works v. Security Trust Co.* (Minn.) 61 N. W. 1131.
60 Minn. 161.

[b] (Minn.: 1895.)

A receiver in an action to dissolve a partnership does not represent creditors or bona fide purchasers, so that he can have a chattel mortgage on firm property set aside because it was not filed. *Berlin Mach. Works v. Security Trust Co.*, 61 N. W. 1131, 60 Minn. 161, followed.—*Walsh v. St. Paul School-Furniture Co.*, 62 N. W. 383, 60 Minn. 397.

[c] (Minn.: 1895.)

A receiver of an insolvent partner cannot maintain an action to set aside as fraudulent a conveyance of property belonging to the firm given to secure firm debts.—*Masterman v. Lumberman's Nat. Bank* (Minn.) 63 N. W. 723.
61 Minn. 290.

[d] (Wis.: 1895.)

A receiver appointed in a suit by partners of an insolvent firm against their copartners for a dissolution stands in the place of the firm, and cannot question judgments confessed by the firm for the purpose of giving a fraudulent preference.—*Weber v. Weber* (Wis.) 63 N. W. 757.
90 Wis. 467.

III. MANAGEMENT OF PROPERTY—POWERS AND LIABILITIES OF RECEIVER.

§ 16. Sale under execution—Purchase by receiver.

(Minn.: 1895.)

A receiver who purchases at execution sale property in his hands as receiver, holds in trust for the owner of the property the title acquired by him, and has no further interest in the property than a lien on it to secure the amount advanced on the sale.—*Donahue v. Quackenbush* (Minn.) 64 N. W. 141.
62 Minn. 132.

§ 17. Adoption of existing contract.

(Iowa: 1896.)

A receiver was appointed to take control of a college, with authority to adopt any contract that had been made with teachers for the ensuing year. Intervener, who had been engaged to teach, was informed by receiver that he would "make good" the contracts previously made, and that she could have her position if she desired it. Intervener entered upon the discharge of her duties under the contract. *Held*, that the receiver was bound by the agreement.—*Worthington v. Oak & Highland Park Imp. Co.* (Iowa) 69 N. W. 258.

§ 18. Acceptance of existing lease and liability for rent.

[a] (Minn.: 1895.)

A receiver has a reasonable time in which to elect whether he will accept or reject a lease wherein the party whose estate he represents is lessee, and during such time he may occupy the premises for the purpose of selling, under the direction of the court, personal property thereon belonging to the estate, without thereby accepting the lease for such estate.—*In re Bishop* (Minn.) 62 N. W. 335; *Nelson v. Kalkhoff*, Id.
60 Minn. 305.

[b] (Minn.: 1895.)

Where a receiver occupies premises leased by the person whom he represents, for the purpose of selling personal property thereon, without any agreement as to rent, he is liable for the rent at the rate reserved in the lease during the time they are so occupied.—*In re Bishop* (Minn.) 62 N. W. 335; *Nelson v. Kalkhoff*, Id.
60 Minn. 305.

§ 19. Sales.

[a] (Neb.: 1896.)

A receiver's sale of assets of an insolvent was void, and hence not cured by a confirmation over objections, where the receiver advertised and sold after the date fixed by the decree for the sale.—*Ackerman v. Ackerman* (Neb.) 69 N. W. 388.

[b] (Neb.: 1897.)

Where one purchases the assets of a bank from a receiver, he takes the title of the receiver, including his exemption from a defense to an action on a note, the enforcement of which would be a fraud on the creditors and depositors of the bank.—*Harrington v. Connor* (Neb.) 70 N. W. 911.

§ 20. Personal liability.

[a] (Minn.: 1895.)

A receiver incurs no personal liability for acts done under and in conformity to the order

of court.—*Schmidt v. Gayner* (Minn.) 62 N. W. 265.

59 Minn. 303.

[b] (Minn.; 1895.)

One is not individually liable for negligence of servants employed by him as receiver.—*Erskine v. McIlrath* (Minn.) 62 N. W. 1130.

60 Minn. 485.

IV. ACCOUNTING AND COMPENSATION—EXPENSES OF RECEIVERSHIP.

§ 21. Accounting.

[a] (Wis.; 1897.)

A receiver is entitled to credit for amount paid a surety company for becoming surety on his bond; such a surety being authorized by Laws 1893, c. 196, and the amount paid being a reasonable charge therefor, not exceeding 2 per cent. per annum authorized by Laws 1895, c. 219.—*Hammacker v. Commercial Bank* (Wis.) 70 N. W. 295.

[b] (Wis.; 1897.)

A receiver who pays a tax against the insolvent, though without authority previously obtained, as provided by Rev. St. § 3225 et seq., should, if the tax be valid, be allowed credit therefor.—*Hammacker v. Commercial Bank* (Wis.) 70 N. W. 295.

§ 22. Compensation and attorney's fees.

[a] (Mich.; 1895.)

After the appointment of a receiver, and during the pendency of further proceedings, a settlement was effected, stipulating that plaintiff should pay one-half of the expenses of the receiver, and certain of the defendants the other half. *Held* a recognition of the regularity of the receiver's appointment, and of the right to compensation.—*Kimmerle v. Dowagiac Manuf'g Co.* (Mich.) 63 N. W. 529.

105 Mich. 640.

[b] (Mich.; 1895.)

In such case, a claim for attorney's fees incurred by the receiver in attempting to maintain its appointment is a proper charge.—*Kimmerle v. Dowagiac Manuf'g Co.* (Mich.) 63 N. W. 529.

105 Mich. 640.

[c] (Mich.; 1895.)

A corporation which has been appointed receiver, and employs an agent to perform the duties of the office, is not entitled to pay for the expenses of such agent, in addition to its regular compensation as receiver.—*Kimmerle v. Dowagiac Manuf'g Co.* (Mich.) 63 N. W. 529.

105 Mich. 640.

§ 23. Duty to provide for compensation.

[a] (N. D.; 1891.)

Where parties to an action in which a receiver has been appointed consent to a judgment of dismissal of the action, without making any provision for the settlement of the accounts of the receiver, or for his compensation, it is not error to vacate the order of dismissal, on the application of the receiver.—*Hoffman v. Bank of Minot* (N. D.) 61 N. W. 1031.

4 N. D. 473.

[b] (N. D.; 1894.)

It is not error to refuse an application to discharge a receiver, though both parties to the record consent thereto, where the receiver's account has not been filed, and no provision has been made for his compensation.—*Hoffman v. Bank of Minot* (N. D.) 61 N. W. 1031.

4 N. D. 473.

§ 24. Expenses incurred before receivership.

(Neb.; 1897.)

Expenditures for repairs made upon order of the lessee before the appointment of a receiver to take charge of the property and col-

lect the rents are not chargeable against the property or the rents in the receiver's hands pending a suit to terminate the lease, where no liens therefor have been perfected against the property.—*Estabrook v. Stevenson* (Neb.) 69 N. W. 972.

V. ACTIONS.

§ 25. Actions by.

[a] (Iowa; 1896.)

A receiver appointed in an action for an accounting by one claiming to be a partner of defendant therein, when in fact there was no partnership, cannot maintain an action to recover money paid by defendant to an individual creditor, where he has enough assets to pay creditors of the business carried on by the parties to the action for the accounting.—*McBride v. Ricketts* (Iowa) 67 N. W. 410; *Martin v. Same*, *Id.*

[b] (Neb.; 1897.)

In an action on a note by the receiver of a bank, appointed under Comp. St. c. 8, § 31, to take charge of the assets, no defense can prevail which involves the recognition and enforcement of an agreement which, when made, was a fraud on creditors and depositors of the bank, though the defense might have been good against the bank.—*Harrington v. Connor* (Neb.) 70 N. W. 911.

§ 26. — Pleading.

[a] (Minn.; 1895.)

A complaint in a suit on a note, brought by N. as receiver of B., alleging that the note was payable to the order of "plaintiff," was sufficient, without alleging facts to show that plaintiff was legally appointed receiver.—*Nelson v. Nugent* (Minn.) 64 N. W. 392.

62 Minn. 203.

[b] (Wis.; 1895.)

A complaint by the receiver of a corporation of another state, appointed by a court of that state, for a debt claimed to be due plaintiff by virtue of his appointment, which does not allege that plaintiff, either by the order appointing him or by the statutes of such state, is authorized to sue, does not show that plaintiff has legal capacity to sue.—*Swing v. White River Lumber Co.*, 65 N. W. 174, 91 Wis. 517.

[c] (Wis.; 1895.)

Objection to a complaint in an action on a debt by a receiver of a corporation of another state, who was appointed by a court of that state, on the ground that it failed to show that plaintiff was authorized to sue, was properly taken by demurrer.—*Swing v. White River Lumber Co.*, 65 N. W. 174, 91 Wis. 517.

§ 27. Rights of foreign receiver.

[a] (Iowa; 1896.)

The principle of comity between the states does not entitle the receiver of a foreign corporation, appointed in another state, to maintain an action in Iowa upon a contract between such corporation and a citizen of Iowa.—*Barker v. Lamb & Sons* (Iowa) 68 N. W. 686.

[b] (Wis.; 1895.)

The receiver of a foreign mutual insurance company, appointed by a court of competent jurisdiction, may maintain an action to recover an assessment on a premium note given by a person residing in Wisconsin, and which was a part of the assets of the insolvent company in the hands of the receiver at the time the assessment was made.—*Parker v. Stoughton Mill Co.*, 64 N. W. 751, 91 Wis. 174.

[c] (Wis.; 1896.)

The right of a receiver appointed by the court of one state to sue as such in another state rests on the law of comity, and may be prohibited entirely, or allowed only on such

condition as the legislature may prescribe.—*Wyman v. Kimberly-Clark Co.* (Wis.) 67 N. W. 932.

93 Wis. 554.

§ 28. Action against—Leave of court.

[a] (Minn.: 1894.)

One cannot sue, without leave of court, to recover money in the actual possession of a receiver under the order of the court which appointed him.—*Schmidt v. Gayner* (Minn.) 61 N. W. 333.

59 Minn. 303.

[b] (Neb.: 1895.)

A receiver in insolvency who voluntarily appeared in the action, and asked for and obtained affirmative relief, cannot object that he was sued without leave of court.—*Flenham v. Steward* (Neb.) 63 N. W. 924.

45 Neb. 640.

[c] (Wis.: 1896.)

A receiver, appointed in an action brought by one partner to wind up and administer the affairs of an insolvent firm, cannot be garnished by a firm creditor without leave of the court which appointed him.—*Blum v. Van Vechten* (Wis.) 66 N. W. 507.

92 Wis. 378.

RECEIVING STOLEN GOODS.

§ 1. Indictment.

[a] (Iowa: 1895.)

An indictment for receiving stolen goods need not name the person from whom they were received.—*State v. Feuerhaken* (Iowa) 65 N. W. 299.

[b] (Iowa: 1895.)

Under a statute making it a crime to buy, receive, "or" aid in concealing stolen goods, an indictment charging defendant with having bought, received, "and" aided, etc., is not bad for duplicity.—*State v. Feuerhaken* (Iowa) 65 N. W. 299.

§ 2. Evidence.

[a] (Iowa: 1895.)

On a trial for receiving stolen goods, evidence of previous transactions between defendant and the thief, in reference to other stolen property, is admissible to show knowledge that the goods were stolen.—*State v. Feuerhaken* (Iowa) 65 N. W. 299.

[b] (Mich.: 1895.)

On a trial for receiving stolen property, it appeared that the complaining witness found her pocketbook, but with the money gone; that, later in the day, she missed a revolver which she and her husband testified to having seen within a few days; that upon defendant's arrest, 10 days thereafter, the revolver was found under his pillow. Defendant claimed at one time to have procured the weapon from a man who had purchased it. *Held* sufficient to sustain a verdict of guilty.—*People v. Ohlaser* (Mich.) 62 N. W. 732.

104 Mich. 579.

§ 3. Instructions.

[a] (Iowa: 1895.)

On a trial for receiving stolen goods, an instruction that the testimony of the thieves was insufficient to convict unless corroborated by other evidence connecting defendant with the offense charged, going not only to the receipt of the goods, but also to the fact that they were stolen, but that the corroboration might be by circumstantial evidence, and that if the goods were found in defendant's possession, and he concealed them, or denied having them, such evidence would be corroborative, the weight thereof being for the jury, is not erroneous.—*State v. Feuerhaken* (Iowa) 65 N. W. 299.

[b] (Iowa: 1895.)

An instruction that if all the facts are such as would reasonably satisfy a man of defendant's age and intelligence that the goods he received were stolen, or if he failed to follow up such inquiry so suggested for fear he would learn that the goods were stolen, he should be as "rigidly" held responsible as if he had knowledge, etc., is not erroneous.—*State v. Feuerhaken* (Iowa) 65 N. W. 299.

RECOGNIZANCES.

See "Bail."

On appeal, see "Bail," § 2.

RECONVENTION.

See "Set-Off and Counterclaim."

RECORDS.

As evidence, see "Evidence," §§ 73, 74.

As notice, see "Mortgages," § 23; "Vendor and Purchaser," § 38.

Conflict in record on appeal, see "Appeal," § 151.

Effect of withholding instrument from record, see "Fraudulent Conveyances," § 8.

Estoppel by, see "Estoppel," §§ 4, 5.

Of assignment, see "Assignment," §§ 6, 7.

—of mortgage, see "Mortgages," §§ 31, 32.

Of board of equalization, see "Taxation," § 43.

Of contracts of conditional sale, see "Sale," § 102.

Of deeds, see "Deed," §§ 16, 17.

Of justices, see "Justices of the Peace," § 29.

Of mortgages, see "Chattel Mortgages," §§ 19-25; "Mortgages," § 23.

Of proceedings of town meeting, see "Towns," § 2.

On appeal, see "Appeal," §§ 104-155.

—from justice, see "Appeal," § 165.

—in criminal cases, see "Criminal Law," §§ 206-215.

On writ of error, see "Error, Writ of," § 7.

Parol evidence to supply omission, see "Evidence," § 101.

Rights as against prior unrecorded deeds, see "Vendor and Purchaser," § 39.

Who entitled to priority over unrecorded mortgage, see "Chattel Mortgages," §§ 24, 25.

§ 1. Right of access to records.

(Mich.: 1896.)

Where it does not appear that a suit pending in the circuit court involves, or is in any way connected with, the land that an abstractor was employed to abstract, by way of contract or otherwise, or that it is necessary to the interests of his employer that he be allowed to inspect the file of the suit, mandamus will not lie to compel the county clerk to allow the abstractor to inspect and copy the file before trial.—*Burton v. Reynolds* (Mich.) 68 N. W. 217.

§ 2. Amendment and correction.

[a] (Iowa: 1895.)

Under Code, § 179, allowing entries made at a previous term to be altered only to correct evident mistakes, an order amending the record so as to show an exception to the decree upon motion filed more than a year after the decree was entered, is improper, where it is shown that the decree was entered with the knowledge of the counsel for the moving party, and after they had personally examined it.—*Independent School-Dist. of Milford v. Ross* (Iowa) 63 N. W. 576.

[b] (Neb.: 1896.)

A court of record, in exercising its inherent authority to amend its records so as to make them conform to the facts, is not confined

to an examination of the judge's minutes or other written evidence.—*School Dist. No. 1 of Harlan County v. Bishop* (Neb.) 65 N. W. 902. 46 Neb. 850.

[c] (Neb.: 1896.)

A court has power, even after the term at which judgment was rendered, to correct its record for the purpose of making it disclose truthfully what occurred in the course of its proceedings.—*Wachsmuth v. Orient Ins. Co.* (Neb.) 68 N. W. 935.

§ 3. Conclusiveness.

(Mich.: 1895.)

A docket entry by a justice that the parties appeared and adjourned the case by consent cannot be contradicted collaterally, notwithstanding a further statement that such adjournment was had without pleading.—*Waldron v. Palmer* (Mich.) 62 N. W. 731.
104 Mich. 556.

RECOUNT.

See "Elections and Voters," § 20.

RECOUPMENT.

See "Set-Off and Counterclaim."

REDELIVERY BONDS.

See "Replevin," § 33.

REDEMPTION.

From chattel mortgage sale, see "Chattel Mortgages," §§ 52-54.
From execution sale, see "Execution," § 34.
From mortgage sale, see "Mortgages," §§ 94-100.
From sale under municipal assessments, see "Municipal Corporations," § 162.
From tax sale, see "Taxation," §§ 93-99.

REDIRECT EXAMINATION.

See "Witness," § 40.

REFERENCE.

Appealable order, see "Appeal," § 33.
Of claim against decedent's estate, see "Executors and Administrators," § 23.
Review of findings of referee, see "Appeal," § 231.

§ 1. In general.

[a] (Neb.: 1895.)

A reference in an action at law cannot be had except by consent, as the parties are entitled to a trial by jury.—*Kuhl v. Pierce County* (Neb.) 62 N. W. 1066.
44 Neb. 584.

[b] (Wis.: 1896.)

Where a complaint for conversion does not allege it to have been wrongful or unlawful, the action is on contract, and therefore referable.—*Casgrain v. Hamilton* (Wis.) 66 N. W. 118.
92 Wis. 179.

[c] (Wis.: 1896.)

A court should not grant a reference in the midst of a trial, unless under exceptional circumstances.—*Kellogg v. Costello* (Wis.) 67 N. W. 24.
93 Wis. 232.

[d] (Wis.: 1897.)

In a proceeding by one judgment creditor to have the proceeds of executions issued by another judgment creditor applied first in payment of movant's judgment, on the ground that he was induced by fraud to release a prior levy, it was proper practice to form an issue of fraud, and refer it to a referee for trial.—*Marks v. Auerbach* (Wis.) 69 N. W. 1901.

§ 2. Compulsory reference—Examination of accounts.

[a] (Minn.: 1895.)

Where it appears from the complaint that a trial will involve the adjustment of complicated accounts between the parties, who sustain fiduciary relations, a compulsory reference is proper.—*Bond v. Welcome* (Minn.) 63 N. W. 3.
61 Minn. 43.

[b] (S. D.: 1896.)

In an action against a county for rent of an office, where the only issues were whether defendant was liable and the amount, the fact that certain books of record of the county might be used as evidence to prove defendant's liability did not require the examination of an account, within Laws 1891, c. 100, § 2, authorizing a reference when the examination of a long account is required.—*Betcher v. Grant County* (S. D.) 68 N. W. 163.

§ 3. Waiver of objections to reference.

[a] (Mich.: 1895.)

Where the appointment of two referees is agreed upon by the parties, instead of one or three, as required by statute, and the parties appear before them, and submit all their matters, an objection cannot be raised, when a confirmation of their report is asked, that the appointment of two referees was improper.—*Shepherd v. Shepherd's Estate* (Mich.) 65 N. W. 580.

[b] (S. D.: 1895.)

By failing to oppose the granting of an order of reference, or to move to set the same aside, a party waives his right to object to the order before the referee, or on appeal.—*Jerauld County v. Williams* (S. D.) 63 N. W. 905.

[c] (Wis.: 1896.)

Defendant, by moving that a case be consolidated with another which has been referred to a referee, thereby consents that the case when consolidated shall be referred to the referee.—*Eau Claire Pulp & Supply Co. v. Laycock* (Wis.) 65 N. W. 732.
92 Wis. 81.

§ 4. Report and findings.

[a] (Iowa: 1896.)

Under a statute requiring the report of a referee to state the conclusions of law and of fact separately, a report need not be paragraphed or arranged under appropriate subdivisions; all that is needed is that the conclusions of fact and law be separately stated somewhere in the report, and that they be not so blended as to render it impossible to distinguish the one from the other.—*Young v. Seoville* (Iowa) 68 N. W. 670.

[b] (S. D.: 1897.)

The denial of motions to set aside a referee's findings, and for a new trial, is such an acceptance of the findings as will support a judgment, under Laws 1891, c. 100, § 9, providing that, if the referee's report is accepted, judgment may be entered thereon.—*Edward P. Allis Co. v. Madison Electric Light, Heat & Power Co.* (S. D.) 70 N. W. 650.

[c] (Wis.: 1896.)

A referee appointed under Rev. St. § 2864, subd. 2, "to take an account between the parties, and report the same to the court," has no power to pass on and determine the basic issues in the case, and his powers cannot

be enlarged by implication or consent of the parties.—*Best v. Pike* (Wis.) 67 N. W. 697.

93 Wis. 408.

[d] (Wis.: 1896.)

Where the referee appointed to take an account has made findings outside his powers, the court may, on the coming in of the referee's report, proceed to make its own findings upon the evidence.—*Best v. Pike* (Wis.) 67 N. W. 697.

93 Wis. 408.

§ 5. — Time of making report.

[a] (Iowa: 1897.)

A referee has no jurisdiction to act after the time he was required, in the order of appointment, to make his report.—*Davis v. Caldwell* (Iowa) 69 N. W. 1037.

[b] (Iowa: 1897.)

A party assenting to a continuance by the referee beyond the time he was required to make his report, and appearing and taking part in the hearing without objection, is not estopped to deny the jurisdiction of the referee.—*Davis v. Caldwell* (Iowa) 69 N. W. 1037.

§ 6. — Objections and exceptions.

[a] (Iowa: 1894.)

Exceptions to the finding of a referee, filed in vacation, under Code, § 2831, providing that a party objecting to a decision must do so at the time the same is made (but, if decision is on motion, demurrer, or judgment, exception may be taken in three days), must be made in three days after the opening of the term of court following such filing.—*In re Malvin's Estate* (Iowa) 61 N. W. 420.

93 Iowa, 169.

[b] (Neb.: 1896.)

A party who appears before a referee at the time fixed for trial, and treats the order of reference as embracing all the issues, and requests findings on all controverted questions, cannot assail the findings, on the coming in of the report, as being unauthorized by the order of reference.—*Moline, Milburn & Stoddard Co. v. Walter A. Wood Mowing & Reaping Mach. Co.* (Neb.) 69 N. W. 405.

[c] (S. D.: 1896.)

Appellant, by filing exceptions to the report of the referee, and moving to set aside the same without calling the attention of the court to the fact that the report fails to contain all the exceptions taken during the trial, waives such defect.—*Hulst v. Benevolent Hall Ass'n* (S. D.) 68 N. W. 200.

§ 7. — Review of report.

(Neb.: 1896.)

When an action at law has been referred, and the referee has failed to report any finding on material issues presented therein, the supreme court will not reverse an order of the district court setting aside the referee's report, and allowing a new trial.—*School Dist. No. 1 of Harlan County v. Bishop* (Neb.) 65 N. W. 902.

§ 8. Jurisdiction of referee after filing report.

[a] (Iowa: 1894.)

A referee, after filing his report, has no further jurisdiction over the subject-matter except by order of the court or agreement of the parties.—*In re Malvin's Estate* (Iowa) 61 N. W. 420.

93 Iowa, 169.

[b] (Neb.: 1897.)

Where the plaintiff, after the referee's report has been filed, is allowed to amend his petition, it is not error to return the case to the referee for a further finding in respect to the items affected by the amendment.—*Grotte v. Nagle* (Neb.) 69 N. W. 973.

REFORMATION OF CONTRACTS.

See "Equity," §§ 5-13.

REFORMATORIES.

(Mich.: 1895.)

A contract made by the board of prison inspectors for the keeping of female convicts in the Detroit House of Correction was not abrogated by Laws 1893, Act No. 118, which superseded all previous acts relating to the management of penal institutions, but expressly saved existing rights.—*Rich v. Chamberlain* (Mich.) 65 N. W. 235.

REFRESHING MEMORY.

Of witness, see "Witness," §§ 30-32.

REGENTS.

See "Colleges and Universities."

REGISTER OF DEEDS.

(Minn.: 1894.)

Though a register of deeds should keep his office at the county seat, his failure to do so does not render void the records in his office.—*Thomas v. Hanson* (Minn.) 61 N. W. 135.

59 Minn. 274.

REGISTRATION.

See "Records."

Of deeds, see "Deed," §§ 16, 17.

REHEARING.

See "Appeal," §§ 158, 159.

In equity, see "Equity," § 62.

REINSTATEMENT.

Of action after dismissal, see "Practice in Civil Cases," § 10.

Of dismissed appeal, see "Appeal," § 284.

REINSURANCE.

See "Insurance," § 15.

RELATIONSHIP.

As affecting qualification of judge, see "Judge," § 1.

RELEASE AND DISCHARGE.

See, also, "Accord and Satisfaction"; "Compromise"; "Payment."

Authority of attorney, see "Attorney and Client," § 2.

Bond for release of property attached, see "Attachment," §§ 21, 22.

Compelling creditors to file releases, see "Assignment for Benefit of Creditors," § 7.

Effect of composition agreement, see "Compositions with Creditors," § 3.

Necessity of filing releases, see "Insolvency," § 13.

Of attachment, see "Attachment," § 31.

Of debtor by oral agreement, see "Frauds, Statute of," § 10.

Of execution, see "Execution," § 12.

Of guarantor, see "Guaranty," §§ 8, 11-13.

Of indorser, see "Negotiable Instruments," § 40.

Of judgment, see "Judgment," §§ 81-88.

Of lien, see "Mechanics' Liens," §§ 41-47.

Of mortgage, see "Chattel Mortgages," §§ 33-37; "Mortgages," §§ 38-45.

Of pledge, see "Pledge," § 7.

Of surety, see "Principal and Surety," §§ 11-19.

§ 1. Validity.

(Minn.; 1895.)

A contract by which an employé, in consideration of an agreement by his employer to give him work as long as he is able to perform it, releases the claim for prior injuries alleged to have resulted from the employer's negligence, is not void for lack of mutuality.—*Smith v. St. Paul & D. R. Co.* (Minn.) 62 N. W. 392.
60 Minn. 330.

§ 2. — Consideration.

(Neb.; 1895.)

A debt will not be extinguished by the payment of a less sum than the amount actually due, unless based upon a new and sufficient consideration.—*Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.) 62 N. W. 899.
44 Neb. 463.

§ 3. Railroad employé's relief fund associations.

[a] (Iowa; 1897.)

An employé of a railroad company which had a relief department for the benefit of its employé's was injured. His membership certificate provided that, by accepting benefits due him by reason of accident, the company should be relieved from liability on account thereof. *Held* that, where he accepted some benefits under a mistake, supposing his injuries were only temporary, and he made no effort to return the money after the mistake was ascertained, the company was not liable.—*Maine v. Chicago, B. & Q. R. Co.* (Iowa) 70 N. W. 630.

[b] (Iowa; 1897.)

He could not avoid the election he had made by pleading the mistake for the first time in an amended reply in an action brought by him for such injuries, filed more than two years after the action was commenced, and offering to allow it as a credit on the amount claimed to be due him from the company.—*Maine v. Chicago, B. & Q. R. Co.* (Iowa) 70 N. W. 630.

[c] (Iowa; 1897.)

An agreement in a certificate of membership in a benefit association organized by a railroad company to which it contributes, and the expenses of which are paid by it, that, in case any member or his beneficiary accepts benefits due by reason of accident on account of his membership, the company shall be released from liability on account of the sickness, injury, or death of such member, is not against public policy.—*Maine v. Chicago, B. & Q. R. Co.* (Iowa) 70 N. W. 630.

[d] (Neb.; 1895.)

A railroad employé agreed, on becoming a member of the relief department of the company, that, if he should be injured and receive relief from such department, the acceptance of such relief should operate as a release of any claim for the injuries against the company. *Held*, that the contract itself does not bar an action by the employé against the railroad company for injuries resulting from the company's negligence, but that the acceptance of relief

from the department under such contract does operate as such bar.—*Chicago, B. & Q. R. Co. v. Bell* (Neb.) 62 N. W. 314.

44 Neb. 44.

§ 4. Of joint obligor.

(Neb.; 1896.)

The release by a payee of one joint obligor operates as a release of the others also.—*Scofield v. Clark* (Neb.) 67 N. W. 754.

48 Neb. 711.

§ 5. Rescission.

[a] (Iowa; 1895.)

A settlement by one entitled to a share in the profits of the purchase and sale of land with those jointly interested with him in the enterprise, who had the management thereof, will not prevent an accounting of the entire profits where the settlement was induced by the concealment of facts.—*Purslow v. Jackson* (Iowa) 62 N. W. 12.
93 Iowa, 694.

[b] (Minn.; 1895.)

Where plaintiff signed a release of her claim for damages for personal injuries on the assurance of defendant's physicians that her injuries were temporary, she cannot avoid the release on the ground that the physicians were mistaken, in the absence of evidence that their advice was given in bad faith.—*Nelson v. Minneapolis St. Ry. Co.* (Minn.) 63 N. W. 486.
61 Minn. 167.

[c] (Wis.; 1896.)

In an action for injuries, plaintiff testified that, when he signed a release set up by defendant, he was confined to his bed; that defendant's representatives called when no one was present except his mother; that neither he nor she could read English; that such representatives asked him if he needed money, and he answered, "Yes"; that they said they would pay him four months' wages in advance and his doctor's bill, and were going to help him further, if he needed more, and he would have to give them a receipt for the money; that he signed the paper, without its being read to him, supposing it a receipt; and would not have signed it otherwise. *Held*, that the question whether he was induced to sign by any excusable mistake, deception, or fraud was for the jury.—*Albrecht v. Milwaukee & S. Ry. Co.* (Wis.) 69 N. W. 63.

§ 6. Pleading.

[a] (Iowa; 1896.)

In an action for breach of an oral contract, whereby defendant agreed to furnish plaintiff permanent employment at a stipulated compensation in settlement of a claim for personal injury, defendant denied the oral agreement, and set up a written contract, whereby, in consideration of a certain sum, plaintiff released defendant from all liability arising out of the injury. Plaintiff replied, denying the written agreement, but pleaded facts showing that he did sign such a contract by reason of fraudulent representations, and on cross-examination admitted the signing. *Held*, that such admission precluded a recovery on the alleged oral agreement until the written contract should be set aside or reformed, in a proper proceeding for that purpose.—*Jessup v. Chicago & N. W. Ry. Co.* (Iowa) 68 N. W. 673.

[b] (S. D.; 1897.)

An allegation, in a complaint in an action by heirs to recover a debt due an estate, that a release of such debt was fraudulently executed by the administrator, is unnecessary and improper, the release being a matter of defense; but as the allegations, taken together, do not constitute a defense to the action, they will be treated as surplusage, and will not render the complaint demurrable.—*Trotter v. Mutual Reserve Fund Life Ass'n* (S. D.) 70 N. W. 843.

§ 7. Evidence.

[a] (Minn.: 1895.)

Upon the trial the defendant gave in evidence a written release signed by plaintiff, who, in rebuttal, testified that he knew the name, but not the paper, and that he never saw the release until it was produced at the trial, and offered to prove that he never settled or released his cause of action, or ever talked about it with any of the defendant's agents; that the defendant had made him a present of \$25, because of his poverty, and asked him to sign a receipt for the same; and that such receipt was the only paper he ever signed. *Held*, that it was error to exclude the offered evidence.—*Christianson v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 63 N. W. 639.

61 Minn. 249.

[b] (Minn.: 1896.)

A finding that plaintiff had not voluntarily released his claim against defendant for injuries was justified by evidence that plaintiff was very ignorant; that his mind was affected by the injuries; that, while he was still confined to his bed, plaintiff's agent presented him a draft for \$25 and a formal release, which was interpreted to him by defendant's foreman; and that, although the amount was grossly inadequate, if he was entitled to anything, he accepted it and signed the release without suggesting that he should have more; his testimony being that he thought the paper signed was only a receipt for the money.—*Christianson v. Chicago, St. P., M. & O. Ry. Co.* (Minn.) 69 N. W. 640.

RELEVANCY.

Of evidence, see "Evidence," § 108.

RELICION.

See "Riparian Rights," § 2.

RELIEF FUND ASSOCIATION.

See "Benevolent Societies"; "Release and Discharge," § 3.

RELIGIOUS SOCIETIES.

See, also, "Cemeteries"; "Charities."

Charges against clergymen, privileged communications, see "Libel and Slander," § 16.
Exemption of property from taxation, see "Taxation," § 23.

Power of city to act as trustee for, see "Municipal Corporations," § 11.

§ 1. Church government.

(Neb.: 1895.)

Where a local church organization is a member of an association of congregations having general rules and government, the decisions of the association are binding on the local organization, so far as they relate to the church government.—*Pounder v. Ash* (Neb.) 63 N. W. 48.
44 Neb. 672.

§ 2. Church property.

(Neb.: 1897.)

A condition, in a grant for church purposes, that the lands shall revert to the grantor in a certain event, cannot be invoked by one faction of the grantee, to the prejudice of another.—*Moseman v. Heitshousen* (Neb.) 69 N. W. 957.

§ 3. — Diversion.

[a] (Iowa: 1895.)

A church incorporated as a branch of a particular denomination cannot, without consent of all its members, transfer property, acquired for its benefit as such corporation, to another denomination or branch of the same denomination holding different doctrines. Given, C. J., and Rothrock, J., dissenting.—*Park v. Champlin* (Iowa) 64 N. W. 674.

[b] (Iowa: 1895.)

The fact that a church incorporated as a branch of a particular denomination has become a member of a higher body of the same branch, with authority only in spiritual matters, the manual of which provides that a church in good standing as a member shall, on request for dismissal to another denomination or branch of the same denomination, receive a letter of recommendation, will not give it power to transfer, without consent of all its members, to another denomination or another branch of the same denomination, property acquired for its use as incorporated. Given, C. J., and Rothrock, J., dissenting.—*Park v. Champlin* (Iowa) 64 N. W. 674.

§ 4. Liability of members.

(Mich.: 1896.)

The members of the building committee of an unincorporated religious society, through whom materials for the construction of a church are purchased, are liable therefor, though the seller charged the material in the name of the society, and at the time inquired and was told that the money for payment was to be raised by subscriptions among the congregation, and by the proceeds of fairs, etc.—*Clark v. O'Rourke* (Mich.) 69 N. W. 147.

§ 5. Action by trustees in behalf of members.

(Mich.: 1897.)

The trustees and agents of a church society may bring an action in behalf of themselves and all other members, all having a like interest in the subject-matter.—*White v. Rice* (Mich.) 70 N. W. 1024.

§ 6. Jurisdiction and duties of courts.

[a] (Neb.: 1895.)

Equity will not supplement the rules of a church by supplying a remedy for the regulation of purely church affairs.—*Powers v. Budy* (Neb.) 63 N. W. 476.
45 Neb. 208.

[b] (Neb.: 1895.)

Courts will not review proceedings of church tribunals on questions involving church discipline.—*Powers v. Budy* (Neb.) 63 N. W. 476.

45 Neb. 208.

[c] (Neb.: 1897.)

When the right of a faction of a church to control church property and records depends mainly on matters of religious doctrine, the courts should not interfere.—*Moseman v. Heitshousen* (Neb.) 69 N. W. 957.

§ 7. Decision of church tribunal—Effect in civil courts.

(Neb.: 1895.)

Where charges have been preferred against a minister of the gospel, and he has been adjudged guilty by the highest tribunal of the church organization, and deposed from the ministry, and expelled from membership in the church, courts will recognize such judgments of the church tribunal, enforce their observance, and enjoin the one against whom they were rendered from further acting in the capacity of a minister, or enjoying the rights of a member of the church organization, and will also enjoin such party and member of the local congregation, or others who have combined with him, from excluding from the church building and property,

and its use for any proper purpose, or from disturbing them in such use, ministers appointed to take charge of the congregation and church, where it appears that the church property was conveyed to the organization or its trustees for church purposes.—*Pounder v. Ash* (Neb.) 63 N. W. 48.

44 Neb. 672.

REMAINDERS.

See "Estates."

Creation by deed, see "Deed," § 18.

REMAND.

In criminal cases, see "Criminal Law," §§ 239, 240.

Of case removed to federal court, see "Removal of Causes."

REMEDY AT LAW.

See "Equity," § 2.

REMITTITUR.

Affirmance on remitting excess of judgment, see "Appeal," § 295.

To defeat jurisdiction on appeal, see "Appeal," § 43.

REMONSTRANCE.

Against consolidation of highway districts, see "Highways," § 3.

REMOTE AND PROXIMATE CAUSE.

See "Damages," § 6; "Negligence," §§ 10-16.

REMOTE DAMAGES.

See "Damages," §§ 30, 32.

For failure to deliver telegram, see "Telegraph Companies," §§ 10, 11.

REMOVAL.

See "Office and Officer."

From premises, abandonment of homestead, see "Homestead," § 16.

Of administrator, see "Executors and Administrators," § 5.

Of assignee, see "Assignment for Benefit of Creditors," § 28.

Of city officer, see "Municipal Corporations," §§ 45, 46.

Of fixtures, see "Fixtures," § 5.

Of guardian, see "Guardian and Ward," § 2.

REMOVAL OF CAUSES.

See, also, "Venue in Civil Cases."

Transfer from justice of causes involving title to land, see "Justices of the Peace," § 8.

Transfer from justice to mayor or other justice, see "Justices of the Peace," § 19.

—from one docket to another, see "Practice in Civil Cases," §§ 19-21.

—from one state court to another, see "Courts," § 22.

—on admission of territory as state, see "Courts," § 11.

[a] (Mich.; 1895.)

How. Ann. St. § 6581, providing for the removal of causes from the circuit court of Kent county to the superior court of Grand Rapids, is constitutional.—*Wood v. Adsit* (Mich.) 63 N. W. 419.

105 Mich. 378.

[b] (Neb.; 1895.)

The state court will not examine the order of a federal court, remanding a cause for want of jurisdiction, to determine whether the remand was in accordance with the practice of the latter court.—*Fitzgerald v. Fitzgerald & Mallory Const. Co.* (Neb.) 62 N. W. 899.

44 Neb. 463.

[c] (N. D.; 1895.)

One who has not been allowed to intervene in an action, and who has made no application therefor, has no standing to petition for the removal of the cause to a federal court.—*State v. Barnes* (N. D.) 65 N. W. 688.

5 N. D. 350.

[d] (N. D.; 1895.)

Service on a nonresident, which may be set aside on the ground of privilege, is sufficient service to start running the time within which a petition for removal of the cause to a federal court may be filed.—*State v. Barnes* (N. D.) 65 N. W. 688.

5 N. D. 350.

REMOVAL OF CLOUD.

See "Quieting Title—Removal of Cloud."

RENEWAL.

Of lease, see "Landlord and Tenant," §§ 25-27.

Of note, see "Negotiable Instruments," §§ 18, 19.

Of policy, see "Insurance," § 14.

RENT.

See "Landlord and Tenant," §§ 43-51.

Allowance for rents and profits in partition, see "Partition," § 7.

Rights of purchaser at foreclosure sale, see "Mortgages," § 74.

REPAIRS.

Conditions in policy, see "Insurance," § 49.

Duty of master, see "Master and Servant," § 40.

Of bridges, see "Bridges," § 1.

Of drains, see "Drainage," § 6.

Of leased premises, see "Landlord and Tenant," §§ 9-11.

Of streets, duty of street-railroad company, see "Horse and Street Railroads," §§ 4, 5.

REPEAL.

Of ordinances, see "Municipal Corporations," § 28.

Of statute, see "Statutes," §§ 24-33.

REPLEVIN.

I. WHEN ACTION LIES—DEFENSES, §§ 1-6.

II. AFFIDAVIT AND WRIT, §§ 7-9.

III. PLEADING AND EVIDENCE, §§ 10-17.

IV. PRACTICE, §§ 18-28.

V. DAMAGES AND COSTS, §§ 29-32.

VI. BONDS AND ACTIONS THEREON, §§ 33-35.

Against constable for property seized under attachment, see "Sheriffs and Constables," § 8.

Amendment of verdict, see "Trial," § 101.

By mortgagee, see "Chattel Mortgages," §§ 56, 57.

By mortgagor against mortgagee, see "Chattel Mortgages," §§ 40-42.

Cross action, see "Abatement and Revival," § 6.

For exempt property seized under attachment, see "Exemptions," § 20.

For portion of commingled goods, see "Confusion of Goods."

For property taken for taxes, see "Taxation," §§ 52, 72.

—seized under execution, see "Execution," § 18.

Judgment as res judicata, see "Judgment," § 59.

Right to set-off, see "Set-Off and Counterclaim," § 1.

I. WHEN ACTION LIES—DEFENSES.

§ 1. In general.

(Wis.; 1896.)

Replevin will not lie, under Rev. St. § 3732, against the town treasurer, to recover property which he has levied on under a tax warrant valid on its face.—*Keystone Lumber Co. v. Pederson* (Wis.) 67 N. W. 696; *Ashland Lumber Co. v. Same, Id.* 93 Wis. 466.

§ 2. Ownership and right to possession.

[a] (Mich.; 1895.)

The vendee under a land contract, with the right to cut and remove timber, has title sufficient to maintain replevin for timber cut on the land by a mere trespasser.—*Gamble v. Cook* (Mich.) 64 N. W. 482.

[b] (Neb.; 1895.)

The right of possession of property obtained by a trespass cannot be made the basis of replevin therefor after losing possession.—*Ellsworth v. McDowell* (Neb.) 62 N. W. 1082. 44 Neb. 707.

[c] (Neb.; 1895.)

Plaintiff in replevin must show that the property was wrongfully detained by defendant, and that he was entitled thereto at the commencement of suit.—*Peterson v. Lodwick* (Neb.) 62 N. W. 1100. 44 Neb. 771.

[d] (Neb.; 1895.)

In replevin, plaintiff cannot recover merely on defendant's failure to affirmatively establish a superior right to the property.—*Johannsen v. Miller* (Neb.) 63 N. W. 141. 45 Neb. 53.

[e] (Neb.; 1896.)

In view of the language of Code Civ. Proc. §§ 191, 192, prescribing the form of verdict and judgment in replevin, the question in such an action is the right to possession at the commencement of the action, and not at the trial.—*Brown v. Hogan* (Neb.) 69 N. W. 100.

[f] (Neb.; 1897.)

A plaintiff in replevin, who claims a special ownership by virtue of a chattel mortgage, must allege facts showing his interest in the property in controversy, and also facts which entitle him

to the immediate possession thereof.—*Norcross v. Baldwin* (Neb.) 70 N. W. 511.

[g] (Wis.; 1895.)

Where a vendee of a bill of sale given as security allows the vendor to keep possession of the property under a lease, the vendee cannot maintain replevin against one seizing the property.—*Schweitzer v. Hanna* (Wis.) 64 N. W. 997, 91 Wis. 318.

[h] (Wis.; 1895.)

A vendor of standing timber, who retains title to all logs cut from the land, and lumber manufactured from the logs, until the purchase price is paid, may maintain replevin upon the vendee's default in such payment. *Bent v. Hoxie* (Wis.) 64 N. W. 426, 90 Wis. 625, followed.—*Hyland v. Bohn Mfg. Co.* (Wis.) 65 N. W. 170, 92 Wis. 157.

[i] (Wis.; 1896.)

A licensee under an unrevoked license to cut and remove timber, for which privilege he has paid full value, has title sufficient to maintain replevin for the timber after it has been cut and removed by a mere trespasser. *Cassoday, C. J., dissenting.*—*Keystone Lumber Co. v. Kolman* (Wis.) 69 N. W. 165.

§ 3. Property in custodia legis.

(Wis.; 1895.)

Rev. St. § 4624, provides that the officer arresting any person for larceny shall secure the property alleged to have been stolen, and, on conviction of defendant, restore it to the owner. The court, before the trial, directed the officer to return the property to defendant on receipt of a bond. The order provided that such delivery should not impair the owner's right to replevy the property. *Held*, that after such delivery the property was not in the custody of the law, so as to defeat the owner's right to replevy the same.—*Byrne v. Byrne* (Wis.) 62 N. W. 413, 89 Wis. 659.

§ 4. Property seized under execution.

(Mich.; 1895.)

Where a sheriff, at the instance of judgment creditors, has seized property under a writ of execution, and placed it in the control of a stranger, an action of replevin will not lie against the judgment creditors.—*House v. Turner* (Mich.) 64 N. W. 20.

§ 5. Demand.

[a] (Iowa; 1896.)

Demand is not necessary before an action of replevin for a horse of which both parties claim absolute ownership.—*Leek v. Chesley* (Iowa) 67 N. W. 580.

[b] (Mich.; 1896.)

Where a tenant on shares has moved the crop, and denies that the landlord has any interest therein, a demand by the latter is not necessary.—*Breitenwischer v. Clough* (Mich.) 69 N. W. 88.

[c] (Neb.; 1895.)

Where a defendant in replevin did not come into possession of the property rightfully, it is not necessary for plaintiff to make proof of demand and refusal, in order to recover costs.—*Wilcox v. Beitel*, 61 N. W. 722, 43 Neb. 451.

[d] (Wis.; 1895.)

Where, in replevin, both parties claim title and the right of possession incident thereto, no demand is necessary.—*Byrne v. Byrne* (Wis.) 62 N. W. 413, 89 Wis. 659.

[e] (Wis.; 1895.)

Plaintiffs sold standing timber, to be manufactured into lumber, on the agreement that they should retain title thereto till the payment of the price; and, after default, plaintiffs' agent forbade further shipments, and placed men in charge of the lumber. Defendant retook possession by force, denying plaintiffs' rights. *Held*, that plaintiffs need make no de-

mand before bringing replevin.—Hyland v. Bohn Manuf'g Co. (Wis.) 65 N. W. 170. 92 Wis. 157.

[f] (Wis.; 1896.)

Plaintiffs, who had delivered logs under an agreement whereby title was to remain in them till payment of the price, retook possession on the vendee's default, drove the logs down the river, and boomed them, the mark on them being recorded in their name; and thereafter defendant, who had taken a mortgage on the property from the vendee, with notice of plaintiffs' rights, seized the same under his mortgage. *Held* that, as such seizure was tortious, plaintiffs could maintain replevin without a previous demand.—Perkins v. Best (Wis.) 68 N. W. 762.

§ 6. Defenses.

[a] (Iowa; 1896.)

In replevin against an officer who has levied on the property in question under an execution against a third person, defendant may set up as a defense that since the commencement of the action a landlord's lien has been established against it and the property taken from him to satisfy such lien; and this though plaintiff was not a party to the landlord's attachment.—Neeb v. McMillan (Iowa) 68 N. W. 438.

[b] (Mich.; 1896.)

Where plaintiff shows possession under claim of purchase, and forcible taking, defendant cannot impeach his title.—Conely v. Dudley (Mich.) 69 N. W. 151.

[c] (Neb.; 1896.)

It is a good defense to an action in replevin to prove title and right of possession in a third person.—Fuller v. Brownell (Neb.) 67 N. W. 6. 48 Neb. 145.

II. AFFIDAVIT AND WRIT.

§ 7. Amendment.

(Neb.; 1895.)

An affidavit in replevin by a corporation, made on behalf of plaintiff by one of its officers, which referred to the rights and claims of "affiant" in the property, instead of those of the corporation, could not be amended to cure the defect.—Commercial State Bank v. Ketcham, 65 N. W. 201, 46 Neb. 568.

§ 8. Certificate of copy.

(Mich.; 1895.)

A writ of replevin should not be dismissed because the copy delivered to the defendant at the time of service was not certified, no damage to defendant having been caused thereby.—Anderson v. Leawee Circuit Judge (Mich.) 62 N. W. 1027.

105 Mich. 89.

§ 9. Issuance against nonresident.

(Mich.; 1895.)

The appearance of a nonresident in a replevin suit cannot be forced by successive writs, issued without expectation of service, and the writ should be quashed on motion where 11 months have elapsed since the issuance of the last writ, and no return thereof has been made.—Lanahan v. Grove (Mich.) 64 N. W. 740.

III. PLEADING AND EVIDENCE.

§ 10. Petition or complaint.

[a] (Neb.; 1895.)

A complaint in replevin by a mortgagee against a stranger is insufficient, by failure to show that, as between mortgagor and mortgagee, the latter had the right of possession.—Camp v. Pollock, 64 N. W. 231, 45 Neb. 771.

[b] (Neb.; 1896.)

A petition in replevin for 19 head of steers from 12 to 18 months old, branded "4," and one yearling steer, branded "llatiron," alleged plaintiff's right under two chattel mortgages. It appeared that one mortgage described 54 calves, branded "4," and the other, 32 cows, 29 of which had calves by their side, the cows being branded "llatiron." The ages of the steers claimed were fixed by the petition with reference to the time suit was brought, but the record did not disclose when that was. *Held*, as against an attack first made after judgment, the petition was not defective for failing to aver that the cattle claimed were the increase of cattle described in the mortgage.—Merrill v. Equitable Farm & Stock Imp. Co. (Neb.) 68 N. W. 365.

[c] (Neb.; 1897.)

Where plaintiff bases his right to possession on a special ownership, he must plead the facts creating such ownership.—Griffing v. Curtis (Neb.) 69 N. W. 968.

§ 11. — Amendment.

(Iowa; 1896.)

In replevin for a horse, where the value of the animal as stated in the complaint was admitted by defendant, a subsequent order allowing an amendment which gave a greater sum as the value of the animal will not be disturbed, on the ground that defendant had not called any witnesses on the question of value, and was not prepared to meet the amendment, in the absence of a motion by defendant for a continuance on such ground.—Leek v. Chesley (Iowa) 67 N. W. 580.

§ 12. Answer.

[a] (Iowa; 1897.)

Where the answer in replevin merely alleges that plaintiff's mortgage did not own the property, nor intend to mortgage it, and that he informed plaintiff of defendant's interest therein at the time the mortgage was given, the contention that the recording of the mortgage was not constructive notice, because the acknowledgment was invalid, is not available to defendant.—Union Bank of Wilton v. Creamery Package Manuf'g Co. (Iowa) 70 N. W. 728.

[b] (N. D.; 1897.)

A general denial puts in issue plaintiff's ownership and right of possession, and the wrongful detention by defendant.—Plano Manuf'g Co. v. Daley (N. D.) 70 N. W. 277.

[c] (S. D.; 1894.)

In replevin of property as the "owner" thereof, an answer denying that "plaintiff is or ever was the owner" of the property *held*, on demurrer, to "state facts sufficient to constitute a defense."—Hill v. Walsh (S. D.) 61 N. W. 440. 6 S. D. 421.

§ 13. Pleading and proof.

[a] (Iowa; 1896.)

In an action to recover personal property taken under execution, where the petition first alleges that plaintiff is the absolute and unqualified owner of said property, but it clearly appears from the whole petition that she claims under chattel mortgages only, the mortgages are admissible in evidence.—Darnall v. Bennett (Iowa) 67 N. W. 273.

[b] (Neb.; 1895.)

An allegation of general ownership in an action of replevin is not supported by proof of a mere lien or other special ownership.—Sharp v. Johnson (Neb.) 62 N. W. 466. 44 Neb. 165.

[c] (Neb.; 1896.)

A plaintiff in replevin may, under a petition alleging general ownership and right of possession in himself and a wrongful detention by defendant, prove fraud inducing a previous sale by plaintiff to defendant, and a rescission because

thereof.—*Phenix Iron-Works Co. v. McEvony* (Neb.) 66 N. W. 290.
47 Neb. 228.

[d] (Neb.; 1896.)

An allegation of general ownership in a petition and affidavit in replevin is not supported by the introduction of the chattel mortgage under which the plaintiff claims the right of possession of the property replevied.—*Strahle v. First Nat. Bank* (Neb.) 66 N. W. 415.
47 Neb. 319.

[e] (Neb.; 1897.)

Allegations of plaintiff's general ownership and right of possession are not proved by the introduction of a chattel mortgage to him describing the property in issue.—*Robinson v. Kilpatrick-Koch Dry-Goods Co.* (Neb.) 70 N. W. 378.

[f] (Neb.; 1897.)

In replevin, a party may prove fraud under general allegations of ownership and right of possession.—*Woodbridge v. De Witt* (Neb.) 70 N. W. 506.

[g] (Neb.; 1897.)

Where plaintiff bases his claim to the property on a chattel mortgage executed by defendant, who admits its execution, but denies all the other allegations of the complaint, and pleads facts upon which he predicates fraud in procuring the mortgage, if the evidence shows that defendant never intended to give, nor plaintiff to take, a mortgage on the property, and that the mistake was not the result of defendant's negligence, defendant will be entitled to verdict, though he fails to prove fraud.—*Plano Manuf'g Co. v. Daley* (N. D.) 70 N. W. 277.

[h] (S. D.; 1895.)

In replevin, where plaintiff claims the property under a written lease, which he introduces in evidence, defendant may avail himself of the stipulation therein giving him a lien on the property, without pleading such lien as an affirmative defense.—*Esshom v. Watertown Hotel Co.* (S. D.) 63 N. W. 229.

§ 14. — Matters admissible under general denial.

[a] (Neb.; 1896.)

Defendant in replevin may, under a general denial, show that he holds the property under an execution.—*Best v. Stewart* (Neb.) 67 N. W. 881.
48 Neb. 859.

[b] (Neb.; 1896.)

After the commencement of an action of replevin for cattle claimed by defendants under a sale by plaintiff's agent, which plaintiff claimed was unauthorized, but before trial, plaintiff learned that it had received the benefit of a portion of the proceeds of the sale, which, however, it neither returned nor tendered to defendants. *Held*, that the ratification of the sale which thereby resulted could be proved by defendants under a general denial, without filing a supplemental answer setting up the facts.—*Johnston v. Milwaukee & Wyoming Inv. Co.* (Neb.) 68 N. W. 383.

[c] (S. D.; 1895.)

Under a general denial in claim and delivery the defendant may show title in himself or in a stranger, and that some other person was in possession at the commencement of the action.—*Pitts Agricultural Works v. Young* (S. D.) 62 N. W. 432.

[d] (S. D.; 1896.)

Under a general denial in claim and delivery against a sheriff, defendant may show that the goods belong to a third person, and that his possession is rightful under an attachment.—*Conner v. Knott* (S. D.) 66 N. W. 461.

§ 15. Evidence.

[a] (Iowa; 1896.)

In replevin by a chattel mortgagee against a levying creditor of the mortgagor,

evidence of the source from which the mortgagor procured the mortgaged property is immaterial.—*Darnall v. Bennett* (Iowa) 67 N. W. 273.

[b] (Mich.; 1895.)

In replevin it appeared that plaintiff gave defendant a mortgage on the property to secure notes given for a horse warranted by defendant to be sound, that defendant had taken the property under the mortgage, because one of the notes was due and unpaid, and that defendant had returned the horse because he claimed there was a breach of the warranty. *Held*, that it was not error to permit plaintiff to testify that he relied on the warranty in making the purchase of the horse.—*Rogers v. Ferris* (Mich.) 64 N. W. 1048.

[c] (Minn.; 1896.)

A seed-grain note is not a conditional sale of the property therein described, so as to vest title thereto in the payee on default of the maker; and it was hence error, in replevin for grain described in such a note, to admit the note in evidence to establish the payee's ownership.—*Schofield v. National Elevator Co.* (Minn.) 67 N. W. 645.
64 Minn. 527.

[d] (Neb.; 1896.)

An appraisal made in an action of replevin for the purpose of determining the amount of a bond to be given therein is not a part of the record of the case, in such a sense as to make it part of the proofs upon the trial, unless offered and received in evidence.—*Dempster Mill Manuf'g Co. v. First Nat. Bank* (Neb.) 68 N. W. 477.

§ 16. — Burden of proof.

[a] (Mich.; 1896.)

Proof of possession in plaintiff, under claim of purchase from the true owner, and of forcible taking of the property without consent, places upon defendant the burden of justifying his taking.—*Conely v. Dudley* (Mich.) 69 N. W. 151.

[b] (Neb.; 1896.)

If plaintiff in replevin shows that he was in undisputed possession of the replevied goods under a claim of ownership, it devolves on defendant to show that the possession was interrupted under a superior right.—*Barkley v. Leiter* (Neb.) 68 N. W. 381.

§ 17. — Sufficiency.

[a] (Iowa; 1896.)

In an action against a sheriff and an attaching creditor, to recover goods held by them under an attachment against a third person, where there was evidence that plaintiff had sold the goods to such third person, but none that the sale had been rescinded, a verdict should have been directed for defendant.—*Morse v. Hamill* (Iowa) 66 N. W. 892.

[b] (Neb.; 1895.)

Where the rights of plaintiff in replevin are based on written leases of parties from whom he claimed, the failure to offer in evidence such leases will defeat the action.—*Johannsen v. Miller* (Neb.) 63 N. W. 141.
45 Neb. 53.

IV. PRACTICE.

§ 18. Compliance with order for seizure of goods.

(S. D.; 1897.)

Where the order for seizure in claim and delivery required the officer to take all the property described in the affidavit, and he took only a part, and returned the affidavit and order into court, certifying the partial seizure, without giving reasons for not seizing all, it was proper to permit him to withdraw such papers, and take the balance of the described property

thereunder, since the return was premature, under Comp. Laws, § 4983, requiring the sheriff to file the notice and affidavit within 20 days after taking the property therein described.—*National Bank of Commerce v. Feeney* (S. D.) 70 N. W. 871.

§ 19. Parties—Intervention and substitution.

[a] (Iowa; 1896.)

In replevin against a sheriff for attached property, the attachment plaintiff, his rights being dependent upon the validity of the attachment, after default judgment has been rendered against the sheriff, cannot, by intervention, enforce his rights under the attachment, the default judgment not being set aside.—*Dupont & Co. v. Amos* (Iowa) 66 N. W. 774.

[b] (Iowa; 1896.)

Under Code, § 3228, providing that third persons, claiming property involved in replevin, may set up their claims by intervention, and section 2681, providing, in regard to intervention, that intervenor has no right to delay, it is error, in replevin, after default has been entered against defendant, to permit a third person to intervene, the default not being set aside.—*Dupont & Co. v. Amos* (Iowa) 66 N. W. 774.

[c] (Neb.; 1897.)

In a replevin, where the plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff, over defendant's objection.—*Flanders v. Lyon & Healey* (Neb.) 70 N. W. 524.

§ 20. Dismissal.

[a] (Neb.; 1896.)

When a plaintiff in replevin, who has obtained the property, fails in his proof, or fails to prosecute the action, the defendant is entitled to judgment, and a trial of his right of property or possession, for the purpose of establishing his damages. Hence plaintiff cannot dismiss without consent.—*Garber v. Palmer, Blanchard & Co.* (Neb.) 66 N. W. 656.

47 Neb. 699.

[b] (Neb.; 1896.)

In replevin, where the property has been taken under the writ, and delivered to the plaintiff, he cannot dismiss the action, and thereby prevent the defendant from having the right to the possession determined in that suit.—*Vose v. Muller* (Neb.) 67 N. W. 598.

48 Neb. 602.

§ 21. Directing verdict.

(N. D.; 1896.)

The rule requiring the court to direct a verdict where the facts are undisputed applies to claim and delivery cases.—*Fletcher v. Nelson* (N. D.) 69 N. W. 53.

§ 22. Issues determinable.

(Mich.; 1895.)

In replevin by the legal owner of wild lands for timber cut and removed therefrom, the fact that defendant was in bona fide adverse possession of the land when he cut the timber does not preclude an investigation of title to the land.—*McKinnon v. Meston* (Mich.) 62 N. W. 1014.

104 Mich. 642.

§ 23. Verdict and findings.

[a] (Mich.; 1894.)

A general verdict for plaintiff in replevin, fixing the sum due under a contract of sale of a piano, and giving plaintiff a lien for that amount, does not warrant the entry of a judgment that the jury assessed such amount as damages for detention.—*Guerold v. Holtz* (Mich.) 61 N. W. 278.

103 Mich. 118.

[b] (Neb.; 1895.)

Where, by special finding on sufficient evidence, the value of replevied property was

fixed, a judgment rendered on a general verdict limited to the same amount will not be disturbed.—*Citizens' Nat. Bank v. Wedgwood* (Neb.) 63 N. W. 375.

45 Neb. 143.

[c] (Neb.; 1895.)

A finding, in replevin by a mortgagee against an attaching creditor, that the proceeds of a sale of the property were sufficient to satisfy plaintiff's mortgage and defendant's claim also, does not support a judgment for defendant in the alternative for the property or the value thereof.—*Kilpatrick-Koch Dry-Goods Co. v. Strauss*, 64 N. W. 223, 45 Neb. 793.

[d] (Neb.; 1896.)

A petition in replevin alleging "that, during the time the said goods were in the possession and under the control of the defendant, the articles of said goods described in Exhibit C, which is hereto attached, and made a part of this petition, were damaged and destroyed without the consent of plaintiff, as stated in said exhibit, to the amount set opposite each article in said exhibit, and in the aggregate to the amount of \$1,840, to plaintiff's damages in the sum of \$1,840," was sufficient to sustain a finding for damages resulting from injury to the property.—*Rosecrans v. Asay* (Neb.) 68 N. W. 627.

[e] (Neb.; 1896.)

A verdict in replevin for a defendant who claims under a lien, without a finding as to the value of his possession, is not responsive to the issues, and is contrary to law, within Code Civ. Proc. § 314, subd. 6.—*Creighton v. Haythorn* (Neb.) 68 N. W. 934.

[f] (Neb.; 1897.)

A plaintiff in replevin alleged that he was the owner and entitled to the immediate possession of the property. The answer was a general denial. All the plaintiff's evidence tended to show that he had a special interest in or lien upon the property replevied, and the court so found. *Held*, that the finding did not respond to the issues.—*Wilson v. City Nat. Bank* (Neb.) 70 N. W. 501.

[g] (S. D.; 1895.)

In claim and delivery, where the property is taken by the officer under process, and the presumption that it was taken from the defendant is not overcome by proof, a verdict finding all the issues in favor of the defendant will ordinarily be construed with reference to this presumption, and not as finding that the defendant was not in possession of the property at the commencement of the action.—*Hitts Agricultural Works v. Young* (S. D.) 62 N. W. 432.

6 S. D. 557.

§ 24. Judgment.

[a] (Minn.; 1895.)

In an action of replevin, where plaintiff did not take possession of the property, and the parties proceeded as in an action for accounting to determine the amount of a lien which the evidence showed defendant had on the property, the judgment for plaintiff for recovery of possession should be conditioned on the payment of the amount of the lien found due.—*Bassett v. Haren* (Minn.) 63 N. W. 713.

61 Minn. 346.

[b] (Neb.; 1897.)

Where, in replevin, the property has been delivered to the plaintiff, the county court, on finding for the defendant, may render judgment for the value of the property, although it exceed \$1,000, the jurisdictional limit of that court.—*Bates & Co. v. Stanley* (Neb.) 70 N. W. 972.

[c] (Neb.; 1897.)

Since Comp. St. c. 20, § 2, confers on the county court jurisdiction in replevin suits where the appraised value of the property does not exceed \$1,000, the jurisdiction is not ousted by proof on the trial that the property exceeds that value, but judgment cannot be rendered for more than the jurisdictional limit of

\$1,000, exclusive of costs.—*Bates & Co. v. Stanley* (Neb.) 70 N. W. 972.

[d] (Wis.: 1896.)

A complaint in replevin will not support a judgment against a defendant not alleged to have at any time had possession of the property, or, being in possession, to have refused to surrender on a proper demand: the only allegation to implicate such defendant being that "the defendants unlawfully detain the same."—*Stahl v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 68 N. W. 954.

§ 25. — In the alternative.

[a] (Neb.: 1895.)

Where a judgment is rendered for defendant in replevin merely for damages for withholding the property, and costs, plaintiff is not prejudiced by a failure to render the judgment against him in the alternative, either for a return of the property, or the value thereof.—*Scott v. Burrill* (Neb.) 62 N. W. 1093.
44 Neb. 755.

[b] (Neb.: 1897.)

Defendant in replevin, to whom return of the property or its value has been awarded, who recovers the property by reason of his original title, will be held to have waived his right to the alternative relief granted by the judgment.—*Otto v. Burch* (Neb.) 70 N. W. 513.

[c] (S. D.: 1895.)

In claim and delivery, where defendant pleads property in himself or in a stranger, or traverses plaintiff's right to the possession, and prevails in the action, he is entitled to a judgment for the return of the property, or its value, in case a return cannot be had.—*Pitts Agricultural Works v. Young* (S. D.) 62 N. W. 432.
6 S. D. 557.

[d] (S. D.: 1897.)

In claim and delivery by a chattel mortgagee against the mortgagor, where defendant gives a redelivery bond, and retains possession of the property, and its value exceeds the debt secured, it is error to give plaintiff alternative judgment for the value of the property, instead of for the amount due on the mortgage, damages, if any, and costs, though Comp. Laws, §§ 5062, 5099, construed literally, contemplate a verdict and judgment in all cases for the actual value of the property, when a delivery cannot be had.—*National Bank of Commerce v. Feeney* (S. D.) 70 N. W. 874.

§ 26. — Satisfaction.

[a] (Neb.: 1896.)

Plaintiff in replevin, against whom judgment was rendered for return of the property, or its value, paid the costs, also the damage awarded for wrongful detention, and thereupon made a tender of the property to defendant. Held a discharge of the alternative judgment.—*Manker v. Sine* (Neb.) 66 N. W. 840.
47 Neb. 736.

[b] (Neb.: 1897.)

B. and K., as agents for G., took possession of personal property by virtue of a mortgage executed by O. In replevin by the latter before a justice, judgment was entered for defendants for the return thereof, or the value. From said judgment, O., upon giving a bond, appealed to the district court, where defendants also recovered judgment. Afterwards, O. having failed to return the property, G. recovered the same by replevin in his own name, under his mortgage, and, after foreclosure, applied the proceeds on the mortgage. Held, in a subsequent action by B. and K. upon the appeal undertaking given by O., that the judgment in the original action was satisfied except as to damages and unpaid costs by the delivery to G. in the subsequent action of the mortgaged property, and the disposition thereof by him in accordance with the terms of his mortgage.—*Otto v. Burch* (Neb.) 70 N. W. 513.

§ 27. Election as to judgment.

(Iowa: 1896.)

The holder of a first mortgage on personal property which has been sold by a second mortgagee, the purchaser being in possession, cannot, in replevin against the two, refuse to take the property under his writ, and recover judgment for its value against the second mortgagee, who has parted with his interest and possession.—*Nichols v. Sheldon Bank* (Iowa) 67 N. W. 582.

§ 28. Review.

[a] (Neb.: 1897.)

In replevin, the county court found for the plaintiff as to certain of the goods taken under the writ, and for the defendant as to the residue. Appropriate judgment was entered on each finding. Held to constitute a single judgment, so that an appeal by the plaintiff brought the whole case up to the district court for trial *de novo*.—*Bates & Co. v. Stanley* (Neb.) 70 N. W. 972.

[b] (Neb.: 1897.)

Where, in replevin in the county court, the appraised value of the property, as well as its actual value found by the court, is less than \$1,000, and the plaintiff appeals from the judgment, the district court may give judgment for the defendant for an amount in excess of the jurisdiction of the county court, if warranted by the facts.—*Bates & Co. v. Stanley* (Neb.) 70 N. W. 972.

[c] (Wis.: 1897.)

Allowing a plaintiff in replevin, after trial, to withdraw all claims for damages, does not affect a substantial right of the defendant (Rev. St. § 2829), and hence is not reversible error.—*Williams v. Hoehle* (Wis.) 70 N. W. 556.

V. DAMAGES AND COSTS.

§ 29. Measure of damages.

[a] (Iowa: 1896.)

In an action against an officer to recover personal property levied on under execution against a third person, the damages for taking the property should be estimated as of the time of the taking, with interest to the time of trial.—*Neeb v. McMillan* (Iowa) 68 N. W. 438.

[b] (Mich.: 1894.)

The measure of damages suffered by defendant in replevin is the value of the use of the property from the time of replevin until trial.—*Hutchinson v. Hutchinson* (Mich.) 61 N. W. 60.

102 Mich. 635.

[c] (Minn.: 1895.)

Where a threshing machine was wrongfully detained under replevin proceedings, but not used during the period of detention, the measure of damages is the fair rental value less the damages which would result from wear and tear in case of use during a similar period.—*Pearless Manufg Co. v. Gates* (Minn.) 63 N. W. 260.

61 Minn. 124.

[d] (Minn.: 1895.)

In replevin for a threshing machine, the reasonable value of its use during detention may be considered in estimating damages.—*Williams v. Wood* (Minn.) 63 N. W. 492.

61 Minn. 194.

[e] (Minn.: 1895.)

In replevin for a note and mortgage, where the actual value is stated in the complaint to be the principal of the note, it is error to charge that in fixing the value the jury may consider the interest on the note which had accrued prior to the action.—*Peterson v. Hall* (Minn.) 63 N. W. 733.

61 Minn. 268.

§ 30. Nominal damages.

(Mich.; 1897.)

In replevin, the goods, though nominally turned over to plaintiffs by the sheriff, did not pass into their hands, but were immediately taken by S. under writ of replevin against defendant, who was manifestly in collusion with S., for whom he appeared as bondsman, and for whom the same attorney appeared who represented defendant in the first suit. Plaintiffs failed to show a right to recover. *Held*, that defendant, waiving the return of the goods, is not entitled to their value, but merely to nominal damages.—*Joseph v. Brady* (Mich.) 70 N. W. 1101.

§ 31. Allowance for increase in value of property.

[a] (Minn.; 1895.)

In replevin by the state for logs cut from state pine lands under a void permit, where it appeared that defendant cut the timber in good faith, relying on the permit, and by his labor and money in cutting the logs and transporting them to a proper market materially increased their value, he is liable in the alternative for the value of the logs at the time and place of the original taking, with interest from the time of taking.—*State v. Shevlin-Carpenter Co.* (Minn.) 64 N. W. 81.

62 Minn. 99.

[b] (Wis.; 1896.)

In replevin by a licensee to cut and remove timber, against a mere trespasser, who, during the existence of such license, cuts the timber, and manufactures it into lumber, defendant is entitled to reimbursement for what he has reasonably expended in enhancing the value of the property.—*Keystone Lumber Co. v. Kolman* (Wis.) 69 N. W. 165.

§ 32. Costs.

(Neb.; 1896.)

A defendant in replevin who unsuccessfully seeks to establish a right of possession in himself is liable for costs, although no demand was pleaded or proved.—*Tilden v. Stilson* (Neb.) 68 N. W. 478.

VI. BONDS AND ACTIONS THEREON.

§ 33. Redelivery bond—Justification of sureties.

(Minn.; 1896.)

The omission of sureties on a replevin bond given in an action in justice court to acknowledge the bond or to justify does not affect the validity of the bond.—*Wheeler v. Paterson* (Minn.) 66 N. W. 964.

64 Minn. 231.

§ 34. Action on replevin bond.

[a] (Minn.; 1896.)

In order to render the sureties liable on a bond given by defendant in replevin, under Gen. St. 1894, § 5278, the judgment for plaintiff must be one authorized by section 5420, and one which can be satisfied by a return of the property.—*New England Furniture & Carpet Co. v. Bryant* (Minn.) 66 N. W. 974.

64 Minn. 256.

[b] (S. D.; 1895.)

In an action by a judgment creditor on an undertaking in replevin given by a claimant of property levied on under the judgment, plaintiff must show that his judgment is unpaid.—*Knott v. Sherman* (S. D.) 64 N. W. 542.

[c] (S. D.; 1895.)

A sheriff served written notice of levy on books in the hands of a binder as the property of the debtor, but did not take possession thereof, and thereafter a third party brought replevin against the sheriff for the books, and the coroner serving the writ gave the sheriff a receipt for the books as in the hands of the binder. On

the binder's refusal to permit the coroner to take the books, because of a claim of lien thereon for binding, the plaintiff in replevin dismissed its action and notified the sheriff thereof. *Held* that, in an action on the undertaking in replevin, the sureties were not estopped by the coroner's receipt from showing that the coroner could not get possession of the books.—*Knott v. Sherman* (S. D.) 64 N. W. 542.

§ 35. Judgment against surety.

(Iowa; 1896.)

In a replevin suit it was not an abuse of discretion for the court to overrule objections by the surety on the replevin bond, filed three weeks after the evidence was closed and the case submitted, to the entry of judgment against him on the ground that he had been released from liability by the act of the parties.—*McMeekin v. Worcestor* (Iowa) 68 N. W. 680.

REPLY.

See "Pleading," §§ 39–43.

REPORTS.

As to condition of corporation, see "Corporations," § 21.

Of referee, see "Reference," §§ 4–7.

REPRESENTATIONS.

See "Deceit"; "False Pretenses"; "Fraud."

REPUTATION.

As to financial ability, fraudulent representations, see "Deceit," § 5.

—representations within statute of frauds, see "Frauds, Statute of," § 27.

Evidence as to financial ability, see "Evidence," § 112.

Evidence of reputation, see "Bastardy," §§ 6–9.

Opinion evidence of, see "Evidence," § 43.

REQUESTS.

For instructions, see "Trial," §§ 62–65.

REQUISITION.

See "Extradition."

RESCISSION.

Of contract, see "Contracts," §§ 55–60.

Of release, see "Release and Discharge," § 5.

RESERVATIONS.

In assignments, see "Assignment for Benefit of Creditors," § 17.

In deeds, see "Deed," § 20.

RES GESTAE.

See "Criminal Law," § 104; "Evidence," §§ 31, 111; "Homicide," § 29.

RESIDENCE.

See "Domicile."

As affecting qualification of voter, see "Elections and Voters," § 4.

Of parties, as affecting jurisdiction of justice, see "Justices of the Peace," § 5.

RESIGNATION.

Of county attorney, see "District and Prosecuting Attorneys."

RES INTER ALIOS ACTA.

See "Evidence," § 110.

RES JUDICATA.

See "Judgment," §§ 39-61.

RESOLUTIONS.

Of city council, see "Municipal Corporations," §§ 22-37.

RESTRICTIONS.

In deeds, see "Deed," § 20.

RESULTING TRUSTS.

See "Trusts," §§ 6-11.

RETAINER.

See "Attorney and Client," § 1.

RETIRING PARTNERS.

See "Partnership," §§ 45-48.

RETROSPECTIVE LAWS.

See "Constitutional Law," §§ 27, 28.

RETURN.

Election returns, see "Elections and Voters," §§ 16-24.

Of attachment, see "Attachment," § 32.

Of execution, see "Execution," §§ 30, 31.

Of service of process, see "Writs and Notice of Suits," §§ 7-9.

REVENUE.

See "Taxation."

REVERSAL.

See "Appeal," §§ 285-288.

REVERSION.

Of school lands to original owner, see "Schools and School Districts," § 31.

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REVIEW.

Bill of, see "Equity," § 63.

On appeal, see "Appeal," §§ 177-261.

— from justice, see "Appeal," §§ 172-174.

— in criminal cases, see "Criminal Law," §§ 216-233.

On certiorari, see "Certiorari," § 8.

REVIEW, WRIT OF.

See "Certiorari."

REVIVAL.

See "Abatement and Revival."

Of judgment, see "Judgment," § 94.

Of mortgage on setting aside foreclosure decree, see "Mortgages," § 81.

Of will, see "Wills," § 18.

REVOCATION.

Of agency, see "Principal and Agent," § 4.

Of decree for distribution, see "Executors and Administrators," § 37.

Of license, see "License," §§ 2, 3.

Of liquor license, see "Intoxicating Liquors," §§ 14, 15.

Of offer to dedicate, see "Dedication," § 5.

Of submission to arbitration, see "Arbitration and Award," § 2.

Of will, see "Wills," § 15.

RIGHT OF WAY.

See "Easements"; "Railroad Companies," §§ 3-6.

RIPARIAN RIGHTS.

See, also, "Navigable Waters"; "Waters and Water Courses."

As to ice, see "Waters and Water Courses," § 14.

Taking without due process of law, see "Constitutional Law," §§ 41, 42.

§ 1. In general.**[a] (Wis.; 1895.)**

A person owning a dam and canal, and the water power thereby created, must so use the same as to permit the water to be returned to the stream, so as not to deprive a lower riparian owner of its use as it has been accustomed to flow past his banks.—*Green Bay & M. Canal Co. v. Kankauna Water-Power Co.* (Wis.) 61 N. W. 1121.

90 Wis. 370.

[b] (Wis.; 1896.)

Laws 1887, c. 169, authorized the court, on petition of 15 owners of land adjacent to Muskego and other lakes, to appoint commissioners for the purpose of lowering the water of Muskego Lake 4 feet, etc. Through the agency of such commissioners, the water in the lake was lowered 4½ feet, and thereby the shore line of a certain riparian owner was extended about 2 rods. He acquiesced in the proceedings, paid the assessments made by the commissioners, and acquired the land uncovered on his shore line. *Held*, that he did not lose his rights as a riparian proprietor, and continued to be entitled to free access to the lake in front of his premises, especially where objection is not raised by the state, but by other alleged riparian owners.—*Prieue v. Wisconsin State Land & Improvement Co.* (Wis.) 67 N. W. 918.

93 Wis. 534.

§ 2. Accretion and reliction.**[a] (Iowa; 1894.)**

Where a lake 5 miles long and 100 rods wide is drained in one year by an artificial ditch and by the cutting into it of a river, a riparian owner does not acquire title to the bed of the lake under the law of accretions.—*Noyes v. Collins* (Iowa) 61 N. W. 250.
92 Iowa, 566.

[b] (Iowa; 1897.)

Land detached from one side of a river by a sudden change in the channel, and left connected with land on the other side, in such manner as to be capable of identification, is not an accretion.—*Coulthard v. Davis* (Iowa) 70 N. W. 716.

[c] (S. D.; 1894.)

A timber culture entryman, obtaining a patent from the government to land bordering on a meandered lake, acquires any reliction to the center of the lake occasioned by its drying up after the day of his entry.—*Olson v. Huntamer* (S. D.) 61 N. W. 479.
6 S. D. 364.

§ 3. Title to lands under water.**[a] (Iowa; 1894.)**

The title of a riparian owner on a nonnavigable lake or pond does not extend beyond the natural shore.—*Noyes v. Collins* (Iowa) 61 N. W. 250.
92 Iowa, 566.

[b] (Mich.; 1896.)

A riparian owner on the shore of the Great Lakes has no ownership in the soil covered by water, but merely a right of fishing and navigation over the water; and therefore Pub. Acts 1895, No. 112, prohibiting, under penalty, the cutting of submarine vegetation, except for the purpose of fishing or navigation, passed in order to make a public shooting ground, is valid.—*People v. Silberwood* (Mich.) 67 N. W. 1087.

[c] (S. D.; 1894.)

One purchasing land bordering on a meandered lake takes to the center thereof ratably with other riparian owners.—*Olson v. Huntamer* (S. D.) 61 N. W. 479.
6 S. D. 364.

RISKS OF EMPLOYMENT.

See "Master and Servant," §§ 67-79.

RIVERS.

See "Navigable Waters"; "Riparian Rights"; "Waters and Water Courses."

ROADS.

See "Bridges"; "Easements"; "Highways"; "Municipal Corporations"; "Turnpikes and Toll Roads."

ROBBERY.**§ 1. Indictment.****(Iowa; 1895.)**

An indictment alleging that defendants, being armed, made an assault upon a certain person, with the intent to kill and maim said person if he should resist defendants, and that defendants put said person in fear of his life, and did rob said person of certain property, sufficiently charged the crime of robbery, and

was not bad for duplicity.—*State v. Callahan* (Iowa) 65 N. W. 150.

§ 2. Evidence.**(Neb.; 1895.)**

Where there was evidence on a prosecution for robbery that in the scuffle between defendant and prosecutor two five-dollar bills in prosecutor's hand were torn in two, the torn pieces remaining with prosecutor were admissible in corroboration of his testimony as to the assault.—*Tracy v. State* (Neb.) 64 N. W. 1069.
46 Neb. 361.

§ 3. — Identity of defendant.**(Iowa; 1896.)**

On trial for robbery, it appeared that the prosecuting witness had gone to a pump near the railroad track to draw water for his stock; that two colored men came up, and asked if they should not fill the trough. Witness gave permission, and started across the track, and upon looking back, saw the two men just behind him. A moment later he was struck, knocked insensible, and robbed. He identified defendant as one of the two men, and three other witnesses who saw the colored men talking to witness at the pump also identified defendant as one of them. *Held*, that the evidence sufficiently connected defendant with the crime.—*State v. Reasby* (Iowa) 69 N. W. 451.

§ 4. — Sufficiency.**(Iowa; 1896.)**

The evidence was sufficient to sustain conviction for robbery where the person robbed positively identified defendant, having had opportunity, with the aid of electric lights, to see him at the time of the robbery, and while in pursuit, though another engaged in the robbery testified that defendant was not present, and there was testimony to prove an alibi.—*State v. Callahan* (Iowa) 65 N. W. 150.

§ 5. Instructions — Possession of stolen property.**(Iowa; 1896.)**

In an indictment for robbery, where there was no direct evidence to connect defendant with the crime, but, among other circumstances, it was shown that he had the stolen property in his possession the following morning, and that his explanations of the possession were contradictory, it was not error to charge that the possession of the fruits of a crime recently after the crime is committed, if unexplained, becomes a strong circumstance of guilt.—*State v. Harris* (Iowa) 66 N. W. 728.

ROYALTY.

On patents, see "Patents for Inventions."

RULES.

Of carrier, see "Carriers," § 36.
Of master, see "Master and Servant," §§ 30-34.

RULES OF COURT.**(Mich.; 1895.)**

Chancery Rule 90, made under authority of 2 How. Ann. St. § 6623, authorizing the supreme court to establish rules of practice for circuit courts in equity, regulates the imposition of costs, and restricts the powers of the circuit courts to impose attorney's fees in foreclosure suits.—*Kittermaster v. Brossard* (Mich.) 63 N. W. 75.

105 Mich. 219.

S.

SABBATH.

See "Sunday."

SALE.

I. THE CONTRACT, §§ 1-26.

1. In General, §§ 1-17.
2. When Title Passes, §§ 18-22.
3. Delivery and Acceptance of Subject of Sale, §§ 23-26.

II. WARRANTY, §§ 27-42.

III. RIGHTS AND REMEDIES OF PARTIES INTER SE, §§ 43-88.

1. In General, §§ 43-49.
2. Rescission by Seller, §§ 50-56.
3. Vendor's Lien, §§ 57, 58.
4. Stoppage in Transitu, § 59.
5. Action for Price, §§ 60-69.
6. Rights and Remedies of Seller Where Buyer Refuses Goods, §§ 70, 71.
7. Election of Remedies by Seller, §§ 72-74.
8. Buyer's Rights, Remedies, and Liabilities, §§ 75-88.

IV. BONA FIDE PURCHASERS, §§ 89-92.

V. RIGHTS OF SELLER AGAINST THIRD PERSONS, §§ 93-96.

VI. CONDITIONAL SALES, §§ 97-103.

Agency of husband for wife, see "Husband and Wife," § 2.

Authority of agent to make, see "Principal and Agent," § 7.

By executor or administrator under order of court, see "Executors and Administrators," § 38.

By pledgee, see "Pledge," § 8.

By receiver, see "Receivers," § 19.

By trustee, see "Trusts," § 21.

Effect of statute of frauds, see "Frauds, Statute of," §§ 19-23.

For nonpayment of taxes, see "Taxation," §§ 82-92.

Garnishment of buyer, see "Garnishment," § 3.

Illegal liquor sales, see "Intoxicating Liquors," §§ 24-27.

Measure of damages for breach of contract to deliver, see "Damages," §§ 15, 16.

Of corporate stock, see "Corporations," §§ 58-62.

Of logs or lumber, see "Logs and Logging," § 3.

Of mortgaged property by mortgagor, see "Chattel Mortgages," §§ 58-60.

On attachment, see "Attachment," §§ 42, 43.

On execution, see "Execution," §§ 19-29.

On foreclosure of mortgage, see "Chattel Mortgages," §§ 47-49; "Mortgages," §§ 68-81.

— under power, see "Mortgages," §§ 82-93.

On partition, see "Partition," § 6.

Regulations interfering with interstate commerce, see "Constitutional Law," §§ 47, 51.

I. THE CONTRACT.

Loan or sale, see "Negotiable Instruments," § 39.

Parol evidence to show bill of sale to be mortgage, see "Chattel Mortgages," § 2.

Pledge or sale, see "Pledge," §§ 1, 2.

When contract operates as mortgage, see "Chattel Mortgages," § 1.

1. IN GENERAL.

§ 1. Offers or orders.

[a] (Iowa; 1895.)

Plaintiff inquired the price of certain steers. Defendant wrote that he could "not

give a close price, on account of not seeing them for a while, but they ought to be worth \$4.25" per hundredweight; "go see them." *Held*, that there was no offer for plaintiff to accept, so as to bind defendant.—*Patton v. Arney* (Iowa) 64 N. W. 635.

[b] (Wis.; 1896.)

That a landowner applied to a lumber company for an estimate of the cost of the lumber necessary for a house did not make her liable to the company for lumber ordered by the contractor in accordance with such estimate, and charged to her without her authority.—*West Shore Lumber Co. v. Northrop* (Wis.) 69 N. W. 338.

§ 2. — Countermand.

(Iowa; 1896.)

An order for goods made through an agent of the seller, subject to the latter's approval, may be countermanded before an acceptance is communicated to the buyer.—*J. Thompson & Sons Manuf'g Co. v. Perkins* (Iowa) 66 N. W. 574.

§ 3. Acceptance of offer or order.

[a] (Iowa; 1896.)

An averment in the complaint that at the time plaintiffs received defendants' written order for goods they "accepted and approved said order and contract and wrote [defendants] a postal card," etc., implies that the order was accepted by sending such communication, and pleads no other legal acceptance.—*J. Thompson & Sons Manuf'g Co. v. Perkins* (Iowa) 66 N. W. 574.

[b] (Mich.; 1896.)

Defendant wrote to plaintiff for a statement as to what discount would be allowed on a "season supply" of bolts, and plaintiff replied, quoting plow bolts in bulk at $\frac{3}{4}$ of an inch for five cents per pound "on your season supply." Defendant thereafter ordered bolts by letter stating, "Please ship us at once by freight 300 plow bolts, $\frac{3}{4}$ of an inch." The bolts were sent on such order at five cents per pound, but on orders subsequently given they were billed at about seven cents per pound, according to the state of the market. *Held*, that defendant's order for a specific number of bolts was not an acceptance of the offer for a "season supply."—*Michigan Bolt & Nut Works v. Steel* (Mich.) 69 N. W. 241.

[c] (Minn.; 1896.)

The parties to a proposed sale not having agreed on certain material terms, the prospective vendee demanded of the prospective vendor the property to be sold "in accordance with the contract." *Held* not an acceptance of the previously unaccepted terms made by the vendor, since the vendee's demand amounted to no more than a claim that the parties had already made a contract.—*Ames & Frost Co. v. Smith* (Minn.) 67 N. W. 999.

§ 4. What constitutes sale.

[a] (Mich.; 1896.)

In reply to a letter, plaintiff gave defendant an option for 60 days to buy a certain judgment at 35 per cent. Afterwards defendant wrote plaintiff to execute an instrument that would allow defendant to enforce the claim in its name, stating that, "of course, this will be on the understanding that, if we use the same, we shall pay you for the claim." Plaintiff sent the assignment, stating that it was to be held in trust until it decided whether it would buy according to previous correspondence. Defendant afterwards used the claim in connection with another owned by it against the same debtor, and realized more than enough to pay the latter claim. It also procured from

the debtor a deed of land in trust to secure payment of such judgment. *Held*, that defendant purchased the judgment.—*Clement, Bane & Co. v. Michigan Clothing Co. (Mich.)* 68 N. W. 224.

[b] (Neb.: 1896.)

An arrangement whereby chattels are conveyed at a price certain, with a provision that the vendee may, if he fails to resell them, return them to the vendor, is a contract of sale, with an option to rescind, and not a contract of brokerage.—*Houck v. Linn (Neb.)* 66 N. W. 1103.

48 Neb. 227.

§ 5. — Agency or sale.

(Neb.: 1896.)

Under an agreement between a manufacturer and a merchant, the merchant was appointed agent of the company to sell its tobacco at such prices as it might direct, and was to be paid a certain commission on sales, unless he sold for a less price than was fixed by the manufacturer, in which case he was to have no commission. The merchant guaranteed payment of all tobacco shipped him, and was to execute his notes due in 60 days for the price. *Held*, that the contract was not one of agency, but was a contract of sale.—*Maek v. Drummond Tobacco Co. (Neb.)* 67 N. W. 174. 48 Neb. 397.

§ 6. — Sale or bailment.

[a] (Iowa: 1897.)

A contract between manufacturer and dealer provided that goods shipped to the latter should remain the property of the former till sold, the money and notes received on sales to be held by the consignee as collateral security to his debt to the consignor, to whom the sales notes were to be made payable; that the consignee should sell the goods at a reasonable profit, within a specified time, advance at time of shipment one-third the price in cash, and give his notes for the balance, or, at his option, execute his notes for full price; that the proceeds of sales should be applied to the consignee's account, but that he might take up any of his notes, either by cash or by sale notes, on such terms as might be agreed on, the sale notes to be guaranteed by him; that goods remaining at end of season, and accepted by the consignor, should be credited on the consignee's account; that the latter could appropriate proceeds after the consignor was fully paid; that no goods should be returned without the consignor's order; that said consignor carried no goods in hands of customers; and that the consignee must look to carrier for all loss or damage. Subsequent correspondence showed that the consignor recognized the consignee as his debtor. *Held* not a contract of bailment, but of sale.—*Norwegian Plow Co. v. Clark (Iowa)* 70 N. W. 808.

[b] (Minn.: 1895.)

On an issue whether a deposit of wheat in an elevator constituted a sale or a bailment, it appeared that the elevator was run by a mill owner in connection with the mill, the wheat received into it being ground as required, and none ever being sold or removed for other purposes; that on receiving wheat a ticket was issued the depositor, stating the grade and number of bushels deposited; that such tickets were not transferable, and were delivered to the mill owner for payment in cash at different times thereafter; and that no storage was charged by the mill owner. *Held*, that the transaction was a sale.—*Weiland v. Sunwall (Minn.)* 65 N. W. 628.

63 Minn. 320.

§ 7. Option.

(Wis.: 1896.)

Plaintiff shipped to the receiver of a railway company more car wheels than ordered, and he

notified plaintiff that they were subject to its order, and that he could not accept them. Plaintiff replied, directing him to unload and hold subject to its order, saying: "If you cannot use these, please keep them, and you need not settle for them until you put them into service. * * * Can't you keep them until you want to use them?" He did not respond, but stored them in the company's barn. *Held*, that the receiver had but an option to buy them, which not having been exercised, they remained plaintiff's property.—*Northwestern Wheel & Foundry Co. v. Milwaukee Electric St. Ry. Co. (Wis.)* 69 N. W. 371.

§ 8. Lease with privilege of purchase.

(Wis.: 1896.)

A contract reciting that the first party, in consideration of \$500 to him to be paid, leases unto the second party, for three months, certain articles; the second party, in case he should return them before the expiration of that time, to pay for the use thereof at the rate of \$200 per month till the return thereof; the second party also having the right, at any time before returning them, to buy them at a price not exceeding \$900,—is a lease with a privilege of purchase during the term thereof, rent not to apply on purchase price.—*Braun v. Wisconsin Rendering Co. (Wis.)* 66 N. W. 196.

92 Wis. 245.

§ 9. Property covered.

[a] (Wis.: 1895.)

A contract reciting that plaintiff sells to defendant all logs cut from certain land, and providing for fixing the price to be paid by the amount of merchantable lumber cut from the logs, is a contract for the sale of the logs, and not the merchantable lumber manufactured, and therefore the unmerchantable lumber gotten from the logs belongs to defendant.—*Rogers v. Newton*, 65 N. W. 52, 91 Wis. 523.

[b] (Wis.: 1895.)

Plaintiff had piled a quantity of lumber for the classes known as "C select and better," and "shop and flat," and defendant's agent, after inspecting the lumber, wanted to buy some on grades, but plaintiff declined to sell except on "pile run." After two cars then ordered had been received, defendant made a contract for a quantity, describing it as "piled for C select and better," and "piled for shop and flat," "it being understood that worthless cull lumber is not to be accepted." *Held*, that the contract called for the lumber as piled in plaintiff's yard, and not according to the grades stated.—*T. B. Scott Lumber Co. v. Hafner-Lothman Manuf'g Co.* 65 N. W. 513, 91 Wis. 667.

[c] (Wis.: 1896.)

A sale of stock in a corporation, together with the seller's interest in all manufactured goods "on hand in the factory of said company," did not affect his right to hold manufactured goods which were then in his own store, and which had been transferred or pledged to him for money advanced, under a valid agreement with the corporation to carry on its business.—*Novelty Paper-Box & Supply Co. v. Stone (Wis.)* 66 N. W. 600.

92 Wis. 523.

§ 10. Parties.

(Neb.: 1895.)

Defendant ordered lumber of M. & W., not knowing that firm had been dissolved. M., being employed by plaintiff in selling lumber, filled defendant's order, invoicing the sale in his own name. Defendant received the lumber, and, not knowing plaintiff's connection therewith, credited the price of the lumber on an indebtedness against M. & W. *Held*, that defendant is not liable to plaintiff for the price of the lumber.—*Pushnell v. Chamberlain (Neb.)* 62 N. W. 1114.

44 Neb. 751.

§ 11. Terms and conditions of contract.**[a] (Iowa; 1895.)**

Cattle were contracted for "to be weighed up on full feed and shrunk three per cent. any time" between certain dates. *Held*, that the phrase "at any time" was qualified by "on full feed," and defendant had the right to put them in that condition before weighing.—*Farm-er v. Thrift* (Iowa) 62 N. W. 804.

[b] (Iowa; 1896.)

The provision in an order for a harvester that "if my crops are a failure, and I do not need a machine, this order to be void," refers only to small grain crops.—*McCormick Harvesting Mach. Co. v. Williams* (Iowa) 68 N. W. 907.

[c] (Minn.; 1895.)

An agreement by the seller of a newspaper business to pay any "indebtedness" of the paper contracted before the sale did not include the settlement of uncompleted advertising contracts for which the seller was paid in advance by the advertisers.—*Blew v. Collins* (Minn.) 63 N. W. 1691.

61 Minn. 418.

§ 12. Provisions as to price.**(Iowa; 1894.)**

Where the purchaser of goods agrees to pay 64 cents on the dollar on cost price, and the owner of the goods has not paid for them, "cost price" means the price such owner, at the time of the sale, would have to pay to the wholesaler; and, if the time for obtaining a discount on the billed price has passed, such purchaser is not entitled to have such discounts considered in computing the price to him.—*McCoy v. Hastings & Bradley Co.* (Iowa) 61 N. W. 205.

92 Iowa, 585.

§ 13. Terms of payment.**[a] (Mich.; 1897.)**

Defendants agreed to purchase goods on condition that they might turn out a note of a third person in payment. Plaintiff's traveling agent, with whom defendants dealt, advised plaintiff of the condition, and that the note was made by a certain company, signed by R. as president, and indorsed by him personally, and that R. had business relations in two other places, and advised plaintiff to look him up through a mercantile agency. There was nothing in the letter indicating that defendants were to be liable on the note, and plaintiff then shipped the goods, and not till the note was afterwards received did it claim that defendants were to be liable as indorsers. *Held*, that plaintiff ratified the entire contract, and was bound to take the note, indorsed without recourse, in full satisfaction of its claim.—*W. H. H. Peck Co. v. Gordon* (Mich.) 70 N. W. 1034.

[b] (Minn.; 1896.)

Defendants agreed to purchase and receive "all ties purchased and handled by" plaintiffs, of a certain quality, until a specified time, upon certain conditions. The contract provided that "said ties must be delivered at" a certain track of the N. P. R. Co. on or before said date. Defendants agreed "to pay for all said ties that have been inspected and accepted by" said company "as follows: 100 per cent, thereof within 30 days after each inspection." Plaintiffs agreed "that, until the ties to be delivered shall be inspected and accepted by" the company, they would assume the risks of loss of and damage to the ties from all causes. *Held*, that inspection and acceptance by the company were a condition precedent to recovery of the price of ties delivered.—*Potter v. Holmes* (Minn.) 68 N. W. 63.

[c] (Neb.; 1897.)

When time or place of payment is not specified, payment must be made on delivery.—*Behrends v. Beyschlag* (Neb.) 69 N. W. 835.

[d] (Neb.; 1897.)

Where a contract of sale fixes the price and the time and place of delivery, but does not state the manner of payment, the vendor may insist on payment on delivery, in cash and not by check.—*Behrends v. Beyschlag* (Neb.) 69 N. W. 835.

[e] (Wis.; 1896.)

Plaintiff contracted with defendant to deliver at a certain place, for a specified price, 1,000 ties, payment to be made therefor "within five days after notice has been received by" defendant "that all ties have been delivered, and after the same have been counted by" defendant, "and known to have been delivered as claimed." Plaintiff notified defendant August 5th that the ties were delivered. On August 11th the ties were counted, and defendant accepted them. *Held*, that plaintiff was not entitled to commence an action for the recovery of the amount due under the contract until five days had elapsed after such counting and acceptance.—*Frederickson v. Ayer* (Wis.) 67 N. W. 35.

93 Wis. 217.

§ 14. Contract severable or entire.**[a] (Iowa; 1897.)**

Where a threshing outfit, consisting of an engine, separator, weigher, etc., is bought as an establishment under a contract which contains specific warranties of each article, and provides that "the failure of any part or machine to fulfill its warranty shall not in any way affect the payment of the purchase price of any other part or parts of said establishment," the contract is divisible, and the buyer cannot rescind it as a whole for a breach of the warranty of the engine only.—*Aultman & Taylor Co. v. Lawson* (Iowa) 69 N. W. 865.

[b] (Iowa; 1897.)

It cannot be urged against the divisibility of a contract for the purchase of a threshing outfit, consisting of several parts, that the consideration is stated at a gross sum, where it appears that this is the aggregate of the prices agreed upon as to the different parts.—*Aultman & Taylor Co. v. Lawson* (Iowa) 69 N. W. 865.

[c] (Mich.; 1895.)

Where a contract for the delivery of 15 ear loads of merchandise made by telegraphic communication between the parties is evidently intended to provide for shipments in ear lots, to be paid for as received, the contract is separable.—*Williams v. Robb* (Mich.) 62 N. W. 352.

104 Mich. 242.

§ 15. Bill of sale.**(Mich.; 1895.)**

A bill of sale of a particular number of broom handles of a specific grade, readily distinguishable from the general mass, is not invalid for uncertainty. *De Graff v. Byles* (1886) 29 N. W. 487, 63 Mich. 31, followed.—*Brown v. My-nard*, 65 N. W. 293.

§ 16. Fraud and mistake.**[a] (Iowa; 1895.)**

Plaintiff, who was unable to read without spectacles, purchased from defendant's agent certain shares of stock of a specified kind, and the agent, in filling out the application therefor, inserted another kind and read the application to plaintiff as though it contained a correct description of the stock purchased. Plaintiff at the time was away from home, and after diligent search was unable to find spectacles. *Held*, in an action to recover the amount paid, that the jury were authorized to find that plaintiff acted with due care.—*Sawin v. Union Bldg. & Sav. Ass'n of Des Moines* (Iowa) 64 N. W. 401.

[b] (Wis.; 1896.)

That the buyer, in ordering goods by letter, ordered by mistake a larger quantity

than desired, the goods to be put up in packages with his advertisement thereon, does not entitle him to refuse to accept all of the goods when delivered, the seller having been unaware of the mistake.—*J. A. Coates & Sons v. Buck* (Wis.) 67 N. W. 23.
93 Wis. 128.

§ 17. Parol evidence.

(Iowa: 1895.)

Under Code, § 3063, providing that no evidence of a contract for the sale of personality is competent, where the property is not delivered nor paid for, unless it be in writing, evidence of the contract, not found in the writing, cannot be supplied by parol.—*American Oak Leather Co. v. Porter* (Iowa) 62 N. W. 658.

2. WHEN TITLE PASSES.

§ 18. On acceptance of order.

(Mich.: 1897.)

A contract for the sale of scrap iron recited that the seller accepted the prices per ton offered by J., the buyer's representative, f. o. b. at G., and guaranteed a maximum freight rate, for the following material: "From 650 to 700 tons of No. 1 wrought, which has been seen by J.; * * * also, about 30 tons heavy mixed country steel, as seen by J.; * * * one car load of horseshoes; * * * and one car load of flat steel sheet car rails, f. o. b. at G., or f. o. b. point where rate is equivalent; terms cash." *Held*, that the title did not pass to the buyer on the mere acceptance of his offers, since the contract, necessarily treated as an entirety, did not identify all the items as specific property.—*Joseph v. Brandy* (Mich.) 70 N. W. 1101.

§ 19. On execution and delivery of contract.

[a] (Iowa: 1896.)

Plaintiff testified that defendant selected a certain cow and steer, and agreed to give him 2 cents per pound for the former, and 2³⁵/₁₀₀ cents per pound for the latter, paid him \$1 on each of the animals, and asked him to keep and feed them until the latter part of the following month, and then to deliver them to him at a certain place, and showed performance of that request, and refusal by defendant to accept the cattle tendered, and an ascertainment of the price by weighing the cattle at the time they were to be delivered. *Held*, that title did not vest in defendant, so as to entitle plaintiff to sue as on an executed contract of sale for the price.—*Restad v. Engemoen* (Minn.) 67 N. W. 146.

[b] (N. D.: 1896.)

When all the terms of a sale of personality which has been identified are agreed on, and embodied in a writing which the parties sign, the delivery of the writing passes title.—*Fletcher v. Nelson* (N. D.) 69 N. W. 53.

§ 20. On delivery of goods.

[a] (Mich.: 1896.)

A contract for the sale of timber in the tree provided that the purchaser might cut and remove such as it selected, for which it was to pay before shipment from the railroad station. *Held*, that the title passed when the timber was cut and removed, and that the seller's insisting on payment for certain logs which had been removed to the station, and there rejected by the purchaser, before shipment of any, did not authorize the purchaser to rescind the contract.—*Nash v. Rockford Veneer Co.* (Mich.) 67 N. W. 111.

[b] (Minn.: 1896.)

Where a crop to be thereafter raised, harvested, and threshed was sold before the seed was sown, the contract of sale was executory, and title did not pass until the crop was ready for delivery, in the absence of a showing

of a contrary intention of the parties.—*Welter v. Hill* (Minn.) 68 N. W. 26

§ 21. — Delivery to carrier.

[a] (Iowa: 1895.)

Defendants sold plaintiffs liquors at different times for several years, and plaintiffs always paid the freight thereon, and credited defendants with the liquors as soon as they received the bills therefor, which was before the delivery of the goods, with the understanding that they should have credit for such goods as might be returned after inspection as being unsatisfactory. *Held*, that the parties intended the title to the goods to pass upon their delivery by defendants to the carrier, plaintiffs' reservation of the right to test the goods before accepting them not of itself postponing the passing of the title.—*Wind v. Her* (Iowa) 61 N. W. 1001.

93 Iowa, 316.

[b] (Mich.: 1895.)

Where defendants ordered goods from samples at plaintiff's store in another state, and directed shipment to Michigan, where defendants were to have the privilege of examining them, and, if found to be like samples, they were to be paid for, title to the goods passed on delivery of the same to the carrier, there being no evidence of an agreement that the title should not pass until the goods were examined. *Rindskopf v. De Ruyter* (1878) 39 Mich. 1, distinguished.—*Kuppenheimer v. Wertheimer*, 64 N. W. 952.

§ 22. On payment of price.

(Iowa: 1896.)

Where plaintiff ordered a car load of apples, and paid a portion of the price, and the seller attached a draft for the remainder to the bill of lading, and shipped the goods to himself as consignee, so that plaintiff could not obtain them before paying the draft and receiving the bill of lading, title did not pass.—*Baker v. Chicago, M. & St. P. Ry. Co.* (Iowa) 67 N. W. 376.

3. DELIVERY AND ACCEPTANCE OF SUBJECT OF SALE.

Passage of title on acceptance of order, see ante, § 18.

— on delivery of goods, see ante, §§ 20, 21.

Waiver of breach of warranty by accepting goods, see post, § 33.

§ 23. Time of delivery.

[a] (Minn.: 1896.)

A vendee's acceptance of property in fulfillment of an executory contract of sale is a waiver of the objection that it was not delivered at the time agreed.—*Minneapolis Threshing-Mach. Co. v. Hutchins* (Minn.) 67 N. W. 807.

[b] (Neb.: 1896.)

Where plaintiff sold a certain amount of hay to defendant at a certain price per ton, on the agreement that the hay should be haled by defendant, and hauled by plaintiff to the railroad station, plaintiff was not under obligation to haul the hay until defendant baled it; and, on the latter's failure to bale the same within a reasonable time, plaintiff could recover the price.—*Barker v. Davies* (Neb.) 66 N. W. 11.
47 Neb. 78.

§ 24. Place of delivery and acceptance.

[a] (Iowa: 1895.)

Under Code, § 2098, providing that, when a contract for the payment or delivery of property other than money does not fix a place of payment, the maker may tender it at the place where the payee resides, when a contract for the sale of cattle fails to specify the place of delivery, it is at the residence of the buyer.—*Holtz v. Peterson* (Iowa) 62 N. W. 19.

[b] (Minn.; 1896.)

A fruit dealer at Duluth ordered of a wholesaler at New Orleans a car of good bananas, to be shipped to St. Paul, in care of the Duluth Railway. They were so shipped, received by the railway, and carried to Duluth, where they were first inspected, and found not to be as ordered; whereupon the consignee wired the consignor as follows: "Car of bananas here, subject to your order. Not a first-class banana in the car,"—and received in reply the telegram: "Take fruit. Will write." The consignee then took and disposed of the fruit. *Held*, that an acceptance or rejection of the fruit at St. Paul was waived, so that the consignee was liable only for its reasonable value. —*Cefalu v. Fitzsimmons-Derrig Co.* (Minn.) 67 N. W. 1018.

[c] (Neb.; 1895.)

A contract of sale reading, "Bought of G. * * * corn, track O. or T., * * * billing of same to be given by" a certain date, was not complied with by a shipment of goods consigned to the vendor at B., to which place the vendee ordered the goods shipped, with a draft for the price attached to the bill of lading. —*Van Valkenburg v. Gregg* (Neb.) 63 N. W. 949. 45 Neb. 654.

[d] (Wis.; 1896.)

A contract for a car of fruit to be delivered at M. is not modified as to place of delivery by reason of the buyer's compliance with the seller's request to inspect the fruit at C., an intermediate point. —*Seefeld v. Thacker* (Wis.) 67 N. W. 1142. 93 Wis. 518.

§ 25. Acceptance.

[a] (Iowa; 1896.)

Where one who has contracted for a new machine accepts one which he knows to have been used, he thereby waives objection to it on that ground. —*Aultman-Taylor Machinery Co. v. Ridenour* (Iowa) 65 N. W. 980.

[b] (Mich.; 1895.)

Plaintiff, by the terms of a written contract, was to furnish defendants with 20,000 cubic feet of timber, averaging 55 cubic feet per stick, at 26½ cents per cubic foot, suitable for the Quebec market, the title to the timber to vest in defendants from the time it was manufactured in the woods. A scaler sent by defendants into the woods to accept the logs marked some logs S & K, diamond, and others S & K. Those marked S & K were those suitable for the Quebec market, but they averaged very small, and were accepted upon the condition that other logs furnished should bring the average up to 55 cubic feet per stick,—what the contract called for. *Held* that, the other logs furnished not so bringing up the average, the defendants were not bound by such acceptance, and therefore a subsequent receipt of the timbers could not oblige them to pay the contract price for any logs not brought within the average. —*Duplanty v. Stokes* (Mich.) 61 N. W. 1015. 103 Mich. 630.

[c] (Minn.; 1895.)

When plaintiffs furnished, and set up in defendant's church, three altars, defendant gave notice that it refused to accept them, because not according to contract, and requested plaintiffs to remove them. This request was frequently repeated, but plaintiffs failed to remove the altars, and allowed them to remain in the church, which was used by defendant for purposes of worship. While the altars remained in the church defendant used one of them for the purpose of celebrating mass, but there was no evidence that such use impaired the value of the altar. *Held*, that such use did not amount to an acceptance of the altars. —*Schwartz v. Church of the Holy Cross of Minneapolis* (Minn.) 62 N. W. 266. 60 Minn. 183.

[d] (S. D.; 1896.)

An employé having a stock of goods for sale, offered it to the employer, who agreed to take the goods at a certain price as they might be needed in his store. By his direction the goods were taken to his store from time to time, account of them being kept by the employé, and sold in the usual course of business, the proceeds being received by him. *Held* that, though he never examined the goods, or formally accepted them, he was, in the absence of fraud, liable for the agreed price. —*Stewart v. Gilruth* (S. D.) 65 N. W. 1005.

§ 26. Refusal to receive goods.

(Neb.; 1895.)

Where an order for goods of a certain kind and quality stated the price in a lump sum, the vendee was not bound to receive the goods if a material part thereof was not of the kind and quality ordered. —*Bryant v. Thesing* 64 N. W. 967, 46 Neb. 244.

II. WARRANTY.

Action by buyer for breach, see post, § 82.

Authority of agent to give warranty, see "Principal and Agent," § 7.

§ 27. Express warranty.

[a] (Iowa; 1895.)

A warranty that a threshing machine will do as good work "as any other separator of its size in the United States" is a representation that it is reasonably fit to perform the work for which it was intended. —*Briggs v. Rumely Co.* (Iowa) 64 N. W. 784.

[b] (Iowa; 1896.)

Where an order is for a "separator and twelve horse dinge horse power," and the warranty is "that with good management the machine is capable of doing a good business," etc., there is a breach of the warranty when it appears that the machine cannot be successfully operated with a power of 12 horses. —*Aultman-Taylor Machinery Co. v. Ridenour* (Iowa) 65 N. W. 980.

[c] (Mich.; 1895.)

Defendants, the organizers of a corporation, issued to themselves the stock as fully paid, and guaranteed to subsequent holders that the stock should be "nonassessable." Stockholders were, by statute, liable for the corporate debts, in addition to their stock, to an amount equal to their stock. *Held*, that defendants were liable to a subsequent owner of the stock on account of payments made by him to satisfy the extra statutory liability, as well as those made on the stock itself. —*Omo v. Bernart* (Mich.) 65 N. W. 622.

[d] (Minn.; 1896.)

The plaintiff agreed to manufacture for the defendant 500 iron bedsteads, to be (except in some particulars not here material) in every respect like a sample furnished by the defendant. It was also agreed that the beds should be inspected and approved by defendant at plaintiff's factory. *Held* to be a qualified warranty that the beds should be like the sample, and that the defendant's right to recover damages for a breach after acceptance of the beds was limited to defects not existing in the sample, which were not obvious on a reasonable inspection of the beds. —*Leitch v. Gillette-Herzog Manufg Co.* (Minn.) 67 N. W. 352. 64 Minn. 434.

[e] (Minn.; 1896.)

Where the vendor makes statements as to the quality of the article, but accompanied by an express and positive refusal to warrant it, and a like notice to the vendee that he will not and does not warrant it, his statements as to quality must be deemed mere expressions of opinion, and not a contract of warranty, at least in the absence of any fraud or deceit, and

where the property is present for the inspection of the vendee.—*Lynch v. Curfman* (Minn.) 68 N. W. 5.

[f] (Neb.; 1895.)

The seller is liable for patent defects in the property sold, if it is so stipulated in the warranty. 46 N. W. 491, 30 Neb. 264 (1890) affirmed.—*Watson v. Roode*, 61 N. W. 625, 43 Neb. 348.

[g] (Neb.; 1895.)

The purchaser of personal property must have relied upon the statements made by the seller, as to the quality of the articles sold, in order to maintain an action for a breach of the warranty. 46 N. W. 491, 30 Neb. 264 (1890) affirmed.—*Watson v. Roode*, 61 N. W. 625, 43 Neb. 348.

[h] (Neb.; 1895.)

Where the seller of a horse stated to the purchaser that a bunch on one of the feet of the horse was caused by the horse's having calked himself, and was not permanent, and "guaranteed" the horse to be all right, it constituted a warranty, though the word "warrant" was not used.—*Erskine v. Swanson* (Neb.) 64 N. W. 216, 45 Neb. 767.

[i] (N. D.; 1894.)

A written contract by the seller of an upright boiler that "we hereby guaranty that the boiler in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit, which we guaranty to be a saving of at least 20 per cent. in fuel over any horizontal tubular boiler," constitutes a binding warranty of the boiler's fuel-saving capacity, and not a mere expression of opinion.—*Hazelton Boiler Co. v. Fargo Gas & Electric Co.* (N. D.) 61 N. W. 151.

4 N. D. 365.

[j] (Wis.; 1895.)

A manufacturer of wheels is liable, under his warranty against defective material, for using a grade of iron not suitable for the purpose for which the wheels were intended.—*J. I. Case Plow Works v. Niles & Scott Co.* (Wis.) 63 N. W. 1013.

90 Wis. 590.

[k] (Wis.; 1895.)

A warranty of good workmanship does not cover a defect in the plan of construction of the article manufactured, but relates only to the execution of the plan.—*J. I. Case Plow Works v. Niles & Scott Co.* (Wis.) 63 N. W. 1013.

90 Wis. 590.

[l] (Wis.; 1896.)

Whether the sale of a horse is usually attended by an express warranty that the animal is sound is a question for the jury.—*Western v. Page* (Wis.) 68 N. W. 1003.

[m] (Wis.; 1897.)

A contract to furnish and put up a furnace in defendant's house, which provided that plaintiff would complete it "ready for use," and contained a specific guaranty of heating capacity, and stated that, on notice of its failure to properly heat the house, plaintiff would have an option to make it heat properly or remove it, embodies an express warranty that it would be suitable for heating the house, so that if it fails to heat as specified, and emits gas in great quantities, and plaintiff attempts to fix it, but fails, and defendant refuses to accept it, the contract price cannot be recovered.—*Fuller-Warren Co. v. Shurts* (Wis.) 70 N. W. 683.

§ 28. Oral warranty.

[a] (Mich.; 1895.)

Where a contract for the purchase of a windmill contains express warranties on the part of the seller, parol evidence is, in the absence of fraud in its execution, inadmissible to show verbal warranties.—*Zimmerman Manuf'g Co. v. Dolph* (Mich.) 62 N. W. 339.

104 Mich. 281.

[b] (N. D.; 1896.)

Where an unconditional bill of sale is made without warranty, an oral warranty, made immediately after delivery of the writing, as an inducement to accept and keep the property, is without consideration.—*Fletcher v. Nelson* (N. D.) 69 N. W. 53.

[c] (Wis.; 1895.)

Where an article is sold by a written contract which is silent on the subject of warranty, no express or oral warranty, made at the same time or previously, can be shown, nor can an oral warranty be added to one that is written.—*J. I. Case Plow Works v. Niles & Scott Co.* (Wis.) 63 N. W. 1013.

90 Wis. 590.

§ 29. Sale by sample.

[a] (Minn.; 1895.)

Where a machine is sold on a written order, it is error to charge that the machine exhibited to the vendee at the time the contract was made became a part of the contract, and a standard by which to test the machine furnished.—*Walter A. Wood Harvester Co. v. Ramberg* (Minn.) 61 N. W. 1132.

60 Minn. 219.

[b] (Minn.; 1897.)

A sale of "common bricks," to be "of good quality and equal to sample," involves no implied warranty that they shall be fit for the purpose for which they are purchased, though the seller is informed of such purpose.—*Wisconsin Red Pressed Brick Co. v. Hood* (Minn.) 69 N. W. 1091.

§ 30. Implied warranty.

[a] (Iowa; 1897.)

The fact that, at the time an order for an article of a specified quality was accepted, the article had no existence, did not preclude the attaching, on delivery and acceptance, though an opportunity for inspection then existed, of a warranty as to quality, arising from the language of the contract.—*Eagle Iron Works v. Des Moines Suburban Ry. Co.* (Iowa) 70 N. W. 193.

[b] (Mich.; 1894.)

Defendant agreed to ship to plaintiff a certain amount of paving stone according to dimensions set forth in specifications furnished by plaintiff. *Held*, that there was no implied warranty that the stone would be suitable for a particular work, in the absence of evidence that defendant knew what such work required, and agreed that the stone should be tested by its requirements.—*Talbot Paving Co. v. Gorman* (Mich.) 61 N. W. 655.

103 Mich. 403.

[c] (Minn.; 1895.)

In a sale of brick by description, there is an implied warranty that the bricks will be of good material, and made according to the description, but none that they will answer the purpose for which they were purchased.—*Wisconsin Red Pressed Brick Co. v. Hurd Refrigerator Co.* (Minn.) 62 N. W. 550.

60 Minn. 401.

[d] (Minn.; 1896.)

Where one contracted to furnish and set up in a mill an engine and boiler of specified make, size, and power, there was no implied warranty that the apparatus would furnish power sufficient to operate the mill.—*Wheaton Roller-Mill Co. v. John T. Noye Manuf'g Co.* (Minn.) 68 N. W. 854.

[e] (N. D.; 1896.)

When a purchaser ordered pure Manilla twine, and the seller assumed to fill the order, he must be deemed to have warranted that the article delivered was pure Manilla twine.—*Northwestern Cordage Co. v. Rice* (N. D.) 67 N. W. 298.

5 N. D. 432.

[f] (Wis.: 1895.)

Plaintiff ordered from defendant certain wheels, which were warranted against defects in material and workmanship. The wheels were constructed according to specifications, and tested in plaintiff's presence before the contract was signed. *Held* that, as there was no reliance on the judgment of the manufacturer that the wheels were otherwise suitable for the purpose for which they were intended, there was no implied warranty to that effect.—*J. I. Case Plow Works v. Niles & Scott Co. (Wis.) 63 N. W. 1013.*

90 Wis. 590.

[g] (Wis.: 1895.)

Where defendant had a chance, before making a purchase, to inspect the lumber bought, there was no implied warranty on plaintiff's part that it was merchantable for the purpose intended for it by defendant.—*T. B. Scott Lumber Co. v. Haftner-Lotham Manuf'g Co. 65 N. W. 513, 91 Wis. 667.*

§ 31. Co-existence of implied and express warranty.

(Wis.: 1895.)

The fact that warranties of material and workmanship of certain wheels manufactured according to specifications were expressed in the contract precludes any implied warranty that the wheels were otherwise suitable for the purpose for which they were intended.—*J. I. Case Plow Works v. Niles & Scott Co. (Wis.) 63 N. W. 1013.*

90 Wis. 590.

§ 32. Waiver of breach.

[a] (Iowa: 1896.)

A provision that the failure of the buyer to settle for the machinery at the place of delivery, as required by the contract, shall be a waiver of the seller's warranty, is binding.—*Robinson & Co. v. Berkey (Iowa) 69 N. W. 434.*

[b] (Minn.: 1896.)

A provision in a contract of sale that the machine sold should be returned on its being found not to work was waived where the seller, after notice of defects, agreed, in consideration of the buyer's giving notes for the price, that he would make the machine do good work, and fix it at any time.—*McCormick Harvesting Mach. Co. v. McNicholas (Minn.) 69 N. W. 36.*

§ 33. — Acceptance of goods.

[a] (Mich.: 1895.)

In an action for the price of a machine warranted to be perfect, it appeared that it was upon delivery found to be defective, and plaintiff's agent promised to remedy the defect, and requested defendant to use it. Defendant used the machine one day, but it was never remedied, and defendant refused to pay for it. *Held*, that such use of the machine was not an acceptance, nor a waiver of a right to a perfect machine.—*Aultman, Miller & Co. v. Knapp (Mich.) 63 N. W. 66.*

105 Mich. 205.

[b] (N. D.: 1896.)

The acceptance by the purchaser of an article which does not correspond to the warranty, with knowledge of the defect, does not, as a matter of law, bar his right to rely upon the warranty.—*Northwestern Cordage Co. v. Rice (N. D.) 67 N. W. 298.*

5 N. D. 432.

[c] (Wis.: 1895.)

The use of a harvesting machine by the purchaser thereof, after discovery of defects therein, merely in order to give an expert sent by the vendor an opportunity to ascertain the defects, does not constitute an acceptance of the machine.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Calvert, 62 N. W. 532, 89 Wis. 610.*

§ 34. — Continued use of property.

[a] (Mich.: 1894.)

A harvesting machine was sold with a provision that, if it did not comply with the warranty, it might be returned, and that keeping it during harvest should be conclusive that it filled the warranty. The contract also provided that no one had any power to change it. *Held* that, the buyer having refused to keep it, because it did not fill the warranty, and the seller's general agent having persuaded him to retain it, and advised him that if he kept it beyond the harvest it would be all right, and the machine would be the seller's, further retention was under a new contract, which permitted return after harvest. *Hooker and Grant, JJs., dissenting.—D. M. Osborne & Co. v. Baker (Mich.) 61 N. W. 509.*

103 Mich. 247.

[b] (N. D.: 1894.)

The warranty on the sale of a threshing machine provided: "The buyer shall have three days after it is first started to ascertain whether said machinery is as represented. If then it is not, he shall at once discontinue use of it," and give notice to the seller, "and wait until seller gets a man there to right it," and after the man sent by the seller is through, the buyer "shall at once give the machinery a fair trial of two days, and, whatever part of the machine is not as warranted or represented, he shall then return such part to where he got it, and the seller may either furnish another part, or may require the return by the buyer of the remainder of such machine, and then furnish another in its place, or refund what he received for it. * * * The use of all or part of said machinery after said two days' trial shall be conclusive evidence that it is as warranted and represented, and shall estop the buyer from all defenses, on any ground, to the payment therefor." *Held*, that where the machine failed to work properly, and the seller sent a man to right it, the subsequent use thereof for more than two days was a waiver of any claim for breach of warranty.—*Minnesota Thresher Manuf'g Co. v. Lincoln (N. D.) 61 N. W. 145.*

4 N. D. 410.

[c] (Wis.: 1895.)

If, after the agent of the vendor of a harvesting machine made repairs thereon at the purchaser's request, and the machine still did not do such work as the contract called for, and the purchaser knew, or ought then to have known, that it would not do good work, and could not be made to do it by the agent sent by the company, but defendant nevertheless used the machine until his harvesting was completed, he would be liable for the price of the machine.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Calvert 62 N. W. 532, 89 Wis. 640.*

§ 35. Notice of defects to seller.

[a] (Iowa: 1895.)

In an action for the price of a machine, on the sale of which it was provided, as a requisite to a claim under the warranty, that, if upon one day's trial it did not work well, the buyer was to give immediate notice, and allow the seller time to send a person to put it in order, there was evidence that plaintiff received the machine set up for work late Monday afternoon, and, in the presence of plaintiff's agent, tried to operate it until Tuesday noon; that the machine did not work well during this time; that the agent then left, with directions to plaintiff to continue to work the machine, saying that he would be back in a day or two, and, if defendant was not pleased with the machine, he would fix it; that defendant requested him to stay and fix the machine, or to send a man to do it; that defendant endeavored to make the machine work until Friday of the same week, when, the agent not having returned, he notified the agent who sold the machine that it was not working right. *Held*, that there was sufficient evidence for the jury with reference to the trial of the machine and

notice to the agent who sold it, or a waiver thereof.—*McCormick Harvesting Mach. Co. v. Brower* (Iowa) 62 N. W. 700.

[b] (Iowa; 1895.)

A threshing-machine company, by sending one of its agents to rectify defects in a machine sold by it, waives a provision in the contract of sale providing that failure to give notice to the company in writing of a defect bars any claim for breach of warranty.—*Briggs v. Rumely Co.* (Iowa) 64 N. W. 784.

[c] (Iowa; 1896.)

In a suit on purchase-money notes, it appeared that the contract for a machine provided that notice of failure of the machine to satisfy the warranty should be sent by registered letter; that defendant got the local agent to write a letter for him to the effect that the machine was unsatisfactory; that defendant signed the letter, and left it with the agent to be registered; that another witness heard the letter read to defendant, and saw him sign it. The agent testified that he did not write or send any letter for defendant, but notified the company to send a man to see about the machine. *Held*, that defendant's letter was sent as claimed by him, within the provisions of the contract.—*Aultman-Taylor Machinery Co. v. Ridenour* (Iowa) 65 N. W. 980.

[d] (Iowa; 1896.)

A compliance with the provision of a written contract for the sale of a harvester, requiring immediate notice in writing to be given by the buyer to the seller or its local agent in case the machine fails to work well on being started, is useless and unnecessary, where the local agent who sold the machine is present when it is started, and knows it fails to work well.—*Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.* (Iowa) 66 N. W. 96.

[e] (Mich.; 1895.)

Where a contract for the sale of a windmill gave the seller a certain time after notice of defects to remedy them, the buyer cannot claim for breach of warranty unless he gave such notice, though he did not know what the defect was.—*Zimmerman Manuf'g Co. v. Dolph* (Mich.) 62 N. W. 339.

104 Mich. 281.

[f] (Minn.; 1896.)

Where a horse is sold with a warranty and an agreement by the vendor to replace him, or to return the notes given for him, if the conditions of the warranty are not fulfilled, the vendor is entitled to notice of breach of such conditions.—*Beckett v. Gridley* (Minn.) 69 N. W. 622.

§ 36. — Waiver.

(Iowa; 1895.)

Notice in writing, that a machine sold does not comply with the warranty, required by the contract to be given the seller, is waived where he acts on an oral notice given his agent.—*Dean v. Nichols & Shepard Co.* (Iowa) 63 N. W. 582.

§ 37. Action for breach of warranty.

[a] (Iowa; 1895.)

The giving of a note for the price of a threshing machine, after a trial of it in threshing one kind of grain, is not a settlement for it "after having tried it," within the meaning of a clause, in the contract for its sale, providing that a settlement for it after having tried it estops the purchaser from all claims for damages for breach of warranty.—*Briggs v. Rumely Co.* (Iowa) 64 N. W. 784.

[b] (Mich.; 1895.)

A vendor sold certain farm implements to defendants, dealers therein, with a guaranty that, if any one was defective, notice thereof should be given, and time allowed to put it in order, but that the use of a machine longer than one day would constitute an acceptance thereof. Defendants subsequently received other imple-

ments, alleged by defendants to be structurally defective. The vendor's agent testified in an action on the account that he afterwards effected a "partial settlement" with defendants for the goods sold by them, but not as to those on hand; that defendants asked for an extension of time for payment, which he refused to grant; and that he received no notice of the alleged defects. Defendants claimed that they gave such notice, and that said agent agreed to carry the implements on hand until they were sold. *Held*, that it was error to preclude defendants from recovering for a breach of warranty if there was no notice of defects at the time of settlement, or if there had been an extension of time, it not appearing that there was a promise to pay in consideration for such extension, or that the limitation on the guaranty applied to dealers until after the implements were sold.—*Stoddard Manuf'g Co. v. Miller* (Mich.) 64 N. W. 948.

[c] (Minn.; 1896.)

Plaintiff agreed to manufacture for defendant 500 iron bedsteads, warranting that they should all be similar to a sample, and it was also provided that defendant should inspect the beds at the factory. On such inspection defendant was told by plaintiff that, if the parts of one of the beds went together properly, the parts of all would do so; and defendant, having found that one could be put together properly, inspected no more. *Held*, that the fact that, if defendant had set up more of the bedsteads, he would have discovered that some were defective, did not justify a finding that his inspection was negligent, so as to preclude his recovering damages for breach of the warranty.—*Leitch v. Gillette-Herzog Manuf'g Co.* (Minn.) 67 N. W. 352. 64 Minn. 424.

[d] (Minn.; 1896.)

A contract of sale, giving the vendee the privilege of returning the property sold in case it does not comply with the warranty, does not preclude the vendee from retaining the property and suing for breach of the warranty.—*Gaar, Scott & Co. v. Patterson* (Minn.) 68 N. W. 69.

§ 38. — Pleading.

(Neb.; 1896.)

An allegation that the vendor of a corn sheller "represented and warranted the same to be as good as new," and "that it would do first-class work in every particular," sufficiently alleged a warranty as against a demurrer.—*Unland v. Garton* (Neb.) 66 N. W. 1130.

48 Neb. 202.

§ 39. — Evidence.

[a] (Mich.; 1896.)

In an action for breach of warranty on the sale of a horse, testimony that defendant had undertaken to deceive plaintiff was properly excluded as not bearing on the question of warranty.—*Connell v. McNett* (Mich.) 67 N. W. 344.

[b] (Minn.; 1896.)

The burden of showing that the conditions of the warranty of a horse sold have not been complied with is on the vendee.—*Beckett v. Gridley* (Minn.) 69 N. W. 622.

[c] (Wis.; 1895.)

In an action for breach of warranty in delivering articles not in conformity with the contract it cannot be inferred that all were defective because some were.—*J. I. Case Plow Works v. Niles & Scott Co.* (Wis.) 63 N. W. 1013.

90 Wis. 590.

§ 40. — Instructions.

(Mich.; 1896.)

In an action for breach of warranty on the sale of a horse, on the request of defendant the jury were instructed that if, after plaintiff had paid part of the price, she was offered the return of the money, but refused it, and insisted upon the trade being carried out, and that at

this time she had discovered the horse was lame and unsound, she could not recover. *Held*, that it was proper for the court to add on its own motion that if plaintiff saw the horse was lame, but supposed the lameness only temporary, this knowledge would not be inconsistent with her right to rely on the warranty. —*Connell v. McNett* (Mich.) 67 N. W. 344.

§ 41. — Damages.

[a] (Iowa; 1895.)

Though defendant did not actually pay out any money for the standing and keeping of a stallion purchased by him of plaintiff, expenses of such keeping and standing are recoverable as damages for the breach of warranty of the animal as a foal getter, it appearing that defendant, after purchasing the horse, entered into a contract with C., the owner of another stallion, by which C. was to stand both horses, out of their earnings pay their expenses, divide the profits, and that through the earnings of C.'s horse profits were made.—*National Horse-Importing Co. v. Novak* (Iowa) 64 N. W. 616.

[b] (Iowa; 1895.)

Freight paid by the purchaser of a threshing machine is recoverable as damages for breach of warranty of the machine, where the freight was made, by the contract of sale, a part of the purchase price.—*Briggs v. Rumely Co.* (Iowa) 64 N. W. 784.

[c] (Iowa; 1896.)

The measure of damages for breach of warranty in the sale of a horse is the difference between his real value and what it would have been if he had been as represented; and the fact that he was worth the price paid is immaterial.—*Douglass v. Moses* (Iowa) 65 N. W. 1004.

[d] (Iowa; 1897.)

The measure of damages for a breach of warranty as to quality was not the difference between the value of the article as it should have been and its value at the trial, where it had been used by the buyer, and changes had been made in it by him.—*Eagle Iron Works v. Des Moines Suburban Ry. Co.* (Iowa) 70 N. W. 193.

[e] (Mich.; 1895.)

In an action on a contract for the purchase of carriage axles, where a recoupment of damages was claimed by reason of plaintiff's failure to deliver the axles as agreed, whereby defendant lost the profits from contracts for carriages made on the faith of plaintiff's promise to deliver, the measure of defendant's damages is limited to such orders for carriages as defendant actually received and was not able to fill by reason of plaintiff's default.—*Liggett Spring & Axle Co. v. Michigan Buggy Co.* (Mich.) 64 N. W. 466.

[f] (Minn.; 1896.)

Where a machine, sold with warranty, consisted of a harvester and a binder attachment, which could be taken off, so as to leave the harvester intact, and any other binder of the seller's manufacture could be used with the harvester, and the failure of the binder to work, which constituted the breach of the warranty, was not shown to be due to defects in any particular part which could be replaced, the buyer was entitled to the value of an entire new binder as damages.—*McCormick Harvester Mach. Co. v. McNicholas* (Minn.) 69 N. W. 36.

[g] (Wis.; 1895.)

The measure of damages for breach of warranty in the sale of a furnace is the difference between its actual value and its value if it had conformed with the warranty, and not the difference between the purchase price and its actual value.—*Park v. Richardson-Boydington Furnace Co.*, 64 N. W. 859, 91 Wis. 189.

[h] (Wis.; 1895.)

The measure of damages for breach of warranty is the difference between the actual value of the defective articles, and their value

had they been in accordance with the warranties, to which may be added compensation for the trouble and expense suffered, and any other special damages.—*J. I. Case Plow Works v. Niles & Scott Co.* (Wis.) 63 N. W. 1013.

90 Wis. 590.

[i] (Wis.; 1895.)

The price for which the purchaser sold the goods cannot be shown in an action for breach of warranty against defects, nor is it material whether he sold them at all.—*J. I. Case Plow Works v. Niles & Scott Co.* (Wis.) 63 N. W. 1013.

90 Wis. 590.

§ 42. Return of goods.

(Iowa; 1895.)

A provision in a contract for the sale of a threshing machine, that it should be returned to the place where received in case it failed to fulfill the warranty, is sufficiently complied with by notice to the vendor that the machine was in the town in which it was received subject to his order.—*Briggs v. Rumely Co.* (Iowa) 64 N. W. 784.

III. RIGHTS AND REMEDIES OF PARTIES INTER SE.

1. IN GENERAL.

§ 43. Modification or rescission of contract by agreement of parties.

[a] (Iowa; 1896.)

A provision that no agent or salesman of the seller has power to waive any of the conditions of the contract will not prevent an authorized agent from making such a waiver.—*Robinson & Co. v. Berkey* (Iowa) 69 N. W. 434.

[b] (Mich.; 1896.)

Defendants agreed to purchase cattle from plaintiff, making a partial payment, plaintiff to keep the cattle until a certain time, when the balance should be paid. The defendants were unable to pay the balance, and the cattle were shipped to market in plaintiff's name, under defendants' charge, and the price for which they were sold by defendants sent to plaintiff by the purchaser. Such sum was insufficient to pay the balance due plaintiff. *Held*, that the shipment in such manner did not release defendants from their contract of purchase, so as to release them from liability for the balance of the contract price.—*Doty v. Nixon* (Mich.) 67 N. W. 116.

[c] (Neb.; 1895.)

One who ordered personal property in writing could be released from the contract of sale, at any time it remained wholly executory, by a parol agreement.—*Bryant v. Thesing* 64 N. W. 967, 46 Neb. 244.

§ 44. — Consideration.

[a] (Minn.; 1895.)

The vendee of a threshing machine having refused to pay the price, for an alleged breach of warranty, the vendor, without objecting that the vendee had lost the right to urge that defense by having failed to notify the vendor of the alleged breach, as provided in the contract of sale, agreed to make the machine conform with the original warranty in consideration of the vendee's giving a note for the price. *Held*, that the agreement of the vendor was not without consideration.—*Hansen v. Gaar, Scott & Co.* (Minn.) 65 N. W. 254.

63 Minn. 94.

[b] (Neb.; 1895.)

The mutual waiver of the rights of the parties to an executory contract of sale of personal property is a sufficient consideration for a cancellation of the contract.—*Bryant v. Thesing*, 64 N. W. 967, 46 Neb. 244.

§ 45. Right of seller to remedy defects.

(Mich.; 1897.)

Where a monument is sold to be set up in a cemetery, the seller could remedy any defects after delivery in the cemetery, but before it was set up.—*Black v. Herbert* (Mich.) 70 N. W. 138.

§ 46. Action by seller for breach of contract—Damages.

(Wis.; 1895.)

In an action by the vendor for the breach of a contract to purchase lumber, the damages were the difference between the contract price and the market value at the time of the refusal to accept.—*T. B. Scott Lumber Co. v. Hafner-Lothman Manuf'g Co.*, 65 N. W. 513, 91 Wis. 667.

(Wis.; 1895.)

In an action for the breach of a contract to buy lumber, the amount realized by the vendor on a resale shortly after the breach is not conclusive as to the market value at the time of the breach, unless all reasonable efforts were made to obtain the best price, or the price obtained was a fair one.—*T. B. Scott Lumber Co. v. Hafner-Lothman Manuf'g Co.* (Wis.) 65 N. W. 513, 91 Wis. 667.

§ 47. Recovery of goods by seller.

(Neb.; 1896.)

Proof of false statements knowingly made by the purchaser of goods, whereby he is shown to be possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the vendor.—*First Nat. Bank v. McKinney* (Neb.) 66 N. W. 280. 47 Neb. 149.

(Neb.; 1896.)

Where a vendor seeks to reclaim goods sold by him on condition of immediate payment, his right is limited to a reclamation of the specific goods by him sold; and he cannot possess himself of an equivalent quantity of similar goods with which the goods by him sold have been commingled with his knowledge and consent.—*Kingsley v. McGrew* (Neb.) 67 N. W. 787. 48 Neb. 812.

(Neb.; 1896.)

Where corn was sold to be paid for on delivery, and it was placed, with the vendor's knowledge and consent, into bins of the vendee, and there mingled with a mass of corn belonging to the vendee, the vendor lost his right to reclaim the corn for nonpayment.—*Kingsley v. McGrew* (Neb.) 67 N. W. 787. 48 Neb. 812.

§ 48. Lien for price.

(Iowa; 1897.)

An ordinary sale of merchandise on credit does not establish trust relations between the parties, giving the seller a lien on the goods or their proceeds, which can be enforced against a transferee of the buyer, in the absence of fraud in the transfer.—*Bentley v. Snyder* (Iowa) 69 N. W. 1023.

§ 49. Waiver of demand for possession and tender of payment.

(Mich.; 1897.)

In replevin of oxen bought by plaintiffs of defendant, and paid for in part only, it appeared that a demand, unaccompanied by a tender, and without evidence of present ability to pay, was made by plaintiffs, two days after the time set for payment, at a place other than that of delivery, and that the demand was received in silence. *Held*, that demand and tender were not waived.—*Miner v. Phelps* (Mich.) 70 N. W. 422.

(Mich.; 1897.)

It appeared that defendant had returned by registered letter the advance payment, but

plaintiffs refused to accept it; that, two days before the time fixed for paying the balance, defendant told plaintiffs he did not own the oxen, and the trade must be declared off. *Held* not to show a waiver of demand and tender.—*Miner v. Phelps* (Mich.) 70 N. W. 422.

2. RESCISSION BY SELLER.**§ 50. For noncompliance with contract.**

(Iowa; 1897.)

A seller cannot rescind a contract, after the delivery of the property to the purchaser, because of failure to make payments in accordance with the contract.—*Kramer v. Messner* (Iowa) 69 N. W. 1142.

§ 51. Time of rescission.

(Neb.; 1895.)

Where a sale was made in March, and the mortgage given by the debtor, which the vendor attacked as fraudulent, was given on June 5th, and the vendor did not rescind the sale until June 14th, when he brought an action for that purpose, the question whether the vendor rescinded within a reasonable time was for the jury.—*Smith v. First Nat. Bank* (Neb.) 63 N. W. 796. 45 Neb. 444.

§ 52. Rights of vendor's creditors to rescind.

(Neb.; 1896.)

Unsecured general creditors of a vendor cannot be heard to assert a right which the vendor may possess to rescind his sale for fraud inducing thereto.—*Kingsley v. McGrew* (Neb.) 67 N. W. 787. 48 Neb. 812.

§ 53. Insolvency of purchaser, and knowledge thereof.

(Iowa; 1896.)

A seller of grain on credit, who learns, while it is in transit, that the buyer is insolvent and intends to get possession with intent to defraud, may rescind the sale. *Deemer, J.*, dissenting.—*Kearney Milling & Elevator Co. v. Union Pac. Ry. Co.* (Iowa) 66 N. W. 1059; *Elm Creek Elevator Co. v. Same, Id.*

(Mich.; 1895.)

The fact that the vendee was insolvent when he purchased the goods, and that shortly thereafter he failed in business, did not entitle the vendor to rescind the contract and recover the goods, where the vendee purchased in good faith, with intent to pay the price.—*Illinois Leather Co. v. Flynn* (Mich.) 65 N. W. 519.

(Wis.; 1897.)

Evidence that a debtor absconded, taking a large amount of property, and not leaving sufficient to satisfy his creditors, it not appearing that he was insolvent at the time of his departure, nor that he contemplated absconding at the time of his purchase, does not show that goods purchased by him were obtained while insolvent or without intending to pay for them, so as to authorize a rescission of the sale.—*Landauer v. Espenhain* (Wis.) 70 N. W. 287.

§ 54. Fraud and false representations.

(Mich.; 1895.)

Fraudulent representations in the statement required by 3 How. Ann. St. § 4161b1, to be filed by a corporation to prevent personal liability to its officers for its debts, and which is made the basis of a report by a commercial agency as to the corporation's financial standing, on the faith of which report goods are sold the corporation on credit, entitles the seller to rescind the sale for fraud.—*Silberman v. Munroe* (Mich.) 62 N. W. 555. 104 Mich. 352.

[b] (Mich.: 1895.)

A shrinkage in six months of 69 per cent. in the value placed by a corporation on its real and personal property in such statement and the value placed thereon by the receiver appointed on its insolvency, and the fact that the corporation, within two weeks after purchasing goods, gave a chattel mortgage on all its property, are sufficient to warrant a finding that the corporation purchased the goods with a fraudulent intent, so as to entitle the seller to recover them from the receiver.—*Silberman v. Munroe* (Mich.) 62 N. W. 555.

104 Mich. 352.

[c] (S. D.: 1895.)

The fact that a vendee omitted to inform the vendor of the pendency of a suit, based on a portion of the former's acknowledged indebtedness, did not entitle the vendor to rescind the sale on the ground of fraud, where the vendee's reason for not communicating the fact was that he believed the creditor who instituted the suit did not intend to prosecute the same to judgment.—*Tootle v. Petrie* (S. D.) 65 N. W. 43.

[d] (S. D.: 1895.)

It was proper to reject evidence of fraudulent representations made by the vendee to a stranger, in an action to rescind a sale, where it did not appear that they were communicated to the vendor, and it was shown that the vendor, in making the sale, relied solely on a statement of the vendee's financial condition made to himself.—*Tootle v. Petrie* (S. D.) 65 N. W. 43.

§ 55. — Representations as to financial ability.

[a] (S. D.: 1895.)

A statement of a vendee's assets and liabilities, purporting to be only approximately correct, which itemized liabilities and assets, and showed on its face that the vendee was greatly involved, and doing an extensive credit business, and had included in his assets past-due notes and accounts, aggregating an amount greatly in excess of his purported net capital, did not entitle the vendor to rescind a sale made in reliance thereon for fraud, where he knew when the credit was extended that the vendee was unable to pay his debts in the ordinary course of business.—*Tootle v. Petrie* (S. D.) 65 N. W. 43.

[b] (Wis.: 1897.)

A statement by the buyer in answer to a casual remark of the seller's agent that he must be worth from \$20,000 to \$50,000, that he "considered himself worth from \$10,000 to \$20,000 clear," made after goods had been sold on long credit and shipped, is not ground for a charge of fraud, so as to authorize the seller to replevy goods sold subsequently.—*Louis F. Fromer & Co. v. Stanley* (Wis.) 69 N. W. 820.

[c] (Wis.: 1897.)

Nor is a statement by the buyer that he would at a certain time discount his bills.—*Louis F. Fromer & Co. v. Stanley* (Wis.) 69 N. W. 820.

§ 56. Return of price paid.

(Neb.: 1896.)

A vendor seeking to rescind a sale for fraud need not offer to return the price when the property has been damaged by the vendee in an amount equal to the price.—*Phenix Iron-Works Co. v. McEvony* (Neb.) 66 N. W. 290.

47 Neb. 228.

3. VENDOR'S LIEN.

§ 57. Lien for caring for property.

(Iowa: 1895.)

Under Code, § 2102, providing that if property tendered by the seller requires care, and no person be found to receive it when tendered, the person making the tender shall care for the same, for which he shall have a lien on the property, a seller of cattle has a lien on

them for feed given after the time specified for their delivery only after tendering them to the buyer, unless the buyer waive such tender.—*Holtz v. Peterson* (Iowa) 62 N. W. 19.

§ 58. Waiver and loss.

[a] (Mich.: 1896.)

Plaintiff sold machinery to the lessees of a mill, and duly filed a statement of lien under Pub. Acts 1891, Act No. 179, as amended by Pub. Acts 1893, Act No. 199 giving the seller of machinery a lien thereon, in preference to any prior title or lien on the land on which it is put, etc. On default of payment of an acceptance given for the machinery, plaintiff authorized its attorneys to take a bill of sale of the machinery sold, if the right to remove it was secured. After the attorneys took the bill of sale, the lessor declared the lease forfeited, and claimed title to the machinery under a forfeiture clause in the lease. *Held*, that plaintiff might disclaim any rights under it, and enforce its lien.—*Marinette Iron Works Co. v. Cody* (Mich.) 66 N. W. 334.

[b] (Mich.: 1896.)

A seller, aware of the financial embarrassment of the buyer, by taking the guaranty of a third person for payment of the price, waives his vendor's lien.—*Dummer v. Smedley* (Mich.) 68 N. W. 260.

4. STOPPAGE IN TRANSITU.

Election of remedies by seller, see post, § 74.

§ 59. When right exists.

[a] (Wis.: 1896.)

Evidence that a corporation failed to pay a claim for lumber sold for more than 10 months after it became due, and after demand therefor had been made; that the seller, while endeavoring to collect the claim, found that there was no such corporation located at the place given in the order for the lumber as its place of business, and that its name was not in the city directory,—sustains a finding that it was insolvent, so as to justify the seller in stopping the goods in transit.—*Jeffris v. Fitchburg R. Co.* (Wis.) 67 N. W. 424.

93 Wis. 250.

[b] (Wis.: 1896.)

Evidence that lumber was delivered to a carrier for transportation to the consignee, and that the company had piled it in a shed after it had reached its destination, and held it for payment of freight and charges, under a local custom allowing the consignee to take possession on payment of such freight and charges, shows that the lumber was in possession of the company as a carrier, and not as a warehouseman, or as the agent of the consignee; so that a stoppage in transit for insolvency of such consignee was permissible.—*Jeffris v. Fitchburg R. Co.* (Wis.) 67 N. W. 424.

93 Wis. 250.

5. ACTION FOR PRICE.

§ 60. When action lies.

(Minn.: 1896.)

A vendor in a contract for the sale of goods, who has done all things required to be done on his part, may maintain an action for the price, though the vendee refuses to accept the goods.—*Wood v. Michaud* (Minn.) 65 N. W. 963.

63 Minn. 478.

§ 61. Defenses.

[a] (Neb.: 1895.)

Defendant, in an action for the price of goods, could show that the goods were not of the kind and quality ordered, though his sole ground for refusing the goods when previously

tendered was that he had been discharged on the order of purchase. — *Bryant v. Thesing* 64 N. W. 967, 46 Neb. 244.

[b] (Neb.; 1896.)

Where an action for the price of a horse was defended on the ground that the animal was taken under a prior mortgage, and the mortgage was not offered in evidence, and there was no evidence as to its validity or date of filing, or as to whether it covered the horse in question, a judgment for plaintiff was proper. — *Hanna v. Buckley* (Neb.), 66 N. W. 1122.

48 Neb. 127.

§ 62. — Failure of consideration.

(Iowa; 1895.)

The fact that an article sold is entirely worthless will defeat an action for the purchase price, though there be no fraud or breach of warranty. — *McCornick Harvesting Mach. Co. v. Brower* (Iowa) 62 N. W. 700.

§ 63. Acceptance of goods as performance—Question for jury.

(Minn.; 1895.)

In an action for the purchase price of logs sold under a contract providing for delivery in installments from time to time during the season, to be sawed as delivered, where the evidence showed that logs do not run evenly as to quality during a season; that the smaller logs usually come first; that as some of the installments came defendant complained of the quality of the logs, and was told by plaintiff that subsequent deliveries would be better, — *held*, that whether defendant had accepted the logs as performance of the contract, so as to bind him to pay the contract price, was for the jury. — *St. Anthony Lumber Co. v. Bardwell-Robinson Co.* (Minn.) 62 N. W. 274.

60 Minn. 199.

§ 64. Set-off and counterclaim.

[a] (Mich.; 1895.)

In an action on a contract for the purchase of carriage axles, a notice by defendant of recoupment of damages which alleges that defendant made a great number of contracts for buggies and carriages relying on plaintiff's contract to furnish the axles, and that by reason of plaintiff's failure defendant was damaged in a certain amount, and further alleging damages suffered by reason of loss of time of employes in waiting for such axles, is sufficiently specific. — *Liggett Spring & Axle Co. v. Michigan Buggy Co.* (Mich.) 64 N. W. 466.

[b] (S. D.; 1897.)

Where, in an action on a note, the answer alleged that the sole consideration was a machine which plaintiffs agreed to repair, and that, by reason of their failure to make such repairs, the machine was worthless, an affirmative judgment for defendant, over and above the price of the machine, was erroneous, there being no averment of loss sustained in attempt to use it. — *Seiberling v. Mortinson* (S. D.) 70 N. W. 835.

§ 65. Pleading and proof.

[a] (Minn.; 1895.)

One cannot recover as for the reasonable value of machinery sold on an implied contract, where the reply of plaintiff and the evidence show that the machinery was sold on a written order specifying the price. — *Gaar, Scott & Co. v. Fritz* (Minn.) 62 N. W. 391.

60 Minn. 346.

[b] (Neb.; 1897.)

A petition which seeks to recover a certain sum as the unpaid purchase price of personal property is not sustained by proof that, while in fact such payment had actually been made, yet, by false representations, defendant had afterwards induced the plaintiff to pay him an amount equal to the amount of such price. — *Cockrell v. Wood* (Neb.) 70 N. W. 944.

§ 66. Evidence.

[a] (Iowa; 1895.)

In an action for the price of a stallion, the defense being breach of warranty, evidence as to money paid defendant under an arrangement by which C. was to stand the animal for defendant is incompetent. — *National Horse-Importing Co. v. Novak* (Iowa) 64 N. W. 616.

[b] (Iowa; 1896.)

In an action to recover the price of a boiler, it was not error to permit defendants, in support of a counterclaim for breach of warranty of two boilers, to testify that the boilers were of no value to them, where it appeared that defendants were plaintiff's agents for the sale of the boilers, which had been put into buildings owned by other persons, according to plaintiff's directions, but both boilers, being unsuitable for the purpose for which they were intended, were subsequently taken out and stored for plaintiff, though defendants made no offer to return the same. — *Boynton Furnace Co. v. Messner* (Iowa) 66 N. W. 65.

[c] (Iowa; 1897.)

In an action for the price of goods bought by plaintiff from C., by whom they were delivered to defendant, it was proper to permit C. to testify that defendant did not pay him for the goods. — *Martin v. Shannon* (Iowa) 70 N. W. 720.

[d] (Iowa; 1897.)

Evidence of what plaintiff paid C. for the goods was properly excluded, as immaterial. — *Martin v. Shannon* (Iowa) 70 N. W. 720.

[e] (Mich.; 1895.)

In an action for the price of three great gross papers of pins, defendant admitted giving the order, but claimed that he was deceived as to the quantity of the pins mentioned therein. *Held*, that it was not error to admit evidence that defendant bargained with plaintiff's agent for three gross, instead of three great gross, of pins, and that the order was not read by him, but was signed upon the understanding that it was for three gross. — *Shrimpton v. Net-zorg* (Mich.) 62 N. W. 343.

104 Mich. 225.

[f] (Mich.; 1895.)

Where a third person sues for the price of goods on the ground that the vendor in selling the goods acted as his agent, evidence that plaintiff is not the real owner is admissible, though it also shows that the transaction by which plaintiff acquired his alleged title to the goods from the vendor was in fraud of creditors. — *McKenzie v. Vandecar* (Mich.) 62 N. W. 1031.

105 Mich. 232.

[g] (Mich.; 1895.)

In an action for the price of "three great gross" of hooks and eyes, defendant testified that his order to plaintiff's agent was for "three gross," and that the agent put that amount in his memorandum book, and then filled out an order which defendant signed without reading, believing that it was for the amount stated. As an inducement to the order, plaintiff agreed to place defendant's advertisement on the cards containing the hooks and eyes. Afterwards defendant received from plaintiff a letter acknowledging the receipt of his order for "three great gross," with a proof of the advertisement, and asking defendant to check all over, and, if O. K., to sign and return the letter. Defendant placed his "O. K." after the advertisement, signed the letter, and returned it. *Held*, that defendant could testify that he intended that his first order should be for only "three gross," and that in signing the letter he paid no attention to the quantity stated therein, as he supposed that his approval of the advertisement only was asked. — *Shrimpton v. Rosenbaum* (Mich.) 63 N. W. 1011.

[h] (Mich.; 1896.)

In an action for the price of lumber sold, plaintiff claimed that defendant and his son

came to his place of business, where the latter made a price for material for a house; that defendant said he intended to build some houses, and that whatever his son ordered might be charged to him. Defendant denied the contract as claimed, and testified that he simply contracted for the material in one house, which he was building. *Held*, that it was error to exclude evidence for defendant that title to the lots other than the first was not in defendant, but in his sons.—*Miller v. Jurczyk* (Mich.) 67 N. W. 898.

[I] (Minn.; 1895.)

In an action for price of a machine sold on a written order, the purchaser, who refused to accept the machine, cannot testify that he "expected" to get a machine like the one shown to him by the agent.—*Walter A. Wood Harvesting Co. v. Ramberg* (Minn.) 61 N. W. 1132. 60 Minn. 219.

[I] (S. D.; 1896.)

In an action to foreclose a mortgage given to secure the price of an engine, and to recover possession of property covered by the mortgage, defendant pleaded a breach of warranty. *Held*, that it was error not to exclude evidence by defendant that two years after such sale the engine, "in its present condition," was of no value to him, but would have been worth to him \$1,050 had it fulfilled the warranty.—*Aultman Co. v. Ferguson* (S. D.) 66 N. W. 1081.

§ 67. — Burden of proof.

(Iowa; 1895.)

A written contract provided that the vendor should place in the vendee's basement a heating apparatus, in consideration of a specified sum, a part to be paid when the job was completed, and the balance the following spring, "provided said apparatus works in accordance with guaranty," which declared that the furnace would heat rooms to a temperature of 70 degrees Fahrenheit "in the coldest winter weather." *Held*, in an action by the vendor to recover the deferred payments, that the burden was on the vendee to allege and prove breach of warranty.—*Hoffman v. Independent School Dist. of Hampton* (Iowa) 65 N. W. 322.

§ 68. Question for jury.

(Mich.; 1897.)

Where plaintiff claimed that material was sold to defendant corporation, which agreed to pay for it on presentation of an order of W., and defendant claimed that the sale was made to C., and that it agreed to pay the price only out of funds in its hands belonging to C., and only on presentation of C.'s order, there was an issue of fact.—*Klumph v. Bousfield & Co.* (Mich.) 70 N. W. 317.

§ 69. Instructions.

(Iowa; 1897.)

In an action for the price of a horse, where defendant has pleaded a breach of warranty that the horse was "suitable for breeding purposes," an instruction to find for defendant if the horse "was not reasonably suited for breeding purposes" is without prejudice to plaintiff.—*Bowers v. Hanna* (Iowa) 70 N. W. 745.

6. RIGHTS AND REMEDIES OF SELLER WHERE BUYER REFUSES GOODS.

§ 70. In general.

[a] (Iowa; 1896.)

Plaintiff advised defendant, a farmer, who wished a windmill, to buy one made by a third party, and gave him a circular, issued by such third party, guaranteeing that it would not wreck in any storm that did not destroy buildings. Defendant thereafter agreed to buy a windmill of that kind. When plaintiff began to set it up on defendant's farm, he gave him a circular, issued by the maker, requiring certain questions to be answered by a purchaser

before a signed guaranty of the windmill would be issued. These questions defendant refused to answer, and also refused to accept the mill, or to pay for it, unless guaranteed as stated in the first circular. *Held*, that an action for the price would not be sustained.—*Becker v. Calderwood* (Iowa) 69 N. W. 536.

[b] (Neb.; 1895.)

Where a vendee of personalty refuses to perform, the vendor may keep the property, and, in a suit on the contract, recover the difference between its value at the time of the breach of contract and the contract price, or may tender the property to the vendee, and recover its contract price.—*Lincoln Shoe Manuf'g Co. v. Sheldon* (Neb.) 62 N. W. 480.

44 Neb. 279.

§ 71. Resale.

[a] (Mich.; 1895.)

Where a vendor, on refusal of the vendee to receive the goods, sold them, as being perishable, for his account at the highest possible price, a verdict giving him the difference between such price and the contract price is justified, though the price for which he sold them was below the market price.—*Williams v. Robb* (Mich.) 62 N. W. 352.

104 Mich. 242.

[b] (Mich.; 1897.)

In an action on a contract to buy apples, which defendant has sought to rescind on account of the inferior quality of the fruit, where it appears that a part of the apples which had been packed by plaintiff for defendant were sold to a third person after defendant had refused to receive them, defendant may show the condition of the apples sold to the third person.—*Carrell v. Kalamazoo Cold-Storage Co.* (Mich.) 70 N. W. 323.

7. ELECTION OF REMEDIES BY SELLER.

§ 72. Election to rescind.

(Iowa; 1896.)

Evidence that a seller of grain, on learning of the insolvency of the buyer, ordered the carrier not to deliver it to the consignee, stopped the grain in transit, and sold it as his absolute property, with full knowledge of all the material facts, sufficiently shows an election to rescind the sale. *Deemer, J.*, dissenting.—*Kearney Milling & Elevator Co. v. Union Pac. Ry. Co.* (Iowa) 66 N. W. 1059; *Elm Creek Elevator Co. v. Same, Id.*

§ 73. In case of fraudulent disposition of goods.

(Mich.; 1895.)

Though plaintiff waives his right to bring replevin for goods sold to defendant because fraudulently purchased, where, being suspicious of this, he enters into a compromise whereby defendant returns part of them, and plaintiff agrees not to sue for recovery of the remainder till the bill therefor is due, yet, where defendant enters into the agreement with an intent to fraudulently dispose of the goods, and immediately proceeds to do so, plaintiff may bring replevin without first offering to return the goods obtained by him under the compromise.—*Munzer v. Stern* (Mich.) 63 N. W. 513.

105 Mich. 523.

§ 74. Effect of election.

[a] (Iowa; 1896.)

Where a seller of grain, on learning that the buyer is insolvent and intends to get possession with intent to defraud, elects to rescind the sale, and stops the grain in transit, he cannot thereafter claim that by the stoppage he acquired a lien for the price, as against one to whom the bills of lading had been transferred by the buyer as collateral. *Deemer, J.*, dissenting.—*Kearney Milling & Elevator Co. v. Union Pac.*

Ry. Co. (Iowa) 66 N. W. 1059; Elm Creek Elevator Co. v. Saine, Id.

[b] (Neb.; 1896.)

A vendor who sues for the price cannot subsequently rescind for fraud and replevy the property.—First Nat. Bank v. McKinney (Neb.) 66 N. W. 280.

47 Neb. 149.

8. BUYER'S RIGHTS, REMEDIES, AND LIABILITIES.

§ 75. In general.

[a] (Iowa; 1895.)

Since an action for conversion of notes given for the price of a machine is not based on the contract of sale, it is not affected by a provision therein limiting the time within which an action for breach of warranty or for damages might be brought.—Dean v. Nichols & Shepard Co. (Iowa) 63 N. W. 582.

[b] (Mich.; 1895.)

Where plaintiff's agent deceived defendant as to the quantity of goods mentioned in an order signed by him, plaintiff cannot recover on the order.—Shrimpton v. Netzorg (Mich.) 62 N. W. 343.

104 Mich. 225.

[c] (Neb.; 1895.)

The fact that a vendee accepted a portion of the goods consigned to the vendor was not a waiver of the delivery of the remaining goods consigned to the vendee according to the contract.—Van Valkenburg v. Gregg (Neb.) 63 N. W. 949.

45 Neb. 654.

§ 76. Election of remedies.

(Iowa; 1896.)

Where goods are not of the quality guaranteed by the seller, the buyer may reject them, or he may accept them and recover the damages sustained by the breach of contract.—Laporte Imp. Co. v. Brock (Iowa) 68 N. W. 810.

§ 77. Delay in delivery—Waiver of delay.

[a] (Mich.; 1895.)

In an action on a contract which required plaintiff to deliver logs at a given time and place astern a vessel to be furnished by defendants, evidence as to whether defendants had a vessel at the place at the time the contract called for is admissible to prove that defendants consented to delivery at a later date.—Duplanty v. Stokes (Mich.) 61 N. W. 1015.

103 Mich. 630.

[b] (Mich.; 1895.)

Where the evidence is conflicting, the question whether a vendee has accepted delivery of goods after the time designated for delivery in the written contract of sale is one of fact, for the jury.—Crane v. Wilson (Mich.) 63 N. W. 506.

105 Mich. 554.

§ 78. Action against seller for failure to deliver.

(Wis.; 1895.)

Plaintiff agreed to sell specified piles of lumber, varying in actual value from \$7 to \$20 per M., title to vest in defendant upon delivery on cars. After several shipments of inferior lumber, a fire, not caused by plaintiff's negligence, destroyed lumber worth \$20 per M., while still in plaintiff's possession. Defendant, with knowledge of the fire, demanded delivery, and plaintiff delivered the balance of the lumber at the contract price. *Held*, that defendant could not recover damages for nondelivery of the lumber destroyed by fire.—McMillan v. Fox (Wis.) 62 N. W. 1052.

90 Wis. 173.

§ 79. Knowingly selling defective goods.

(Minn.; 1895.)

A manufacturer of brick who knowingly uses unsuitable and defective material in their manufacture, is liable for any latent defect not disclosed to a purchaser. Wisconsin Red Pressed Brick Co. v. Hurd Refrigerator Co. (Minn.) 62 N. W. 550.

60 Minn. 401.

§ 80. Breach of contract to indemnify buyer—Recoupment of damages.

(Mich.; 1896.)

The seller of a machine agreed to give the buyers (defendants) a satisfactory "letter or bond" to indemnify them against interference by one who claimed the machine was an infringement on his patents. *Held* that, after defendants had used the machine several months, they could not insist on such bond as a condition precedent to their liability for the price, and could merely recoup damages sustained by plaintiff's failure to give it.—Young Bros. Mach. Co. v. Young (Mich.) 69 N. W. 152.

§ 81. Recovery of price paid.

[a] (Iowa; 1895.)

A vendee of personal property which was sold with a warranty must, in order to recover the purchase money on breach of warranty, return or offer to return the property.—Hoffman v. Independent School Dist. of Hampton (Iowa) 65 N. W. 322.

[b] (Mich.; 1896.)

Plaintiff averred that defendant stated that he had been advised by attorneys that a contract with third persons, assigned to plaintiff for a valuable consideration, was a lien on certain property, "practically a chattel mortgage," and that, in taking the assignment in this belief, "a mistake was made, through which she was injured." *Held* that, in absence of averments of fraud, plaintiff could not recover from defendant the consideration for the assignment.—Miller v. Brooks (Mich.) 66 N. W. 1092.

§ 82. Action for breach of contract—Damages.

[a] (Iowa; 1896.)

Where a contract to deliver bricks at a specified price is broken, and the price is not paid before delivery, the measure of damages is the difference between the contract price and the market price at the time the delivery should have been made.—Laporte Imp. Co. v. Brock (Iowa) 68 N. W. 810.

[b] (Mich.; 1894.)

In an action to recover a balance due for slabs, edgings, etc., trimmed from lumber cut at plaintiff's mill, it appeared that the mills of the parties were close together; that the contract gave defendant the privilege of doing the piling; and that no complaint of bad piling was made by defendant until after suit was brought. *Held*, that defendant was not entitled to damages on the ground that it was compelled to employ extra help to unload the scows because of bad piling.—Taylor v. Butters & Peters Salt & Lumber Co. (Mich.) 61 N. W. 5.

103 Mich. 1.

[c] (Mich.; 1897.)

It is a question for the jury whether plaintiffs waived damages for defendant's failure to perform a contract to deliver asphaltum by writing defendant that on account of such failure they had procured a satisfactory substitute for the asphaltum, where plaintiffs testify that at the time of writing such substitute had not been fully tested, and that it afterwards proved unsatisfactory.—Berry v. Haldeman (Mich.) 70 N. W. 325.

[d] (Minn.; 1895.)

The measure of damages, in an action for breach of an agreement by the vendor to make a machine conform to the warranty made by him at the time it was sold, is the difference

in value of the machine as it was when the agreement was made, and what its value would have been had it been made to fulfill the warranty.—*Hansen v. Gaar, Scott & Co. (Minn.)* 65 N. W. 254.

63 Minn. 94.

[c] (Wis.; 1896.)

Where goods as specially ordered by a vendee have no established market value, and the vendor, knowing that they were purchased by the vendee to enable him to fulfill his contracts with third persons, delivers goods not according to contract, whereby the vendee receives a less price than his contracts called for, the measure of damages is the difference between the price actually received, and a price which would yield him a reasonable profit, which would be the price such third person had contracted to pay, unless such price would yield an extraordinary profit, in which case it would control only if the vendor, when contracting, had knowledge of it.—*Gnetzkow Bros. Co. v. Andrews (Wis.)* 66 N. W. 119.

92 Wis. 214.

[f] (Wis.; 1896.)

One contracting for a car of fruit without any particular car being called for is entitled to damages, in case of nondelivery, on the basis of the amount of fruit in an ordinary car.—*Seefeld v. Thacker (Wis.)* 67 N. W. 1142.

93 Wis. 518.

§§ 83, 84. Effect of receipt or acceptance.

[a] (Mich.; 1894.)

Where paving stone was sold without warranty as to fitness for the particular work for which the vendee intended to use it, and such vendee accepted it, and performed the work necessary to make it suitable for that purpose, and used it therefor, he cannot recover damages by reason of such unfitness.—*Talbot Paving Co. v. Gorman (Mich.)* 61 N. W. 655.

103 Mich. 403.

[b] (Mich.; 1895.)

Where a vendee has an opportunity to inspect the goods before accepting them, he cannot complain that they are not of the quality ordered, unless there is a distinct warranty to that effect.—*Williams v. Robb (Mich.)* 62 N. W. 352.

104 Mich. 242.

§ 85. Rescission.

(Minn.; 1896.)

The breach of a warranty neither rescinds the sale nor gives the vendee a right to rescind, but merely a right of action for damages.—*Lynch v. Curfman (Minn.)* 68 N. W. 5.

§ 86. — Fraudulent representations.

[a] (Iowa; 1896.)

In an action on notes given for the purchase of a stallion, defendants pleaded that plaintiff made fraudulent representations as to the breeding qualities of the stallion, which he knew to be false, and that the horse was impotent. The evidence showed that there had been a previous sale of the stallion, and the purchaser had rescinded it because the stallion was not a sure foal getter, as represented; that defendants learned of such sale soon after their purchase; that they went to plaintiff with the matter, and he offered to take back the stallion and return the notes, but wanted the horse tried on a two-years test. Defendants rescinded the contract at the end of the first year. *Held*, that the rescission was made in a reasonable time.—*Humbert v. Larson (Iowa)* 68 N. W. 703.

[b] (Mich.; 1896.)

The use by the buyer of the articles purchased for 30 days after discovery of the fraudulent representations made to the buyer at the time of the sale will deprive him of the right to rescind the sale.—*Foster v. Rowley (Mich.)* 67 N. W. 1077.

4 N.W.DIG.—54

[c] (Neb.; 1897.)

False representations made by the seller as positive statements of known facts, without knowledge whether they are true or false, if believed and acted on by the purchaser to his injury, are ground for rescission.—*Olcott v. Bolton (Neb.)* 70 N. W. 366.

[d] (Neb.; 1897.)

That a vendee, who bought on false representations by the vendor, obtained other information on the same subject, is immaterial if this other information did not disclose the falsity of such representations.—*Olcott v. Bolton (Neb.)* 70 N. W. 366.

§ 87. — Trade talk.

(Iowa; 1896.)

A purchaser of a patent right who gives a note secured by a mortgage for the price cannot defend an action on the note on the ground of fraud in the representations of the agent of the seller that the owner of the patent rights demanded a certain price therefor, which was in excess of what he really asked, the purchaser dealing with the agent at arm's length, and the representations being only "trade talk."—*Des Moines Ins. Co. v. McIntire (Iowa)* 68 N. W. 565.

§ 88. — Waiver and estoppel.

[a] (Iowa; 1897.)

Where the buyer of an article, with warranty as to quality, relied, for over seven months after learning that the warranty had been broken, on a recoupment of damages, and the seller sued for the price upon that claim being made, the buyer could not rescind because of the breach.—*Eagle Iron Works v. Des Moines Suburban Ry. Co. (Iowa)* 70 N. W. 193.

[b] (Iowa; 1897.)

A buyer of goods, "as per invoice, at cost," is not estopped to claim fraud on the part of the seller, in raising the cost mark, by keeping the goods for six months, and making payments thereon and sales therefrom, where, except in one or two instances, the fraud was not discovered till after full payment of the price.—*Welch v. Burdick (Iowa)* 70 N. W. 94.

[c] (Minn.; 1896.)

Where, within a reasonable time after receiving the property, the vendee notified the vendor of defects therein, and that he would refuse to accept it unless the defects were remedied at once, he did not thereby deprive himself of the right to rescind in case the defects were not remedied within a reasonable time thereafter.—*Tufts v. Hunter (Minn.)* 65 N. W. 922.

63 Minn. 464.

IV. BONA FIDE PURCHASERS.

See, also, post, § 103.

§ 89. Parting with value.

(Neb.; 1896.)

To constitute one a bona fide purchaser, he must have parted with something valuable on the faith of the purchase before he had knowledge of any prior right.—*Regier v. Shreck (Neb.)* 66 N. W. 618.

47 Neb. 667.

§ 90. Taking as collateral security.

(Neb.; 1896.)

One who takes a pledge or mortgage of personal property to secure a pre-existing debt is not entitled to protection as a bona fide purchaser against an action to rescind a sale of the property previously made to the pledgor or mortgagor.—*Phenix Iron-Works Co. v. McEvony (Neb.)* 66 N. W. 290.

47 Neb. 228.

§ 91. Notice.

(S. D.; 1897.)

A purchaser of goods is not affected by knowledge possessed by the seller of the existence of an unfiled chattel mortgage thereon executed by a former owner, and an agreement by such seller to pay the mortgage debt.

La Crosse Boot & Shoe Manuf'g Co. v. Mons Anderson Co. (S. D.) 70 N. W. 877.

§ 92. Action against purchaser for conversion.

(Minn.; 1895.)

Where the consignor sold for cash, shipped the goods to the consignee, drew drafts on him for the price, and forwarded them, with the bills of lading attached, to a third party, at the place of destination, for collection, and the carrier, on the order of the consignee and without production of the bills of lading, or payment of the drafts or price, delivered the goods at the place of destination to one who purchased from the consignee in good faith, the consignor could maintain conversion against such purchaser, the consignee not having been invested with indicia of ownership.—*Freeman v. Kraemer* (Minn.) 65 N. W. 455.

63 Minn. 242.

V. RIGHTS OF SELLER AGAINST THIRD PERSONS.

§ 93. Recovery of goods.

(Neb.; 1895.)

Goods not shipped within a reasonable time after being ordered were received by the clerk of the vendee, in violation of the vendee's orders, and stored without being unpacked. Subsequently the vendee sold his entire stock without inventory, not knowing that the goods in question were received. *Held*, that the vendor could recover the goods of the purchaser of the vendee.—*Graves v. Morse* (Neb.) 63 N. W. 841.

45 Neb. 604.

§ 94. Lien of attachment.

(Neb.; 1895.)

The lien of an attachment is superior to rights reserved in an unrecorded note given by the debtor for the purchase price of the property levied on.—*New Home Sewing-Mach. Co. v. Beals* (Neb.) 62 N. W. 1092.

44 Neb. 816.

§ 95. Asserting fraud as against bona fide purchaser.

(Mich.; 1895.)

A naked, pre-existing debt is not such a consideration for the transfer of a stock of goods as to constitute the purchaser a bona fide purchaser for value, as against a claim by the debtor's vendor that his sale to the debtor was induced by fraud. *Montgomery and Hooker, JJs.*, dissenting.—*Schloss v. Feltus* (Mich.) 61 N. W. 797.

103 Mich. 525.

§ 96. Enforcement of vendor's lien.

(Mich.; 1895.)

Property otherwise exempt from execution, but subject, under the statute, to execution for the purchase price, may be seized in the hands of third persons, where the transfer is not bona fide, but is made for the purpose of defeating the statutory right of the vendor, although the notice provided for in the statute is not filed prior to the transfer.—*Lillibridge v. Walsh* (Mich.) 62 N. W. 172.

104 Mich. 153.

VI. CONDITIONAL SALES.

§ 97. What are.

[a] (Mich.; 1895.)

A bill of sale of a stock of goods made to relieve the seller from pressing debts under an agreement that the buyer was to advance, for a large bonus, two-thirds the value of the stock, so that the business could be continued under the management of the seller, does not pass the absolute title to the goods.—*Duffie v. Clark* (Mich.) 64 N. W. 57.

[b] (Neb.; 1897.)

A contract with a manufacturing company, wherein the other party expressly agrees to pay for all goods shipped to him under the contract, to make a settlement by a certain day, and pay interest on any balance due, the property in the meantime to remain that of the manufacturing company until it is paid for, is one of conditional sale.—*D. M. Osborne & Co. v. Plano Manuf'g Co.* (Neb.) 70 N. W. 1124.

§ 98. — Effect of taking collateral security.

(Mich.; 1894.)

The title to property may be retained by the seller until the price is paid, though other collateral security is taken to secure its payment.—*Pettyplace v. Groton Bridge & Manuf'g Co.* (Mich.) 61 N. W. 266.

103 Mich. 155.

§ 99. Statutory regulations.

[a] (Wis.; 1896.)

The owners of a sawmill contracted to transport and saw certain logs owned by another, and to sell the lumber as agents; the title to remain in the principal until so sold. Both were to share in the proceeds. *Held*, that the agents were factors, and had such an interest in the property as entitled them to make contracts for its sale in their own name, and that a written contract for the conditional sale of lumber, executed by them, was signed by "the parties," within the meaning of Rev. St. § 2317, and, when properly filed as therein required, would protect the rights of both principal and agents.—*Kellogg v. Costello* (Wis.) 67 N. W. 24.

93 Wis. 232.

[b] (Wis.; 1896.)

Rev. St. § 2317, provides that no contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession in the vendee until the price is paid or the conditions of the sale are complied with, shall be valid, as against any other person than the parties thereto, "and those having notice thereof," unless such contract is in writing, subscribed by the parties and filed, etc. *Held*, that a person who, knowing that certain logs were purchased from one P., takes a mortgage thereon, reciting that they are "free and clear from any lien or prior incumbrance, except a claim of 40 cents per thousand in favor of P.," has notice, within the meaning of the statute, of a contract between his mortgagor and P., whereby title was to remain in the latter until full payment of the price.—*Perkins v. Best* (Wis.) 68 N. W. 762.

§ 100. Who may assert condition.

(Mich.; 1895.)

In replevin by a mortgagee of a stock of goods against the mortgagor's receiver, defendant cannot set up the fact that part of the goods replevied were delivered to the mortgagor by a certain company under agreements that the title should remain in the company.—*Chafey v. Mathews* (Mich.) 62 N. W. 141.

104 Mich. 103.

§ 101. Rights and liabilities of parties inter se.**[a] (Mich.: 1896.)**

Under a contract of sale by which title remained in the seller till payment of all the purchase price, and he had right of possession on default in payment, it is error, in a replevin suit by the seller, on default in payment, to hold that the purchaser has a special interest in the goods to the amount that their value exceeds the unpaid price, and to give him judgment against the seller therefor, as, even if the purchaser has a right to treat the contract rescinded, he has at most a personal claim against the seller for the amount paid.—*Ryan v. Wayson* (Mich.) 66 N. W. 370.

[b] (Mich.: 1896.)

Under a contract of sale providing that title to the goods should remain in the seller till all the purchase price was paid as provided by the contract, and that the purchaser should have the right of possession of the goods, and might sell the same at retail, provided that they should not at any time be reduced below a certain amount, the seller is entitled to possession on default in payment.—*Ryan v. Wayson* (Mich.) 66 N. W. 370.

[c] (Mich.: 1896.)

A note given for a boiler, etc., provided that title to the property should remain in the seller until the full price was paid, and in case of default in payment the property "may be taken back" by the seller, and "in such case" all payments made shall be deemed payments for use, etc. *Held*, that the seller could not refuse to accept the sum due on the note at any time before possession of the property was actually taken by him, though he had, after default, elected to take the property.—*Vaughn v. McFadyen* (Mich.) 68 N. W. 135.

§ 102. Validity of condition as against third person—Record of contracts.**[a] (Neb.: 1896.)**

A mortgagee of a conditional vendee in possession of the goods sold is not a purchaser, within Comp. St. c. 32, § 26, providing that no conditional sale shall be valid against any purchaser unless the same be in writing, and be filed with the clerk of the county of the vendee's residence.—*McCormick Harvesting Mach. Co. v. Callen* (Neb.) 67 N. W. 803.
48 Neb. 849.

[b] (Neb.: 1897.)

Comp. St. c. 32, § 26, requiring an agreement for a conditional sale to be recorded, does not protect purchasers with knowledge of the contract under which the conditional vendee is in possession.—*D. M. Osborne & Co. v. Plano Manuf'g Co.* (Neb.) 70 N. W. 1124.

[c] (Wis.: 1895.)

A contract for the sale of standing timber, in which the vendor retains title until payment of the purchase price, need not be filed in the office of the town clerk, as required by Rev. St. §§ 2314, 2317, of conditional sales of personal property or chattel mortgages.—*Bent v. Hoxie*, 64 N. W. 426, 90 Wis. 625.

§ 103. Rights of seller as against bona fide purchaser from buyer.**[a] (Iowa: 1895.)**

Under Code, § 1922, providing that no conditional sale of a chattel shall be valid against any purchaser of the vendee without notice unless the contract of sale be in writing and recorded as a chattel mortgage, an unrecorded conditional sale is void as to one without notice who purchased the chattel from another who, with notice of the conditional sale, had purchased the chattel from the original vendee.—*National Cash-Register Co. v. Maloney* (Iowa) 64 N. W. 618.

[b] (Mich.: 1894.)

A person in possession of a chattel under a conditional contract of purchase cannot,

before the condition is complied with, sell the chattel, so as to vest the title thereto in a bona fide purchaser.—*Pettyplace v. Groton Bridge & Manuf'g Co.* (Mich.) 61 N. W. 266.
103 Mich. 155.

[c] (Mich.: 1897.)

A provision of the contract that the title shall remain in the seller till payment of the price is effective as against a bona fide purchaser from the vendee.—*Lansing Iron & Engine Works v. Wilbun* (Mich.) 69 N. W. 667.

[d] (Neb.: 1896.)

A mortgagee of a conditional vendee in possession of the property sold is not "a purchaser," within Comp. St. 1895, c. 32, § 26, providing that no sale, etc., wherein the transfer of title of personal property is made to depend upon any condition, shall be valid against any purchaser of the vendee without notice, unless the same be in writing, etc., and said mortgagee is therefore not entitled to the property, after the vendee's default, as against the vendor.—*Campbell Printing-Press & Manuf'g Co. v. Dyer*, 65 N. W. 904, 46 Neb. 830.

SAMPLES.

Sale by sample, see "Sale," § 29.

SATISFACTION.

See "Accord and Satisfaction"; "Compromise"; "Payment"; "Release and Discharge."

Of judgment, see "Judgment," §§ 81-88.

Of legacy, see "Wills," § 60.

SAVINGS BANKS.

See "Banks and Banking," § 9.

SCALING.

Logs, see "Logs and Logging," § 4.

SCHOOLS AND SCHOOL DISTRICTS.

I. IN GENERAL, § 1.

II. ORGANIZATION OF DISTRICT, §§ 2, 3.

III. CHANGE OF BOUNDARIES—DIVISION AND ANNEXATION OF DISTRICTS, §§ 4-6.

IV. GOVERNMENT IN GENERAL, §§ 7-16.

V. OFFICERS, § 17.

VI. CONTRACTS AND WARRANTS, §§ 18-23.

VII. TEACHERS AND PUPILS, §§ 24-28.

VIII. TAXATION, § 29.

IX. SCHOOL FUND, § 30.

X. SCHOOL LANDS, § 31.

XI. ACTIONS—ENFORCING CLAIMS AGAINST DISTRICT, §§ 32, 33.

Collateral attack on judgment against district, see "Judgment," § 68.

Mandamus to compel removal of school house, see "Mandamus," § 17.

Requiring appraisal of leased school lands, act impairing obligation of contract, see "Constitutional Law," § 30.

I. IN GENERAL.

§ 1. Liability to subcontractors and material men.

[a] (Mich.; 1896.)

Where members of a school board fail to require a contractor for the erection of a school house to give the statutory bond for the payment of laborers and material men, neither notice nor demand is necessary to the cause of action against them thereby accruing to the laborer or material man for labor or material furnished in the construction of the building.—*Stafion v. Lyon* (Mich.) 68 N. W. 151.

[b] (Wis.; 1895.)

Rev. St. § 3528, provides that any subcontractor who furnishes materials to a principal contractor for the construction of any building for a school district may sue such principal contractor and school district jointly; but no judgment shall be rendered against any defendant therein other than the principal contractor for any amount greater than the amount due from it to such principal contractor at the time of the commencement of such action. *Held*, that in such an action it is error to fail to submit to the jury or decide the question of the amount due from the district to the contractors.—*Bank of Iron River v. Board of School Directors of Town of Iron River* (Wis.) 65 N. W. 368, 91 Wis. 596.

II. ORGANIZATION OF DISTRICT.

§ 2. Division of county into school districts.

(S. D.; 1895.)

Laws 1879, c. 14, § 10, providing that the county superintendent of schools shall "divide his county into school districts and subdivide and re-arrange the boundaries of the same, when petitioned by a majority of the citizens residing in the district or districts to be affected by said change, if he believes such change to be for the good of the public schools, and furnish the county commissioners of such county with a written description of the boundaries of such district, which description must be filed in the register of deeds' office, before such district shall be entitled to proceed with its organization, by the election of school district officers," does not require a petition to authorize a superintendent, in the first instance, to divide his county into school districts.—*Coler v. Rhoda School Tp. of Charles Mix County* (S. D.) 63 N. W. 158.
6 S. D. 640.

§ 3. Termination of existence of district.

[a] (Iowa; 1895.)

The existence of a school subdistrict, formed in 1855 by the school-fund commissioner from territory within the limits of two townships, for the convenience of the inhabitants, was not terminated by the taking effect as to that district of Code 1873, § 1796, providing that the school directors shall divide their townships into subdistricts, "such as justice, equity and the interests of the people require," and may make such alterations in subdistricts heretofore formed as may be deemed necessary, provided that the boundaries of the subdistricts shall conform to the lines of the congressional divisions of land.—*Russell v. District Tp. of Cleveland* (Iowa) 62 N. W. 661.

[b] (Minn.; 1896.)

Where an independent school district has been dissolved pursuant to statute, no presumption in favor of the continued legal existence of the district under Gen. St. 1894, § 3648, arises from the fact that certain inhabitants of the former district have persisted in the usurpation of corporate powers for one year after the dissolution.—*State v. Cooley* (Minn.) 68 N. W. 66.

III. CHANGE OF BOUNDARIES—DIVISION AND ANNEXATION OF DISTRICTS.

§ 4. Change of boundaries—Notice.

[a] (Mich.; 1891.)

The requirement of 2 How. Ann. St. § 5010, that, when boards of schools inspectors wish to change the boundaries of a fractional school district, notice, signed by the clerk of each township interested, shall be posted in each of such townships, is jurisdictional, and proof of the posting of such notice must be filed with the clerks before any action is taken.—*Graves v. Joint Board of School Inspectors of Benton and Grant Townships* (Mich.) 61 N. W. 60.

102 Mich. 634.

[b] (S. D.; 1896.)

Laws 1893, c. 78, sube. 3, § 6, authorizes the special commission, composed of the county commissioners, and the county superintendent of schools, to change the boundaries of school districts, and create new ones, after notice by the county auditor to the school boards of the districts to be affected, without specifying the manner in which the notice shall be given. *Held*, that a remonstrance to the special commission, signed by the school officers of a district affected, acknowledging receipt of notice regarding the change, is prima facie evidence that notice was duly given.—*School Dist. No. 56 of Lincoln County v. School Dist. No. 27 of Lincoln County* (S. D.) 69 N. W. 17.

[c] (S. D.; 1896.)

Testimony of the clerk of the school-district board that no notice was served on the board "officially" does not rebut the presumption of notice arising from the acknowledgment in the remonstrance.—*School Dist. No. 56 of Lincoln County v. School Dist. No. 27 of Lincoln County* (S. D.) 69 N. W. 17.

[d] (S. D.; 1896.)

The manner in which such notice is given is immaterial.—*School Dist. No. 56 of Lincoln County v. School Dist. No. 27 of Lincoln County* (S. D.) 69 N. W. 17.

§ 5. Division of districts.

[a] (Iowa; 1896.)

Code, § 1713, by which it was enacted that each civil township and each independent school district theretofore organized should constitute a school district, had the effect of dividing subdistricts then extending across township lines, except those so organized because of natural obstacles, under Acts 1866, c. 143, § 16, which provision was retained as section 1797 of the Code.—*Russell v. District Tp. of Cleveland* (Iowa) 66 N. W. 771.

[b] (S. D.; 1896.)

Under Laws 1893, pp. 112-115, authorizing the change of school district boundaries on a petition of "10 legal voters residing in the district or districts to be affected," a petition for the creation of a new district out of parts of several old districts, signed by 10 voters, at least one of whom resides in each of the districts affected, is sufficient.—*School Dist. No. 74 v. Board of Com'rs of Lincoln County* (S. D.) 68 N. W. 746.

[c] (S. D.; 1896.)

Laws 1893, pp. 112-115, provide that in counties organized for school purposes under the district system, each school district shall remain a district school corporation, and the boundary lines of any district shall not be altered except as therein provided; that township districts shall be divided, and also created out of districts smaller than civil townships, as therein prescribed; that, after the boundary lines of the several school districts in a county are established, they may at any regular meeting be changed by the county commissioners and the county superintendent of schools, on a peti-

tion by 10 legal voters of the district or districts to be affected, due notice being given to the school boards of such districts; and that, whenever district boundaries shall be changed, the county commissioners and superintendent shall make an apportionment of property and indebtedness. *Held*, that the county commissioners and superintendent have authority to create new districts.—*School Dist. No. 74 v. Board of Comrs of Lincoln County (S. D.)* 68 N. W. 746.

§ 6. — Apportioning assets and liabilities.

[a] (Minn.: 1897.)

It is not sufficiently definite, where it provides that all outstanding indebtedness, if any, of the old district, shall be taken into consideration, and that the division of the funds shall be based upon the assessed valuation of the land constituting the new district, but does not provide who shall determine the amount of the outstanding indebtedness, or how the assessed valuation of the land shall be ascertained.—*Gregg v. French (Minn.)* 69 N. W. 1102.

[b] (Minn.: 1897.)

Such an award is not uncertain if it sufficiently indicates the means by which the amount may be ascertained by a ministerial act or an arithmetical calculation.—*Gregg v. French (Minn.)* 69 N. W. 1102.

[c] (Minn.: 1897.)

A division and award of the funds and credits of a school district, made by the county commissioners under Gen. St. 1894, § 3674, is governed by the rules applicable to awards made by statutory or common-law arbitrators.—*Gregg v. French (Minn.)* 69 N. W. 1102.

[d] (Neb.: 1896.)

A delay of nearly two years, by a school district formed out of a school district having property, to seek to enforce its right to an apportionment of such property, does not estop the new district from thereafter asserting that right.—*School Dist. No. 46 of Douglas County v. School Dist. No. 53 of Douglas County (Neb.)* 68 N. W. 366.

[e] (Neb.: 1896.)

The duty of the county superintendent of public instruction, under Comp. St. c. 79, § 9, subd. 1, upon the erection of a new school district out of a district owning property, to determine the amount due the new district from the parent district on account of such property, is a continuing one, unaffected by the superintendent's failure to act within the time fixed by the statute.—*School Dist. No. 46 of Douglas County v. School Dist. No. 53 of Douglas County (Neb.)* 68 N. W. 366.

[f] (S. D.: 1896.)

Where, after a school district has issued bonds for the erection of a schoolhouse, part of its territory is made into new districts, under a general law which does not expressly provide that the new districts shall be liable for a proportionate share of the debts of the old district, neither the old district nor a creditor thereof can enforce against the new districts a liability on such bonds, especially where the schoolhouse remains in the old district.—*Livingston v. School Dist. No. 7 of Brookings County (S. D.)* 68 N. W. 167.

[g] (S. D.: 1896.)

Under Laws 1893, c. 78, subc. 3, § 3, subd. 2, requiring the county commissioners and county superintendent of schools, at the regular July meeting of the county commissioners, to make an apportionment among the school districts, school districts are not entitled to notice of the time when the apportionment matter would be taken up.—*School Dist. No. 56 of Lincoln County v. School Dist. No. 27 of Lincoln County (S. D.)* 69 N. W. 17.

IV. GOVERNMENT IN GENERAL.

§ 7. Meetings.

(Iowa: 1897.)

That school directors, having trouble at a meeting, left the place without arranging to return or to hold another meeting, did not constitute an adjournment, and their reassembling on the same day continued the meeting.—*State v. Powell (Iowa)* 70 N. W. 592.

§ 8. Appropriations — Requiring Two-thirds vote.

[a] (Wis.: 1896.)

A by-law of a board of education requiring a two-thirds vote of all the members in favor of an appropriation of money is void as an unauthorized limitation of the power of the board.—*Short-Conrad Co. v. School Dist. of Eau Claire (Wis.)* 69 N. W. 337.

[b] (Wis.: 1896.)

A contract for placing apparatus in a school building at a specified price, subject to satisfactory tests, is not an appropriation of money, within a charter requiring, for all appropriations by the board of education, a two-thirds vote of all the members.—*Short-Conrad Co. v. School Dist. of Eau Claire (Wis.)* 69 N. W. 337.

§ 9. Power of directors of independent district.

(Iowa: 1895.)

Code, § 1717, subd. 2, as supplemented by Acts 19th Gen. Assem. c. 51, § 1, authorizes the electors of district townships to authorize the boards of directors of such townships to obtain at the township's expense highways necessary for proper access to schoolhouses. Code, § 1717, subd. 3, as supplemented by Acts 19th Gen. Assem. c. 51, § 2, authorizes the district township electors to vote a tax for obtaining such highways. Code, § 1806, provides that independent districts "shall be governed by the laws enacted for district townships," so far as they are applicable. *Held*, that a board of directors of an independent district is authorized, on vote of the electors, to appropriate funds for highways for better access to schoolhouses, and a tax may properly be levied therefor.—*Bogaard v. Independent Dist. of Plain View (Iowa)* 61 N. W. 859.

93 Iowa, 269.

§ 10. Submitting questions to electors.

[a] (Iowa: 1896.)

In an application for an injunction to restrain a board of school directors from certifying a tax alleged to have been voted at a school meeting, it appeared from affidavits that the meeting was called for 2 p. m.; that a few moments before 4 p. m., when the ballot box was surrounded by people favoring the tax, the polls were declared open; that, as soon as these had voted, the polls were declared closed, not having been open more than 15 minutes; that there were at least 34 persons in the room who would have voted against the tax, thus defeating it, but their votes were refused; that, when the vote was counted, there were more ballots in the box than there were persons who voted. *Held*, that the facts established were sufficient to justify the granting of an injunction.—*Hinkle v. Saddler (Iowa)* 66 N. W. 765.

[b] (Iowa: 1896.)

The notice of an election recited that it was proposed to issue bonds "to build a schoolhouse on the old site." The ballots also indicated that the bonds were to be issued "to build a schoolhouse on the old site." *Held* that, in the absence of anything to show that it was impossible to build on the old site, the directors were bound by the vote on the bonds.—*Rodgers v. Independent School Dist. of Colfax (Iowa)* 69 N. W. 544.

§ 11. Conclusiveness of decision of superintendent.

(Iowa; 1895.)

The decision of the superintendent of public instruction on appeal being final (Code, § 1835), the school directors cannot, after he has affirmed their location of a schoolhouse, make a relocation of it on grounds which existed at the time of their decision.—*Carpenter v. Independent District No. 5 of Columbia Tp., Tama County* (Iowa) 63 N. W. 708.

§ 12. Appeal from decision of school board to superintendent.

(Iowa; 1896.)

Where a board of school directors, by fraud and abuse of power, have declared the adoption of a vote levying a tax for building a new schoolhouse, such action is not a decision of the board, within Code, § 1829, providing that any person aggrieved by a decision or order of the district board of directors in matters of law or fact may appeal therefrom to the county superintendent.—*Hinkle v. Saddler* (Iowa) 66 N. W. 765.

§ 13. Right of appeal to courts.

(Iowa; 1896.)

McClain's Code, § 2985, declaring that any person aggrieved by any decision of the district board of school directors may appeal to the county superintendent, does not preclude the right to an appeal to the courts upon questions involving the authority of the board of directors.—*Rodgers v. Independent School Dist. of Colfax* (Iowa) 69 N. W. 544.

§ 14. Location and building of schoolhouse.

[a] (Iowa; 1895.)

Under Code, § 1724, providing that the board of school directors shall fix the site of each schoolhouse, taking into consideration the geographical position, and the convenience of the people, of each portion of the subdistrict, the controlling consideration is not the wishes of a majority of the legal voters, but the geographical position; the welfare of the people, not voters, or who are at inconvenient distance from proposed site, are not to be ignored.—*Carpenter v. Independent District No. 5 of Columbia Tp., Tama County* (Iowa) 63 N. W. 708.

[b] (Iowa; 1897.)

Under Code, §§ 1825, 1826, providing that not exceeding one acre shall be taken by condemnation proceedings for the location of a schoolhouse, and that the site must be on a public highway, the acre may be so measured as to be exclusive of the road.—*Salisbury v. School Dist. of Highland Tp.* (Iowa) 70 N. W. 706.

[c] (Neb.; 1895.)

Under Comp. St. 1893, c. 79, subd. 2, § 10, providing that the qualified voters of each school district shall have the power to direct the building of a schoolhouse; and Id. subd. 5, § 6, providing that the district school board shall erect the schoolhouse "when lawfully directed by the qualified voters,"—it is not imperative that the voters select such board as agent in superintending the construction of the building, a selection of any persons whom they deem competent being sufficient.—*Mizera v. Anten* (Neb.) 63 N. W. 399.

45 Neb. 239.

§ 15. Change of schoolhouse site.

[a] (Minn.; 1895.)

Where a schoolhouse site is located within one quarter of a mile of the center of the district, it cannot be changed unless at least a majority of the legal voters in the district vote on the question, and two-thirds of the voters are present and vote in favor of such change.—*Stadler v. School Dist. No. 40 of Houston County* (Minn.) 63 N. W. 638.

61 Minn. 259.

[b] (Neb.; 1895.)

Under Comp. St. c. 79, § 8, subd. 2, a schoolhouse site cannot be changed at a special election in the district, but can be relocated at an annual meeting by a two-thirds vote of those present, except where the original location is three-fourths of a mile from the district, in which case the site may, by a majority vote, be changed to a point nearer the center.—*Wilber v. Woolley* (Neb.) 62 N. W. 1095.

44 Neb. 739.

[c] (S. D.; 1896.)

Where a school board, having power to change the location of schoolhouses only when authorized to do so by the voters of the district (Laws 1891, c. 56, subc. 5, §§ 1, 5), contracts for the removal of a schoolhouse, it will be presumed, in the absence of a contrary showing, that the board was so authorized.—*Burkhardt v. Georgia School Tp.* (S. D.) 69 N. W. 16.

§ 16. Obtaining highways.

(Iowa; 1895.)

The power given to the boards of directors of district townships by Acts 19th Gen. Assem. c. 51, § 1, to obtain at the expense of the district such highways for access to schoolhouses as they deem necessary, is not limited to cases where the schoolhouses are not situated on any highway.—*Bogaard v. Independent Dist. of Plain View* (Iowa) 61 N. W. 859.

93 Iowa, 269.

V. OFFICERS.

Discretion of board as to employing teacher, see post, § 26.

Power as to contracts, see post, § 18.

— of directors of independent district, see ante, § 9.

§ 17. Liability of district for nonofficial acts.

(Iowa; 1896.)

The fact that some of the members of a school board, with knowledge that the architect employed by the board to superintend the construction of a school building had directed changes in the building contract, permitted them to be made without objection, does not estop the district from claiming damages on account of such changes, as the district could only act through its directors as a board.—*Forcum v. Independent Dist. of Montezuma in Poweshiek County* (Iowa) 68 N. W. 802.

VI. CONTRACTS AND WARRANTS.

Contracts with teachers, see post, § 25.

§ 18. Authority of officers—Contracts for supplies and apparatus.

[a] (Iowa; 1896.)

A contract by the president and secretary of a school district does not bind the district, unless expressly authorized by the board of directors in session, or ratified thereby.—*Weir Furnace Co. v. Independent School Dist. of Seymour, Wayne County* (Iowa) 68 N. W. 584.

[b] (Iowa; 1896.)

A school board has no power to make a contract for school supplies which fixes the place of payment at any other place than at the school treasury, without special legislative authority.—*Weir Furnace Co. v. Independent School Dist. of Seymour, Wayne County* (Iowa) 68 N. W. 584.

[c] (Iowa; 1896.)

A school board has no power, in the absence of express legislative authority, to make a contract for school supplies which stipulates for the payment of attorney's fees by the school district.—*Weir Furnace Co. v. Independent*

School Dist. of Seymour, Wayne County (Iowa). 68 N. W. 584.

[*Id.* (Mich.; 1896.)

A school district having authorized the purchase of desks for a new school house, the director gave an order for them, signed by himself alone. When the desks arrived they were taken to the school house by the director and the moderator, who, together with the assessor, placed them in the school room. The bills for freight and hauling were paid by the assessor, upon orders signed by the moderator, and the desks were used by the district for 15 months without complaint. *Held*, that the acts of the moderator and assessor, and the acquiescence in the use of the furniture, operated as a ratification of the purchase, binding upon the district.—*Jones v. School Dist. No. 3 of Iosco* (Mich.) 68 N. W. 222.

§ 19. Letting to lowest bidder.

(Mich.; 1895.)

Injunction will not lie to restrain a school board from awarding a contract to one who was not the lowest bidder, where the board reserved the right to reject any and all bids, and there is no evidence of fraud on the part of the board, and no statute requiring contracts to be awarded to the lowest bidder.—*Chandler v. Board of Education of City of Detroit* (Mich.) 62 N. W. 370.

104 Mich. 292.

§ 20. Bonds.

[*a*] (Iowa; 1896.)

Where a school district issues bonds for the purpose of taking up outstanding bonds, when it is at the time indebted 10 times the 5 per cent. on the assessed valuation of its taxable property allowed by Const. art. 11, § 3, in an action to enjoin the payment of and to cancel such bonds, the burden of showing that the proceeds of any one or more of such bonds were in fact applied to a legal debt is on the defendants.—*Holliday v. Hildebrandt* (Iowa) 66 N. W. 89.

[*b*] (S. D.; 1896.)

A school-district bond for more than \$500, reciting that it issued pursuant to Sp. Act Feb. 21, 1879, is void, even in the hands of an innocent purchaser; it being provided by the act, which authorizes bonds to the amount of \$2,000, that they shall be issued "in denominations of not more than \$500.00, nor less than \$50.00."—*Livingston v. School Dist. No. 7 of Brookings County* (S. D.) 69 N. W. 15.

§ 21. Limit of indebtedness.

[*a*] (Iowa; 1896.)

Purchasers of school-district bonds are bound, at their peril, to take notice of the constitutional limitation of the power of such corporations to become indebted, and of such facts as the authorized official assessments disclose touching the valuation of all taxable property within the limits of such district.—*Holliday v. Hildebrandt* (Iowa) 66 N. W. 89.

[*b*] (Iowa; 1896.)

Where, in an action to enjoin the payment of bonds issued by a school district when it was indebted largely in excess of the constitutional limit, it is shown simply that such bonds were issued for the purpose of taking up outstanding bonds, but it does not appear that the proceeds were in fact used for such purpose, it appears that the indebtedness was increased by the issue of such bonds.—*Holliday v. Hildebrandt* (Iowa) 66 N. W. 89.

[*c*] (Iowa; 1896.)

The obtaining a judgment against a school district is not the creation of a debt against it within Const. art. 11, § 3, fixing its limit of indebtedness.—*Edmundson v. Independent School Dist. of Jackson* (Iowa) 67 N. W. 671.

[*d*] (Iowa; 1897.)

A judgment against a school district on orders issued in payment of other valid orders, though rendered at a time when the outstanding obligations of the district are in excess of the constitutional limit, does not create an indebtedness, within the inhibition of the constitution.—*Thompson v. Independent School Dists. of Allison and Jackson, in Lyon County* (Iowa) 70 N. W. 1093.

[*e*] (Iowa; 1897.)

The fact that a judgment by default was rendered against a school district at a time when its outstanding obligations were largely in excess of the constitutional limit does not show that it was obtained by fraud and collusion.—*Thompson v. Independent School Dists. of Allison and Jackson, in Lyon County* (Iowa) 70 N. W. 1093.

[*f*] (Iowa; 1897.)

The fact that bonds issued by a school district in payment of a valid judgment against it draw semiannual interest at 10 per cent. per annum, and that the aggregate amount thus agreed to be paid in excess of the judgment creates an indebtedness beyond the constitutional limit, will not prevent recovery of the amount of the bonds, with semiannual interest at 6 per cent. per annum.—*Thompson v. Independent School Dists. of Allison and Jackson, in Lyon County* (Iowa) 70 N. W. 1093.

§ 22. Compromise of indebtedness.

(Neb.; 1895.)

Act 1887, c. 9 (Sess. Laws, p. 100), authorizing any school district that is unable to pay its indebtedness in full to compromise such indebtedness by "negotiation with the holder or holders of any such indebtedness of whatever form," and issue bonds therefor, does not empower a school district to issue its bonds in compromise of any indebtedness evidenced by school-district warrants or orders.—*State v. Moore* (Neb.) 63 N. W. 130.

45 Neb. 12.

§ 23. Warrants.

(Neb.; 1896.)

A school district of the "city" class cannot issue, as evidence of an indebtedness for furnishing the school building, warrants or orders payable to a party or his order at stated intervals, after date, with interest at a specified rate. *School District v. Stough* (1876) 4 Neb. 257, and *State v. Sabin* (1894) 39 Neb. 570, 58 N. W. 179, followed.—*Andrews v. School Dist. of City of McCook*, 68 N. W. 631.

VII. TEACHERS AND PUPILS.

Compulsory vaccination of pupils, see "Health," § 6.

§ 24. Certificate of qualification.

[*a*] (Mich.; 1896.)

A teacher's certificate, issued for three years, cannot be legally extended, by being changed to read for four years, by the secretary of the board of examiners who issued it, after he has gone out of office.—*Bryan v. Fractional School Dist. No. 1 of Shelby and Sterling Tps.* (Mich.) 69 N. W. 74.

[*b*] (Mich.; 1896.)

Under the statute making invalid any contract to teach school where the person employed does not then hold a legal certificate of qualification (How, Ann. St. § 5065), such a contract cannot be made the basis of a recovery of salary as a teacher.—*Bryan v. Fractional School Dist. No. 1 of Shelby and Sterling Tps.* (Mich.) 69 N. W. 74.

§ 25. Contract with teacher.

[*a*] (Iowa; 1896.)

A school board authorized its president to employ plaintiff as teacher for the "winter term,"

no provision being made as to what constituted such term. The president employed plaintiff for nine months. *Held*, that a subsequent attempt of the board to correct the report, by stating that the president was authorized to close contracts for "six months only,—the winter term," did not affect plaintiff.—*Benson v. District Tp. of Silver Lake (Iowa)* 69 N. W. 419.

[b] (*Iowa*; 1896.)

Code, § 1753, provides that a subdirector of a district school board, under the rules of the board, may contract for the employment of a teacher, the contract to be approved by the president, and reported to the board. *Held*, that a contract with a teacher, made and signed by a director, who was, at the time, president of the board, was not invalidated by his failure to approve it as president, and file it with the directors.—*Benson v. District Tp. of Silver Lake (Iowa)* 69 N. W. 419.

[c] (*Neb.*; 1897.)

Where a teacher's contract permitted her to teach three months, with option to teach a year, *held* that, on completion of the three months, a new written contract was not necessary to bind the district for the entire year.—*Wallace v. School Dist. No. 27, Saline County (Neb.)* 69 N. W. 772.

[d] (*S. D.*; 1895.)

A contract whereby a teacher agreed to devote to the school, under direction of the principal thereof and the board of education, six hours of each school day, implied an agreement to assist in the school during school hours by teaching such branches and by conducting such recitations as might be reasonably assigned the teacher by the principal.—*Morrow v. Board of Education of City of Chamberlain (S. D.)* 64 N. W. 1126.

§ 26. Discretion of board—Mandamus.

(*Neb.*; 1896.)

The discretion of the district school board under Comp. St. 1895, c. 79, § 3, subd. 5, as to whom it will employ as a teacher, and as to whether it will permit one so employed to take charge of the school, cannot be controlled by mandamus issued at the instance of taxpayers and voters.—*State v. Smith (Neb.)* 69 N. W. 114.

§ 27. Discharge of teacher.

[a] (*Iowa*; 1896.)

Under Code, § 1734, a teacher cannot be discharged before the end of the term without an opportunity to be heard.—*Benson v. District Tp. of Silver Lake (Iowa)* 69 N. W. 419.

[b] (*Neb.*; 1897.)

If a teacher duly employed in the public schools for a specified period is dismissed by the school board before the end of that period, without being shown to be incompetent, or for other good reason, the district is liable therefor.—*Wallace v. School Dist. No. 27, Saline County (Neb.)* 69 N. W. 772.

[c] (*Neb.*; 1897.)

In the absence of a stipulation in the contract to the contrary, under the existing statute, a qualified teacher can be discharged only for just cause.—*Wallace v. School Dist. No. 27, Saline County (Neb.)* 69 N. W. 772.

§ 28. Tuition.

(*Mich.*; 1896.)

The father of a nonresident pupil need not be notified of the recorded resolution of the school board fixing the rate of tuition for nonresident pupils, and the intention to charge tuition for his child, to render him liable therefor.—*Fractional School Dist. No. 1, Paw Paw and Antwerp Tps., v. Yerrington (Mich.)* 66 N. W. 324.

VIII. TAXATION.

Injunction against collection of school taxes, see "Taxation," § 49.

§ 29. Property subject to.

[a] (*Iowa*; 1897.)

The fact that one of the directors of a school district, and the secretary of the school district board, and an elector who was not an officer of the district, while acting as judges at a school district election, refused to allow electors residing on certain land to vote, on the ground that they lived outside the district, will not estop the district from thereafter claiming that such land was within its limits for purposes of taxation.—*Independent Dist. of Ottumwa v. Taylor (Iowa)* 69 N. W. 1009.

[b] (*Iowa*; 1897.)

Where the records of the organization and limits of a school district have been lost, and certain land has been considered as a part of the district for 30 years, and taxes have been assessed thereon for the benefit of such district, and the district has furnished school facilities to the inhabitants during such time, the land will be considered as a part of the district for the purpose of taxation.—*Independent Dist. of Ottumwa v. Taylor (Iowa)* 69 N. W. 1009.

[c] (*Neb.*; 1897.)

In the absence of express legislative authority the officers of a school district are without jurisdiction to levy a tax upon real estate not within the limits of their school district.—*Chicago, B. & Q. R. Co. v. Cass County (Neb.)* 70 N. W. 955.

[d] (*Neb.*; 1897.)

Comp. St. c. 79, subd. 3, § 8, providing that every school district shall be presumed to have been legally organized when it has exercised the franchises of the district for a year, does not require the court to presume that property taxed is within or without the limits of such district.—*Chicago, B. & Q. R. Co. v. Cass County (Neb.)* 70 N. W. 955.

[e] (*Wis.*; 1896.)

Under Sanb. & B. Ann. St. § 412, providing that every school district shall be of contiguous territory, and shall not embrace more than 36 square miles of land, lands situated 10 miles from a village cannot be included in the school district of such village, so as to be subject to taxation therein.—*Keystone Lumber Co. v. Town of Bayfield (Wis.)* 69 N. W. 162.

IX. SCHOOL FUND.

§ 30. Apportionment and distribution.

[a] (*Neb.*; 1896.)

Where fines, penalties, or license moneys are in the hands of the treasurer of a city of the first class, having over 8,000 and less than 25,000 inhabitants, such moneys are properly distributable under Const. art. 8, § 5, among the common schools which territorially constitute a part of the city.—*King v. State (Neb.)* 69 N. W. 307.

[b] (*Wis.*; 1896.)

A newly-formed school district, whose report, made under Supp. Rev. St. § 462, does not show it to have maintained a school, is not entitled to share in the town school fund, the apportionment of which, under Rev. St. § 538, can be made only to such districts as have maintained a school for at least six months during the year past.—*Joint School Dist. No. 8, Town of Harmony, v. School Dist. No. 5, Town of Harmony (Wis.)* 66 N. W. 794.
92 Wis. 608.

X. SCHOOL LANDS.

See, also, "Public Lands," § 12.

§ 31. Reversion to original owner.

(*Iowa*; 1895.)

Code, §§ 1827, 1828, provide that, where a school district shall cease to use land for school purposes for two years, the title shall revert to

the owner of the fee upon repayment by him of the purchase price and the value of improvements. *Held*, that where one has neither paid nor tendered the purchase price, nor the value of the improvements, he is not entitled to the land.—*Independent Dist. of Oak Dale v. Fagen (Iowa)* 63 N. W. 456.

XI. ACTIONS—ENFORCING CLAIMS AGAINST DISTRICT.

§ 32. Parties.

(Iowa; 1896.)

A school district is not an indispensable party to an action by citizens and taxpayers of the district against the officers of such district, the county board of supervisors, auditor, and county treasurer, to enjoin the payment of and to cancel certain bonds of the district, on the ground that they are void. *Turner v. Cruzen* (1886) 30 N. W. 483, 70 Iowa, 202, and *Moore v. Held* (1887) 35 N. W. 623, 73 Iowa, 538, distinguished.—*Holliday v. Hildebrandt (Iowa)* 66 N. W. 89.

§ 33. Presentation of claims for allowance.

[a] (Iowa; 1896.)

In an action against a school district on a contract for supplies, the petition is demurrable if it discloses that the claim was not presented to the board of directors before suit was brought.—*Weir Furnace Co. v. Independent School Dist. of Seymour, Wayne County (Iowa)* 68 N. W. 584.

[b] (Neb.; 1896.)

The requirements of Cobbey's Consol. St. § 3715, in regard to the auditing of claims against school districts by the officers thereof, apply only as between the district and said officers, and do not cast on the claimant a duty to present his claim to said officers for allowance before suit thereon.—*Andrews v. School Dist. of City of McCook (Neb.)* 68 N. W. 631.

SEAL.

On bond for sale of decedent's lands for debts, see "Executors and Administrators," §§ 39.

On tax deed, see "Taxation," § 107.

Use by public officer, see "Office and Officer," § 19.

Use on corporate contracts, see "Corporations," § 27.

SEARCHES AND SEIZURES.

Of intoxicating liquors, see "Intoxicating Liquors," §§ 43, 44.

(Mich.; 1895.)

Where a steam boiler exploded on the premises of relator, alleged to have been caused by the criminal negligence of the engineer, the court had no right, 10 days after the accident, to order the boiler and engine into the custody of the police, but not to be removed from the premises, to be used as evidence on the trial of the engineer for manslaughter. *McGrath, C. J., dissenting.*—*Newberry v. Carpenter (Mich.)* 65 N. W. 530.

SEASHORE.

See "Riparian Rights."

SECONDARY EVIDENCE.

See "Evidence," §§ 9-15.

SECRET TRUSTS.

See "Assignment for Benefit of Creditors," § 10; "Fraudulent Conveyances," § 9.

SECURITY.

For costs, see "Costs," §§ 16-19.

SEDUCTION.

I. CIVIL ACTION, §§ 1, 2.

II. CRIMINAL PROSECUTION, §§ 3-8.

As aggravating damages for breach of marriage promise, see "Breach of Marriage Promise," § 2.

I. CIVIL ACTION.

Joinder of count with one for alienating affections of spouse, see "Action," §§ 5-7.

§ 1. Who may sue.

[a] (Mich.; 1895.)

One who seduces an unmarried woman is not liable in damages to her affianced husband.—*Case v. Smith (Mich.)* 65 N. W. 279.

[b] (Minn.; 1894.)

Gen. St. 1878, c. 66, § 33, provides that "a father, or in case of his death, or desertion of his family, the mother, may prosecute as plaintiff for seduction of the daughter, * * * though the daughter is not living with or in the service of the plaintiff at the time of the seduction, or afterward, and there is no loss of service." *Held*, that a father may sue for the seduction of his adult daughter if his home is in fact her home, though she was seduced while employed elsewhere.—*Schmit v. Mitchell (Minn.)* 61 N. W. 140.

59 Minn. 251.

§ 2. Evidence.

[a] (Wis.; 1896.)

Evidence of the previous unchastity of the woman seduced is admissible in mitigation of damages.—*Stewart v. Smith (Wis.)* 65 N. W. 736.

92 Wis. 76.

[b] (Wis.; 1896.)

Evidence of a hackdriver that, prior to the alleged seduction by defendant, he had driven the woman, in company with a different man, around the town, without stopping anywhere, and with the hack curtains closed, was admissible to show prior unchastity.—*Stewart v. Smith (Wis.)* 65 N. W. 736.

92 Wis. 76.

[c] (Wis.; 1896.)

Evidence that the woman was seen to enter, in company with a dissolute woman, and at about the time of the alleged seduction, rooms kept by young men who did not live in the rooms or have any place of business there, was admissible to show unchastity.—*Stewart v. Smith (Wis.)* 65 N. W. 736.

92 Wis. 76.

[d] (Wis.; 1896.)

Where the woman testified that prior to the seduction, and as leading up to it, defendant took her out riding several times, and named a certain man as an eyewitness of the rides, such alleged eyewitness should be allowed to contradict the statement.—*Stewart v. Smith (Wis.)* 65 N. W. 736.

92 Wis. 76.

[e] (Wis.; 1896.)

In an action for seduction, where defendant admitted on cross-examination that he had paid a doctor for services to the woman during

confinement, he should be allowed, on redirect examination, to explain the admission.—*Stewart v. Smith* (Wis.) 65 N. W. 736.

92 Wis. 76.

II. CRIMINAL PROSECUTION.

§ 3. Indictment.

[a] (Iowa: 1896.)

An indictment under Code, § 3867, declaring a punishment "if any person seduce and debauch any unmarried woman of previous chaste character," may charge the offense in the words of the statute.—*State v. Whalen* (Iowa) 68 N. W. 554.

[b] (S. D.: 1897.)

The words "illicit connection," as used in the statute defining seduction under promise of marriage, are equivalent to "sexual intercourse."—*State v. King* (S. D.) 70 N. W. 1016.

§ 4. Evidence.

[a] (Iowa: 1895.)

The presumption of the previous chastity of prosecutrix is not overcome by testimony of defendant that he had intercourse with her one week before the act of seduction testified to by prosecutrix occurred, since it is immaterial on what date the seduction was consummated.—*State v. Bauerkemper* (Iowa) 64 N. W. 609.

[b] (Iowa: 1895.)

In a prosecution for seduction, alleged to have taken place in March, under promise of marriage, in which the state claimed that the intimacy between defendant and prosecutrix continued until June 12th or later, it was not error to admit evidence of the birth of a child February 28th following.—*State v. Wickliff* (Iowa) 64 N. W. 282.

[c] (Iowa: 1895.)

In a prosecution for seduction the court refused to allow defendant to ask prosecutrix the questions: "You kept company with J. prior to your keeping company with [defendant], did you not?" and "When did you cease keeping company with J., if you ever did?" *Held* proper, in the absence of any disclosure of the purpose of the inquiry.—*State v. Wickliff* (Iowa) 64 N. W. 282.

[d] (Iowa: 1896.)

That prosecutrix once agreed to accept a certain amount in settlement of her claims against defendant is immaterial on a prosecution for seduction.—*State v. Whalen* (Iowa) 68 N. W. 554.

[e] (S. D.: 1897.)

In a prosecution for seduction, an unsigned typewritten letter, inclosed in an envelope, addressed to the prosecutrix, and postmarked at a place where defendant was then staying, asking prosecutrix to go to that place, and be treated by a physician, was properly admitted; it appearing that she was then pregnant, that defendant had previously given her medicine to relieve her, that she told no one except him of her condition, and that, when she complied with the request in said letter, she was taken in charge by an intimate friend of defendant.—*State v. King* (S. D.) 70 N. W. 1046.

[f] (S. D.: 1897.)

In a prosecution for seduction, testimony as to defendant's bad reputation for chastity up to the time he was accused was properly received, though the crime was committed several months prior thereto.—*State v. King* (S. D.) 70 N. W. 1046.

§ 5. — Offer to marry.

[a] (Iowa: 1895.)

On trial for seduction, evidence that defendant, after learning that prosecutrix was pregnant, offered to marry her, can be considered only so far as it tends to show that the in-

tercourse was obtained under promise of marriage, or by acts leading her to believe that he would marry her if she submitted. *State v. Bauerkemper* (Iowa) 64 N. W. 609.

[b] (Iowa: 1896.)

The willingness of defendant to marry prosecutrix is admissible only on the question of whether she really was seduced, and in mitigation of punishment.—*State v. Whalen* (Iowa) 68 N. W. 554.

§ 6. — Corroboration of prosecutrix.

[a] (Iowa: 1895.)

The corroboration required by statute must be not only as to the debauching, but also as to the seductive arts.—*State v. Bauerkemper* (Iowa) 64 N. W. 609.

[b] (Iowa: 1895.)

The evidence of the prosecutrix on a trial for seduction, who testified as to the intercourse with defendant, was sufficiently corroborated by testimony that defendant frequently visited prosecutrix, and wrote love letters to her, hinting at marriage; that after the birth of the child he expressed his willingness to marry her; and that on the night of the seduction the light was extinguished in the room where defendant and prosecutrix were sitting.—*State v. Landerbeck* (Iowa) 65 N. W. 158.

[c] (S. D.: 1896.)

On trial for seduction it appeared that defendant first met the prosecuting witness late in the year 1894; that he frequently escorted her to places of public worship and social entertainments, and informed her that he was keeping company with no other young lady; that they had associated thus to the last of February, 1895, when accused temporarily left the state; that during his absence for five months the prosecuting witness had no other male attendant; and that upon his return to the state accused renewed his attentions, and soon afterwards accomplished her ruin. *Held*, that the corroborating evidence was sufficient to sustain the verdict that the offense was accomplished under a promise of marriage.—*State v. Ayers* (S. D.) 67 N. W. 611.

[d] (S. D.: 1897.)

Under Comp. Laws, § 7386, requiring the testimony of the prosecutrix in cases of seduction under promise of marriage to be corroborated by other evidence "tending to connect defendant with the commission of the offense," the testimony of the prosecutrix that such an offense was committed need not be corroborated.—*State v. King* (S. D.) 70 N. W. 1046.

§ 7. — Sufficiency.

[a] (Iowa: 1894.)

On a prosecution for seduction, the evidence showed that for a year prior to the commission of the alleged offense defendant scarcely saw prosecutrix, and that during such time she was contemplating marriage with another. The prosecutrix testified that defendant, who a year before had professed to love her, after dancing with her several times at a party, induced her to walk with him; that, while walking, they entered a corner room; that defendant again professed to love her, and attempted to raise her clothes; that, on her attempting to run from him, he caught her, and told her to "quit acting the fool," and that he "would be out and speak to the folks about joining the church and about having her"; that she then consented to the intercourse. On cross-examination she testified that she did "everything in her power to prevent him from doing it." When before the grand jury, she testified that he had, prior to that night, had intercourse with her. *Held*, that prosecutrix's testimony was too conflicting to warrant a conviction, though there was some other evidence slightly tending to connect defendant with the offense if it had been committed.—*State v. Bolierman* (Iowa) 61 N. W. 183.

92 Iowa, 460.

[b] (Iowa: 1895.)

The fact that a child was born within 238 days from the date of the alleged intercourse, or 258 days after the last catamenia, did not disprove the testimony of prosecutrix on a trial for seduction, where the evidence showed that a developed child may be born within 260 days from the last menstrual flow.—*State v. Lauderheck* (Iowa) 65 N. W. 158.

§ 8. Instructions.

[a] (Iowa: 1896.)

On a trial for seduction, a charge that if defendant induced prosecutrix to consent to sexual intercourse by representing to her, in substance, that there was nothing wrong in such an act between parties who are going to marry, that would be an artifice, within the meaning of the law, did not amount to a withdrawal of other competent evidence from consideration by the jury.—*State v. Garrity* (Iowa) 67 N. W. 92.

[b] (Iowa: 1896.)

Omission from an instruction defining seduction of a statement that the woman must have been unmarried, and of previous chaste character, is cured by statements of these facts in other parts of the charge.—*State v. Whalen* (Iowa) 68 N. W. 554.

SEISIN.

See "Adverse Possession."

SELF-DEFENSE.

See "Homicide," §§ 15, 16.

SENTENCE.

See "Criminal Law," §§ 183-191.

SEPARATE ESTATE.

Of wife, see "Husband and Wife," §§ 11-20.

SEPARATION.

Of husband and wife, see "Divorce"; "Husband and Wife," § 34.

Of jurors, see "Criminal Law," § 173.

Of witnesses, see "Criminal Law," § 69; "Trial," § 13.

SEPULTURE.

See "Cemeteries."

SERVANT.

See "Master and Servant."

SERVICE.

Of bond or undertaking on appeal, see "Appeal," § 64.

Of inventory of property attached, see "Attachment," § 27.

Of notice of appeal, see "Appeal," §§ 58, 59.

— of cross bill, see "Equity," § 57.

— of lien claim, see "Mechanics' Liens," §§ 22-24.

— of meeting of county board, see "Counties," § 26.

Of pleadings, see "Practice in Civil Cases," § 28.

Of process, see "Writs and Notice of Suits," §§ 3-19.

SERVICES.

Action by physician for services, see "Physicians and Surgeons," § 4.

— for work and labor, see "Assumpsit."

Exemption from claims for alimony of husband's income from professional services, see "Divorce," § 23.

Expert testimony as to value of legal services, see "Evidence," § 61.

Recovery on quantum meruit when express contract is within statute, see "Frauds, Statute of," § 29.

SERVITUDE.

See "Easements."

Imposing additional servitudes on streets, rights of abutting owners, see "Eminent Domain," § 26.

SET-OFF AND COUNTERCLAIM.

I. WHEN ALLOWABLE. §§ 1-10.

II. PLEADING AND PRACTICE, §§ 11-13.

Authority of agent to allow, see "Principal and Agent," § 8.

Election to plead defense or set-off, see "Pleading," § 38.

In action before justice, see "Justices of the Peace," § 20.

— by assignee, see "Assignment for Benefit of Creditors," § 41; "Insolvency," § 11.

— by state to compel county to levy state taxes, see "States and State Officers," § 20.

— for price of goods, see "Sale," § 64.

Of deposit against claim by assignee of bank, see "Banks and Banking," § 29.

— against debts due bank, see "Banks and Banking," § 13.

Of judgments, see "Judgment," § 82.

Protection of attorney's lien from set-off, see "Attorney and Client," § 23.

Recoupment in action for rent, see "Landlord and Tenant," § 50.

Time of filing counterclaim, see "Practice in Civil Cases," § 27.

When matter is res judicata, see "Judgment," § 43.

I. WHEN ALLOWABLE.

§ 1. In general.

[a] (Mich.: 1894.)

In trover to recover money which came into defendant's hands as attorney for plaintiff, defendant may set off his claim for services as such attorney in reduction of plaintiff's damages.—*Pierce v. Underwood* (Mich.) 61 N. W. 344.

103 Mich. 62.

[b] (Mich.: 1894.)

Where a husband, at the time of buying a decree of foreclosure of a mortgage on land owned by his wife, told her that he would pay off the mortgage, and hold the place for her, and that if the land increased in value any, and she wanted to sell it, she need pay him only what he expended, no agreement can be inferred that she was to pay him in cash without right of set-off, because at that time he was indebted to her.—*Moore v. Smith* (Mich.) 61 N. W. 538.

103 Mich. 387.

[c] (Mich.; 1895.)

In assumpsit for advances on logging contracts, defendant cannot set off items for cutting, hauling, and skidding a quantity of logs, amounting to a certain sum, where liens and attachments are filed against such logs for an amount exceeding defendant's charges.—*Backus v. Morrill* (Mich.) 65 N. W. 273.

[d] (Mich.; 1896.)

In replevin for property claimed under a chattel mortgage, an indebtedness due the mortgagee from the mortgagee cannot be set off against the mortgage debt.—*Finch v. Willard* (Mich.) 66 N. W. 42.

[e] (Minn.; 1896.)

A. and B. were two of five sureties on a joint and several bond to a county, executed that the principals, doing a banking business, might be designated a depository for county funds, under Gen. St. 1894, § 729 et seq. They were also indebted to the principals on a note, A. as principal, and B. as surety. While having county funds in their hands, the principals made an assignment for the benefit of their creditors, and the makers of the note then filed a petition showing that they had paid the county a certain sum, which was one-half the funds on deposit when the assignment was made, and praying that the payment might be set off against the note in the hands of the assignee in insolvency. *Held*, that B., being merely a surety on the note, was not entitled to the set-off.—*In re Smith* (Minn.) 68 N. W. 76; *Cosgrove v. McKassay*, *Id.*

[f] (Minn.; 1896.)

Under the rule that, when two or more sureties stand in the same relation to a principal, they must bear the burdens equally, A. was not entitled to an offset of more than one-fifth of the amount due the county on the bond.—*In re Smith* (Minn.) 68 N. W. 76; *Cosgrove v. McKassay*, *Id.*

[g] (Neb.; 1895.)

A cause of action arising on contract may be pleaded in set-off of an action for the recovery of damages.—*Jones v. Driscoll* (Neb.) 65 N. W. 194, 46 Neb. 575.

[h] (Neb.; 1896.)

In an action upon a supersedeas bond, against the principal and sureties thereon, a legal claim from the plaintiff to such principal may be pleaded as a set-off.—*Van Etten v. Kesters* (Neb.) 66 N. W. 1106.

48 Neb. 152.

§ 2. Claims not existing at commencement of action.

[a] (Iowa; 1895.)

A landlord, in an action for rent, sued out an attachment, and, upon its being quashed, filed an amended petition in equity for the foreclosure of the lien under the lease, as a mortgage. *Held*, that the filing of the amended petition was not the beginning of a new action, hence damages caused to defendant by the attachment could not be pleaded as a counterclaim, as they were not an existing cause of action at the time of the commencement of the suit, as required by Code, § 2659.—*Youngerman v. Long* (Iowa) 63 N. W. 674.

[b] (Minn.; 1895.)

A counterclaim is properly stricken out where it neither arose out of the transaction set forth in the complaint, nor existed at the commencement of the action.—*Fergus Printing & Pub. Co. v. Board of Com'rs of Otter Tail County* (Minn.) 62 N. W. 272.

60 Minn. 212.

[c] (S. D.; 1896.)

In an action on a duebill which plaintiff claimed was assigned to him by the payee, defendant pleaded as a counterclaim an account against such payee bearing date subsequent to the action; and there was no affirmative proof that such account existed, in favor of defendant or any other person, when suit was brought.

Held, that evidence of the account was properly excluded, under Comp. Laws, § 1915, which only authorizes demands "existing at the commencement of the action" to be counterclaimed.—*Kirby v. Jameson* (S. D.) 67 N. W. 851.

[d] (S. D.; 1897.)

In claim and delivery by the transferee of a note and chattel mortgage, defendant mortgagee could not set up as a counterclaim, under Comp. Laws, § 4915, damages for breach of warranty by the mortgagee as to the property for which the note was given.—*National Bank of Commerce v. Feecey* (S. D.) 70 N. W. 874.

§ 3. In equity.

(Neb.; 1895.)

The insolvency of the party against whom a set-off is claimed is a sufficient ground for a court of equity to allow it in cases not provided for by statute. *Thrall v. Hotel Co.* (1877) 5 Neb. 295, followed.—*Richardson v. Doty*, 62 N. W. 254, 41 Neb. 73.

§ 4. Claims arising out of contracts.

[a] (Mich.; 1895.)

Where the owner guaranteed and subsequently paid to a subcontractor the sum due him for plastering, included in the original contract, such owner was entitled to set off the sum so paid against the original contractor.—*Yeomans v. Parker* (Mich.) 63 N. W. 316.

105 Mich. 323.

[b] (Mich.; 1895.)

Where, on default of the contractor, the architect, acting for the owner, let to the lowest bidder the contract for the completion of a building, the owner was entitled to set off against the original contractor or any subcontractor the actual amount paid for the completion of the work.—*Yeomans v. Parker* (Mich.) 63 N. W. 316.

105 Mich. 323.

[c] (Mich.; 1895.)

In an action on a note given by the owner of a building in payment for materials furnished the contractor, in the absence of any warranty exacted from plaintiffs when the note was given or other contract in regard to the materials, defendant cannot recoup damages on the ground that the material furnished did not come up to the specifications in the building contract.—*Delbridge, Brooks & Fisher Co. v. Patterson* (Mich.) 63 N. W. 436.

105 Mich. 413.

[d] (Minn.; 1895.)

In an action to reform a mortgage for mutual mistake, an answer admitting the mistake, and alleging default in payment of the mortgage, and praying for foreclosure, constitutes a good counterclaim.—*Lahiff v. Hennepin County Catholic Building & Loan Ass'n* (Minn.) 63 N. W. 493.

61 Minn. 226.

[e] (Minn.; 1896.)

When lessees enter into and retain possession of premises under a lease providing that the landlord shall make improvements, after his failure to do so they may, in an action against them for the rent, recoup the damages resulting from the breach, or set them up as a counterclaim under Gen. St. 1895, § 5237, as a claim arising out of the contract in suit.—*Pioneer Press Co. v. Hutchinson* (Minn.) 65 N. W. 938.

63 Minn. 481.

[f] (Wis.; 1895.)

Where the lease authorizes the lessor to take the furniture of the lessee, and sell the same to satisfy unpaid rent, and also requires the lessor to keep the building in repair, in replevin by the lessor to recover possession of the furniture a counterclaim by the lessee for damages arising from failure of the lessor to keep the premises in repair is one arising out of the contract which is the foundation of the lessor's claim (Rev. St. § 2656, subd. 1), and is there-

fore properly allowed.—*Collins v. Morrison* (Wis.) 64 N. W. 1000, 91 Wis. 324.

§ 5. Same or independent transactions.

[a] (Minn.: 1895.)

Further allegations by defendant in an action to reform a mortgage that, after the execution of such mortgage, plaintiffs executed another mortgage on the same premises, and that default had been made in payment thereof, and seeking foreclosure, constitutes a good counterclaim, since it is connected with the subject of the action.—*Lahiff v. Hennepin County Catholic Building & Loan Ass'n*, 63 N. W. 493, 61 Minn. 226.

[b] (Neb.: 1894.)

A claim for an alleged libelous publication concerning the husband cannot be set off, in an action to foreclose a mortgage given by him and his wife on the latter's separate land, as one arising from the "transaction set forth in the petition," within Code, § 101.—*Watts v. Gantt*, 61 N. W. 104, 42 Neb. 869.

[c] (Neb.: 1895.)

In an action upon an attachment undertaking, a claim due the principal in such bond from plaintiff is a proper subject of set-off.—*Field v. Maxwell* (Neb.) 63 N. W. 62, 44 Neb. 900.

[d] (S. D.: 1896.)

In an action to foreclose a mortgage on land given to secure a note, a counterclaim alleged that, at the time the note was given, defendant executed to plaintiff a chattel mortgage as security for the note; that thereafter, before filing it, plaintiff materially altered it, without the consent of defendant; that thereafter plaintiff, pretending to foreclose the altered mortgage, unlawfully took the chattels and converted them, defendant knowing nothing of the alteration till plaintiff had disposed of the chattels. *Held*, that the cause of action set out in the counterclaim arose out of the transaction set out in the complaint, or was connected with the subject of the action.—*McHard v. Williams* (S. D.) 66 N. W. 930.

§ 6. Assigned claims.

[a] (Mich.: 1895.)

Where a corporation holds the book accounts of another corporation under a naked assignment, a set-off due by the assignor to a debtor is available to the debtor against the assignee only to the extent of the assigned debt.—*Pabst Brewing Co. v. Lueders* (Mich.) 64 N. W. 872.

[b] (Neb.: 1894.)

On a foreclosure by the assignee for the benefit of creditors of a mortgage owned by his assignor, an insolvent bank, a purchaser from the mortgagor may set off an indebtedness due him from the bank on a certificate of deposit, though the certificate was originally issued to a third person.—*Salladin v. Mitchell* (Neb.) 61 N. W. 127, 42 Neb. 859.

[c] (Wis.: 1895.)

A private banker closed his bank, and after six days made a voluntary assignment. Plaintiff, whose note to the assignor became due prior to the assignment, between the day of closing and the day of assignment purchased certificates of deposit issued by the assignor. *Held*, that under Rev. St. § 4258, authorizing one sued on a note by an assignee after maturity to set off against the same a contract demand against the assignor which he holds as assignee, in good faith, before notice of assignment, if the demand be such as might have been set off against the assignor while the note belonged to him, the certificate should be a set-off against his note.—*Johnston v. Humphrey* (Wis.) 64 N. W. 317, 91 Wis. 76.

§ 7. Unliquidated claims.

(Mich.: 1895.)

Defendant, having bought coal of plaintiff, and not having rescinded the contract and returned the coal on discovering its defective

quality, but having thereafter paid for it, cannot, in an action on a subsequent transaction, set off the overpayment on account of such defects: his claim being for unliquidated damages, for which he must bring an action on the contract.—*Shipman v. Coryell* (Mich.) 63 N. W. 410, 105 Mich. 395.

§ 8. Joint and separate debts.

(Minn.: 1895.)

In an action against one partner on an individual obligation given for a partnership debt, defendant may avail himself of any recompense available to the partners in a suit on the debt against them.—*McKinnon v. Palen* (Minn.) 64 N. W. 387, 62 Minn. 188.

§ 9. Against insolvent.

[a] (Minn.: 1895.)

The debtor of an insolvent bank, which has assigned for the benefit of creditors, cannot set off against his debt a check drawn in his favor by a depositor, before the failure of the bank, but which had not been presented for payment.—*Northern Trust Co. v. Rogers* (Minn.) 62 N. W. 273, 60 Minn. 208.

[b] (Minn.: 1895.)

A debtor who purchased a claim against his creditor, knowing him to be insolvent, could not set off the same in a subsequent action by the creditor's assignee in insolvency.—*Northern Trust Co. v. Healy* (Minn.) 63 N. W. 625, 61 Minn. 230.

§ 10. Of usury.

[a] (Mich.: 1896.)

The amount of usurious payments cannot be set off against a debt arising out of a subsequent and distinct transaction between the parties.—*Pinch v. Willard* (Mich.) 66 N. W. 42.

[b] (Neb.: 1895.)

Usurious interest paid a national bank on a note cannot be applied by way of set-off in an action by the bank on the note for the principal sum due.—*Norfolk Nat. Bank v. Schwenk*, 64 N. W. 1073, 46 Neb. 381.

See, also, "Usury," § 18.

II. PLEADING AND PRACTICE.

§ 11. Sufficiency of pleading.

[a] (N. D.: 1894.)

The sufficiency of the facts alleged in the answer to constitute a counterclaim can be questioned only by demurrer to the answer, rather than by an objection to the admission of evidence thereunder.—*First Nat. Bank v. Laughlin* (N. D.) 61 N. W. 473, 4 N. D. 391.

[b] (N. D.: 1894.)

In an action on a note alleged by defendant to be void because of having been materially altered after delivery, the further allegation that defendant had previously paid plaintiff another note similarly altered does not constitute a counterclaim, in the absence of an allegation that the note paid was given without consideration.—*First Nat. Bank v. Laughlin* (N. D.) 61 N. W. 473, 4 N. D. 391.

[c] (Wis.: 1896.)

In an action on a note given for part of the purchase price of a stallion, an answer setting up, as defensive matter, that plaintiff made fraudulent misrepresentations as to the condition of the stallion, and further alleging that defendant, answering by way of counterclaim, says that he lost in his time and expenses, in his effort to use the stallion for breeding, \$400, in consequence of the fraudulent misrepresentations of plaintiff, and demanding that the note be canceled, and that defendant have \$400 for damages, does not

sufficiently set up a counterclaim.—*Rood v. Taft* (Wis.) 69 N. W. 183.

§ 12. Reply.

(N. D.; 1895.)

An answer in an action on a promissory note given in payment for a machine, which alleged that the machine was sold with a warranty, and set up a breach thereof, and damages, for which defendant demanded judgment, contained matter constituting a counterclaim, and which required a reply.—*Heebner v. Shepard* (N. D.) 63 N. W. 892.

5 N. D. 56.

§ 13. Pleading and proof.

[a] (S. D.; 1895.)

A counterclaim alleging that plaintiff is indebted to defendant is not supported by evidence of a debt from plaintiff's assignor.—*Ander-son v. Alseth* (S. D.) 62 N. W. 435.

6 S. D. 566.

[b] (Wis.; 1896.)

On a counterclaim founded on tort as for deceit, recovery cannot be had for breach of warranty.—*Rood v. Taft* (Wis.) 69 N. W. 183.

SETTLEMENT.

See "Accord and Satisfaction"; "Compromise"; "Payment"; "Release and Discharge."

By executors and administrators, see "Executors and Administrators," §§ 27-32.

By guardian, see "Guardian and Ward," §§ 7-11.

Of accounts between old and new counties, see "Counties," § 7.

— by county officers, see "Counties," § 22.

Of bill of exceptions, see "Exceptions. Bill of," §§ 3, 4.

Of case on appeal, see "Appeal," § 130.

SEVERABLE CONTRACTS.

See "Sale," § 14.

SEVERANCE.

Of defendants, see "Trial," § 1.

SEWERS.

Liability of city for defects, see "Municipal Corporations," §§ 102-108.

SHAM PLEADINGS.

See "Pleading," §§ 33, 36.

SHARES.

Of stock in corporation, see "Corporations," §§ 44-62.

SHERIFFS AND CONSTABLES.

I. COMPENSATION. §§ 1-5.

II. POWERS, DUTIES, AND LIABILITIES. §§ 6-12.

III. BONDS, §§ 13, 14.

IV. DEPUTIES, §§ 15, 16.

See, also, "Jail and Jailer."

Conclusiveness of return of process, see "Writs and Notice of Suits," § 22.

Deed to property sold under execution, see "Execution," § 27.

— under mortgage, see "Mortgages," § 89.

Election of constable in city, see "Municipal Corporations," § 42.

Indemnity of sheriff, see "Indemnity," § 2.

Limitation of actions against, see "Limitation of Actions," § 6.

Officers in charge of jury, see "Criminal Law," § 172.

Service of process, see "Writs and Notice of Suits," § 11.

I. COMPENSATION.

Of deputy, see post, § 16.

Fees for maintaining prisoner, see "Jail and Jailer."

Of town marshal, see "Municipal Corporations," § 48.

§ 1. Time of fixing salary.

(Wis.; 1895.)

Saub. & B. Ann. St. § 694, as amended by Laws 1885, c. 260, provides that the county board, at its annual meeting in November, shall fix the salary of every county officer who is to be elected during the ensuing year, and who is entitled to a salary from the county treasury. Saub. & B. Ann. St. § 694a (Laws 1881, c. 53), provides that the county board may by resolution make the sheriff a salaried officer, and that, when such resolution shall have been passed, it shall be the duty of the county board, at its next annual meeting in November, to fix the salary of the sheriff in the same manner as salaries are fixed for other county officers under said section 694. *Held*, that such salary must be fixed at the meeting prior to the election of the sheriff. Newman, J., dissenting.—*State v. McClure* (Wis.) 64 N. W. 992, 91 Wis. 313.

§ 2. Attendance on court.

(Neb.; 1895.)

A sheriff or constable is not entitled to fees for attendance during the trial of a civil case before a justice of the peace.—*Kissinger v. Staley* (Neb.) 63 N. W. 55.

44 Neb. 783.

§ 3. For collecting judgment.

(Iowa; 1895.)

Where, before property which has been levied on and advertised for sale is sold by the sheriff, the debtor pays into court the amount of the judgment and costs, and the execution is recalled, the sheriff is not entitled to fees for "collecting" the judgment given by Acts 19th Gen. Assem. c. 94, § 9.—*Nordyke-Marmon Co. v. Jones* (Iowa) 61 N. W. 1085.

93 Iowa, 705.

§ 4. Taking insane person to hospital.

(Neb.; 1896.)

Comp. St. c. 40, § 50, providing that, for conveying insane patients to the hospital, the sheriff shall receive "mileage the same as allowed in other cases," refers to chapter 28, § 5, allowing sheriffs five cents as "travelling expenses for each mile actually and necessarily travelled," and not to chapter 86, § 33, allowing 10 cents per mile for conveying prisoners to the penitentiary. *Porter v. Merrick County* (1894) 60 N. W. 588, 42 Neb. 397, followed.—*Smith v. Franklin County*, 68 N. W. 381.

§ 5. Expense of caring for property in custody.

(Neb.; 1896.)

An officer who levied on stock and standing corn should be allowed as compensation the amount incurred by him in having the corn husked in order to preserve it, and in taking care of the stock, and hiring help therefor.—

William Deering & Co. v. Wisherd (Neb.) 65 N. W. 788, 46 Neb. 720.

II. POWERS, DUTIES, AND LIABILITIES.

Liability for acts of deputy, see post, § 15.

§ 6. In general.

[a] (Iowa; 1896.)

A sheriff is not liable for the negligence of a receptor to whom he has delivered the attached property by direction of plaintiff in the attachment.—*Citizens' Nat. Bank v. Loomis* (Iowa) 69 N. W. 443.

[b] (Iowa; 1896.)

Where a sheriff, to his return on a writ issued in a landlord's attachment, annexed a receipt of a third person for the property attached, he can show by parol that the property was delivered to such third person by the direction of the attorney of the plaintiff in the attachment.—*Citizens' Nat. Bank v. Loomis* (Iowa) 69 N. W. 443.

[c] (Iowa; 1896.)

A sheriff's return showing that he holds the attached property subject to the order of the court is not contradicted by evidence that the property is held by a receptor under the direction of the creditor.—*Citizens' Nat. Bank v. Loomis* (Iowa) 69 N. W. 443.

[d] (Wis.; 1896.)

Where property held by a constable under attachments is seized and taken from his possession by the sheriff under another attachment, and is sold by order of the circuit court, and in a subsequent action against the sheriff for its conversion the constable is awarded from the proceeds the full amount of all valid liens held by him, he has no further interest in such proceeds, and cannot further litigate the validity of the attachment under which the sheriff acted.—*Magnire v. Bolen* (Wis.) 68 N. W. 408.

§ 7. Trespasser ab initio.

(Mich.; 1895.)

Under How. Ann. St. § 7998, providing that property attached shall remain in the hands of the officer unless a bond for release thereof be given, an officer who, without an order and before judgment, sells part of the property, and permits the balance to be taken beyond the jurisdiction of the court, is a trespasser ab initio, and liable for conversion.—*Terry v. Metevier* (Mich.) 62 N. W. 164.

104 Mich. 50.

§ 8. Liability for wrongful search, levy, and sale.

[a] (Iowa; 1897.)

In replevin by a mortgagee against a sheriff who admitted taking certain goods in attachment against the mortgagor, but denied any knowledge of plaintiff's rights, evidence that the mortgage was voluntary, and void as to the mortgagor's creditors, was not admissible under the issues tendered.—*J. V. Farwell Co. v. Zenor* (Iowa) 69 N. W. 1030.

[b] (Minn.; 1895.)

Even though, by reason of irregularities and omissions, the tax proceedings are in fact void, if the distress warrant is regular on its face it protects the officer executing it in a reasonable manner; and neither replevin, trover, nor trespass will lie against him for taking the property, subject to levy, of the person against whom the tax is assessed, in executing such warrant.—*C. N. Nelson Lumber Co. v. McKinnon* (Minn.) 63 N. W. 630.

61 Minn. 219.

[c] (Minn.; 1895.)

Defendant, in an action for wrongful seizure of property under execution wherein the judgment debtor's name was misstated, can-

not justify under such execution until the judgment and all proceedings are amended in a direct action for that purpose.—*Casper v. Klippen* (Minn.) 63 N. W. 737.

61 Minn. 353.

[d] (Neb.; 1896.)

Where an officer makes a levy upon personal property, and the debtor files under oath the inventory required by Code Civ. Proc. § 522, and the officer neglects or refuses to cause the property to be appraised, but proceeds to sell it to satisfy his writ, he is thereby guilty of the conversion of the property, though the averments in the affidavit attached to the inventory were false.—*Daley v. Peters* (Neb.) 66 N. W. 862.

47 Neb. 848.

[e] (Neb.; 1896.)

In an action of replevin against a constable who held the property under a writ of attachment, his rights depend upon the attachment, and he cannot justify on the ground that the attachment plaintiff had an independent lien upon the property prior to the attachment.—*Houck v. Linn* (Neb.) 66 N. W. 1103.

48 Neb. 227.

§ 9. — Notice of ownership.

(Iowa; 1896.)

Under McClain's Code, § 4195, protecting an officer from liability for a levy on property belonging to a third person unless such person gives notice of his ownership, stating the nature of his interest, how acquired, and for what consideration, a notice to the sheriff by the claimant of property taken under attachment, which fails to state the source of claimant's interest, or the consideration paid, is insufficient to charge the officer.—*Bradley v. Miller* (Iowa) 69 N. W. 426.

§ 10. — Levy under void judgment.

(Iowa; 1895.)

A constable will be protected in levying execution under a void judgment, unless the levy was made with intent to oppress the execution defendant.—*Thompson v. Jackson* (Iowa) 61 N. W. 1004.

93 Iowa, 376.

§ 11. Action for wrongful seizure—Evidence.

[a] (Neb.; 1895.)

In an action against an officer for selling property in execution of a judgment in attachment after the filing by the debtor of his inventory and affidavit of exemption, provided by Comp. St. § 522, such inventory and affidavit are admissible as evidence of the facts therein stated.—*Smith v. Johnson* (Neb.) 62 N. W. 217.

43 Neb. 754.

[b] (S. D.; 1896.)

Where an officer justifies the seizure of goods under a writ of attachment valid on its face, the recitals of indebtedness in the affidavit, or in the complaint annexed and made a part thereof, are prima facie evidence of such indebtedness.—*Howard v. Dwight* (S. D.) 66 N. W. 935.

[c] (S. D.; 1896.)

In an action against a sheriff for conversion by wrongful attachment, a disclosure in the attachment suit by a witness since deceased is not admissible against the sheriff, where he was not a party to the attachment suit.—*Smith v. Hawley* (S. D.) 66 N. W. 942.

§ 12. — Damages.

[a] (Mich.; 1895.)

In an action for the illegal seizure of property on execution, an offer to apply the amount obtained for the property at the execution sale on the execution judgment cannot be pleaded in mitigation of damages.—*Isaac v. McLean* (Mich.) 64 N. W. 2.

[51] (Minn.; 1895.)

In an action by a merchant for wrongful seizure of part of his stock in trade, by reason of which he was compelled to discontinue business and sell the balance of his stock for less than its value, the loss resulting from the sale of such balance, or from the deprivation of future profits, could not be recovered as damages.—*Casper v. Klippen* (Minn.) 63 N. W. 737.

61 Minn. 553.

III. BONDS.**§ 13. Liability of sureties.****[a] (Minn.; 1895.)**

The sureties on a sheriff's bond conditioned for the faithful performance of the duties of the office are liable for the wrongful attachment of exempt property and the sheriff's refusal to release the seller on the debtor's demand.—*Hursey v. Marty* (Minn.) 63 N. W. 1090.

61 Minn. 430.

[b] (Neb.; 1895.)

Where a constable, with execution against one person, seizes the property of another, he is guilty of official misconduct, for which he and his sureties are liable in an action on his official bond.—*Thomas v. Markmann* (Neb.) 62 N. W. 206, 43 Neb. 823.

§ 14. Action on bond.**[a] (Mich.; 1895.)**

Under How. Ann. St. § 6988, providing that, if a constable neglects to pay over money collected on execution, the party in whose favor the execution was issued, or who "shall be entitled" to the money, may recover the amount in assumpsit on the constable's bond, the assignee of the judgment creditor's claim may sue on the bond.—*Montgomery v. Martin* (Mich.) 62 N. W. 578.

104 Mich. 390.

[b] (Wis.; 1895.)

Where a sheriff or his deputy takes the property of a stranger to the writ of attachment, the latter may at once sue on the sheriff's bond, without previous demand.—*Dishneau v. Newton*, 64 N. W. 879, 91 Wis. 199.

[c] (Wis.; 1895.)

Where, after a default by his deputy, a sheriff dies, an action may be brought against his sureties without joining the personal representatives of decedent.—*Dishneau v. Newton*, 64 N. W. 879, 91 Wis. 199.

[d] (Wis.; 1895.)

A complaint against the sureties on a sheriff's bond alleged that a writ of attachment was issued against the property of D., and delivered to and received by H. to be executed; that H., "while acting as deputy sheriff, * * * in the pretended exercise of his duty as such officer, and while pretending to act" under the writ, seized plaintiff's property. *Held*, that the complaint sufficiently showed that H., in taking plaintiff's property, acted under the writ, and stated a good cause of action.—*Dishneau v. Newton*, 64 N. W. 879, 91 Wis. 199.

IV. DEPUTIES.**§ 15. Liability for acts of deputy.****(Wis.; 1895.)**

Independent of any statute, an action will lie against a sheriff and his sureties for the wrongful act of his deputy in levying on the property of a stranger to the writ.—*Dishneau v. Newton*, 64 N. W. 879, 91 Wis. 199.

§ 16. Compensation.**[a] (Neb.; 1895.)**

Under Comp. St. 1895, § 3135, relating to the compensation of certain county officers

and their deputies, a sheriff of a county having over 25,000 inhabitants is not liable absolutely for the payment of his deputies' salaries, such salaries being payable out of fees earned and collected.—*Wolfe v. Kyd* (Neb.) 64 N. W. 968, 46 Neb. 292.

[b] (Neb.; 1895.)

Under Comp. St. 1895, § 3135, counties having over 25,000 inhabitants are entitled to one deputy sheriff, whose salary is \$900 per year, and such additional deputies as the county board may find necessary, whose time of employment and compensation, not to exceed \$700 per year, are to be fixed by the county board.—*Wolfe v. Kyd*, 61 N. W. 968, 46 Neb. 292.

[c] (S. D.; 1896.)

A custodian appointed by a sheriff to care for horses attached by him is entitled to a reasonable compensation for the care, feed, and stabling of the horses from the time of his appointment as custodian until notified of the release of the attachment.—*Lawrenson v. McDonald* (S. D.) 69 N. W. 586.

SHIPPING.

See, also, "Admiralty"; "Maritime Liens."

Regulation of interstate commerce, see "Constitutional Law," § 48.

[a] (Mich.; 1895.)

There being evidence that plaintiff's property was set on fire by sparks from defendant's steamer, which was not supplied with a fire screen, as required by statute, and that by the use of a certain kind of screen all dangerous sparks would be prevented from escaping, it was error to charge that, if a screen of the kind mentioned could have totally prevented the fire, and through failure to use it the fire was set, plaintiff could recover, but that, if the fire was set by the smaller sparks, there could be no recovery, since the statute required the injury to have been occasioned by a lack of the screen, and, if the screen did not prevent the escape of the smaller sparks, there would be no liability.—*Burrows v. Delta Transp. Co.* (Mich.) 64 N. W. 501.

[b] (Wis.; 1896.)

In an action by a stevedore against the owners of a vessel for injuries received by falling through a scuttle hole in the lower deck, which was uncovered, it appeared that plaintiff was working under the employ of a boss stevedore, who was unloading the vessel, which was laden with a cargo of stove-size coal, under contract with the consignee. It was customary, in loading a vessel with such coal, after the hold had been filled, to put on the hatches, leaving the scuttle holes open,—which were about 10 by 20 inches, and placed between the hatches,—so that the coal which was placed on the lower deck could run through into the hold; thereby allowing the cargo to trim itself, and also to allow the cargo, while it was being unloaded, to run towards the hatch from which it was being unloaded. The officers of the vessel opened and closed the hatches when requested by the stevedores. *Held*, that the evidence was insufficient to show that defendants were negligent in failing to cover the scuttle hole through which plaintiff fell.—*Kraeft v. Meyer* (Wis.) 65 N. W. 1032.

92 Wis. 252.

SIGNALS.

At crossings, see "Railroad Companies," §§ 32, 33. To avoid injury to persons on track, see "Railroad Companies," § 47.
—to stock, see "Railroad Companies," § 61.

SIGNATURES.

To memoranda required by statute of frauds, see "Frauds, Statute of," § 6.
To petition for change of county seat, see "Counties," § 12.
To will, see "Wills," § 11.

SILENCE.

Estoppel by, see "Estoppel," § 25.

SIMULATION.

See "Fraud."

SINKING FUNDS.

See "Municipal Corporations," § 184.

SLANDER.

See "Libel and Slander."

SOCIETIES.

See "Agricultural Societies"; "Associations"; "Benevolent Societies"; "Building and Loan Associations"; "Corporations"; "Religious Societies."

SOLDIERS' HOME.

See "Army and Navy."

SOLICITOR.

See "Attorney and Client."

SPECIAL.

Deposits in bank, see "Banks and Banking," § 15.
—rights after insolvency, see "Banks and Banking," § 28.
Indorsement, see "Negotiable Instruments," § 25.
Interrogatories and verdicts, see "Trial," §§ 103-118.
Laws, see "Constitutional Law," §§ 16-25.
—repeal by general laws, see "Statutes," § 28.
Privileges, see "Constitutional Law," § 26.
Proceedings, appealable orders, see "Appeal," §§ 19, 34.
Venire, see "Grand Jury," § 5; "Jury," § 12.
Warranty, see "Covenants," § 4.

SPECIFIC LEGACIES.

See "Wills," § 56.

SPECIFIC PERFORMANCE.

- I. JURISDICTION, § 1.
 - II. CONTRACTS ENFORCEABLE, §§ 2-6.
 - III. GOOD FAITH AND DILIGENCE, §§ 7-9.
 - IV. PLEADING AND PRACTICE, §§ 10-13.
- 4 N.W.DIG.—55

I. JURISDICTION.

Of probate court, see "Courts," § 21.

§ 1. Adequate remedy at law.

[a] (Minn.; 1895.)
An action does not lie for specific performance of a contract to purchase shares of stock, since their value can be definitely ascertained; and in such case an adequate remedy is provided by an action for damages.—Northern Trust Co. v. Markell (Minn.) 63 N. W. 735.
61 Minn. 271.

[b] (Wis.; 1896.)
Where a vendor of land sues to enforce a specific performance of an executory contract by the purchaser, although the substantial part of the relief asked is the recovery of money, and though he also asks the enforcement of a vendor's lien, the action is clearly triable in equity.—Gates v. Farmy (Wis.) 66 N. W. 253.
93 Wis. 294.

II. CONTRACTS ENFORCEABLE.**§ 2. In general.**

[a] (Iowa; 1896.)
Specific performance of a contract of sale, signed, in the name of the owner of the land, by another, will not be enforced, when no authority for such other to sign the contract was shown, and payments made under the contract were never received by such owner, and the contract price was inadequate, to the knowledge of all parties to the contract.—Coudon v. Osgood (Iowa) 65 N. W. 1003.

[b] (Mich.; 1895.)
A contract between father and son provided that the father would give the son a certain tract, of 69 acres, in case he would work the adjoining tract, of 120 acres, on shares, and furnish his father and mother, who had a homestead thereon, with wood and the necessities of life, and keep the place in repair. In case the son performed his part of the contract, the father contracted that after his death the son should have a deed "of the old homestead 120 acres." It was shown that the son moved on the 69-acre tract, and for 18 years, without objection or complaint from the father, worked the 120 acres on shares, kept the place in repair, and furnished the agreed necessities. *Held*, that the son was entitled to the absolute control of the 69-acre tract during his father's life, and at his death to specific performance of the contract to convey it, but that the contract to convey the 120 acres could be enforced only as to that part which could be severed from the homestead proper.—Engle v. White (Mich.) 62 N. W. 154.
104 Mich. 15.

[c] (Mich.; 1895.)
Where, under a contract to exchange real property, deeds were deposited in escrow, equity will decree a specific performance at the instance of a party who has performed the conditions on which the deeds were deposited.—Bowman v. Gork (Mich.) 63 N. W. 998.

[d] (Mich.; 1897.)
Equity has jurisdiction to specifically enforce an antenuptial contract.—Thompson v. Tucker-Osborn (Mich.) 69 N. W. 730.

§ 3. Certainty.

[a] (Mich.; 1897.)
An antenuptial contract with a woman without means, who had been the man's housekeeper, provided for her support from his estate, by providing a home and such amount monthly, quarterly, or yearly as would "enable her to live in comfort, and equal to such as she has heretofore enjoyed, and, in case of sickness, such added amount as may be necessary for care, medical attendance, and other

necessary expenditures," and at her death the expenses of the funeral and rites of burial. *Held* not so uncertain and indefinite that it could not be specifically enforced.—*Thompson v. Tucker-Osborn* (Mich.) 69 N. W. 730.

[b] (Minn.; 1891.)

A contract whereby defendant sold and agreed to convey a farm to plaintiff, and the latter agreed to purchase it, for \$2,000, to be paid out of the crops raised thereon, the market value of half of said crops to be paid on or before November 1st of each year, until the full amount of the purchase price was paid, with interest, is not too indefinite to support a decree for specific performance.—*Strandberg v. Rossman* (Minn.) 61 N. W. 675.

59 Minn. 509.

[c] (Wis.; 1895.)

Equity will not decree specific performance of an oral contract for the use of a ditch through defendants' land where the duration of the license is material and is in doubt.—*Thoenke v. Fiedler*, 64 N. W. 1039, 91 Wis. 386.

[d] (Wis.; 1897.)

A contract to convey land may be specifically enforced, though it be uncertain as to time, since the legal implication is that the conveyance was to be made within a reasonable time.—*Williamson v. Neeves* (Wis.) 69 N. W. 806.

§ 4. Sufficiency of vendor's title.

[a] (Wis.; 1896.)

In an action for specific performance, it is sufficient if a vendor is able to make title at any time before trial or decree.—*Gates v. Parnly* (Wis.) 66 N. W. 253.

93 Wis. 294.

[b] (Wis.; 1897.)

The fact that plaintiff did not have title to land when he made the contract to convey will not preclude a suit for specific performance, where he explained the condition of his interest at the time the contract was made, and obtained title before commencing action.—*Williamson v. Neeves* (Wis.) 69 N. W. 806.

§ 5. Parol contracts—Part performance.

[a] (Mich.; 1896.)

A parol contract by a husband with his wife, who was about to leave him, that she should take certain personal property of his, and that, in consideration, he should have the right to occupy for life certain rooms in the house they then occupied, title to which was in her, and that he should have the use of a grapery and barn on the rear of the premises, is taken out of the statute of frauds, so as to be entitled to specific performance; he having taken possession of the rooms, grapery, and barn, and abandoned possession of the other part, and she having left him in possession, and taken possession of the other part, and rented it, and taken the personal property.—*Sigler v. Sigler* (Mich.) 66 N. W. 489.

[b] (Wis.; 1895.)

Payment of part of the price, with payment of taxes, and a listing of the land with real-estate agents for sale, is not such part performance as will warrant specific performance of a parol agreement to convey land.—*Harney v. Burhans*, 64 N. W. 1031, 91 Wis. 348.

[c] (Wis.; 1896.)

Under a parol contract for the purchase of lands, part payment of the consideration, and delivery of possession of one of the parcels included in the contract, are sufficient to enable the purchaser to enforce a specific performance of the contract as to all the parcels.—*Bartz v. Paff* (Wis.) 69 N. W. 297.

§ 6. Against whom enforceable.

[a] (Iowa; 1896.)

Specific performance of a contract to convey land cannot be enforced against the vendor's wife, who was not a party to the contract.—*Venator v. Swenson* (Iowa) 69 N. W. 522.

[b] (Iowa; 1896.)

Nor against the vendor himself, if it appears that the agreement was made with the understanding that the wife would join in the conveyance, and she afterwards refused to do so.—*Venator v. Swenson* (Iowa) 69 N. W. 522.

III. GOOD FAITH AND DILIGENCE.

§ 7. Performance by complainant.

[a] (Iowa; 1897.)

A purchaser is not entitled to the specific enforcement of a contract to convey land, after his default in making payments, which, by the terms of the contract, operated as a forfeiture of all his rights thereunder, without proof of a waiver of such provision by the vendor.—*Foot v. Bush* (Iowa) 69 N. W. 874.

[b] (Mich.; 1896.)

Where the vendor in a contract for the sale of land fails to make the payments required by his contract, and takes no steps to enforce it after notice from the vendor that he had forfeited it, and permits a subsequent grantee to take possession of the land and make valuable improvements thereon, specific performance will not be enforced at the instance of the vendee.—*Cathro v. Gray* (Mich.) 66 N. W. 346.

§ 8. — Tender.

[a] (Neb.; 1897.)

Where time is not the essence of the contract a vendor who is unable to make title when he should convey may have specific performance by tendering good title at any time before decree, provided he has acted in good faith, and specific performance can be enforced without injustice to the vendee.—*Scaver v. Hall* (Neb.) 70 N. W. 373.

[b] (N. D.; 1895.)

Where plaintiff contracted to sell land to defendant, taking notes for the purchase price, and sued on the notes after having quitclaimed the land to another, who conveyed it to defendant, the action on the notes is in equity for specific performance, making it necessary for plaintiff to tender a conveyance to defendant.—*Shelly v. Mikkelsen* (N. D.) 63 N. W. 210.

5 N. D. 22.

§ 9. Laches of complainant.

[a] (Minn.; 1896.)

The complaint in an action for specific performance alleged that plaintiff, holding an executory contract for the purchase of land, refused to accept the conveyance tendered by defendant C., the vendor, because the title was not marketable, and the land was incumbered with the liens of certain judgments against a prior grantor, which were docketed before the conveyance by him to C.; that thereafter C. conveyed the land for value to defendant A., who took with notice of plaintiff's rights; and that the title had since improved by reason of the removal of some of said judgments, and the better financial condition of the judgment debtor. *Held*, that the change in the condition of the title did not excuse plaintiff's laches in delaying to bring his action for a year as against defendant A.—*Oliver Mining Co. v. Clark* (Minn.) 68 N. W. 23.

[b] (Neb.; 1896.)

Where a contract provided that a conveyance of land would be made upon payment of the price, together with an independent indebtedness due the vendor from the vendee, on or before a certain date, and time was made of the essence of the contract, the fact that the vendor, on the vendee's default, sued to recover the independent indebtedness, did not constitute a waiver of strict performance.—*Brown v. Ulrich* (Neb.) 67 N. W. 168.

48 Neb. 409.

[c] (Neb.; 1896.)

Parties to a contract for the sale of land may make time of its essence, by a distinct pro-

vision to that effect in the contract; and where they have done so a court of equity will refuse to enforce specific performance in favor of a party who has been in default, unless strict performance has been waived. *Morgan v. Bergen* (1874) 3 Neb. 209, followed.—*Brown v. Ulrich*, 67 N. W. 168, 48 Neb. 409.

[d] (Wis.: 1895.)

Where plaintiff, who had the right by parcel agreement to use a drainage ditch over defendants' land, acquiesced for 16 years in the closing thereof by defendants, specific performance is barred.—*Thoenke v. Fiedler* (Wis.) 64 N. W. 1030, 91 Wis. 386.

IV. PLEADING AND PRACTICE.

§ 10. Bill, complaint, or petition.

[a] (S. D.: 1896.)

An allegation in a complaint that the parties entered into a contract will be taken on demurrer to mean a legal contract, and one in writing, where that is essential to its validity.—*Sundback v. Gilbert* (S. D.) 66 N. W. 941.

[b] (S. D.: 1896.)

A complaint for the specific enforcement of a contract by which defendant agreed to convey certain land to plaintiff is not demurrable because it fails to describe other land which was to be conveyed by plaintiff to defendant in part payment, where it alleges that plaintiff has fully performed on his part.—*Sundback v. Gilbert* (S. D.) 66 N. W. 941.

§ 11. Sufficiency of evidence.

[a] (Iowa: 1896.)

Plaintiff offered defendants, husband and wife, \$1,000 for a lot. The husband subsequently, without his wife's knowledge, agreed to sell it to him for payment of a mortgage of \$600 on the lot, and for a cash payment the amount of which was disputed, and accepted \$10 as part payment, the balance to be paid on delivery of the deed. Plaintiff tendered the balance of cash, but defendants refused to convey, claiming the contract was not binding for want of the wife's consent, and tendered back the \$10 paid. Defendants subsequently conveyed to the intervenor, a bona fide purchaser, for \$1,000, who paid part of the consideration before, and part after, notice of plaintiff's contract. *Held*, that plaintiff was not entitled to specific performance.—*Zundelowitz v. Webster* (Iowa) 65 N. W. 835.

[b] (Mich.: 1895.)

Plaintiff procured a conveyance to defendant, his mother, of land, for \$1,300; she, by written contract, agreeing to convey to him on his paying her \$100 cash, and satisfying a mortgage of \$500 then on the land,—such consideration being in full satisfaction for its performance. The mother testified that she advanced \$620, and the son admitted that she advanced \$450, but claimed that it was a gift. The son took possession, and paid the taxes and interest on the mortgage for 11 years, during which time the mother never demanded principal or interest of the amount advanced. The son paid off the mortgage. *Held*, that on payment by him of \$100, with interest from the date of the contract, he was entitled to specific performance.—*Edwards v. Waghorn* (Mich.) 65 N. W. 549.

[c] (S. D.: 1896.)

Defendant authorized Y. to negotiate with plaintiff for the purchase of real estate, and he submitted to plaintiff a writing dictated by defendant, and signed, "Y., Agent for" defendant, offering to pay a certain amount for the property; plaintiff to furnish a complete abstract of title, "to be approved by me," showing the property clear of incumbrances or clouds; plaintiff to give possession on or before September 10th. Plaintiff accepted the offer,

and procured, and, at defendant's request, delivered for examination to defendant's attorney, an abstract, which was returned the evening of September 9th, though examination had been completed several days before, with numerous objections thereto, and further objections September 10th, with notice that, unless an abstract showing title free from all reasonable doubt was furnished that day, the offer would end. Y. approved of the abstract September 10th, and on the same day plaintiff presented to defendant the abstract and a deed, and offered to give possession that day, and forthwith to remove all objections to the abstract, and, at time of payment of purchase money, to discharge a mortgage, release of which plaintiff had ready to go on record, or to allow defendant to retain enough of the purchase price to satisfy all liens till the same were removed, which was to be done immediately, without cost to the defendant, as soon as the proper entries on the records and abstracts could be made. *Held*, that plaintiff was entitled to a decree for specific performance, requiring him, however, to furnish satisfactory title.—*Edmison v. Zborowski* (S. D.) 68 N. W. 288.

§ 12. Decree.

[a] (Iowa: 1895.)

Though a contract to convey provided that the vendee should have the rents for the current year, it was proper, in a suit for specific performance, to leave the question of rent undetermined, where no rents were due the vendee, and none asked for in the petition.—*Hession v. Linastruth* (Iowa) 65 N. W. 399.

[b] (Iowa: 1895.)

Though defendant's wife did not join in a contract to convey, it was proper, in a suit for specific performance, to protect plaintiffs against the inchoate rights of defendant's wife in the land, under a general prayer for equitable relief.—*Hession v. Linastruth* (Iowa) 65 N. W. 399.

[c] (Mich.: 1895.)

Plaintiff, the owner of a land contract, agreed with a builder that the latter should erect a house, take the land as security for payment for the house, pay off what remained due on the original purchase price, and reconvey after these amounts were repaid by complainant. The latter contract was afterwards assigned to defendant, who mortgaged the premises and erected a building not in substantial compliance with the contract. In a suit for specific performance, the court decreed that defendant remove the house and reconvey to plaintiff, after receiving the sums he had paid for taxes and on the purchase price, or that he accept complainant's offer of the house and a portion of the lot, and reconvey to her the remaining portion free from incumbrances. *Held*, that the positive requirement that defendant remove the building was inserted for his benefit, and might be waived, but that the decree was otherwise proper.—*Crawford v. Schneider* (Mich.) 64 N. W. 39.

[d] (Mich.: 1896.)

On a bill for specific performance of a contract to convey land, it appeared that, after complainant took possession, he contracted to sell the premises to one D., for an advanced price, defendant consenting to accept from D. the balance then due from complainant, which amounted to \$491, with interest at 10 per cent.; that, after D. had paid defendant \$100, defendant, intending no wrong, gave him a deed, and received \$400 more, which D. raised by mortgaging the land to a third person, who had no knowledge of complainant's rights. *Held*, that in canceling the deed to D., and decreeing specific performance of defendant's contract to convey to complainant, it would be inequitable to make defendant pay the mortgage, as he received no more than he was entitled to, and complainant suffered no substantial loss.—*Fontaine v. Leveque* (Mich.) 66 N. W. 575.

[*Mich.*; 1897.)

A decree in favor of a vendor for specific performance, providing that, on the vendee's default in payment of the price, the premises be sold, and judgment entered against him for the deficiency, is proper. — *Loveridge v. Shurtz* (*Mich.*) 70 N. W. 132.

§ 13. — Dismissal.

[*Mich.*; 1895.)

Where, in an action for specific performance, the evidence shows that the price has not been entirely paid or tendered, and the amount unpaid is determined, it is not error to dismiss the bill, instead of retaining it for an accounting. — *Sawtells v. Howard* (*Mich.*) 62 N. W. 156. 104 *Mich.* 54.

SPECULATIVE DAMAGES.

See "Damages," §§ 30, 32.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

SPRINGS.

See "Waters and Water Courses," § 13.

STALE DEMAND.

See "Equity," §§ 49, 50.

STARE DECISIS.

See "Courts," § 28.

STATE COURTS.

See "Courts," §§ 12-22.

STATE LEGISLATURE.

Authority as to management of university, see "Colleges and Universities."

Contracts to control legislative action, public policy, see "Contracts," § 22.

Division of governmental power as between legislative and judicial departments, see "Constitutional Law," §§ 5-7.

Duty to enact laws, see "Constitutional Law," § 64.

Eligibility of member to state office, see "States and State Officers," § 3.

Legislative divorce, see "Divorce," § 1.

— powers, see "Constitutional Law," §§ 10-15.

[*Minn.*; 1894.)

Gen. Laws 1893, c. 4, providing for the appointment of three persons to inspect the ballots on a contest for a legislative office, does not conflict with Const. art. 4, § 3, making each house the judge of the election of its own members.—*In re Election Contest* (*Minn.*) 61 N. W. 553; *State v. District Court Seventh Judicial District, Id.* 59 *Minn.* 489.

[*S. D.*; 1895.)

In case the legislature should fail to provide by law for the enumeration of the inhabitants of the state in the year 1895, as required by Const. art. 3, § 5, as a basis for the apportionment of senators and representatives, the existing apportionment would remain in force.—*In re State Census* (*S. D.*) 62 N. W. 129.

6 *S. D.* 540.

STATEMENT.

Of intention to contest election, see "Elections and Voters," § 27.

Of lien claim, see "Mechanics' Liens," § 31.

STATES AND STATE OFFICERS.

I. IN GENERAL, §§ 1, 2.

II. OFFICERS AND EMPLOYES, §§ 3-8.

III. LIABILITIES IN GENERAL, § 9.

IV. CONTRACTS, §§ 10-14.

V. FISCAL MANAGEMENT — ALLOWANCE AND PAYMENT OF CLAIMS, §§ 15-18.

VI. ACTIONS, §§ 19, 20.

See, also, "State Legislature."

Admission of territories, jurisdiction of state courts, see "Courts," §§ 10, 11.

Depositories of state funds, see "Depositories," §§ 1, 2.

Division of governmental powers, see "Constitutional Law," §§ 5-15.

Donation by county to state institution, see "Counties," § 37.

Jurisdiction of crimes committed on river forming boundary of states, see "Criminal Law," § 10.

Land titles derived from states, see "Public Lands," § 13.

State as party to action to try tax title, see "Taxation," § 114.

— courts, see "Courts," §§ 12-22.

Submission by governor of question to courts, see "Courts," § 7.

Tax accounts between county and state, see "Taxation," § 3.

I. IN GENERAL.

§ 1. Control of state institutions.

(*Neb.*; 1895.)

The institution for the blind at Nebraska City is one for "educational purposes," within Const. art. 5, § 19, which excepts such institutions of the state from the control of the board composed of the commissioner of public lands and buildings, the secretary, treasurer, and attorney general of the state.—*Curtis v. Allen*, 61 N. W. 568, 43 *Neb.* 184.

§ 2. Right of inmates of state institutions.

(*Neb.*; 1895.)

The mere fact that the inmates of the state institution for the blind at Nebraska City are poor and indigent does not entitle them to any privilege at the institution, except to receive an education, and incidentally such aid and support as thereby shall be rendered necessary; and they are not entitled, as of right, to be supported at the institution during vacation.—*Curtis v. Allen*, 61 N. W. 568, 43 *Neb.* 184.

II. OFFICERS AND EMPLOYES.

Ratification of unauthorized contract, see post, § 14.

Certiorari to state boards and officers, see "Certiorari," § 6.

Deposit of public moneys by state treasurer, see "Depositories," §§ 1, 2.

Hearing before secretary of state of objections to certificates of nomination, see "Elections and Voters," § 9.

Mandamus to state boards and officers, see "Mandamus," § 14.

§ 3. Eligibility of member of legislature to office—Resignation.

(Minn.: 1895.)

The disability imposed on senators and representatives by Const. art. 4, § 9, to hold any office under the authority of the United States or the state of Minnesota during the full period for which they are elected, is not removed by resignation.—*State v. Sutton* (Minn.) 65 N. W. 262.

63 Minn. 147.

§ 4. Appointment by governor.

[a] (S. D.: 1895.)

When a vacancy in a state office is filled by appointment of the governor under Const. art. 4, § 8, providing that when any office shall become vacant, and no mode is provided for filling the vacancy, the governor may fill the same by appointment, the appointment is for the unexpired term of the member whose place the appointment was made to fill.—*State v. Finnerud* (S. D.) 64 N. W. 121.

[b] (S. D.: 1895.)

Though Const. art. 14, § 3, provides that the state educational institutions shall be under the control of members appointed by the governor and confirmed by the senate, when a vacancy in the board of regents of education is filled by appointment by the governor under Const. art. 4, § 8, providing that when a vacancy in a state office shall occur, and no mode is provided for filling the same, the governor may fill the same by appointment, no confirmation of the appointment by the senate is required.—*State v. Finnerud* (S. D.) 64 N. W. 121.

§ 5. Powers of board of auditors—Compromise of claim.

(Mich.: 1895.)

A resolution of the legislature recited that excessive salaries had been paid state officers, due to the fact that acts increasing their salaries were unconstitutional, and that the board of state auditors were "authorized to ascertain the amount paid under said acts, and to inquire into the facts and circumstances thereof, and to make such a settlement with the several parties as shall, in the opinion of the board, be just and equitable in each case, and, if any sum be found due the state, said board of state auditors are hereby authorized and required to commence suit therefor." *Held*, that the board were not authorized to compromise with such officers, but to determine if the state had a just claim, and, if so, to sue thereon.—*Ellis v. Board of State Auditors* (Mich.) 65 N. W. 577.

§ 6. Liability of board of public lands.

(Neb.: 1896.)

Since, under Comp. St. c. 83, art. 4, § 2, the state treasurer is charged with the general duty of receiving and disbursing public funds, the chairman of the board of public lands and buildings is not chargeable on his official bond with money appropriated for the support of the penitentiary.—*State v. Holcomb* 65 N. W. 873, 46 Neb. 612.

§ 7. Duty of treasurer as to funds on expiration of office.

(Neb.: 1897.)

Where public funds are deposited and remain in a state depository at the termination of the office of a state treasurer, he need not withdraw them and physically deliver their possession to his successor.—*In re State Treasurer's Settlement* (Neb.) 70 N. W. 532.

§ 8. — Indictment for failure to turn over money to successor.

(S. D.: 1895.)

An indictment of a state treasurer, under Comp. Laws, § 6698, subd. 4, for refusing

to pay over state funds to his successor in office, which alleged that the officer making the demand on defendant for the funds was elected, and qualified on January 8th, on which day the demand was made, but failed to allege that the demand occurred after 12 o'clock m. of that day, at which time he became treasurer, alleged no offense.—*State v. Taylor* (S. D.) 64 N. W. 548.

III. LIABILITIES IN GENERAL.

Liability of state for costs of criminal prosecutions in unorganized counties, see "Costs," § 37.

§ 9. Goods furnished under unauthorized contract.

(S. D.: 1896.)

Where one plants trees on the grounds of the state agricultural college under a contract with the board of regents which it was not authorized to make, and no subsequent ratification is shown, the state is liable only for the reasonable value of the trees. 59 N. W. 1025, 5 S. D. 623 (1894) affirmed.—*Jewell Nursery Co. v. State*, 67 N. W. 629.

IV. CONTRACTS.

Liability for goods furnished under unauthorized contract, see ante, § 9.

Assignability of contract for state printing, see "Assignment," § 1.

§ 10. Building contract — Provision against claims of subcontractors.

(Neb.: 1896.)

A state officer entering into an agreement in behalf of the state for the erection or repair of state buildings may properly require the insertion of a condition in the contract and the contractor's bond that the contractor shall pay for all labor performed and material furnished him in completing the contract.—*Kauffmann v. Cooper*, 65 N. W. 796, 46 Neb. 644.

§ 11. For state printing—Rights of contractor.

[a] (S. D.: 1896.)

A person who has a contract to do state printing for one year commencing July 1, 1892, is entitled to print the auditor's annual report, which, by Laws 1891, c. 70, must be made to the governor by December following the ending of the fiscal year in June, even though the auditor let the contract to another prior to the end of the fiscal year.—*Carter v. State* (S. D.) 69 N. W. 593.

[b] (S. D.: 1896.)

It was the intention of the legislature, in passing Laws 1891, c. 99, providing for five classes of state printing to be let by the secretary of state, to have all the state printing done by contract; and a person who has a contract for the printing of the fifth class, which includes "printing of circulars and blanks for state officers, and all other printed matter not in pamphlet form, and not included in the foregoing classes," is entitled to do all printing not specifically designated in the other four classes.—*Carter v. State* (S. D.) 69 N. W. 593.

§ 12. Limitation of indebtedness.

[a] (S. D.: 1895.)

Appropriations from the assessed but uncollected revenues of the state, and the issuance of warrants in pursuance thereof to defray current expenses, is not the incurring of an indebtedness, within Const. art. 13, § 2, which provides that to make public improvements, or to meet extraordinary expenses, or deficits or failure in revenue, the state may contract debts never to exceed with previous debts, \$100,000, and no greater indebtedness shall be

incurred, except to repel invasion, suppress insurrection, or defend the state or United States in war.—In re State Warrants (S. D.) 62 N. W. 101.

G S. D. 518.

[b] (S. D.; 1895.)

Revenues of the state, assessed and in process of collection, are to be considered as constructively in the treasury, and may be appropriated and treated as though actually there.—In re State Warrants (S. D.) 62 N. W. 101.

G S. D. 518.

[c] (S. D.; 1895.)

The fact that warrants issued in anticipation of such assessed revenues draw interest does not make the issuance of the warrants an incurring of an indebtedness to the extent of such interest, within Const. art. 13, § 2, where such warrants, with respect to interest, are not different from other warrants which may properly be drawn and issued.—In re State Warrants (S. D.) 62 N. W. 101.

G S. D. 518.

[d] (S. D.; 1895.)

Const. art. 8, §§ 2, 13, provide that the state shall make good all losses to the perpetual school fund; and that losses caused by the defalcation or mismanagement of the officer controlling the fund shall be a permanent funded debt against the state, which shall not be counted a part of the indebtedness to which the state is limited by Const. art. 13, § 2.—In re State Bonds (S. D.) 63 N. W. 223.

[e] (S. D.; 1895.)

Act March 12, 1895, directing the issue and sale of state bonds to make good losses to the permanent school fund and to the interest and income funds, caused by the defalcation of the late state treasurer, is not repugnant to Const. art. 13, § 2, limiting the state's power to "contract debts."—In re State Bonds (S. D.) 63 N. W. 223.

§ 13. Bonds.

(S. D.; 1895.)

Const. art. 2, § 3, declares that no part of the permanent fund, "either principal or interest," shall be diverted from its purpose. *Held*, that the state must make good all losses to the interest and income funds as well as to the permanent fund, and for this purpose the legislature may authorize the issue of bonds.—In re State Bonds (S. D.) 63 N. W. 223.

§ 14. Ratification of unauthorized contract.

(S. D.; 1896.)

Where the board of regents entered into an unauthorized contract with plaintiff for the planting of trees on the grounds of the state agricultural college, the subsequent presentation of a memorial to the legislature, reciting plaintiff's claim, and the passage of a bill for the payment of such claim by one branch of the legislature only, was not a ratification of the contract.—Jewell Nursery Co. v. State (S. D.) 67 N. W. 629.

V. FISCAL MANAGEMENT—ALLOWANCE AND PAYMENT OF CLAIMS.

§ 15. Appropriations.

[a] (Neb.; 1896.)

Const. art. 3, § 19, provides that legislative appropriations for the expenses of government shall end with the expiration of the first fiscal quarter after adjournment of the next regular session. *Held*, the legislative sessions being biennial, Laws 1895, c. 1, expressly providing an appropriation for sugar bounties which is to endure for three years, is not valid as an appropriation for the period permitted by the constitution.—State v. Moore (Neb.) 69 N. W. 373.

[b] (Neb.; 1896.)

In view of Const. art. 3, § 22, declaring that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, the executive officers of the state have no power to pay sugar bounties earned under Laws 1895, c. 1, though the state be morally or legally bound to pay the same; no specific appropriation having been made therefor.—State v. Moore (Neb.) 69 N. W. 373.

[c] (S. D.; 1895.)

Laws 1895, c. 97, forbidding the state auditor to draw any warrant on the state treasurer without an appropriation in the exact amount for the specific purpose having been made, does not invalidate the appropriation made by Laws 1887, c. 53, for the use of fire companies, since the amount for which such warrant is required by the latter act to be drawn is exact in amount, being 2 per cent. of a definite sum appearing on the official books of the auditor.—State v. Hipple (S. D.) 64 N. W. 120.

§ 16. Sufficiency of voucher.

(Neb.; 1895.)

Sess. Laws 1895, c. 65, providing for a uniform system of vouchers for all disbursements of the state's funds, applies to claims against the state university.—State v. Moore 64 N. W. 975, 46 Neb. 373.

§ 17. Duty of auditor to draw warrants.

(Iowa; 1894.)

Under Code, § 120, providing that the executive council shall audit and certify "necessary and lawful expenses" incurred by the governor, "not otherwise provided for," and that "warrants drawn therefor" shall be paid by the state treasurer, it is the duty of the auditor to draw his warrant upon the treasurer for the payment of indebtedness incurred by the adjutant general for the sustenance and compensation of state troops ordered into service by the governor, when the accounts therefor shall have been audited and certified to him by such executive council.—Prime v. McCarthy (Iowa) 61 N. W. 220.

92 Iowa, 569.

§ 18. What tribunal to pass on claims.

(Iowa; 1894.)

The auditing and certifying to the state auditor of a claim against the state for indebtedness incurred by it to compensate state troops called into service by the governor to prevent breaches of the peace, under Acts 18th Gen. Assem. c. 74, § 4, are within the jurisdiction of the executive council, under Code, § 120, as amended by Acts 16th Gen. Assem. c. 142, § 8, providing that the executive council procure for various state officers certain specified articles "and any other thing necessary" for the proper and efficient performance of their duties, not otherwise provided for, and that such council audit the accounts for "such other necessary and lawful expenses," the auditing of which is not otherwise provided for.—Prime v. McCarthy (Iowa) 61 N. W. 220.

92 Iowa, 569.

VI. ACTIONS.

§ 19. Against state.

(S. D.; 1897.)

Where a person is, by a special act of the legislature, appointed a commissioner to revise the general laws of the state, and report a compilation of them to the next legislature, and the act makes no provision for his compensation, he has no right of action against the state for the same.—Harris v. State (S. D.) 69 N. W. 825.

§ 20. By state—Set-off.

(Mich.: 1895.)

In proceedings by the state to compel a county to levy and collect taxes due the state from a certain year the county cannot set off taxes paid to the state prior to that time in excess of the amount due, as the state cannot be sued.—Auditor General v. Board of Sup'rs of Bay County (Mich.) 64 N. W. 570.

STATUTE OF FRAUDS.

See "Frauds, Statute of."

STATUTE OF LIMITATIONS.

See "Limitation of Actions."

STATUTES.

- I. ENACTMENT AND APPROVAL, §§ 1-5.
- II. AMENDMENT, §§ 6-9.
- III. SUBJECTS AND TITLES OF ACTS, §§ 10-12.
- IV. CONSTRUCTION, OPERATION, AND EFFECT, §§ 13-23.
- V. REPEAL, §§ 24-33.
- VI. PLEADING AND PROOF, §§ 34, 35.

Contract in violation of statute, public policy, see "Contracts," § 15.

Curative acts, see "Constitutional Law," § 27.

—affecting foreign acknowledgments, see "Acknowledgment," § 5.

Judicial notice of public laws, see "Evidence," § 4.

Local and special acts, see "Constitutional Law," §§ 16-25.

Necessity of statute to jurisdiction on appeal, see "Appeal," § 2.

Reading statutes to jury, see "Trial," § 45.

I. ENACTMENT AND APPROVAL.

Duty of legislature to enact, see "Constitutional Law," § 64.

Enactment of ordinances, see "Municipal Corporations," §§ 22, 23.

§ 1. Enactment.

(Minn.: 1897.)

Laws 1889, c. 91, reducing the time for bringing an action to recover real estate from 20 to 15 years, was constitutionally passed.—Kelly v. Gallup (Minn.) 69 N. W. 812.

§ 2. Amendment pending enactment.

[a] (Mich.: 1895.)

Act March 15, 1895, amending the Detroit city charter, providing for a fund to be expended by the board of health for the remainder of that year, was not enacted in violation of Const. art. 4, § 28, prohibiting the introduction of bills after the first 50 days of the session, because an amendment thereto, which was germane to the purpose of the act, was introduced after the limitation had expired.—Davock v. Moore (Mich.) 63 N. W. 424.

105 Mich. 120.

[b] (Wis.: 1896.)

Where a bill as approved contains important clauses which the journals show were stricken out by amendment in the houses, it is invalid.—State v. Wendler (Wis.) 68 N. W. 759.

[c] (Wis.: 1896.)

Bill No. 258 S was passed after amendments, and, by mistake, two bills numbered 258

were sent to the governor, and approved. One was printed in Laws 1895 as chapter 221, on page 367, and the other as chapter 221, on page 397. The former chapter is invalid, because not the bill passed in either house. The latter does not contain the amendments to the original bill. *Held*, that the fact that the amendments were embodied in the former does not save the latter from invalidity, on account of its failure to contain them.—State v. Wendler (Wis.) 68 N. W. 759.

§ 3. Approval by executive.

(Mich.: 1895.)

Const. art. 4, § 14, provides that, if any bill be not returned by the governor within ten days after it has been presented to him, the same shall become a law in like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return, in which case it shall not become a law; and that the governor may approve and sign, within five days after the adjournment of the legislature, any act passed during the last five days of the session, and the same shall become a law. *Held*, that a bill passed previous to the last five days of the session, and signed by the governor after the adjournment of the legislature, became a law. Grant, J., dissenting.—City of Detroit v. Chapin (Mich.) 66 N. W. 587.

§ 4. Evidence—Journal entries.

(Minn.: 1896.)

Where the legislative journals show that a bill or bills of one title came before the legislature, sometimes designated as "H. F. No. 399," and sometimes as "H. F. No. 339," and it is conceded that if these numbers refer to the same bill the journals affirmatively show that the act in question was constitutionally passed, and it appears that only one bill of said title was introduced at that session of the legislature, and that the only one introduced was H. F. No. 399, and that H. F. No. 339 was on an entirely different subject, and was passed long before the passage of the act in question, the file number will be rejected as surplusage, and the bill *held* to have been constitutionally passed.—Miesen v. Canfield (Minn.) 67 N. W. 632.

64 Minn. 513.

§ 5. — Presumption.

[a] (Minn.: 1896.)

The presumption that a properly authenticated bill was passed in accordance with the constitution is not overcome by the failure of the legislative journals to show any fact which is not specifically required by the constitution to be entered therein.—Miesen v. Canfield (Minn.) 67 N. W. 632.

64 Minn. 513.

[b] (Wis.: 1896.)

It cannot be presumed, on a question of the enactment of bill No. 258 S (Laws 1895, p. 397, c. 221), that a reference in the assembly journal to bill No. 258 A, as having been passed, meant 258 S, and that the use of the letter "A" was a clerical error, where said journal shows that there was introduced in the assembly a bill known as "258 A."—State v. Wendler (Wis.) 68 N. W. 759.

II. AMENDMENT.

Pending enactment, see ante, § 2.

§ 6. Necessity of reference to act amended.

[a] (Neb.: 1896.)

Laws 1895, c. 71, providing for the appointment of a board of trustees in certain counties to construct and operate a canal, is invalid, as an attempt to amend the general corporation law without referring to its provisions.

—State v. Board of Com'rs of Douglas County (Neb.) 66 N. W. 434.
47 Neb. 428.

[b] (Neb.; 1897.)

The act of 1895, allowing persons outside the district to receive instruction at the high school, is an amendment of the previous act limiting that right to children residing within the district, and consequently is unconstitutional in not mentioning or describing the latter act. *Board of Education of Aurora v. Moses* (Neb.) 70 N. W. 946.

§ 7. By indirection.

(Mich.; 1895.)

2 How. Ann. St. § 5801, provided that, on a petition for the probate of a will, public notice of the hearing should be given by personal service on all persons interested, or by publication for three successive weeks. 3 How. Ann. St. § 6812, provided that, when any of the heirs are residents of a foreign country, notice shall be sent to a consul of such foreign nation at least 60 days before such day of hearing. *Held*, that section 6812 is not in conflict with section 5801, and does not necessarily amend it so as to violate the constitutional prohibition of an amendment by indirection.—*Rice v. Hosking* (Mich.) 63 N. W. 311.

105 Mich. 303.

§ 8. Title of amending act.

[a] (Minn.; 1896.)

When an act purports to amend any part of the General Statutes of 1878, its title is sufficient if it would be so if such statutes were an original enactment, and hence Gen. Laws 1885, c. 53, entitled "An act to amend section 36 of chapter 73 of the General Statutes of 1878, relating to the testimony of witnesses," is not repugnant to Const. art. 4, § 27.—*Hall v. Leland* (Minn.) 66 N. W. 202.

64 Minn. 71.

[b] (Neb.; 1896.)

Act Feb. 27, 1879, entitled "An act to amend chapter 13, Revised Statutes of 1866, entitled 'Courts'" (section 49), is unconstitutional in amending Act Feb. 19, 1877, § 5, without referring in its title to said section or act, and without repealing said section.—*Morgan v. State* (Neb.) 67 N. W. 780.

48 Neb. 798.

§ 9. By reference to title only—Setting forth sections referred to.

[a] (Neb.; 1896.)

Since it is only when the act is incomplete in itself, and manifestly amendatory of some existing statute to which it does not refer, that it is within the inhibition of Const. art. 3, § 11, providing that no law shall be amended unless the new act contain the section or sections so amended, and such section or sections are repealed, Act March 30, 1891 (Laws 1891, c. 33), authorizing the organization of mutual insurance companies, being complete in itself, does not violate that provision.—*State v. Moore* (Neb.) 67 N. W. 876.

48 Neb. 870.

[b] (Neb.; 1896.)

Since an amendatory act is not unconstitutional because of an apparent confusion in its application to the statute sought to be amended, if the intention of the legislature is not doubtful, and the amendment is consistent with the title and subject-matter of the original law, Act March 10, 1885 (Laws 1885, p. 162, c. 20), amending Act March 1, 1879, § 69, providing for the organization, government, and powers of cities and villages, is not invalid, though an act had been passed March 2, 1885, with an emergency clause, amending a subdivision of said section 69.—*State v. Kearney* (Neb.) 68 N. W. 533.

[c] (Neb.; 1896.)

Since Const. art. 3, § 11, providing that no law shall be amended unless the new act contains the section or sections amended, does not require the amendment of a subdivision of a section of a designated statute to set forth the entire section as amended, Act March 2, 1885 (Laws 1885, p. 161, c. 19), amending Comp. St. c. 14, § 69, subd. 1, does not conflict therewith.—*State v. City of Kearney* (Neb.) 68 N. W. 533.

[d] (Neb.; 1897.)

The "Depository Law," providing for the deposit of public money by the state treasurer in legally constituted depositories for public funds, is not amendatory of Comp. St. c. 83, art. 4, § 2, subd. 8, relating to duties of the state treasurer, and is therefore not unconstitutional, as not containing the latter section.—*In re State Treasurer's Settlement* (Neb.) 70 N. W. 532.

[e] (Neb.; 1897.)

Chapter 46, Sess. Laws 1891, relating to public schools, is complete in itself, and hence need not comply with Const. art. 3, § 11, requiring an amendatory act to set out the sections amended.—*Affholder v. State* (Neb.) 70 N. W. 544.

III. SUBJECTS AND TITLES OF ACTS.

Amendment by reference to title, see ante, § 9.

Title of amending act, see ante, § 8.

§ 10. Expression of subject in title.

[a] (Mich.; 1895.)

The act "to establish and provide justices' courts in the city of Detroit, and to repeal Act No. 280 of the Local Acts of 1883 entitled 'An act relative to justices' courts in the city of Detroit,'" is not repugnant to Const. art. 4, § 20, declaring that "no law shall embrace more than one object, which shall be expressed in its title"; the one general object expressed in the title being to establish and provide justices' courts in the said city, and all the provisions of the act being germane to that object.—*Messenger v. Teagan* (Mich.) 64 N. W. 499; *Engel v. Donovan*, *Id.*

[b] (Mich.; 1895.)

Act No. 183, Pub. Acts 1881, entitled "An act to compel steam vessels * * * to provide fire screens for smokestacks, and to provide a penalty for its violation," does not contravene Const. art. 4, § 20, providing that "no law shall embrace more than one object, which shall be expressed in its title," though it provides for recovery of damages occasioned by neglect to provide such screens; the term "penalty" being broad enough to include this.—*Burrows v. Delta Transp. Co.* (Mich.) 64 N. W. 501.

[c] (Mich.; 1895.)

Pub. Acts 1885, No. 169, entitled "An act to amend How. St. § 915, relative to compensation of state troops," and providing that their compensation shall be paid by the county sending the requisition, is not unconstitutional in that the title of the act does not cover the provisions thereof.—*Auditor General v. Board of Sup'rs of Bay County* (Mich.) 64 N. W. 570.

[d] (Mich.; 1895.)

The provision of Pub. Acts 1895, Act No. 200, § 2, forbidding any person to "use any pound, trap, stake, gill, or set nets or seines or any device of any kind for taking fish in any of the tributaries of Saginaw river," is covered by the title, "An act for the protection of fish in the Saginaw river and its tributaries, and to repeal act number thirty-one of the Public Acts of 1893."—*In re Yell* (Mich.) 65 N. W. 97.

[e] (Mich.; 1895.)

Pub. Acts 1889, No. 99 (3 How. Ann. St. § 9314d), entitled "An act to provide for the punishment of crimes in certain cases," which makes it a felony to take indecent liberties with

male children, is in violation of Const. art. 4, § 20, requiring the object of an act to be expressed in the title.—*In re Snyder* (Mich.) 65 N. W. 562.

[f] (Mich.: 1896.)

§ 3 How. Ann. St. § 6222, providing that "any clergyman or magistrate who shall join together in marriage parties who have not delivered to him a properly issued license * * * shall be adjudged guilty of a misdemeanor," is within the title of the act, which is "An act for the requiring a civil license in order to marry and for due registration of the same, and to provide a penalty for the violation of the same."—*People v. McGlaughlin* (Mich.) 66 N. W. 385.

[g] (Mich.: 1896.)

Local Acts 1893, No. 306, was entitled "An act relative to justice courts of the city of Grand Rapids, to reduce the number thereof and to fix the compensation of such justices and provide a clerk and offices thereof." By Local Acts 1895, No. 274, entitled "An act to amend an act entitled, 'An act relating to justice courts in the city of Grand Rapids * * *'" etc., justices of the peace in the city of Grand Rapids were given exclusive jurisdiction of actions between residents of the city within the limits of a justice's jurisdiction. *Held*, that the amendatory provision was sufficiently expressed in the title of the act, under Const. art. 4, § 20, requiring that a statute shall contain but one object, which shall be expressed in its title.—*Soukup v. Van Dyke* (Mich.) 67 N. W. 911.

[h] (Mich.: 1896.)

Pub. Acts 1893, No. 186, was entitled "An act to amend section 1 of Act No. 159, Session Laws of 1891, entitled 'An act to regulate the taking and catching of fish in the inland waters of this state.'" The title of the act amended contained the word "lakes," instead of "waters," and the object of the amendment was to extend the law of 1891 to inland waters other than lakes. The title of the bill upon which the act of 1893 was passed also correctly used the word "lakes." *Held*, that the act of 1893 was unconstitutional, in that its object did not appear in the title.—*Fish v. Stockdale* (Mich.) 69 N. W. 92.

[i] (Mich.: 1896.)

Local Acts 1893, p. 1270, tit. 10, § 14, declaring that the city council of Lansing shall afford fire and police protection to state property, and care for the streets, walks, and sewers adjacent to such property, and that the state shall pay the city such sum as would, in the judgment of the city assessor, be lawfully assessable for like purposes against property generally in said city, violates Const. art. 4, § 20, in that no such object is expressed in its title, "An act to reincorporate the city of Lansing, * * * and to repeal all acts and parts of acts in conflict therewith." *Hooker and Montgomery, J.L.*, dissenting.—*City of Lansing v. Board of State Auditors* (Mich.) 69 N. W. 723.

[j] (Mich.: 1897.)

A charter amendment requiring an action against the city for negligent injury to be commenced within a year, and written notice of the injury to be given the city's law department within three months, may be added, where the original act is entitled "An act to provide a charter for the city of D., and to repeal all acts and parts of acts in conflict therewith."—*City of Detroit v. Donovan* (Mich.) 70 N. W. 891.

[k] (Minn.: 1895.)

Sp. Laws 1881, c. 76, entitled "An act to amend and consolidate the charter of the city of Minneapolis," and providing that, on conviction by the municipal court of that city for the violation of an ordinance relating to the exercise of a license issued by the council, the court may, and on a second conviction shall, revoke the license, in addition to the penalties provided by law and by ordinance for such vio-

lation, is not in conflict with Const. art. 4, § 27.—*State v. Anderson* (Minn.) 65 N. W. 265. 63 Minn. 208.

[l] (Minn.: 1895.)

Const. art. 4, § 27, providing that the subject of a law shall be expressed in its title, does not apply to the action of the legislature proposing a constitutional amendment.—*Julius v. Callahan* (Minn.) 65 N. W. 267. 63 Minn. 154.

[m] (Minn.: 1896.)

Laws 1893, c. 124 (Gen. St. 1894, § 2171), entitled "An act for the preservation, propagation, and protection of the game and fish of the state of Minnesota," in making it a misdemeanor for any person to have in his possession, within said state, any game or fish which has been captured in or shipped out of any other state or country in violation of the laws thereof, conflicts with Const. art. 4, § 27.—*State v. Chapel* (Minn.) 65 N. W. 940. 63 Minn. 535.

[n] (Minn.: 1896.)

Gen. Laws 1878, c. 53, entitled "An act providing for the foreclosure of mortgages by advertisement," does not contain a subject which is not expressed in its title, in that it provides, in section 24, for a penalty to enforce fidelity on the part of the mortgagee in foreclosing the mortgage and accounting for the proceeds of the sale.—*Lynott v. Dickerman* (Minn.) 67 N. W. 1143.

[o] (Minn.: 1896.)

Laws 1872, c. 87, entitled "An act to change the county lines of Otter Tail county," which detaches from Wilkin county certain townships which it attaches to Otter Tail county, sufficiently expresses its subject in its title.—*In re Section No. Six, Township One Hundred and Thirty-Four* (Minn.) 68 N. W. 323; *State v. Honerud*, *Id.*

[p] (Minn.: 1897.)

The title of Laws 1893, c. 143,—"to provide for the creation and organization of new counties and government of the same,"—is sufficient to cover the provisions therein for changing the boundaries of organized counties, the temporary location of the seats of new counties, the organization of towns and school districts therein, and the division of the indebtedness of the old counties from which new counties are created between such old and new counties.—*State v. Board of Com'rs* (Minn.) 69 N. W. 1083.

[q] (Neb.: 1895.)

Act April 6, 1891, entitled "An act to amend section 136 and section 139 of chapter 16, Comp. St. 1889, and to repeal said original sections," is not unconstitutional on the ground that the subject-matter of the portion of the act which makes its provisions operative as to actions pending or accrued is not expressed in the title.—*Kleckner v. Turk* (Neb.) 63 N. W. 469.

45 Neb. 176.

[r] (Neb.: 1895.)

Act March 27, 1889, entitled "An act to provide for water rights and irrigation, and to regulate the use of water for agriculture and manufacturing purposes" and providing for the acquisition by irrigation companies of rights of way for canals and ditches, is not in conflict with Const. art. 3, § 11, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title.—*Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.* (Neb.) 64 N. W. 343, 45 Neb. 884.

[s] (Neb.: 1895.)

Act 1895, amending Act 1887, incorporating cities of the metropolitan class, and defining, regulating, and prescribing their powers of government, does not, in authorizing the removal of officers of the appointing board of fire and police commissioners, render the act in conflict with Const. art. 3, § 11, providing that no bill shall contain more than one subject, which shall be

clearly expressed in its title.—*State v. Bemis* 64 N. W. 348, 45 Neb. 724.

[c] (Neb.; 1896.)

Act 1895, entitled "An act to annul a contract between the state of Nebraska and D., alleged assignee of M., for leasing the penitentiary, penitentiary grounds, and convict labor of the state," and providing, in section 5, for the leasing of the convict labor until the last day of the next session of the legislature, is in conflict with Const. art. 3, § 11.—*State v. Holcomb*, 65 N. W. 873, 46 Neb. 612.

[d] (Neb.; 1896.)

The title of Laws 1895, c. 71, purported to confer on certain counties power to construct, own, and operate canals, and to acquire right of way, and for the appointment of a board of trustees to carry the provisions into effect. The act provided for the appointment of a board of trustees, and that in this board should be vested the power to construct and operate such canal, and such board might, in its own name, acquire right of way even by condemnation proceedings. *Held*, that the subject was not expressed in its title, as required by Const. art. 3, § 11.—*State v. Board of Com'rs of Douglas County* (Neb.) 66 N. W. 434, 47 Neb. 428.

[v] (Neb.; 1896.)

Act March 31, 1887, entitled "An act to amend section 55 of the Code of Civil Procedure in regard to lis pendens and to repeal said original section," in so far as it makes a lis pendens constructive notice of such action to the holders of liens or conveyances executed prior to the filing of such lis pendens, is unconstitutional, as failing to express its subject in its title.—*Sheasley v. Keens* (Neb.) 66 N. W. 1010, 48 Neb. 57.

[w] (Neb.; 1896.)

Act March 30, 1891 (Laws 1891, c. 33), entitled "An act to authorize the organization of mutual insurance companies," has but one general object, which is fairly expressed in its title.—*State v. Moore* (Neb.) 67 N. W. 876, 48 Neb. 870.

[x] (Neb.; 1896.)

Laws 1887, p. 662, c. 107, entitled "An act to amend section one of an act to amend sections one, two, and three of an act entitled 'An act to prohibit the catching of game fish in certain cases,'" in so far as it requires persons erecting or maintaining milldams to keep suitable fishways around the dams, fails to express its subject in its title, and is accordingly in so far invalid.—*West Point Water-Power & Land Imp. Co. v. State* (Neb.) 68 N. W. 507.

[y] (Neb.; 1896.)

Where an act has been passed complete in itself, the legislature may, under the title of an act to amend such act, substitute another law of similar complete character; and so long as its provisions are germane to the title and subject of the act amended, it may be valid, although it may operate incidentally to modify other statutes.—*Henry v. Ward* (Neb.) 68 N. W. 518.

[z] (Neb.; 1897.)

The title of Sess. Laws 1879, p. 82,—"An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,'"—was broad enough to cover a provision for a stenographic reporter for each district court, and for his compensation.—*State v. Moore* (Neb.) 70 N. W. 56.

[zz] (Neb.; 1897.)

The term "text book" as used in the title of Sess. Laws 1891, c. 46, requiring school districts to furnish text books for the children, is broad enough to include all apparatus and appliances proper for use in the schools.—*Affholder v. State* (Neb.) 70 N. W. 544.

§ 11. — Liquor legislation.

[a] (Iowa; 1895.)

That the act may be in effect a license law does not render it invalid, it being called by another name in both the title and the act itself.—*State v. Forkner* (Iowa) 62 N. W. 772.

[b] (Iowa; 1895.)

The subject is sufficiently expressed in the title of Acts 25th Gen. Assem. c. 62 ("Mule Law"), entitled "An act to tax the traffic in intoxicating liquors and to regulate and control the same," the body of which authorizes a tax of \$600 against the seller of liquors and owner of the property, and the levy of additional taxes when deemed necessary for further regulating the traffic, and provides that the act shall not be construed as a license, or as legalizing the business, nor as protecting the wrongdoer from any penalty provided for by existing laws, except as otherwise provided therein, and requiring the payer of the tax to file with the county auditor the written consent of a majority of the resident voters.—*State v. Forkner* (Iowa) 62 N. W. 772.

§ 12. Plurality of subjects.

[a] (Mich.; 1896.)

3 How. Ann. St. §§ 6222a-6222k, inclusive, entitled "An act for the requiring a civil license in order to marry, and the due registration of the same, and to provide a penalty for the violation of the same," is not in violation of Const. art. 4, § 20.—*People v. McGlaughlin* (Mich.) 66 N. W. 385.

[b] (Minn.; 1891.)

Laws 1893, c. 206, entitled "An act to authorize reassessments for local improvements by cities and to legalize certain of such assessments," is not repugnant to Const. art. 4, § 27, as embracing more than one subject.—*In re City of Duluth*, 61 N. W. 678, 59 Minn. 522; *Reynolds v. City of Duluth, Id.*; *In re Piedmont Ave. East, Id.*; *Scoville v. City of Duluth, Id.*

[c] (Minn.; 1896.)

Laws 1885, c. 184 (Gen. St. 1894, § 3312), entitled "An act to provide for the incorporation and regulation of co-operative or assessment life, endowment, and casualty insurance associations and societies," does not include more than one subject, in that it provides that the money to be paid by such associations under their policies or certificates shall be exempt from execution.—*First Nat. Bank v. How* (Minn.) 67 N. W. 994.

[d] (Neb.; 1895.)

Laws 1895, c. 28, entitled "An act to provide for township organization, to divide counties under township organization into supervisor districts, to determine the rights, powers and liabilities of towns, the duties and compensation of the officers thereof, and to provide for the election of town officers, and for the election of supervisors and the terms of office of supervisors to be elected and chosen in the several supervisor districts into which the county is to be divided when governed by township organization," embracing the whole subject of township organization, but not affecting counties, except in regard to the construction of boards of supervisors, is not in conflict with Const. art. 3, § 11.—*Van Horn v. State*, 64 N. W. 365, 46 Neb. 62.

[e] (S. D.; 1896.)

Laws 1895, c. 64, authorizing the several courts of the state "to hear, try and determine prosecutions upon information, for crimes, misdemeanors and offenses" theretofore triable on indictment only, embraces but a single subject, and is not in violation of Const. art. 3, § 21, which provides that "no law shall embrace more than one subject, which shall be expressed in the title."—*State v. Ayers* (S. D.) 67 N. W. 611.

IV. CONSTRUCTION, OPERATION, AND EFFECT.

Extraterritorial force of penal laws, see "Conduct of Laws," § 1.

Retrospective and ex post facto laws, see "Constitutional Law," §§ 27, 28.

—effect of statute relating to fraudulent conveyances, see "Fraudulent Conveyances," § 10.

§ 13. General rules of construction.

(a) (Mich.; 1895.)

Act No. 183, Pub. Acts 1881, is not repugnant in its terms, because, while the title is an act to compel steam vessels to provide fire screens for smokestacks, the body of the act provides that "all vessels" using wood for fuel shall have fire screens attached to their smokestacks.—*Burrows v. Delta Transp. Co.* (Mich.) 64 N. W. 501.

(b) (Mich.; 1896.)

§ 3 How. Ann. St. § 5187, known as the "Teachers' Institute Law," provides that all boards or officers authorized to examine applicants for certificates as teachers shall collect from each male applicant for a certificate an annual fee of \$1, and each female applicant an annual fee of 50 cents, and the director and secretary of any school board that shall employ any teacher who has not paid the fee shall collect at the time of making contract such fee, and that all persons paying such fee shall be given a receipt for the same, and no person shall be required to pay said fee more than once in any school year. The law also provides that the money thus derived shall be expended towards defraying the expense of holding teachers' institutes. *Held*, that section 5187 is not defective, incomplete, and ineffectual, and therefore void.—*Hammond v. School Board of City of Muskegon* (Mich.) 67 N. W. 973.

(c) (Neb.; 1895.)

When two independent statutes are not necessarily in conflict, the later one will not be construed as creating an exception to the operation of the earlier.—*Lingonner v. Ambler* (Neb.) 62 N. W. 486.

44 Neb. 316.

(d) (Neb.; 1896.)

Where language similar to that contained in a statute has previously been used in other acts, and has received a practical interpretation by the legislative and executive departments of the government, the presumption is that the language was used in the later act in view of such construction.—*State v. Moore* (Neb.) 69 N. W. 373.

(e) (Wis.; 1896.)

The fact that the insurance commissioners of the state, charged with the execution of the statutes regulating the fees to be paid by foreign insurance companies, have uniformly failed to correctly apply such statutes in the case of a certain company, does not constitute a practical construction of such statutes, contrary to their plain provisions, which is binding on the courts.—*Travellers' Ins. Co. v. Fricke* (Wis.) 68 N. W. 958.

§ 14. Certainty.

(a) (Neb.; 1897.)

A statute is not void for uncertainty because it prescribes as a punishment the same punishment which is prescribed for doing another named act, when the same Code defines the latter act and prescribes its punishment.—*Davis v. State* (Neb.) 70 N. W. 984.

(b) (Neb.; 1897.)

Crim. Code, § 93, making the displacement of a railway track a felony, and containing the proviso that if such displacement occasion death the person displacing the fixtures shall be guilty of murder in the first degree, second degree, or manslaughter, is not void for uncertainty because such degrees are not defined in the proviso.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 15. Statutes adopted from another state.

[a] Where the legislature adopts a statute of another state, the judicial construction which obtains in such state is also adopted.

—(Neb.; 1895) *Coffield v. State*, 62 N. W. 875, 44 Neb. 417;

(Wis.; 1896) *Pomeroy v. Pomeroy*, 67 N. W. 430, 93 Wis. 262.

(b) (Neb.; 1896.)

When the legislature adopts a statute of another state, it also adopts the construction which has been placed on that statute by the highest court of such state.—*Forrester v. Kearney Nat. Bank* (Neb.) 68 N. W. 1059.

(c) (S. D.; 1896.)

The chapters on guaranty (Comp. Laws, §§ 4293-4296) and suretyship (sections 4297-4320) are to be construed in the light of the distinction that a surety "enters into the contract primarily for the benefit of the debtor," while with the guarantor "the benefit of the principal debtor is no part of the inducement to him to contract"; since the commissioners, in preparing the Civil Code for New York (which was never adopted in that state), made such distinction in their notes to section 1558 thereof, defining a surety, of which Comp. Laws, § 4297, is a copy.—*Bailey Loan Co. v. Seward* (S. D.) 69 N. W. 58.

§ 16. Proviso.

(Neb.; 1895.)

Laws 1895, c. 28, relating to township organization, provides, in section 4, that the balance of a county which contains city districts having two supervisors shall be divided into three supervisor districts, but the proviso of that section requires that the territory outside of the city districts shall be divided so as to create seven districts, including such city districts. *Held*, that the proviso controlled as to the number of districts.—*Van Horn v. State* 64 N. W. 365, 46 Neb. 62.

§ 17. Correcting clerical mistakes.

(Neb.; 1895.)

Act March 27, 1889, art. 2, § 8, provides that "if" any irrigation company may acquire a right of way for the construction of its canals. *Held*, that the word "if" should be disregarded in construing the section.—*Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.* (Neb.) 64 N. W. 343, 45 Neb. 884.

§ 18. Effect of partial invalidity.

(a) (Mich.; 1897.)

Pub. Acts 1895, No. 181, authorizes proceedings in the nature of proceedings for discovery, gives testimony taken under the act the force of evidence, and confers on the judge at chambers and the circuit court commissioners, before whom a party must be examined, the judicial power to determine what is relevant to the issue. *Held*, that the unconstitutionality of the last provision renders the whole act void.—*Mulhern v. Grove* (Mich.) 70 N. W. 15.

(b) (Minn.; 1896.)

While the language of Gen. St. 1894, § 2680, is broad enough to authorize a city to divert lands held in trust for a specific use to another and inconsistent one, and the language of St. Paul Ordinance 286 may be equally broad, it does not follow that either is void in toto, since the operation of the statute may be restricted by construction to a grant of authority to municipalities to grant such rights in public grounds as the legislature itself might have granted, and the ordinance, although too broad, will be valid to the extent of such granted rights as the city was authorized to grant.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.* (Minn.) 68 N. W. 458.

63 Minn. 350.

[c] (Neb.: 1896.)

Conceding that the eleventh section of Act March 30, 1891 (Laws 1891, c. 33), relating to mutual insurance companies, which provides for the adjustment of loss by arbitrators, is unconstitutional, as ousting courts of their constitutional jurisdiction, and hence void, the remainder of the act is not thereby vitiated, since said section is separable and distinct from the remainder.—*State v. Moore* (Neb.) 67 N. W. 876.

48 Neb. 870.

[d] (Neb.: 1897.)

Where a part of an act amending a former act is unconstitutional because it fails to describe it, and such part of an act is the inducement for the passage of the remainder of such act, the entire act is unconstitutional.—*Board of Education of City of Aurora v. Moses* (Neb.) 70 N. W. 916.

[e] (N. D.: 1896.)

Rev. Codes, §§ 1738-1743, attempting to tax persons engaged in the occupation of offering for sale by samples goods to be shipped from another state, being void as to nonresidents, is void as to all others, since it cannot be assumed that the legislature would have discriminated against the business interests of the state by imposing burdens upon such interests which would not affect similar interests of nonresidents.—*State v. O'Connor* (N. D.) 67 N. W. 824.

5 N. D. 629.

[f] (Wis.: 1896.)

Laws 1895, c. 221, providing for the protection of game and fish, though unconstitutional, as an ex post facto law, as affects acts prior to the passage of the act, is not unconstitutional as regards those after the passage of the act.—*Bittenhaus v. Johnston* (Wis.) 66 N. W. 805.

92 Wis. 588.

§ 19. Presumption of validity.

(Mich.: 1896.)

In determining the necessity of a legislative act for the public welfare, presumptions are in its favor, and validity will be given to the act, unless the courts find that the plain provisions of the constitution are thereby violated, or the act is not within the rule of necessity, in view of facts of which judicial notice may be taken.—*People v. Smith* (Mich.) 66 N. W. 382.

§ 20. Time of taking effect.

[a] (Neb.: 1895.)

Act 1895, amending Act 1887, incorporating cities of the metropolitan class, passed over the veto of the governor April 4th, in providing for the appointment of police commissioners within 30 days from its passage, refers to the time when it should take effect, under Const. art. 3, § 24, three months from the adjournment of the legislature.—*State v. Bemis* (Neb.) 64 N. W. 348, 45 Neb. 724.

[b] (N. D.: 1895.)

Laws 1893, c. 74, relating to the revision of the statutes and the publication of the same, and providing, in section 7, that, on delivery of the finished copies of the volume to the secretary of state, the governor shall proclaim the acceptance of the volume, and 30 days after the proclamation the statutes shall take effect, and thereafter be in force and be received as evidence of the laws of the state, fixed a date when the laws should go into effect, as well as when they should be received as evidence; and the alterations in additions thereto, except when otherwise provided, do not go into effect until the expiration of the 30 days from the proclamation.—*In re Hendricks* (N. D.) 64 N. W. 110. 5 N. D. 114.

§ 21. Uniform operation of general law.

(Iowa: 1895.)

The fact that Acts 23d Gen. Assem. c. 39, § 1, provides that the shares of capital stock

of state banks shall be assessed to the banks, and not to the individual shareholders, while Code, §§ 818, 819, provide that national bank stock shall be assessed as the personal property of the owner, does not render the same void, as in violation of Const. art. 1, § 6, providing that general laws shall have a uniform operation.—*Pringlar State Bank v. Ikerick* (Iowa) 64 N. W. 801.

§ 22. When statute is prospective or retrospective.

[a] (Mich.: 1895.)

Act March 14, 1895, prohibits the printing on the official ballot of the name of a candidate receiving the nomination of two or more parties in more than one column, and provides that, in case the candidate does not notify the election commissioners, within five days after his name has been certified to them as having been nominated by two or more parties, in the column of which party he wishes his name to be printed, the commissioners shall print his name in the column of the party first notifying them of his nomination. *Held*, that such act does not have a retrospective effect, so as to deprive a candidate of the right to have his name appear in the column of each party, where the time for making his election as to which column his name shall appear in had expired before the law went into effect.—*Todd v. Board of Election Com'rs of Kalamazoo, Calhoun, Branch, Eaton, and Hillsdale Counties* (Mich.) 62 N. W. 564. 104 Mich. 474.

[b] (Minn.: 1895.)

Gen. St. 1878, § 92, as amended by Gen. Laws 1889, c. 185, gave to the holder of a lien on a divided part of an entire tract of land sold for taxes a right to have the amount of the tax lien apportioned between the parts of the tract, and to redeem from the tax sale the part on which he held his said lien, by paying the amount of the tax lien so apportioned thereto; hence Gen. Laws 1893, c. 118 (Gen. St. 1894, § 1604), amending such section so as to provide a summary remedy to enforce such right, is not retroactive, though applied to a sale made prior thereto.—*Wade v. Drexel* (Minn.) 62 N. W. 261.

60 Minn. 164.

[c] (Minn.: 1895.)

Gen. St. 1894, § 1631, providing that, if any tax is prevented from being collected, the amount thereof shall be added to the tax for the current year, being purely remedial, applies to taxes levied and prevented from being collected prior, as well as subsequent, to its passage.—*Taxes in Hennepin County v. Baldwin* (Minn.) 65 N. W. 80.

62 Minn. 518.

[d] (Neb.: 1895.)

Laws 1893, c. 44, relating to the fixation in criminal cases of the penalty in the verdict, as approved April 8, 1893, contained no emergency clause, and provided that it should apply to all who commit crimes after its passage. *Held*, that the act did not apply to a crime committed before it went into effect.—*Walker v. State*, 64 N. W. 357, 46 Neb. 25.

[e] (Neb.: 1896.)

The clause of Laws 1895, c. 72, authorizing a county judge to allow a bill of exceptions embodying the evidence on a motion to discharge an attachment, whereby the act is made to apply to all cases pending at its passage, does not cure error in a judgment rendered prior to that event, on consideration of a bill of exceptions erroneously allowed by the county judge. *Altschuler v. Snyder*, 67 N. W. 869, 49 Neb. 22, followed.—*Weitz v. Walter A. Woods Reaping & Mowing Mach. Co.*, 68 N. W. 613.

[f] (Neb.: 1897.)

The provision of Act March 31, 1887, amending Comp. St. c. 14, art. 1, § 69, that a city of the second class or a village may provide for levying a tax, not exceeding seven mills on

the assessed valuation in any one year, "to pay for water furnished such city or village under contract," is not retrospective.—*State v. City of Kearney* (Neb.) 70 N. W. 255.

[g] (Neb.; 1897.)

Sess. Laws 1879, p. 156, providing for the collection of public money and funds, operates prospectively as well as retroactively.—*Melntosh v. Johnson* (Neb.) 70 N. W. 522.

[h] (N. D.; 1896.)

It is not in the power of the legislature to cure by retroactive legislation the defect in foreclosure proceedings arising from the failure to publish the notice of sale for the full period of 42 days, and thus validate the void proceedings; hence Act March 8, 1889 (Laws 1889, c. 38), is without that effect.—*Finlayson v. Peterson* (N. D.) 67 N. W. 953.

5 N. D. 587.

[i] (S. D.; 1895.)

Statutes will not be given a retroactive effect unless this intention is clearly expressed therein.—*American Inv. Co. of Emmetsburg, Iowa, v. Thayer* (S. D.) 63 N. W. 233.

[j] (S. D.; 1895.)

Laws 1893, c. 161, authorizing county treasurers to refund money received on invalid tax sales, does not apply to sales made before its passage.—*American Inv. Co. of Emmetsburg, Iowa, v. Thayer* (S. D.) 63 N. W. 233.

[k] (Wis.; 1895.)

Laws 1893, c. 286, does not change the amount of a license as previously established by the voters of a town at an election held under Sanb. & B. Ann. St. §§ 1548-1548c.—*McGuigan v. Town of Belmont* (Wis.) 62 N. W. 421, 89 Wis. 637.

[l] (Wis.; 1895.)

Laws 1889, c. 471, authorizing an action against both the municipality and an adjoining landowner for injuries caused by defective sidewalks, does not apply to injuries before the law took effect.—*Pife v. City of Oshkosh* (Wis.) 62 N. W. 541, 89 Wis. 540.

§ 23. — Application to pending suits.

[a] (Iowa; 1897.)

Acts 25th Gen. Assem. c. 96, providing that when a demurrer shall be overruled, and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer, being merely remedial, applies to rulings on demurrers made after the act went into effect, though the demurrers were filed before the passage of the act.—*Bibbins v. Polk County* (Iowa) 69 N. W. 1007.

[b] (Iowa; 1897.)

Acts 17th Gen. Assem. c. 132, authorizing any school district against which judgments have been rendered "prior to the passage of this act" to issue bonds in payment thereof, includes judgments rendered between the approval of the act and the time it took effect.—*Thompson v. Independent School Dist. of Allison and Jackson, in Lyon County* (Iowa) 70 N. W. 1093.

[c] (Mich.; 1896.)

Laws 1895, Act No. 186, increasing the period for settling a case, applies to actions then pending.—*Beebe v. Birkett* (Mich.) 65 N. W. 970.

[d] (Mich.; 1896.)

In the absence of a proviso to that effect, a law relating to procedure will not affect pending proceedings.—*Auditor General v. Chandler* (Mich.) 66 N. W. 482.

[e] (Neb.; 1896.)

The clause of Laws 1895, c. 72, authorizing a county judge to allow a bill of exceptions embodying the evidence on a motion to discharge an attachment, whereby the act is made to apply to all cases then pending, does not cure error in a judgment rendered prior to its passage on the consideration of a bill of

exceptions allowed by the county judge.—*Altshuler v. Snyder* (Neb.) 67 N. W. 869.

V. REPEAL.

Of liquor laws, see "Intoxicating Liquors," § 2.

§ 24. In general.

[a] (Neb.; 1897.)

The simultaneous repeal and re-enactment of the whole or a part of a statute, in terms or in substance, is an affirmance and not a repeal thereof.—*Stenberg v. State* (Neb.) 69 N. W. 849.

[b] (N. D.; 1896.)

The broad language of the repealing act which went into effect with the Revised Codes must be so limited by the obvious purpose of the new revenue law as to leave unaffected those portions of Laws 1890, c. 132, as relate to the office of district assessors in unorganized townships.—*State v. Moorhouse* (N. D.) 67 N. W. 140.

5 N. D. 406.

[c] (S. D.; 1895.)

Laws 1891, c. 94, relating to the assessment of damages for the taking of private property by "municipal or other corporations," does not apply to townships organized under the state laws, and hence does not repeal the provisions of Compiled Laws relating to the assessment of damages for the laying out of township highways.—*Town of Dell Rapids v. Irving* (S. D.) 64 N. W. 149.

§ 25. Express repeal of inconsistent and conflicting acts.

[a] (Mich.; 1895.)

Act No. 141, Laws 1877,—a general law applicable to all corporations, prescribing procedure for enforcing liability of stockholders,—is not repealed or in any way abrogated by Act No. 232, Laws 1885, declaring that stockholders of corporations "organized under this act shall be individually liable for all labor performed for such corporations, which said liability may be enforced against any stockholder by action founded on this statute"; the repealing clause referring merely to two other acts, and "all acts amendatory or supplemental" to them.—*Musselman v. Wright* (Mich.) 65 N. W. 569.

[b] (Neb.; 1895.)

Const. art. 3, § 11, provides that no law shall be amended unless the new act contains the section so amended, and that such amended section shall be repealed. Act 1887, incorporating cities of the metropolitan class (section 145), was amended in 1889 by the addition of a provision, and repealed, and in 1891 was further amended by the addition of another provision, and repealed as previously amended. *Held*, that Act 1895, entitled "An act to amend section 145 of 'An act incorporating cities of the metropolitan class,' * * * as subsequently amended," was a valid amendment of the original section 145; that section not having been repealed by the amendment of 1889 or 1891.—*State v. Bemis* 64 N. W. 348, 45 Neb. 724.

[c] (Neb.; 1895.)

Since Laws 1895, c. 28, embraces the whole subject of township organization and government, the fact that it does not expressly repeal all sections in conflict therewith does not render it repugnant to Const. art. 3, § 11, providing that no law shall be amended unless the new act contains the section or sections amended, and the section or sections amended shall be repealed.—*Van Horn v. State* (Neb.) 64 N. W. 365, 46 Neb. 62.

[d] (Neb.; 1897.)

Act Feb. 27, 1879, providing for stenographic reporters for the district courts, and fixing their salary, is complete in itself, and hence, though in conflict with a prior law, is not invalid, under Const. art. 3, § 12, because

it does not refer to nor expressly repeal the prior law. *Morgan v. State* (1896) 67 N. W. 780, 48 Neb. 798, overruled.—*State v. Moore*, 70 N. W. 56.

§ 26. By implication.

[a] (Iowa: 1896.)

Code, § 478, providing that charges for public improvements in a city, "when assessed shall be payable by the owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessment," was not repealed by implication by Acts 21st Gen. Assem. c. 168, § 13, providing that such assessments shall be a lien on the property abutting on the street or streets on which any such improvement is made, from the commencement of the work, and shall so remain until fully paid.—*Farwell v. Des Moines Brick Manuf'g Co.* (Iowa) 66 N. W. 176.

[b] (Iowa: 1896.)

Acts 18th Gen. Assem. c. 151, § 14, providing that local boards of health shall regulate fees of persons employed by them in the execution of the health laws, repeals, to that extent, Code, § 1366, providing that claims for care of poor shall be paid if the county board of supervisors are satisfied they are reasonable and proper.—*Tweedy v. Fremont County* (Iowa) 68 N. W. 921.

[c] (Iowa: 1896.)

Acts 22d Gen. Assem. c. 1, providing for the establishment of a board of public works in cities containing over 30,000 inhabitants, was not repealed, and boards of public works established thereunder abolished, by Act 23d Gen. Assem. (March 13, 1890), for the extension of the limits of certain cities (including those covered by the previous act), which provided for biennial elections on the first Monday in April, commencing in 1890, of elective officers.—*Sherman v. City of Des Moines* (Iowa) 69 N. W. 410.

[d] (Iowa: 1897.)

Acts 1868, c. 173, entitled "Life Insurance Law," provides, in section 18, that life insurance shall, in the absence of agreement or assignment to the contrary, inure to the separate use of the husband or wife and children of deceased, free from debts, and that an endowment policy payable to assured on attaining a certain age shall also be exempt, and in section 27 repeals all acts affecting life insurance companies. *Held*, that Revision 1860, § 2362 (Code, § 2372), providing that the avails of life insurance are not subject to debts of deceased, except by special contract or arrangement, but shall, in other respects, be disposed of like other property left by deceased, was not thereby repealed.—*Larrabee v. Palmer* (Iowa) 70 N. W. 100.

[e] (Mich.: 1895.)

Pub. Acts 1885, Act No. 161, § 10, passed to relieve the recorder's court of petty offenses, provides that the police court of the city of Detroit shall have "concurrent" jurisdiction with the recorder's court in certain cases arising under ordinances. Act 408, Local Acts 1893, entitled "An act to amend certain sections of Act 1883 and to repeal all acts inconsistent therewith," passed for the purpose of creating an additional judge of the recorder's court, merely amended section 22, which provided that the recorder's court should have "exclusive" jurisdiction of all offenses arising under ordinances of the city by striking out certain provisions relating to the procedure in the recorder's court. Section 51 repealed all inconsistent acts. *Held*, that the latter act did not impliedly repeal Act 1885, so as to deprive the police court of jurisdiction in the cases therein provided for.—*In re Bushey* (Mich.) 62 N. W. 1036.

105 Mich. 64.

[f] (Mich.: 1896.)

How. Ann. St. § 9353, providing for the punishment of any person who shall, by repre-

senting himself as agent, etc., fraudulently obtain the signature of any person to any note with intent to defraud such person, was not repealed by Act May 31, 1895, amending How. Ann. St. § 9161, providing for the punishment of any persons who shall, with intent to defraud by false pretenses, cause any person to convey any land, or obtain the signature of any person to any written instrument, the making of which would be forgery.—*1'cople v. Kinney* (Mich.) 67 N. W. 1089.

[g] (Mich.: 1897.)

How. Ann. St. § 9161, providing for the punishment of any persons who shall, with intent to defraud by false pretenses, cause any person to convey any land, or obtain the signature of any person to any written instrument, the making of which would be forgery, was not repealed by Pub. Acts 1895, No. 234, which further provided only that, if the property obtained be of the value of \$25 or less, the offender shall be punished by a fine not exceeding \$100, or imprisonment in the county jail not exceeding three months.—*Crane v. Snow* (Mich.) 69 N. W. 721.

[h] (Mich.: 1897.)

How. Ann. St. § 653, conferring on the governor power to remove all city officers chosen by the electors of any city, was not repealed as to the mayor of the city of Detroit by the charter of such city, which provides for the removal of all city officers other than the mayor.—*Attorney General v. Common Council of City of Detroit* (Mich.) 70 N. W. 450.

[i] (Minn.: 1895.)

Sp. Laws 1881, c. 76, subc. 4, § 16, providing that, on conviction by the municipal court of the city of Minneapolis for violation of an ordinance relating to the exercise of a license issued by the council, the court may, and on a second conviction shall, revoke the license, in addition to other penalties prescribed, was not repealed by Sp. Laws 1889, c. 34, consolidating and amending the several acts relating to the municipal court of Minneapolis.—*State v. Anderson* (Minn.) 65 N. W. 265.

63 Minn. 208.

[j] (Neb.: 1895.)

Act March 29, 1889, § 49, providing that road taxes in cities of the first class shall be paid to the city treasurer, does not repeal Comp. St. c. 78, § 76, providing for the payment of one-half the county road fund to the officer of the road district in which it was collected.—*State v. Cobb* (Neb.) 62 N. W. 867.

44 Neb. 434.

[k] (Neb.: 1895.)

Comp. St. c. 40, § 11, providing for the removal by the governor of the superintendent of the hospital for the insane at Lincoln, was not repealed by Comp. St. c. 83, art. 7, § 7, providing for the hearing by the board of public lands and buildings of charges against a class of officers which includes said superintendent.—*State v. Hav* (Neb.) 63 N. W. 821.

45 Neb. 321.

[l] (Neb.: 1895.)

Since Act 1895, amending Act 1887, incorporating cities of the metropolitan class, conflicts with Comp. St. c. 12a, § 149a, authorizing the appointment of a police matron by the mayor, and section 167, providing that the mayor shall receive, as a member of the board of fire and police commissioners, the compensation allowed other members of such board, those sections are repealed by said act.—*State v. Bennis*, 64 N. W. 348, 45 Neb. 724.

[m] (Neb.: 1896.)

Laws 1891, c. 50, providing for the deposit of county funds in banks, did not repeal so much of Crim. Code, § 124, as constituted the loaning of county funds by an officer intrusted with their care and disbursement an embezzlement.—*Korth v. State* (Neb.) 65 N. W. 792, 46 Neb. 631.

[n] (Neb.: 1896.)

Act March 2, 1881, giving district judges certain powers when sitting in chambers, does not repeal Code Civ. Proc. § 498, conferring authority on the district judge to confirm sales of real estate in vacation, nor Act Feb. 27, 1879, § 39, relating thereto, since no repeal is expressly made, and the different acts are not unavoidably repugnant.—Beatrice Paper Co. v. Beloit Iron Works, 65 N. W. 1059, 46 Neb. 900.

[o] (Neb.: 1896.)

Rev. St. 1866, c. 43, §§ 5, 41, relating to authentication of conveyances acknowledged before commissioners of deeds, were enacted at the same time, as parts of the same statute, and, being in some of their provisions directly repugnant, the latter section prevailed, and the other was repealed.—Omaha Real-Estate & Trust Co. v. Reiter (Neb.) 66 N. W. 658, 47 Neb. 592.

[p] (Neb.: 1896.)

Act Jan. 26, 1856 (Sess. Laws, p. 80, c. 31) § 5, as amended by Act Feb. 15, 1864 (Sess. Laws, p. 58, c. 12), was in direct conflict with chapter 31, § 44, passed at the same time, requiring the certificate of the secretary of the state to be attached to acknowledgments of deeds taken before a commissioner of deeds, and consequently operated to repeal the latter.—Omaha Real-Estate & Trust Co. v. Reiter (Neb.) 66 N. W. 658, 47 Neb. 592.

[q] (Neb.: 1896.)

The fact that an act inconsistent with a prior law, and complete in itself, contains no special or general repealing clause, does not preclude its repealing the prior law by implication.—State v. Moore (Neb.) 67 N. W. 876, 48 Neb. 870.

[r] (Neb.: 1896.)

Since it is only when two statutes on the same subject are so repugnant to each other that both cannot be enforced that the former is repealed by implication, Act March 30, 1891 (Laws 1891, c. 33), authorizing the organization of mutual insurance companies, does not repeal by implication the provisions of Comp. St. c. 43, relating to insurance companies in general, apparently in conflict with it,—the two laws together authorizing the organization of two distinct classes of mutual insurance companies.—State v. Moore (Neb.) 67 N. W. 876, 48 Neb. 870.

[s] (Neb.: 1896.)

Act Feb. 26, 1879, § 1, declaring that the homestead shall be exempt from judgment liens and from forced sale, except as against debts secured by mechanics', laborers', and vendors' liens, or by mortgage executed by both husband and wife, or an unmarried claimant, repealed, so far as in conflict therewith, Code Civ. Proc. § 531, providing that nothing shall exempt any property from execution or attachment for clerks', laborers', or mechanics' wages.—Fox v. McClay (Neb.) 67 N. W. 888, 48 Neb. 820.

[t] (Neb.: 1897.)

Act 1887, amending section 23 of Act March 1, 1879, so as to allow a sale of public grounds of a county to be made on credit, did not repeal by implication section 24 of Act 1879, which requires that the question of the sale of such grounds shall be submitted to a vote of the people of the county.—Stenberg v. State (Neb.) 69 N. W. 849.

[u] (S. D.: 1894.)

Comp. Laws, § 3111, making the stockholders personally liable to laborers employed by a corporation, is, by implication, repealed by section 2933, limiting the liabilities of such stockholders; the latter section being the later enactment, and both referring to the same subject-matter.—Busby v. Riley (S. D.) 61 N. W. 164.

6 S. D. 401.

[v] (S. D.: 1896.)

Laws 1895, c. 67, authorizes the issuance of an attachment against a foreign corporation which has not complied with the requirements of chapter 47, as to the appointment of state agents on whom service of process may be made, or against a nonresident defendant, or against a defendant who has absconded, etc., but does not mention the subject of attachments for debts incurred by false pretenses, and repeals all inconsistent acts. *Held*, that Comp. Laws, § 4995, subd. 3, and section 5014, subd. 2, authorizing the issuance of attachments on a matured or immatured debt incurred by false pretenses, were not repealed. Haney, J., dissenting as to matured debts.—Finch v. Armstrong (S. D.) 68 N. W. 740.

[w] (S. D.: 1897.)

Laws 1890, c. 137, providing for the annual apportionment among the several educational institutions of the income of their lands (which lands, Const. art. 8, § 7, provides, shall remain a perpetual fund, the income to be applied to the institutions to which they were granted), and providing for the issuance of warrants for the amounts so apportioned, was not impliedly repealed by Laws 1895, c. 97, forbidding the creation of unauthorized indebtedness against the state, and providing that no warrant shall issue without an appropriation first made by the legislature in exact amount for the specific purpose.—Heston v. Mayhew (S. D.) 70 N. W. 635.

§ 27. By failure to embody in revision.**(Wis.: 1896.)**

Rev. St. § 3314, provided that a lien for improvements should attach to the real property of any person on whose premises the improvements were made, etc. Laws 1887, c. 466, declared that the provisions of section 3314 should not be considered as giving a lien where the relation of landlord and tenant existed. Subsequently section 3314 was revised by Laws 1887, c. 442, and Laws 1889, c. 275, and the provisions of chapter 446 were omitted. *Held*, that this did not repeal, by implication, chapter 446, since the latter was an independent act.—Bentley v. Adams (Wis.) 66 N. W. 505, 92 Wis. 386.

§ 28. Of special acts by general law.**[a] (Mich.: 1896.)**

An act passed for a particular purpose is not repealed by a general law sufficiently broad to include it, unless the intent to repeal is clear.—Regents of University of Michigan v. Auditor General (Mich.) 66 N. W. 956.

[b] (Minn.: 1895.)

Sp. Laws 1864, c. 18, § 8, limiting the time within which actions for recovery of certain lands after tax sale may be brought, is repealed by Gen. Laws 1887, c. 127, providing that actions to test the validity of a tax judgment and to remove the cloud of a tax title may be brought at any time.—In re East River Bank Parkway (Minn.) 62 N. W. 618; O'Connor v. Finnegan, *Id.*

60 Minn. 455.

[c] (Minn.: 1895.)

Laws 1895, c. 304, providing that all jurors in every county shall receive two dollars per day for attendance, and repealing all acts and parts of acts inconsistent therewith, repealed the special law fixing a smaller compensation for jurors in Ramsey county.—State v. Sullivan (Minn.) 64 N. W. 813, 62 Minn. 283.

[d] (Minn.: 1895.)

Sp. Laws 1889, c. 64, creating a joint committee to take charge of the city hall and courthouse of the city of St. Paul and county of Ramsey, was not affected by the Bell charter, subsequently enacted for said city.—State v. McCarty (Minn.) 64 N. W. 1133, 62 Minn. 509.

[c] (Minn.: 1896.)

Sp. Laws 1889, c. 477, prohibiting the catching of fish in Hennepin county during certain periods, was modified by Gen. Laws 1891, c. 9, § 18, and repealed by implication by Gen. Laws 1893, c. 124, so far as inconsistent with the latter law.—*Merriman v. Great Northern Exp. Co.* (Minn.) 65 N. W. 1080.

63 Minn. 543.

[f] (Minn.: 1896.)

The provisions of the St. Paul special city charter as to the method of making and collecting reassessments were not repealed by Gen. Laws 1893, c. 206, relating to assessments for local improvements by municipal corporations in general.—*In re Opening Linwood Place* (Minn.) 67 N. W. 77; *Putnam v. Second Judicial District Court of Ramsey County*, 1d.

64 Minn. 331.

[g] (Wis.: 1895.)

Laws 1889, c. 385, § 16, providing that, in proceedings under an assignment for the benefit of creditors, appeals may be taken by the debtor or any creditor from "any order or judgment" entered, is not repealed by Laws 1895, c. 212, § 1, subd. 2, containing the general provision that an appeal may be taken from "a final order affecting a substantial right in a special proceeding"; such subdivision being a re-enactment, without change, of Rev. St. § 3069, subd. 2, which was in force when the special statute of 1889 regarding assignment proceedings was enacted.—*In re Gilbert* (Wis.) 68 N. W. 863; *Appeal of Cleasby*, 1d.

§ 29. Of general by special law.

[a] (Mich.: 1895.)

After the passage of Act 1887, which is a general law regulating the sale of liquor, and therefore repealed the provision of the charter of the city of Kalamazoo authorizing the city to regulate the sale of liquor, the legislature passed an act, in 1889, for the purpose of amending the charter of the city so as to enable it to regulate street parades; and apparently in order to comply with the constitutional provision requiring amendments to be made by a re-enactment of the section amended, the subdivision empowering the city to regulate the sale of liquor, as well as the other subdivisions of that section, was re-enacted in the same words as used in the original section. *Held*, that the re-enactment of the subdivision in regard to the sale of liquor did not impliedly repeal the general law, and authorize the city to regulate such sales.—*People v. Wenzel* (Mich.) 62 N. W. 1038. 105 Mich. 70.

[b] (Minn.: 1895.)

Gen. St. 1894, § 7048, fixing the health officer's term at three years, was repealed, as to the city of Duluth, by Sp. Laws 1887, c. 2, incorporating that city.—*State v. Routh* (Minn.) 63 N. W. 621.

61 Minn. 205.

§ 30. By constitution.

[a] (Neb.: 1895.)

Laws 1875, p. 149, § 2, providing for the election by the legislature of trustees for the Institution for the Blind, being repugnant to Const. art. 5, § 10, which was subsequently adopted, was repealed by that article.—*State v. Holcomb*, 64 N. W. 437, 46 Neb. 88.

[b] (Neb.: 1896.)

Act March 4, 1870, § 32, empowering the warden of the penitentiary to sue and be sued as to matters concerning the prison by his name of office, was repealed by implication by Const. 1875, art. 5, § 19, creating the board of public lands and buildings, and by Act Feb. 13, 1877.—*State v. Holcomb*, 65 N. W. 873, 46 Neb. 612.

[c] (N. D.: 1895.)

The adoption of the state constitution did not of itself repeal existing laws authorizing boards of county commissioners to fix the salary of state attorneys until the legislature provided

for such salary as required by the constitution.—*Doherty v. Ransom County* (N. D.) 63 N. W. 148.

5 N. D. 1.

§ 31. Effect of repeal.

(Mich.: 1895.)

The act approved June 4, 1895, entitled "An act to authorize the city of Detroit to take private property for the use and benefit of the public," was passed without a saving clause, and therefore terminated proceedings commenced after said act was passed, but before it took effect, under a former statute which was repealed by said act.—*City of Detroit v. Chapin* (Mich.) 66 N. W. 587.

§ 32. — Of penal statute.

(Neb.: 1895.)

The repeal of a penal statute abates a suit pending to enforce the penalty, in the absence of a general saving clause.—*Kleckner v. Turk* (Neb.) 63 N. W. 469.

45 Neb. 176.

§ 33. — On pending criminal prosecutions.

(Minn.: 1895.)

A pending prosecution under Pen. Code, § 467, making the receiving of deposits in an insolvent bank a misdemeanor, was not affected by Laws 1895, c. 219, making the offense a felony, though that act contained no saving clause, since Gen. St. 1894, c. 258, provides that no repeal shall affect any proceeding commenced under the law repealed. *State v. McDonald* (1873) 20 Minn. 136 (311. 119) overruled.—*State v. Smith*, 64 N. W. 1022, 62 Minn. 540.

VI. PLEADING AND PROOF.

§ 34. Foreign statute.

(Neb.: 1895.)

The statutes of another state must be pleaded and proved, to be availing.—*Smith v. Mason* (Neb.) 63 N. W. 41.

44 Neb. 610.

See, also, "Evidence," § 121.

§ 35. Proof—Printed copies of laws.

[a] (Iowa: 1896.)

Books entitled "The Revised Statutes, Codes and General Laws of the State of New York," purporting to contain the text carefully compared with the original of all the general statutory law of that state, but which do not appear to have been published under legislative authority, and not proved to be commonly admitted as evidence of the existing laws of New York in the courts of that state, as required by Code, § 3718, are not admissible in an action in Iowa.—*Goodwin v. Provident Sav. Life Assur. Soc.* (Iowa) 66 N. W. 157.

[b] (Mich.: 1896.)

In an action for services rendered as attorneys in the province of Ontario, and claiming compensation in accordance with the rates established by the statutes of Ontario, a printed volume, purporting to be the Revised Statutes of Ontario, printed by the Toronto Law Printers, and identified by a barrister as the statute commonly admitted and used as evidence in the courts of Ontario, was properly admitted as showing the rates established by statute.—*Dawson v. Peterson* (Mich.) 68 N. W. 246.

[c] (Neb.: 1896.)

Printed copies of the statute laws, purporting or proved to have been published under the authority of the state, are presumptive evidence, and presumptive evidence only, under Code Civ. Proc. § 419, of such laws,—the original enrolled act, bearing the certificates of the presiding officers of the two houses of the legislature, and the approval of the governor, and

deposited with the secretary of state, being the controlling evidence.—*Bruce v. State* (Neb.) 67 N. W. 454.
48 Neb. 570.

STAY.

See "Continuance."
Of execution pending appeal, see "Criminal Law," § 191.
Of injunction, see "Injunction," § 22.
Of proceedings pending appeal, see "Appeal," §§ 264–272.

STEALING.

See "Burglary"; "Larceny"; "Receiving Stolen Goods"; "Robbery."

STENOGRAPHERS.

Admissibility of notes taken at former trial, see "Evidence," § 105.
Reporting trial in shorthand, see "Trial," § 7.

STEVEDORE.

See "Shipping."

STIPULATIONS.

See "Practice in Civil Cases," §§ 22–26.

STOCK.

See "Animals."
Corporate stock, see "Corporations," §§ 44–62.
In associations, see "Associations," § 2.
In building association, see "Building and Loan Associations," §§ 8, 9.
Killed or injured by locomotive, see "Railroad Companies."
Of bank, see "Banks and Banking," § 1.
Shipment by carrier, see "Carriers."

STOLEN GOODS.

See "Receiving Stolen Goods."

STOPPAGE IN TRANSITU.

See "Sale," § 59.

STORAGE.

See "Warehousemen."
Lien for, see "Liens," § 2.
Warrants, see "Warehousemen," § 1.

STREAMS.

See "Waters and Water Courses."
As boundaries, see "Boundaries," §§ 1, 2.

STREET RAILROADS.

See "Horse and Street Railroads,"
4 N.W.DIG.—56

STREETS.

See "Dedication"; "Highways"; "Municipal Corporations"; "Turnpikes and Toll Roads."
Control by city, see "Municipal Corporations," §§ 54, 55.
Damages from change of grade, see "Municipal Corporations," §§ 164, 165.
Dedication, see "Dedication," § 2.
Right of abutting owners to compensation for construction of railroad in street, see "Eminent Domain," § 26.
Telephone poles and wires as additional servitude, see "Eminent Domain," § 26.

STRUCK JURY.

See "Jury," § 13.

STUDENTS.

Qualification as voters, see "Elections and Voters," § 4.

SUBCONTRACTORS.

See "Mechanics' Liens," §§ 18–20.

SUBLETTING.

See "Landlord and Tenant," § 34.

SUBMISSION.

Of questions by executive to courts, see "Courts," § 7.
To arbitration, see "Arbitration and Award," §§ 1, 2.

SUBPARTNERSHIP.

See "Partnership," § 4.

SUBPOENA.

See "Writs and Notice of Suits."

SUBROGATION.

Rights of insurer, see "Insurance," § 91.

§ 1. When allowed.

[a] (Mich.: 1894.)
Where an administrator mortgaged land of the estate, and with the proceeds purchased for the heirs the widow's dower interest in the estate, although the mortgage be void, the debt secured thereby was properly declared a lien on the dower interest.—*Campbell v. Smith* (Mich.) 61 N. W. 654.
103 Mich. 427.

[b] (Neb.: 1897.)
The right of subrogation must rest on some recognized principle of equity, such as a mistake of fact, or an agreement or understanding that the money advanced was for the express purpose designated.—*Seieroe v. Homan* (Neb.) 70 N. W. 244.

§ 2. To rights of mortgagee.

[a] (Mich.: 1895.)
A first mortgage of land was foreclosed by suit without making the second mortgagee a

party. Before the equity of redemption expired, the first mortgagee, who had bought in the land, in consideration of the amount due on his mortgage, quitclaimed the land to the mortgagor, who at the same time executed to defendant a mortgage securing money then borrowed by him to pay the first mortgage. Defendant's attorney, upon examination of an abstract, had reported the title in the first mortgagee, supposing that the second mortgagee was a party to the foreclosure suit, and defendant made the loan, believing that the second mortgage was cut off. *Held*, that defendant was subrogated to the rights of the prior mortgagee, and entitled to priority over the second mortgage.—*Draper v. Ashley* (Mich.) 62 N. W. 707.

101 Mich. 527.

[b] (Mich.; 1897.)

The fact that the last mortgagee had foreclosed the mortgage did not affect the purchaser's right to subrogation, where the mortgagee, who was acting for him, was assured by the mortgagor that the old mortgage had been paid, and acted in that belief.—*Palmer v. Sharp* (Mich.) 70 N. W. 903.

[c] (Mich.; 1897.)

A mortgagor's father paid off a balance on the mortgage, and took an assignment. The mortgagor procured a new loan from A., whose agent, B., had been assured by the mortgagor's father that the old mortgage had been paid. When the A. mortgage matured, it was paid with money borrowed from another lender, also represented by B., who found no incumbrances subsequent to the A. mortgage, and the A. mortgage was released. *Held* that, since the last mortgagee had advanced money to pay off the A. mortgage, believing that she was to receive a valid first lien on the property, she was entitled to be subrogated to A.'s rights under the released mortgage, as against which the father, as assignee, was estopped from setting up the old mortgage.—*Palmer v. Sharp* (Mich.) 70 N. W. 903.

[d] (Neb.; 1895.)

A surety on a note to indemnify her against loss by reason of her suretyship, and also to secure the payment of a debt due to her from her principal, took from him a mortgage. The principal afterwards gave to the payee of the note signed by the surety a mortgage to secure its payment. This mortgage covered the same property pledged to the surety, and by its terms was made subject thereto. In a suit to foreclose the mortgage given to secure the note signed by the surety, the latter answered, and claimed a first lien on the mortgaged property to satisfy the debt owing her by her principal, and which was then due. *Held*, that the holder of the note signed by the surety should be subrogated to her lien on the mortgaged property.—*South Omaha Nat. Bank v. Wright* (Neb.) 63 N. W. 126.

45 Neb. 23.

[e] (Neb.; 1895.)

One who furnished money to a mortgagor for the payment of a first mortgage, and accepted an apparent first mortgage to secure the loan, was not entitled to be subrogated to the rights of the first mortgagee, as against a second mortgagee, whose mortgage was released without authority, though the record showed the second mortgage to be released at the time the first mortgage was paid.—*Rice v. Winters* (Neb.) 63 N. W. 530.

45 Neb. 517.

[f] (S. D.; 1896.)

One who, through mistake of law, loans money with which a mortgage executed by and existing upon the real property of a person since deceased is satisfied, and takes therefor the promissory note of the guardian of the minor heirs of such deceased person, such guardian being also the owner of an undivided one-third interest in the premises, and by whom a mortgage upon said real property is executed to secure said promissory note, is not entitled to a decree in equity reviving

and foreclosing the former mortgage, unless it appears from the complaint and evidence that said guardian and maker of the last-mentioned obligation is insolvent, or that his mortgaged interest in the land will be insufficient to secure the payment of the note when the same matures.—*Kelsey v. Welch* (S. D.) 66 N. W. 390.

[g] (Wis.; 1895.)

Where a grantee in a deed, believing that he is the owner of the land, in good faith pays a mortgage thereon, he will be subrogated to the rights of the mortgagee, the deed having been set aside after the grantor's death on the ground that there was no delivery of it.—*Stewart v. Stewart* (Wis.) 63 N. W. 886.

90 Wis. 516.

§ 3. To rights of surety.

[a] (Iowa; 1896.)

A surety paying the debt may rely on and enforce a contract made by a third person with the principal to pay the debt.—*Gilbert v. Adams* (Iowa) 68 N. W. 883.

[b] (Iowa; 1896.)

A surety on a note is subrogated, on payment, to the rights of the payee, as against one assuming payment of the note by contract with the maker.—*Gilbert v. Adams* (Iowa) 68 N. W. 883.

[c] (Mich.; 1895.)

A creditor may enforce in equity his right to security given by a principal debtor to indemnify his surety without first exhausting his remedies at law or reducing his debt to a judgment.—*Union Nat. Bank v. Rasch* (Mich.) 64 N. W. 339.

[d] (Mich.; 1895.)

A creditor becomes by subrogation entitled to all the benefits of security given by a principal debtor, after he and his surety have become bound, to indemnify the surety.—*Union Nat. Bank v. Rasch* (Mich.) 64 N. W. 339.

SUBSCRIPTION.

Alteration of contract, see "Alteration of Instruments," § 1.

By married woman, charge on separate estate, see "Husband and Wife," § 15.

Return on abandonment of right of way, see "Railroad Companies," § 6.

To corporate stock, see "Corporations," §§ 44-51-57.

To stock in association, see "Associations," § 2.

§ 1. The contract.

[a] (Iowa; 1895.)

A written subscription imports a consideration.—*First M. E. Church in Ft. Madison v. Donnell* (Iowa) 64 N. W. 412.

[b] (Iowa; 1895.)

A subscription paper to a church fund, containing an unqualified promise to pay, was read to the congregation, and the parties desiring to subscribe announced the amount, and the name and amount were placed on the list by those acting for the church, with the consent of said subscribers. *Held*, that defendant's subscription so obtained constituted a contract in writing, actions on which are governed by the 10-years statute of limitations.—*First M. E. Church in Ft. Madison v. Donnell* (Iowa) 64 N. W. 412.

[c] (Neb.; 1895.)

A subscription contract, by which a certain sum is payable on the erection of an opera house with a seating capacity of 1,700, *held* complied with by the donee, where 1,700 auditors can have permanent or temporary seats, so that they can both hear and see the exhibition, and still leave sufficient room for passageways for going to and from the seats.—*Gerner v. Church* 62 N. W. 51, 43 Neb. 690.

[d] (Wis.: 1896.)

A company having offered to build a mill at a certain place if a site and a certain amount was given it as a bonus, a subscription paper was circulated, and defendant telegraphed a person who approached him on the matter that he would give \$1,000 if the mill was built. This was attached to the subscription paper, and thereafter, the full amount being subscribed, the mill was completed in a reasonable time, without any formal acceptance of the offer, but without it having been withdrawn. *Held*, that there was a valid contract.—*Superior Consol. Land Co. v. Bickford*, 67 N. W. 45, 93 Wis. 220.

§ 2. Construction.

[a] (Iowa: 1894.)

Where such hospital set apart a ward with four beds in it, and named it after the name of the subscriber, and never at any time refused a soldier's application for admission, it completely performed the contract.—*Cottage Hospital v. Merrill* (Iowa) 61 N. W. 490.

92 Iowa, 649.

[b] (Iowa: 1894.)

A subscription paper recited that, whereas the managers of a certain hospital are about to erect a building, "I do hereby subscribe for this purpose the sum of \$100. * * * And, further, as a soldier's memorial I agree to support three beds in said hospital, at a cost of \$250 each per annum, for ten years from date of completion of said building. * * * These beds all for the use of soldiers, but always for use when there are no soldier applicants." *Held*, that the instrument should not be construed as two separate contracts,—one for \$100, and one for the support of the beds,—so as to make the latter void for want of consideration, because there was no promise by the hospital to set apart such beds for the use and benefit of soldiers.—*Cottage Hospital v. Merrill* (Iowa) 61 N. W. 490.

92 Iowa, 649.

[c] (Iowa: 1895.)

Where separate papers, containing a contract of subscription to a fund for the erection of a creamery, were identical, except that one contained the words, "the amounts set opposite our names," not contained in the other, they form but one contract, such words being surplusage.—*Davis v. Campbell* (Iowa) 61 N. W. 1053.

93 Iowa, 524.

[d] (Neb.: 1896.)

A contract recited in printing that "we, D. & R., parties of the first part, hereby agree with the undersigned subscribers hereto, parties of the second part," etc., who were to incorporate, to erect a creamery for the latter, and contained the following printed clauses: "The parties of the second part hereby agree to furnish, at their own expense, suitable lands for said building," etc.; and "we, the subscribers, agree to pay the above amount for said butter and cheese factory when completed, payment as above; and we, the said subscribers, agree to accept the same as soon as completed according to said specifications." It was written in the contract that "it is hereby understood that subscribers are liable only for the amount and number of shares signed by them, shares to be for \$150 each." Opposite the name of each signer was stated the number of shares taken by him, and the amount of stock which he should take on incorporation. *Held*, that the subscription was several, and not joint, so that each subscriber was liable to the contractors only to the amount of his subscription.—*Davis v. Ravenna Creamery Co.* (Neb.) 67 N. W. 436.

48 Neb. 471.

§ 3. Joint or several obligation.

(Wis.: 1895.)

Plaintiff contracted to build for defendants a factory for \$3,750, defendants stipulating

that "we, the subscribers hereto," agree to pay for the factory when completed. The contract provided that defendants, as soon as the \$3,750 is subscribed, may incorporate, with a capital stock of not less than the amount subscribed, to be issued to the subscribers in proportion to the amount of their paid-up interest, and that each stockholder should be only liable for the amount subscribed by him. *Held*, that the contract was a several contract with each subscriber, to the amount of his subscription, and not a joint contract, by which each subscriber became liable for the whole contract price of the factory.—*Davis & Rankin Bldg. & Manuf'g Co. v. Cupp*, 62 N. W. 520, 89 Wis. 673.

§ 4. Actions on.

[a] (Iowa: 1895.)

An averment, in an answer to an action on a subscription to aid in the erection of a creamery, that defendant notified plaintiffs that he had canceled his subscription before they had expended money or performed labor under the contract, was properly stricken out where the answer contained no averment that the cancellation was made before plaintiffs accepted the contract.—*Davis v. Campbell* (Iowa) 61 N. W. 1053.

93 Iowa, 524.

[b] (Iowa: 1895.)

Defendant subscribed a certain amount "for the purpose of securing the location in the city of C. of the R. O. Co.," a corporation. Plaintiffs were officers of the corporation, and, at the time of the removal of the business to C., acquired all the stock of the corporation, and continued business as a firm. *Held*, that plaintiffs did not succeed to the rights of the corporation to sue on the subscription, as the contract was in consideration of the corporation locating at C.—*Keys v. Weaver* (Iowa) 63 N. W. 357.

[c] (Neb.: 1895.)

In an action on a subscription contract to recover the amount thereof, an assignee of the donee is the necessary party plaintiff.—*Gerner v. Church*, 62 N. W. 51, 43 Neb. 690.

[d] (Neb.: 1896.)

Suit was brought on a subscription contract, alleging an absolute subscription. The answer contained a general denial. The evidence tended to show that the defendant had authorized the plaintiff's solicitor to enter his name for a certain amount, subject to certain conditions, and that the solicitor had subscribed defendant's name without embodying such conditions in the contract. *Held*, that the issue presented was not whether there had been a breach of the conditions which would constitute a defense, but was whether the defendant had authorized the contract which the solicitor had undertaken to make for him.—*Rawlings v. Young Men's Christian Ass'n* (Neb.) 66 N. W. 1124.

48 Neb. 216.

§ 5. — Evidence.

[a] (Iowa: 1895.)

Statements made to defendant by one who procured his subscription to a fund for the erection of a creamery that the profits would be large are matters of opinion only, and, if false, do not constitute a defense to an action on the subscription.—*Davis v. Campbell* (Iowa) 61 N. W. 1053.

93 Iowa, 524.

[b] (Neb.: 1895.)

In a suit on a written contract for a subscription payable on certain conditions mentioned therein, parol evidence is not admissible, in the absence of fraud, to show that the subscriptions were not to be payable except on certain other conditions.—*Gerner v. Church* (Neb.) 62 N. W. 51, 43 Neb. 690.

[c] (Neb.: 1895.)

In an action on a subscription contract by which defendant agreed to donate plaintiff a

certain sum for the erection of an opera house payable on certain conditions, where plaintiff had, by a separate contract, modified the conditions of the subscription of one M. by making it payable when M. had sold certain real estate, defendant could show that, to induce him to sign a contract, plaintiff represented that M. had made a similar subscription which would be payable on the same conditions as would defendant's subscription.—*Germer v. Church* 62 N. W. 51, 43 Neb. 690.

141 (Neb.; 1895.)

In an action on a subscription contract by which defendant agreed to pay a certain amount for the construction of an opera house, where the contract is silent as to the materials to be used, defendant cannot show a parol agreement by which certain material was to be used.—*Germer v. Church*, 62 N. W. 51, 43 Neb. 690.

SUBSTITUTION.

Of parties, see "Parties," § 13.

Substituted service of process, see "Writs and Notice of Suits," § 15.

SUBTERRANEAN WATERS.

See "Waters and Water Courses," § 13.

SUCCESSION.

See "Descent and Distribution"; "Executors and Administrators."

SUFFERANCE.

Tenancy by, see "Landlord and Tenant," § 39.

SUGAR BOUNTIES.

See "Bounties."

SUICIDE.

See "Insurance," §§ 58, 125-127.

SUIT.

See "Action."

SUMMARY PROCEEDINGS.

Before court commissioner, see "Court Commissioners."

To recover possession of leased premises, see "Landlord and Tenant," § 62.

SUMMONING.

Juror, see "Jury," §§ 8-13.

SUMMONS.

See "Writs and Notice of Suits."

In action before justice, see "Justices of the Peace," § 18.

To garnishee, see "Garnishment," § 16.

SUNDAY.

See, also, "Holidays."

Exclusion in computing time, see "Time," § 3. Keeping saloon open on Sunday, see "Intoxicating Liquors," § 25.

[a] (Iowa; 1894.)

It is no defense to an action for negligent shooting that, at the time of the injury, plaintiff and defendant were unlawfully engaged in shooting on the Sabbath.—*Gross v. Miller* (Iowa) 61 N. W. 385.
93 Iowa, 72.

[b] (Iowa; 1895.)

It is no defense to an action for delay in delivering a telegram requesting the addressee, in South Dakota, to furnish stable room for horses in transit from Iowa, the transportation through the former state taking place on Sunday, that the laws of South Dakota prohibit such transportation on Sunday.—*Taylor v. Western Union Tel. Co.* (Iowa) 64 N. W. 660.

[c] (Iowa; 1896.)

Code, § 2952 (providing that "where the petition states, in addition to the other facts required, that the plaintiff will lose his claim unless the attachment issues and is served on Sunday, it may be issued and served on that day"), does not limit service on Sunday to a writ issued on that day; but a writ issued on Saturday, which cannot be served on that day, may be served on Sunday, the petition being amended on that day to show that plaintiff will lose his claim if service is not made then.—*Richards v. Schreiber, Conchar & Westphal Co.* (Iowa) 67 N. W. 569.

[d] (Mich.; 1895.)

A policy dated and delivered on Monday is not a Sunday contract, though the agents examined the property, and agreed on the amount of insurance with the assured, on Sunday.—*Wooliver v. Boylston Ins. Co.* (Mich.) 62 N. W. 149.

104 Mich. 132.

[e] (Mich.; 1896.)

The fact that a note was handed to plaintiff in satisfaction of a guaranty on Sunday, it not appearing that the contract was made on Sunday, would not invalidate the delivery.—*Steere v. Treblecock* (Mich.) 66 N. W. 342.

SUPERINTENDENT.

See "Master and Servant," §§ 53-60.

SUPERIOR COURTS.

See "Courts," § 16.

SUPERSEDEAS.

See "Appeal," §§ 264-272.

SUPPLEMENTAL ABSTRACT.

See "Appeal," § 127.

SUPPLEMENTAL COMPLAINT.

See "Pleading," § 73.

SUPPLEMENTARY PROCEEDINGS.

See "Execution," §§ 38-44; "Garnishment," § 28.

SUPPORT.

Of infants, see "Divorce": "Infancy."
Of insane persons, see "Insanity."

SUPREME COURT.

See "Courts," §§ 13, 14.

SURETY COMPANIES.

Power to act as surety, see "Principal and Surety," § 1.

SURETYSHIP.

See "Principal and Surety."

SURFACE WATER.

See, also, "Drainage."

Diversion in constructing highway, see "Highways," § 1.

Duty of city as to, see "Municipal Corporations," § 102.

§ 1. What is surface water.

(Neb.: 1895.)

The term "surface water" includes such water as is carried off by drainage independently of a water course.—*Bunderson v. Burlington & M. R. R. Co.*, 61 N. W. 721, 43 Neb. 545.

§ 2. Rights of landowner to obstruct or turn away.

[a] (Iowa: 1895.)

A landowner cannot collect surface water so as to cause it to flow on the land of an adjoining owner in a manner different from its natural flow.—*Stinson v. Fishel* (Iowa) 61 N. W. 1063.

93 Iowa, 656.

[b] (Iowa: 1895.)

A landowner is liable only for nominal damages for constructing a tile drain on his land, through which a larger quantity of water than the natural flow is discharged upon the lands of an adjoining owner, where the only injury shown to have been sustained by the latter is such increase in the flow of water on his land.—*McCormick v. Winters* (Iowa) 62 N. W. 655.

[c] (Minn.: 1894.)

One draining his land may deposit the surface water in a natural drain, though it is thereby conveyed on a neighbor's land, if it does not unreasonably injure the latter; and such drainage which reclaims twenty acres of agricultural land, and causes only an acre or two of his neighbor's land to be submerged for a time in the spring of the year, is not unreasonable.—*Sheehan v. Flynn* (Minn.) 61 N. W. 462.

59 Minn. 436.

[d] (Minn.: 1896.)

The facts that a ravine traversing adjoining mining claims was dammed up by the upper owner, and the surface water diverted for his use in mining by an artificial ditch, so that no water flowed on the lower claim, and that the lower claim owner, supposing the diversion to be permanent, but without representations to that effect having been made by the upper owner, refrained from taking precautions against the water flowing upon the covered portions of his mine in the ravine below, did not preclude the upper owner from removing the dam, after reasonable notice to the lower owner, so as to permit the water to flow in its natural channel.

—*Canton Iron Co. v. Biwabik-Bessemer Co.* (Minn.) 65 N. W. 643.

63 Minn. 367.

[e] (Minn.: 1896.)

The surface water on defendants' lands naturally drained into a marsh having a natural outlet over plaintiff's lands. Defendants deepened the natural outlet as far as it ran over their lands, thereby reclaiming land of their own, and subsequently, after an unusually heavy rainfall, plaintiff's lands were flooded. *Held*, that though the overflow was caused by the deepening of the outlet, which thereby rendered the water more liable to overflow, or to cause greater quantities to overflow, plaintiff was without recourse against defendants.—*Gillfillan v. Schmidt* (Minn.) 66 N. W. 126.

64 Minn. 29.

[f] (Neb.: 1895.)

An owner may protect his premises against surface water by dike or embankment without liability for damages to adjoining proprietors if the embankment is constructed in a reasonable manner.—*Lincoln & B. H. R. Co. v. Sutherland* (Neb.) 62 N. W. 859.

44 Neb. 526.

[g] (Neb.: 1895.)

An owner may defend his premises against surface water by dike or embankment without liability for damages to adjoining owners, if his acts are necessary and reasonable.—*City of Beatrice v. Leary* (Neb.) 63 N. W. 370.

45 Neb. 149.

[h] (Neb.: 1896.)

One may not accumulate surface waters on his own land, and, by means of a ditch, discharge them in a volume upon the land of another. *Railroad Co. v. Marley* (1888) 40 N. W. 948, 25 Neb. 138, followed.—*Jacobson v. Van Boening*, 66 N. W. 993, 48 Neb. 80.

[i] (Neb.: 1897.)

The common-law right to control surface waters must be so exercised by any person as not to unnecessarily or negligently cause injury to the rights and property of others.—*Town v. Missouri Pac. Ry. Co.* (Neb.) 70 N. W. 402.

[j] (Neb.: 1897.)

Surface waters may be controlled by the owner of the land on which they fall or originate, or over which they flow. He may appropriate to his own use all that falls or comes on his land, and refuse to receive any that falls or originates or flows on or over adjoining property.—*Town v. Missouri Pac. Ry. Co.* (Neb.) 70 N. W. 402.

[k] (Neb.: 1897.)

Where surface waters have such an accustomed flow as to have cut in the soil a well-defined channel, one constructing an embankment across such channel must make necessary provision for the uninterrupted flow of the water; and, having provided a suitable culvert or passageway permitting the accustomed flow, he cannot, in case of an unusual rainfall, be charged with having collected the surface waters and thrown them upon the land of an adjoining proprietor.—*Town v. Missouri Pac. Ry. Co.* (Neb.) 70 N. W. 402.

[l] (Neb.: 1897.)

Whether such embankment has been negligently constructed with reference to the obstruction of the flow of the surface waters, and whether such negligence, if any, is the proximate cause of an alleged injury, are generally questions to be submitted to the jury.—*Town v. Missouri Pac. Ry. Co.* (Neb.) 70 N. W. 402.

§ 3. — Injunction.

(Iowa: 1896.)

Injunction will not issue to restrain the owner of the dominant estate from maintaining a tile drain discharging water into a drain leading to the land of the servient owner, when it does not appear that the latter owner is injured by the substitution of this mode of

drainage for the natural surface drainage.—*Resser v. Davis* (Iowa) 69 N. W. 524.

§ 4. Liability of railroad company.

(Neb.: 1895.)

For the construction of an embankment proper for railroad purposes, which deflects surface water from its normal course, a railroad company is not liable in damages to the proprietor or lessee of neighboring lands, thereby incidentally overflowed and injured.—*Bunderson v. Burlington & M. R. Co.* (Neb.) 61 N. W. 724, 43 Neb. 545.

§ 5. Liability of county.

(Iowa: 1896.)

The maintenance of a tile drain by a county along a highway, which has the effect of discharging on plaintiff's premises surface water which would not otherwise have flowed over them, and casts water on his land in a different manner from that in which it flowed before, to his injury, is actionable, and will be enjoined.—*Holmes v. Calhoun County* (Iowa) 66 N. W. 145.

§ 6. Action for flowage.

[a] (Minn.: 1895.)

Defendant's land abutted on the west side of a street, and was crossed by a ravine, which also crossed the street, and ran east to a lake. Plaintiff's land lay south of defendant's, separated from it by a ridge forming the south bank of the ravine. The city built a culvert in the ravine, the west end of which terminated on the east end of defendant's land, at which point was built with defendant's permission a catch-basin covered with a screen. Subsequently the city filled in the street so that the only way in which water flowing down the ravine could escape from defendant's land was through the catch-basin, and thereafter defendant erected a wall on the ridge. After a heavy rain, water coming down the ravine carried with it much debris, which choked up the screen, and consequently the water overflowed the wall, tore away one end of it, and poured down on plaintiff's premises. *Held* that, in an action for the damages sustained thereby, it was inapplicable to instruct that it was defendant's duty to keep the ravine on its land free from accumulations, so that it might carry waters to the basin without obstruction.—*Simpson v. Stillwater Water Co.* (Minn.) 64 N. W. 1144.

62 Minn. 444.

[b] (Neb.: 1896.)

In an action for damages caused by the drainage of surface water from a pond on defendant's land into a draw, by which the water was conducted to and across plaintiff's land, an admission by plaintiff that the draw was a natural water way, and had been such since his ownership of the land claimed to have been damaged, and that the water generally from that portion of the country had flowed through the draw, precluded a recovery of damages for the destruction of grass in the bed of the draw on plaintiff's premises, caused by the additional flowage resulting from said drainage.—*Rath v. Zimbleman* (Neb.) 68 N. W. 488.

SURGEONS.

See "Physicians and Surgeons."

SURPLUSAGE.

As ground for demurrer, see "Pleading," § 21.

SURPRISE.

As ground for continuance, see "Continuance," § 2; "Criminal Law," § 50.
— for new trial, see "New Trial," § 29.

SURRENDER.

Of accused, liability on bail bond, see "Bail," § 4.
Of corporate franchise, see "Corporations," § 10.
Of fugitive from justice, see "Extradition."
Of leased premises, see "Landlord and Tenant," §§ 23, 24.
Of policy, see "Insurance," § 26.

SURVEYS AND SURVEYORS.

See "Boundaries," §§ 6, 10.
County surveyor, see "Counties," § 21.
Establishment of highway on government section line, see "Highways," § 11.

SURVIVAL.

Of cause of action, see "Abatement and Revival," § 9.

SURVIVORSHIP.

See "Joint Tenancy."
Construction of wills, see "Wills," §§ 35, 36.
Homestead rights of surviving spouse, see "Homestead," §§ 13-15.
Presumption as to, see "Death."
Rights of surviving partners, see "Partnership," § 49.

SUSPENSION.

Of members of association, see "Associations," § 5.
— of benevolent society, see "Benevolent Societies," § 3.
Of officer, see "Office and Officer," §§ 28-29.
Of sentence, see "Criminal Law," § 190.

SWAMP LANDS.

See "Public Lands," §§ 10, 11.

SWINDLING.

See "False Pretenses"; "Forgery"; "Larceny."

T.

TACKING.

Possession, see "Adverse Possession," § 25.

TALESMEN.

See "Jury," § 11.

TAXATION.

I. IN GENERAL, §§ 1-5.

II. TAXABLE PERSONS AND PROPERTY, §§ 6-19.

III. EXEMPTIONS, §§ 20-24.

IV. ASSESSMENT AND LEVY, §§ 25-37.

V. EQUALIZATION, §§ 38-44.

VI. REMEDIES FOR ERRONEOUS TAXATION, §§ 45-54.

VII. LIEN, §§ 55-57.

VIII. PAYMENT, §§ 58-62.

IX. COLLECTION OF TAXES, §§ 63-92.

1. In General, §§ 63-81.

2. Sale for Nonpayment, §§ 82-92.

X. REDEMPTION, §§ 93-99.

XI. TAX TITLES, §§ 100-120.

1. In General, §§ 100-105.

2. Tax Deed, §§ 106-109.

3. Actions to Try and to Confirm, §§ 110-115.

4. Rights of Defeated Tax-Title Holders, §§ 116-120.

See, also, "Constitutional Law," §§ 53-59.

Action by state to compel county to levy state taxes, see "States and State Officers," § 20.

Allowance to defendant in ejectment for taxes paid, see "Ejectment," §§ 12-14.

Assessments and taxes for irrigating purposes, see "Irrigation."

— for highway purposes, see "Highways," §§ 22-24.

Authority of city as to license taxes, see "Municipal Corporations," § 29.

Duty to pay taxes as between vendor and purchaser, see "Vendor and Purchaser," § 11.

Effect of voluntary assignment as discharging liability for taxes, see "Assignment for Benefit of Creditors," § 25.

For city purposes, see "Municipal Corporations," §§ 185-189.

For drainage purposes, see "Drainage," §§ 7-9.

For school purposes, see "Schools and School Districts," § 29.

For town purposes, see "Towns," § 7.

Interference with interstate commerce, see "Constitutional Law," §§ 49-52.

Nonpayment of taxes as breach of condition against incumbrances, see "Covenants," § 3.

Of costs, see "Costs," §§ 20-26.

Payment of taxes on assigned estate, see "Assignment for Benefit of Creditors," § 38.

— on mortgaged land, see "Mortgages," § 27.

Of liquor traffic, see "Intoxicating Liquors," §§ 8-23.

I. IN GENERAL.

§ 1. For what purposes authorized.

[a] (Neb.: 1895.)

Comp. St. 1893, c. 82a, § 17, authorizing counties to levy an additional tax of three-tenths of a mill for a soldiers' relief fund, is permissive only; and, where the current expenses of the county require the full limit of taxa-

tion (Const. art. 9, § 5), such additional levy may be omitted.—*Young v. Lane* (Neb.) 62 N. W. 202, 43 Neb. 812.

[b] (Wis.: 1895.)

Sanb. & B. Ann. St. § 669, subd. 9, authorizing a county to levy a tax to purchase land for the purpose of holding thereon agricultural fairs, does not authorize the county to levy a tax to be paid over to an agricultural society.—*Hixon v. Town of Eagle River* (Wis.) 65 N. W. 366, 91 Wis. 649.

[c] (Wis.: 1895.)

A county tax levied to pay for placing stones from the county in the state building at the World's Fair is invalid.—*Hayes v. Douglas County* (Wis.) 65 N. W. 482.

92 Wis. 429.

§ 2. Control by court of amount of levy.

(Neb.: 1895.)

Where a county board has levied taxes to the constitutional limits, the court cannot compel it to reduce the amount of any levy, and levy in lieu thereof a tax for the soldiers' relief fund, authorized by Comp. St. 1893, c. 82a, § 17.—*Young v. Lane*, 62 N. W. 202, 43 Neb. 812.

§ 3. Accounts between county and state.

[a] (Mich.: 1895.)

Where a petition by the state to compel a county to levy and collect taxes set out a statement of account from a certain year, the county is not precluded from questioning the correctness of the account for that year, though the statement showed that the balance due was paid the following year.—*Auditor General v. Board of Sup'rs of Bay County* (Mich.) 64 N. W. 570.

[b] (Mich.: 1895.)

Where a portion of a county had been detached and organized into a separate county, and the state assessed taxes on the county as originally constituted, which were collected, said county cannot refuse to pay the amount collected in excess of its share, but must resort to the new county for reimbursement.—*Auditor General v. Board of Sup'rs of Bay County* (Mich.) 64 N. W. 570.

[c] (Mich.: 1895.)

Pub. Acts 1882, No. 9, § 43, provides that "the town treasurer shall pay to the county treasurer all state and county taxes collected except that * * * he may retain a sum sufficient to fill any deficiency in the amount collected for school purposes." *Held*, that the state has a right to charge the county with interest on the amount so retained, and the county must have recourse to the town.—*Auditor General v. Board of Sup'rs of Bay County* (Mich.) 64 N. W. 570.

[d] (Mich.: 1895.)

Pub. Acts 1889, No. 195, § 74, provides that a collection fee of 4 per cent. shall be added to all delinquent taxes returned to the county treasurer, and when paid to the county treasurer it shall belong to the general county fund, and when paid to the auditor general it shall belong to the state general fund. *Held*, that such fee belongs to the county or state as it is paid to the one or the other officer.—*Auditor General v. Board of Sup'rs of Bay County* (Mich.) 64 N. W. 570.

[e] (Mich.: 1895.)

Pub. Acts 1885, No. 153, § 81, provides that losses sustained by the default of any officer shall be charged to the municipality which he represents. Section 101 provides that, if the error originated with the township or county officer, the proper amount shall be charged back to the county. *Held*, that where the attor-

ney general advised and the county treasurer made a tax sale under act of 1885 for taxes assessed under the law of 1882, which sale was declared to be void, and the auditor general refunded to the purchaser the amount paid, the loss falls on the state and county proportionately.—*Auditor General v. Board of Sup'rs of Bay County* (Mich.) 61 N. W. 570.

[1] (Mich.; 1895.)

Where land was sold under Pub. Acts 1885, No. 153, for taxes assessed under the law of 1882, and the sale was afterwards declared void because the act of 1885 was not retrospective, the auditor general had a right, under Acts 1885, § 104, on presentation of a certificate from the trial judge, to refund to the purchaser the amount paid, though neither the state nor the county was a party to the suit declaring the sale void.—*Auditor General v. Board of Sup'rs of Bay County* (Mich.) 61 N. W. 570.

§ 4. Accounts between town or city and county.

[a] (S. D.; 1895.)

Under Laws 1889, c. 121, as amended by Laws 1890, c. 149, an organized civil township is entitled to credit for the amount of the dog tax collected therein, though the entire county in which it is situated be not organized into civil townships.—*Liberty Tp. v. Hutchinson County* (S. D.) 64 N. W. 1117.

[b] (S. D.; 1895.)

In an action by a township against a county to recover a tax collected by the latter and withheld from plaintiff in violation of the act authorizing the tax, defendant cannot raise the question of the constitutionality of the act, since the invalidity thereof would relieve it of its duty to account to plaintiff for the tax.—*Liberty Tp. v. Hutchinson County* (S. D.) 64 N. W. 1117.

[c] (Wis.; 1895.)

Where a town treasurer collected taxes, and appropriated them, but returned them to the county treasurer as unpaid and delinquent, and, on this being found out, the amount thereof was charged back to the town, and added to the county tax apportioned to the town for the following year, and collected and paid to the county, the town cannot sue to recover them of the county, because they never belonged to the town, as they were raised directly from the taxpayers for the county, the town treasurer acting as the county's agent in collecting them.—*Town of Westboro v. Taylor County* (Wis.) 63 N. W. 287.

90 Wis. 355.

[d] (Wis.; 1895.)

Where a county board, without authority in law, deducted from the taxes levied by a town a portion thereof alleged to be invalid, and the county treasurer did not collect the same, the county is not liable to the town for the amount so deducted.—*Town of Crandon v. Forest County*, 64 N. W. 847, 91 Wis. 239.

§ 5. Apportionment of taxes among townships—Record of board.

[a] (Mich.; 1895.)

The record of a resolution of the board "that the following amount of state and county tax be assessed on the rolls of the several townships," followed by their names, with the amounts set opposite each township in separate columns for the state and county tax, with the totals for each tax for all the townships footed up at the bottom, is a substantial compliance with Comp. Laws 1871, requiring the board to apportion the county and state tax among the several townships, and that the apportionment be entered at large on the records of the board.—*Hoffman v. Lynburn* (Mich.) 62 N. W. 728.

104 Mich. 494.

[b] (Mich.; 1895.)

The proceedings are not invalid because such record does not show the amount of state

tax authorized to be raised as certified by the auditor general, in the absence of any statute requiring such certificate to be spread on the record of the proceedings of the board.—*Hoffman v. Lynburn* (Mich.) 62 N. W. 728.

104 Mich. 494.

II. TAXABLE PERSONS AND PROPERTY.

Properly subject to street assessments, see "Municipal Corporations," §§ 138, 139.

—taxable for city purposes, see "Municipal Corporations," § 187.

§ 6. In general.

(Wis.; 1896.)

A contract for the purchase of land by a city for park purposes, as authorized by Laws 1889, c. 488, and Laws 1891, c. 179, provided for possession by the city on part payment, and for a conveyance on payment within 10 years, at the city's option, of the balance of the price with interest, and of all taxes levied in the meantime, but declared, as required by such statutes, that the agreement created no liability against the city. On default in payment of interest or taxes, the vendors were authorized to foreclose the city's equity. *Held*, that the agreement was not an "effect * * * having a marketable value," within Rev. St. §§ 1034-1036, providing for the taxation of such effects as personality.—*Perrigo v. City of Milwaukee* (Wis.) 65 N. W. 1025.

92 Wis. 236.

§ 7. Railroad grants.

(N. D.; 1894.)

The Northern Pacific land grant is not exempt from taxation because the question of its nonmineral character has not been finally settled.—*Northern Pac. R. Co. v. McGinnis* (N. D.) 61 N. W. 1032.

4 N. D. 494.

§ 8. Debts owing taxpayer.

(Wis.; 1896.)

A contract for the purchase of land by a city for park purposes, as authorized by Laws 1889, c. 488, and Laws 1891, c. 179, provided for possession by the city on part payment, and for a conveyance on payment within 10 years, at the city's option, of the balance of the price with interest, and of all taxes levied in the meantime, but declared, as required by such statutes, that the agreement created no liability against the city. On default in payment of interest or taxes, the vendors were authorized to foreclose the city's equity. *Held*, that the agreement did not create a debt taxable against the vendors, under Rev. St. §§ 1034-1036, providing for the taxation of personal property, including "all debts due from solvent debtors."—*Perrigo v. City of Milwaukee* (Wis.) 65 N. W. 1025.

92 Wis. 236.

§ 9. Deduction of indebtedness of taxpayer.

(Mich.; 1896.)

Laws 1893, No. 206, § 9, exempting from taxation so much of "the debts due or to become due as shall equal the amount of bona fide and unconditional debts" by the person owing, does not entitle a taxpayer to a reduction on account of an unconditional liability under a lease for future payments of rent for a term continuing into the future.—*Beecher v. Common Council of City of Detroit* (Mich.) 68 N. W. 237.

§ 10. To whom taxable.

[a] (N. D.; 1896.)

Under the revenue law, which requires personal property to be assessed as of May 1st in each year, when prior to that date one had sold

the wheat in an elevator, in good faith, it was error to assess such wheat, though it was not shipped until after May 1st.—*State v. Minneapolis & N. Elevator Co.* (N. D.) 68 N. W. 81.

[b] (Wis.; 1896.)

Personal property transferred on May 1st may be assessed to the vendee.—*Day v. Town of Pelican* (Wis.) 69 N. W. 368.

§ 11. Corporations and corporate stock.

[a] (Iowa; 1896.)

The organization of a corporation to make and sell loans under its articles of incorporation had been filed, and blank applications for loans, notes, and mortgages had been procured for it by the promoters, was abandoned; no stock having been issued or other property than the blanks acquired. These were assigned in blank by the corporation, and divided among the promoters, who never became members of the corporation. *Held*, that the corporation was not subject to assessment, as the owner of notes and mortgages appearing in its name in the county recorder's office, through the blanks being used by the promoters in their own business.—*Farmers' Loan & Trust Co. v. City of Newton* (Iowa) 66 N. W. 784.

[b] (Iowa; 1896.)

McClain's Code, § 1288, providing for the assessment of the average value of the moneys and credits which have been in the possession of a corporation making loans, has no application when loans were made in the name of the corporation by private persons, but the corporation never had in its possession or control any of the moneys.—*Farmers' Loan & Trust Co. v. City of Newton* (Iowa) 66 N. W. 784.

[c] (Iowa; 1897.)

A corporation engaged in the manufacture and sale of sewer pipe and drain tile, made from water, salt, and clay, is assessable, under Code, § 816, providing that one who holds personal property to increase the value thereof by manufacturing, or by the combination of different materials with a view to profit by sale, is a manufacturer.—*Appeal of Iowa Pipe & Tile Co.* (Iowa) 70 N. W. 115.

[d] (Minn.; 1896.)

If a title insurance company, organized under Gen. Laws 1887, c. 135 (Gen. St. 1894, §§ 3338-3343), avails itself of the provisions of Gen. Laws 1889, c. 227, and engages in the annuity, safe-deposit, and trust business authorized by Gen. Laws 1883, c. 107 (Gen. St. 1894, §§ 2841-2854), all its property is subject to assessment and taxation under the general tax law, in the same manner as the property of annuity, safe-deposit, and trust companies organized under the act of 1883.—*Nelson v. St. Paul Title Insurance & Trust Co.* (Minn.) 66 N. W. 206.
64 Minn. 101.

[e] (Wis.; 1895.)

Franchises granted to an electric light company, and the property used to exercise the same, being inalienable, a transfer thereof to an electric street-railway company does not relieve the electric light company from liability for taxes thereon, or east it on the railway company.—*State v. Anderson* (Wis.) 63 N. W. 746.
90 Wis. 550.

§ 12. Banks.

[a] (Iowa; 1895.)

Surplus moneys and credits of a savings bank are taxable as a part of "the paid up capital," under Acts 15th Gen. Assem. c. 60, § 28, providing that "the paid up capital of all savings banks" shall be subject to taxation.—*Iowa State Sav. Bank v. City Council of Burlington* (Iowa) 61 N. W. 851.

[b] (Iowa; 1895.)

The amount paid for United States bonds purchased out of the general assets of a savings bank should be deducted from its taxable assets.

—*Ottumwa Sav. Bank v. City of Ottumwa* (Iowa) 63 N. W. 672.

§ 13. Liability of bank as agent of shareholder.

[a] (Iowa; 1894.)

Under Code, § 819, providing that banks shall be liable for the tax on shares of capital stock as the agent of the shareholders, and that they "shall retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied on his shares," a bank is not liable unless it has money or property belonging to the delinquent shareholder.—*Farmers' & Traders' Nat. Bank v. Hoffmann* (Iowa) 61 N. W. 418.
93 Iowa, 119.

[b] (Iowa; 1894.)

Evidence that a bank had not declared a dividend for a year previous to the levy of an assessment on its capital stock, and that the surplus which it reported after the assessment was made was worthless, by reason of the shrinkage of the securities composing it, will sustain a finding that, after the assessment, the bank had no money of the shareholder with which to pay the tax.—*Farmers' & Traders' Nat. Bank v. Hoffmann* (Iowa) 61 N. W. 418.
93 Iowa, 119.

§ 14. Place of taxation.

[a] (Iowa; 1896.)

Under Code, § 806, providing that, when a person is doing business in more than one county, the property existing in one of the counties shall be taxed in that county, the capital invested by a manufacturer residing in one county, but doing business in another, is taxable in the latter county, though the business was temporarily suspended during a part of the year, and the property used in carrying on the business, but not the property assessed, was removed to the county where the residence was located.—*Dean v. Town of Solon* (Iowa) 66 N. W. 182; *Same v. Maber*, *Id.*

[b] (Minn.; 1895.)

Under Gen. St. 1894, § 1516, providing that the personal property pertaining to the business of a merchant shall be listed in the town or district where his business is carried on, the buying of personal property outside of the town of the purchaser's residence does not render the property taxable at the place of purchase.—*Minneapolis & N. Elevator Co. v. Board of Com'rs of Clay County* (Minn.) 63 N. W. 101.
60 Minn. 522.

[c] (S. D.; 1895.)

Under Comp. Laws, § 1557, personal property situated, kept, and owned in the unorganized county of Lyatt in the year 1893 was subject to taxation for state purposes in Stanley county, that being the nearest organized county.—*Dupree v. Stanley County* (S. D.) 65 N. W. 426.

[d] (Wis.; 1895.)

The franchises of an electric street-railway company, and the property necessary for their exercise, including power houses and the lands on which they are located, are taxable, as an entirety, in the assessment district in which the principal office of the company is located.—*State v. Anderson* (Wis.) 63 N. W. 746.
90 Wis. 550.

§ 15. — Personalty of ward.

(Iowa; 1895.)

Under Code, § 805, which provides that "any person required to list property belonging to another shall list it in the same county in which he would be required to do if it were his own," the personal property of a ward is assessable only in the county where the guardian resides.—*Hinkhouse v. Town of Wilton* (Iowa) 62 N. W. 782.

§ 16. — Manufacturers.

[a] (Minn.: 1896.)

Under Gen. St. § 1516, providing that personal property pertaining to the business of a manufacturer shall be listed for taxation at the place where the business is carried on, one who regularly contracts with the owners of a plant to have his materials manufactured for him by them is carrying on a manufacturing business at the place of such manufacture, so as to give his materials a situs there for taxation, though he resides elsewhere in the state, and owns and operates a similar manufacturing plant at the place of his residence. *State v. Clarke* (Minn.) 67 N. W. 1144.

64 Minn. 556.

[b] (Minn.: 1896.)

In that case he is taxable at the place of manufacture on materials belonging to him in transit to that place, to be there so manufactured for him by the owners of the plant.—*State v. Clarke* (Minn.) 67 N. W. 1141.

64 Minn. 556.

[c] (Minn.: 1896.)

One may be a manufacturer for the purpose of taxation within Gen. St. 1894, §§ 1516, 1520, though he neither owns nor operates a plant, but contracts with the owners of a plant to have his materials manufactured for him.—*State v. Clarke* (Minn.) 67 N. W. 1141.

64 Minn. 556.

§ 17. — Logs.

[a] (Mich.: 1895.)

Logs piled during the winter on the ice of a lake, around which a boom is constructed for the purpose of preventing their floating away when the ice shall have broken up, and which it is intended shall be moved to a point on the shore of the lake where a hoist and spur track have been constructed, for the purpose of conveying them out of the township as soon as the weather permits, but which are not so conveyed before the second Monday in April, though they are then being crowded towards the hoist with boom sticks, are nevertheless assessable under § 1109, Ann. St. § 1170b, subd. 4, which provides that logs "piled and left in any yard * * * shall not be deemed in transit but shall be assessed to the owner thereof in the township or ward where they may be situate at the time provided for by law for taking any assessment."—*Plainfield Tp. v. Sage* (Mich.) 64 N. W. 731.

[b] (Wis.: 1896.)

Laws 1891, c. 473, § 2, provides that all saw logs cut within six months before April 1st shall be assessed in the district where they are piled for shipment, except that logs to be sawed in a mill of the owner in the state shall be assessed in the district where the mill is located. Section 3 requires the assessor in any district in which saw logs cut within six months before April 1st may be piled, to ascertain the amount thereof which is or has been "at any time during the month of April" in his district, to fix the value, and assess the same to the owner as of April 1st, etc. *Held*, that logs cut and piled for shipment within six months of April 1st, and which, before that date, are shipped to a mill in another assessment district, to be sawed, are assessable in the latter district.—*Day v. Town of Pelican* (Wis.) 69 N. W. 368.

§ 18. — Debts owing nonresidents.

[a] (Mich.: 1896.)

The legislature may impose a tax on credits in the hands of resident trustees in trust for nonresidents.—*City of Detroit v. Lewis* (Mich.) 66 N. W. 958.

[b] (Mich.: 1896.)

Pub. Acts 1893, No. 206, § 8, subd. 6, declaring that, for the purpose of taxation, personal property "shall include all credits of every kind belonging to inhabitants of this state," and

section 11, subd. 6, providing that personal property under the control of a trustee may be assessed to him in the township where he resides, authorize a tax on credits held by resident trustees for nonresident beneficiaries.—*City of Detroit v. Lewis* (Mich.) 66 N. W. 958.

§ 19. Estoppel to enforce tax.

(S. D.: 1896.)

An attempted release by the county commissioners of a lien on real estate for personal taxes, made subsequent to the execution of a mortgage of the property, cannot operate to estop the county, as against the mortgagee, from enforcing the lien.—*Iowa Land Co. v. Douglas County* (S. D.) 67 N. W. 52.

III. EXEMPTIONS.

See, also, "Constitutional Law," § 58.

§ 20. Public property.

[a] (Minn.: 1895.)

Under Gen. St. 1894, § 1512, exempting from taxation all public market houses, passed pursuant to Const. art. 9, § 3, subd. 8, exempting from taxation public property used exclusively for any public purposes a building erected by a private corporation, organized to erect the same, on land owned by the corporation, for a city market, under a contract with the city whereby it secured a franchise for conducting the business for 25 years, though declared a public market, and exempt, by ordinance, was not exempt.—*State v. Cooley* (Minn.) 64 N. W. 379.

62 Minn. 183.

[b] (Wis.: 1897.)

Property which is in the possession of the city of Milwaukee under a contract giving it the option to become the owner by the making of certain payments, and the right of possession until default, but which creates no obligation on its part to purchase, is not exempt from taxation, under Rev. St. 1878, § 1038, subd. 2, exempting property owned exclusively by municipal corporations, nor under the city's charter (Laws 1874, c. 184), exempting property held by it under a lease.—*City of Milwaukee v. Milwaukee County* (Wis.) 69 N. W. 819.

§ 21. When entry on public land becomes taxable.

[a] (Iowa: 1897.)

Under Revision 1860, § 711, subd. 7, providing that "government lands entered or located shall not be taxed for the year in which the entry, location or purchase was made"; and section 712, making all real estate not exempt by the preceding section subject to taxation, lands entered in 1869 were not exempt from taxation for the year 1870.—*Barrett v. Kevane* (Iowa) 69 N. W. 1036.

[b] (S. D.: 1896.)

Where a homestead entry on government land was changed into a cash entry, which was suspended, and the proof of residence finally rejected, by the United States land department, necessitating the making of new proof thereafter, on which the patent issued, the land did not become taxable under state authority until the second proof was made.—*Duncan v. Newcomer* (S. D.) 69 N. W. 580.

§ 22. Franchise and property of street-railway company.

[a] (Wis.: 1895.)

The mere fact that the statutes do not fix the method of valuing the franchises of an electric street-railway company for the purposes of taxation does not render such franchises exempt from taxation.—*State v. Anderson* (Wis.) 63 N. W. 746.

90 Wis. 550.

[b] (Wis.: 1897.)

Under Laws 1895, c. 363, § 6, imposing a license fee on street railways, and providing that it shall be in lieu of all other taxes and assessments, and "all" personal property, franchises, and real estate owned by such companies shall be exempt from assessment and taxation, and that all lands and lots unimproved or having buildings thereon shall be liable to taxation for state, county, and school purposes,—all the property of such companies, whether used for railroad purposes or not, is exempt from assessments.—*Milwaukee Electric Railway & Light Co. v. City of Milwaukee* (Wis.) 69 N. W. 796.

§ 23. Property of charitable, educational, or religious institutions.

[a] (Iowa: 1895.)

A pastor, having purchased lots with the express purpose of building a church thereon, subsequently secured a more desirable location, where he erected the church, paying for it with money secured by a mortgage on the lots first purchased. *Held*, that the latter lots were not exempt under Code, § 797, providing that property devoted solely to religious purposes, "and not leased or otherwise used with a view to pecuniary profit," shall be exempt from taxation.—*Nugent v. Dilworth* (Iowa) 63 N. W. 448.

[b] (Iowa: 1895.)

Vacant and unused land held by a college for sale, the proceeds of which do not appear to be restricted to any particular use, is not within McClain's Code, § 1271, exempting from taxation grounds and buildings of literary institutions devoted solely to the appropriate objects thereof, and not leased, or otherwise used with a view to pecuniary profit.—*Foy v. Coe College* (Iowa) 64 N. W. 636.

§ 24. Limitations as to value of exemption.

(S. D.: 1895.)

Comp. Laws, § 1542, subd. 14, provides that "any one-fourth part of any quarter section, * * * together with all improvements thereon, not exceeding in value \$1,000," shall be exempt from taxation. *Held*, that the limitation as to value includes both the land and improvements together, and the land and improvements in excess of \$1,000 in value are subject to taxation.—*Grigsby v. Minnehaha County* (S. D.) 62 N. W. 105.
6 S. D. 492.

IV. ASSESSMENT AND LEVY.

Assessment by board of equalization, see post, § 39.

§ 25. In general.

[a] (Mich.: 1895.)

Under the tax act of 1882, § 84 (re-enacted in 1885 and 1889), providing that irregularities in the assessment shall not render any tax invalid, the assessment of partnership property in the name of one of the members of the firm is valid.—*Fletcher v. Post* (Mich.) 62 N. W. 574.
104 Mich. 424.

[b] (Mich.: 1895.)

A contract provided that defendants might cut timber from plaintiff's land, the former to pay all taxes thereon until they should give written notice to plaintiff that they had removed all the timber they desired, and that thereupon defendants should be released from paying taxes which might be "assessed" thereafter. *Held*, that an "assessment" is not complete until the amount is ascertained by the board of supervisors in October, under Pub. Acts 1885, Act No. 153; and notice to plaintiff in July released defendants from liability for taxes of that year, though the land was listed for taxation in April.—*Rothschild v. Pegole* (Mich.) 63 N. W. 339.
105 Mich. 388.

[c] (N. D.: 1896.)

A county tax levy of a specific amount for each item of county expenses for the ensuing year sufficiently complies with Laws 1890, c. 132 (Revenue Law), § 48, requiring the levy to be based on an itemized statement of such expenses.—*Shattuck v. Smith* (N. D.) 69 N. W. 5.

[d] (N. D.: 1896.)

An entire assessment is not rendered invalid by the fact that the assessor, while acting within his jurisdiction, and in the exercise of honest judgment, assessed certain property at less than its actual value, or omitted taxable property from the assessment roll.—*Shattuck v. Smith* (N. D.) 69 N. W. 5.

§ 26. Notice of assessment.

(Iowa: 1895.)

Where property of a college is subject to taxation, notice that it is to be assessed need not be given the college, though in previous years it has not been assessed; and being assessed to another, who returns it to be assessed to him, and being sold for taxes, and the time for redemption having expired, the owner has no remedy, though it had no knowledge of any of the proceedings.—*Foy v. Coe College* (Iowa) 64 N. W. 636.

§ 27. Preliminary classification of property.

(Iowa: 1895.)

Under Code, § 821, providing that the board of supervisors shall, at their meeting in January in each year, classify the several descriptions of property to be assessed, and shall deliver to each assessor, on or before January 15th, a certificate of such classification, a classification made at the regular session in June is illegal.—*McCutchen v. Board of Sup'rs of Lyon County* (Iowa) 63 N. W. 455.

§ 28. Assessment books and rolls.

[a] (Iowa: 1897.)

Code, § 825, providing that "each assessor shall on or before the first Monday in April of each year deliver to the clerk of his township one of the assessment books to be used by the trustees for the equalization of the assessment," is not mandatory; and hence a taxpayer cannot complain of delay in delivering the assessment book, if he had an opportunity to present his objections to the board of equalization after the delivery thereof.—*Burlington Gaslight Co. v. City of Burlington* (Iowa) 70 N. W. 628.

[b] (Mich.: 1895.)

The fact that, in the headings of each page of the book in which the supervisor entered the copy of his roll for the use of the township treasurer, the blanks provided for the names of the township and county were not filled out, does not invalidate the tax, where the names of the township and county were printed on the outside of the book.—*Auditor General v. Keeweenaw Ass'n* (Mich.) 65 N. W. 288.

[c] (Minn.: 1896.)

Ditto marks under the word "Unknown," in the column in the assessment roll headed "In Whose Name Assessed," is a sufficient statement that the owner's name is unknown, within Gen. St. 1894, § 1625.—*Hoyt v. Clark* (Minn.) 66 N. W. 262.
64 Minn. 139.

[d] (S. D.: 1896.)

The duplicate assessment roll required by law to be filed by a city assessor with the county auditor, and upon which the county board acts in the levy of taxes, is the roll, after the changes made by the city council, as a board of equalization, have been entered thereon; and any roll filed which does not contain the valuations as so fixed is not in fact a duplicate of the legal assessment.—*Dakota Loan & Trust Co. v. County of Codrington* (S. D.) 68 N. W. 114.

§ 29. — Certificate.

[a] (Mich.; 1895.)

Under a city charter providing that no tax assessment shall be held invalid for matters not affecting the merits, a certificate affixed to an assessment roll reciting that the property had not been estimated "at the price it would sell for at a forced sale," instead of "at a forced auction sale," as provided by the charter, is not invalid, when the variance was not designed as an evasion to enable the assessing officers to list the property at a lower valuation than the law required.—*Blue Iron Min. Co. v. City of Negaunee* (Mich.) 63 N. W. 202.

105 Mich. 317.

[b] (Mich.; 1897.)

It is sufficient that the certificate annexed to the tax record, in which the county clerk, acting as register ex officio, describes himself as county clerk and register in chancery, is signed by him as "register," though Laws 1893, No. 206, requires it to be signed by the clerk.—*Mersereau v. Miller* (Mich.) 70 N. W. 341.

§ 30. Description of property.

[a] (Neb.; 1896.)

The owner cannot avoid payment of taxes because the description on the assessment roll and tax list does not refer to a lawfully existing recorded plat or subdivision, if the description, by reference to generally known plats, or otherwise, locates the land with such certainty as to afford notice, and protect the owner's rights. *Bryant v. Estabrook* (1884) 20 N. W. 215, 16 Neb. 217, and *Roads v. Estabrook* (1892) 53 N. W. 64, 35 Neb. 297, followed.—*Kershaw v. Jansen*, 68 N. W. 616.

[b] (S. D.; 1896.)

IL obtained title to land described as the "Santa Fé Lode Mining Claim, Lot. No. 402, embracing 8.80 acres," and he afterwards sold and conveyed an undivided half of it. The land was situated 3½ miles from Lead City, in L. county, and listed in "Assessor's List, L. County," on a page headed "Tax List of L. County," etc. The assessor wrote "Lead City" on the corner of the page, and entitled it, "List of Taxable Property Belonging to H. et al., of the Town of —, L. County," etc. Under the ruled space headed "Town Lots" he wrote the words "Santa Fé Lode," omitting any entry in the spaces headed "School Dist.," "Lot," and "Block." In the assessment roll, on another page, were similar entries, except the numbers of the road and school districts were given. *Held*, that the description was insufficient.—*Van Cise v. Carter* (S. D.) 68 N. W. 539.

§ 31. Name of owner—Assessment of bank stock.

(Iowa; 1894.)

Under Code, § 819, providing for the taxation of shares of bank stock, and requiring the officers to furnish the assessors "the name of each person owning shares, and the amount owned by each," an assessment on the capital stock as the personal property of the bank, without mention of the shareholders, is void.—*Farmers' & Traders' Nat. Bank v. Hoffmann* (Iowa) 61 N. W. 418.

93 Iowa, 119.

§ 32. Assessment of corporate stock or property.

[a] (Iowa; 1897.)

Assessing rolling stock of an elevated road as "corporation stock," being a mere mistake of classification, will not defeat the assessment.—*Robbins v. Magoun* (Iowa) 70 N. W. 700.

[b] (Iowa; 1897.)

Assessing a corporation for corporate stock is proper, though it owns none, if the shares of the stockholders are not assessed to them.—*Robbins v. Magoun* (Iowa) 70 N. W. 700.

§ 33. — Double taxation.

(Wis.; 1896.)

A bank with a surplus of \$300,000 and a capital of \$200,000 reported to the assessor the true value of its shares of stock to be \$200 each, the face value being \$250. The assessor and board of review fixed the taxable value at \$150, and the stockholders paid the taxes assessed at such valuation. Much of the surplus was composed of real estate. *Held*, that taxes on such real estate were taxes on the surplus, and not on the capital stock; hence the taxation was not double.—*Second Ward Sav. Bank v. City of Milwaukee* (Wis.) 69 N. W. 359.

§ 34. Valuation.

[a] (Iowa; 1896.)

Under Code, § 816, providing that the average value of personal property held to increase the value thereof by manufacturing shall be listed for taxation, and that the value shall be estimated upon those materials only which enter into the manufactured product, the lessee of a creamery and its appliances is required to list for taxation the average value of the material used in making butter.—*Dean v. Town of Solon* (Iowa) 66 N. W. 182; *Same v. Maher*, *Id.*

[b] (Iowa; 1897.)

Under Code, § 816, providing that the average value of personal property held for the purpose of adding to its value by manufacture shall be listed for taxation, and that the value shall be estimated on those materials only which enter into the combination, the labor and fuel employed in the manufacture of sewer pipe are not to be considered.—*Appeal of Iowa Pipe & Tile Co.* (Iowa) 70 N. W. 115.

[c] (S. D.; 1896.)

The valuation of property as fixed by the city assessor was reduced by the city council, acting as a board of equalization, as provided by law; but such equalization was not completed until after the assessor had returned a duplicate of the assessment roll as made by him to the auditor, and the county board had made the levy of taxes thereon. *Held*, that the true value of the property for purposes of taxation was that fixed by the board of equalization, and the owner could not be compelled to pay taxes on a greater valuation.—*Dakota Loan & Trust Co. v. County of Codington* (S. D.) 68 N. W. 314.

§ 35. Reassessment.

(Wis.; 1895.)

Where it appears that the assessors' roll is equitable, though all the property is assessed below its true value, and the board of review illegally increases the valuation of the property of one taxpayer, it is not necessary, on such action of the board being set aside, to order a reassessment under the provision of Sanb. & B. Ann. St. § 1210b.—*Hixon v. Town of Eagle River*, 65 N. W. 366, 91 Wis. 649.

§ 36. Property unlawfully stricken from assessment roll.

(S. D.; 1895.)

The county board of equalization, or the county auditor, must place on the assessment roll any property unlawfully stricken off as exempt from taxation by the city board of equalization, at the valuation placed on it by the city assessor.—*Grigsby v. Minnehaha County* (S. D.) 62 N. W. 105.

6 S. D. 492.

§ 37. Correction of assessment.

[a] (Iowa; 1896.)

Code, § 841, providing that the county auditor may correct clerical or other errors in the assessment or tax book, does not authorize him to change the assessment of property as made and returned by the assessor, and to which no objection was made before the board of equalization, which has sole original jurisdiction to in-

crease or reduce an assessment.—*Polk County v. Sherman* (Iowa) 68 N. W. 562.

[b] (Iowa; 1896.)

The district court has no original jurisdiction to correct an assessment, or to order a change made in the valuation of property as it appears on the books of the county treasurer.—*Polk County v. Sherman* (Iowa) 68 N. W. 562.

V. EQUALIZATION.

Appeal from board, see post, § 46.

§ 38. Power and jurisdiction of board.

[a] (S. D.; 1895.)

Where the city board of equalization struck from the assessment rolls the whole assessment made of 33 acres of land, valued by the assessor at \$16,000, as exempt from taxation, under Comp. Laws, § 1542, its action was unauthorized, and not binding on the county board of equalization.—*Grigsby v. Minnehaha County* (S. D.) 62 N. W. 105.
6 S. D. 492.

[b] (Wis.; 1895.)

Where assessments are relatively equal, but at much less than the true value of the property, the board of review cannot increase the valuation of the property of one taxpayer without increasing in proportion the valuation of the property of the other taxpayers.—*Hixon v. Town of Eagle River*, 65 N. W. 366, 91 Wis. 649.

§ 39. Validity of assessment.

[a] (N. D.; 1896.)

An assessment of railroad property by the state board of equalization pursuant to Laws 1890, c. 135, is not invalidated by the fact that the value fixed by the board was less than the actual value, in the board's judgment, where there are grave doubts as to the liability of the property for taxation, and the record is silent as to whether the board regarded it as taxable.—*Shattuck v. Smith* (N. D.) 69 N. W. 5.

[b] (N. D.; 1896.)

Laws 1891, c. 104, declaring a tax previously levied by the state board of equalization without authority as valid as if made by the legislative assembly, as provided by law, is valid.—*Shattuck v. Smith* (N. D.) 69 N. W. 5.

§ 40. Equalization as between townships.

[a] (Iowa; 1895.)

Under Code, § 832, providing that the board of supervisors shall equalize the assessments of the several townships, cities, and incorporated towns of their county at their regular meeting in June in each year substantially as the state board equalize assessments, and section 834, providing that the state board of equalization shall equalize the valuation of said property among the several counties and towns by adding to or taking from the aggregate valuation of real property of each county such percentage as will raise or reduce the same to its proper valuation, an order raising the valuation of all farm lands in one town 100 per cent. above the valuation of other farm land in the county is void.—*McCutehen v. Board of Suprs of Lyon County* (Iowa) 63 N. W. 455.

[b] (Mich.; 1896.)

How. Ann. St. § 1027, requires the supervisors to examine the assessment rolls of the several townships, and ascertain whether the relative valuation of the "real" property has been uniformly estimated, and to equalize the same by adding to or deducting from the valuation of the "taxable property" in any township such an amount as will produce an equal valuation of the "real" property in the county, etc. *Held*, that such statute is complied with where the supervisors add to or deduct from the valuation of the real estate without reference to

the total taxable property in the respective townships.—*Auditor General v. Longyear* (Mich.) 68 N. W. 130.

§ 41. — Presumption.

[a] (Mich.; 1895.)

In the absence of any showing of relative inequality, an equalization of the property of the several townships of a county, the record of which recites that the equalizing board determined the aggregate valuation of the taxable property of each township at a certain sum, will be presumed regular, under Comp. Laws 1871, § 993, requiring that the board shall equalize the valuations if they deem them to be relatively unequal, and that the amount added or deducted shall be entered upon the records.—*Hoffman v. Lynburn* (Mich.) 62 N. W. 728.
104 Mich. 494.

[b] (Mich.; 1895.)

The presumption in favor of the regularity of the proceedings cannot be overcome by an inference that there must have been a deduction from the assessed valuation, although that fact is not disclosed by the record, on the ground that, if the state tax is computed upon the basis of the equalization, that assessable against the property in controversy would amount to more than the levy thereon for the state tax.—*Hoffman v. Lynburn* (Mich.) 62 N. W. 728.
104 Mich. 494.

§ 42. Sessions of board.

[a] (Iowa; 1897.)

The board of equalization met on the first Monday in April according to law, and, the assessor's book not being completed, adjourned to May 1st. On that date they met, and appointed a committee to hear objections, and report. Six days later, at special session, the report of the committee approving the assessment was adopted. *Held*, that a taxpayer who did not appear at the meeting on May 1st, and present his objections, could not complain of the assessment, or of the procedure of the board in appointing a committee, instead of hearing objections itself.—*Burlington Gaslight Co. v. City of Burlington* (Iowa) 70 N. W. 628.

[b] (Mich.; 1896.)

The provision of Sess. Laws 1893, No. 206, § 30, requiring the township boards of review to meet on the fourth Monday in May, and "continue in session during the day, and the day following," is mandatory; and, where a property owner is deprived of a hearing by the illegal adjournment of the board on the first day, there is no jurisdiction to levy taxes on his property.—*Auditor General v. Chandler* (Mich.) 66 N. W. 482.

§ 43. Records of board.

[a] (Mich.; 1896.)

Where the record of the board of equalization shows the amount of taxable real estate as assessed and the amount of assessed personalty and the amount of taxable property as equalized, and the amount added or deducted can be readily found by computation, there is a sufficient compliance with Acts 1893, No. 206, § 34, providing that the record of such board shall show the amount added to or deducted from the valuation in any township.—*Auditor General v. Ayer* (Mich.) 67 N. W. 985.

[b] (Mich.; 1896.)

Where the records of the board of equalization show the aggregate value of the real estate as assessed in each township, and the amount of taxable personalty and the whole amount of taxable property as equalized, and there is nothing in such record to indicate that the equalization was based on the aggregate of realty and personalty, or that it was not based on the realty alone, it will be presumed that it was based solely on the realty, as required by Acts 1893, No. 206, § 34.—*Auditor General v. Ayer* (Mich.) 67 N. W. 985.

§ 44. Right of board to appeal.

(Iowa; 1896.)

Under McClain's Code, § 4392, giving the supreme court appellate jurisdiction over judgments of courts of record in special proceedings, an appeal will lie to the supreme court by a city, or its board of equalization in its behalf, from a judgment of the district court canceling an assessment rendered on appeal from the board of equalization under section 1312, giving parties aggrieved by assessments the right to appeal from the board of equalization, though the city or board had no right in the first instance to appeal to the circuit court.—*Farmers' Loan & Trust Co. v. City of Newton* (Iowa) 66 N. W. 781.

VI. REMEDIES FOR ERRONEOUS TAXATION.

§ 45. Duty to make objections before reviewer.

[a] (Mich.; 1895.)

The supreme court, in a decision filed March 18, 1892, declared it to be the duty of assessors to assess to banks the value of real-estate mortgages owned by them, and to deduct the same from the value of their capital stock. On March 26th plaintiff bank furnished the assessors with a list of its real-estate mortgages, but the assessors, on the advice of the city counselor, refused to deduct them from the value of plaintiff's stock, on the ground that the mortgages all contained agreements that the mortgagors should pay the tax. On May 11th, while the assessment rolls were in the hands of the common council for review, the supreme court filed a further opinion, in which it was held that the decision of March 18th applied also to mortgages containing such agreements; but plaintiff took no steps to have the assessment corrected, either before the assessors or the common council. *Held*, that having failed to appeal to the board of review, as provided in the city charter, plaintiff was not entitled to recover the tax paid under protest, and its belief that such appeal would have been useless afforded no excuse for the neglect.—*Michigan Sav. Bank v. City of Detroit* (Mich.) 65 N. W. 101.

[b] (Mich.; 1895.)

One cannot complain that the assessment of a tax was made in the name of the wrong person, or of any other irregularity which the board of review might have corrected, had application been made to it at the proper time.—*Hinds v. Township of Belvidere* (Mich.) 65 N. W. 544.

§ 46. Appeal from board of equalization.

[a] (Iowa; 1897.)

On appeal from the action of a board of equalization in increasing an assessment, the district court must try the matter anew, and make a just assessment, without reference to the action of the board.—*Lyons v. Board of Equalization of City of Ottumwa* (Iowa) 70 N. W. 711.

[b] (Neb.; 1896.)

An appeal does not lie, in the absence of statute, from the determination of a board of equalization on a complaint of one against whom an assessment has been levied.—*Webster v. City of Lincoln* (Neb.) 69 N. W. 394.

[c] (Neb.; 1896.)

The decision of a board of equalization on the complaint of one against whom an assessment has been levied is final, and the consequent order a final one, which is reviewable on error under Code Civ. Proc. § 580.—*Webster v. City of Lincoln* (Neb.) 69 N. W. 394.

[d] (S. D.; 1895.)

The right of appeal to the circuit court from the decision of a city board of equaliza-

tion, under Laws 1890, art. 10, c. 37, § 5, by "any person feeling aggrieved at any decision of the board of equalization upon matters he has called upon it to correct, alter or change in reference to the listing or valuation of his property," cannot be extended to parties or cases other than those specified in the act.—*Grigsby v. Minnehaha County* (S. D.) 62 N. W. 195.
6 S. D. 492.

§ 47. Double taxation.

[a] (Minn.; 1896.)

One who is assessed in two counties for the same personality cannot obtain relief from the state auditor, under Gen. St. 1894, § 1652, on recommendation of the county board alone, but the county auditor must recommend such relief, as required by that section.—*Clarke v. Board of Com'rs of Stearns County* (Minn.) 69 N. W. 25.

[b] (Minn.; 1896.)

Nor can he obtain relief under Gen. St. 1894, § 1522, by an ex parte application to the state auditor to determine in which he should be assessed, but must apply to the auditor on notice to the two counties, or ask the auditor to fix a time and place of hearing, and give notice thereof, though the statute does not expressly provide for notice.—*Clarke v. Board of Com'rs of Stearns County* (Minn.) 69 N. W. 25.

§ 48. Injunction.

[a] (Iowa; 1895.)

Under Code, § 797, exempting from taxation property devoted solely to religious purposes, on condition that the deeds of such property shall previously have been recorded, one who seeks to restrain a sale of church property for taxes must allege and prove that the deeds thereto have been recorded.—*Ngent v. Dilworth* (Iowa) 63 N. W. 448.

[b] (Neb.; 1895.)

One not guilty of laches may sue in equity to restrain the collection of a void tax or assessment.—*Morris v. Merrel* (Neb.) 62 N. W. 865.
44 Neb. 423.

[c] (Neb.; 1896.)

The owner of land sued to restrain collection of a tax on the ground of the inadequacy of a proceeding in error to review the board's decision on account of the absence of a law for perfecting a bill of exceptions of any matters occurring on the hearing before the board of equalization. *Held*, that the complaint was insufficient if it failed to allege that matters had been presented on such hearing which required presentation on error by bill of exceptions.—*Webster v. City of Lincoln* (Neb.) 69 N. W. 394.

[d] (Neb.; 1897.)

The equity jurisdiction of the district courts of the state includes authority to enjoin the collection of a void tax, and this jurisdiction the legislature can neither take away nor impair.—*Chicago, B. & Q. R. Co. v. Cass County* (Neb.) 70 N. W. 955.

[e] (Neb.; 1897.)

That the tax agent of a railroad company for several years has listed a bridge for taxation with the officers of a school district, erroneously believing that it was within such district, does not estop the company from suing to enjoin the collection of a tax on the bridge by such district on the ground that the bridge is outside the district.—*Chicago, B. & Q. R. Co. v. Cass County* (Neb.) 70 N. W. 955.

[f] (S. D.; 1895.)

Since, under Laws 1891, c. 14, § 8, cattle must be assessed in the county wherein their owner resides, the owner of cattle assessed in different counties for the same year, who paid the taxes thereon in the county of his residence, is entitled to an injunction to prevent the collection of the tax assessed in another county, without first presenting the question as to which was the proper county for assessment

to the state auditor, under section 14.—*Knapp v. Charles Mix County* (S. D.) 64 N. W. 187.

[*g*] (S. D.; 1896.)

A property owner who has tendered payment of the taxes due on his property, computed on its legal assessment, may maintain an action to enjoin a sale of the property for the purpose of collecting a void excess claimed.—*Dakota Loan & Trust Co. v. County of Codington* (S. D.) 68 N. W. 314.

[*h*] (S. D.; 1897.)

Where the entire capital stock of a bank is taken as a basis of valuation of a stockholder's shares, for purposes of taxation, without deducting the amount legally invested in real estate, as provided by Laws 1891, c. 14, § 24, the stockholder, after paying all that could be lawfully assessed against his shares, may sue in equity to restrain collection of the tax, which, being regular on its face, creates an apparent lien on his land.—*Macomb v. Lake County* (S. D.) 70 N. W. 652.

[*i*] (Wis.; 1897.)

The fact that the resolution of a town for raising taxes fails to designate the specific purposes for which the taxes were to be raised is not available in equity as a ground to restrain the collection of the tax.—*Chicago & N. W. Ry. Co. v. Forest County* (Wis.) 70 N. W. 77.

§ 49. — School taxes.

(Iowa; 1895.)

Injunction does not lie to restrain the district board of directors from collecting a tax for highways for school purposes, since Code, § 1829, providing that any person aggrieved by its decisions may appeal to the county superintendent, gives an adequate remedy.—*Bogaard v. Independent Dist. of Plain View* (Iowa) 61 N. W. 859.

93 Iowa, 269.

§ 50. Recovery back of taxes paid.

[*a*] (Iowa; 1896.)

In an action to recover taxes paid to a school district, plaintiff claimed that a part of the tax paid was on one acre of land which was not within the district, but the petition did not state the assessed value of that acre, nor make demand for any specific tax paid thereon. *Held*, that plaintiff could not recover such tax.—*Chicago, R. I. & P. Ry. Co. v. Independent Dist. of Avoca* (Iowa) 68 N. W. 881; *Benjamin v. Same*, *Id.*

[*b*] (Iowa; 1897.)

Code, § 870, directing the treasurer to refund any tax erroneously or illegally exacted, does not authorize a second mortgagee, whose mortgage was prior to the lien for taxes on personally assessed against the mortgagor and had been foreclosed prior to the tax sale, to recover from the county the amount paid by him to redeem from the tax sale, in order to obtain an extension of the time for payment of the first mortgage.—*Bibbins v. Polk County* (Iowa) 69 N. W. 1007.

[*c*] (Iowa; 1897.)

A school district need not be notified or made a party to a petition by a taxpayer to the board of county supervisors for the refunding of a tax paid by him to the county for the benefit of the school district.—*Independent Dist. of Ottumwa v. Taylor* (Iowa) 69 N. W. 1009.

[*d*] (Mich.; 1894.)

Laws 1893, Act 206, § 53, besides providing for the recovery of illegal taxes paid to the township treasurer under protest (provided the township is sued therefor in 30 days), provides for the payment to such treasurer by one co-tenant of his share of the taxes, and also by a person having a lien on the land. Section 58 provides that, after the return of land for unpaid taxes, the "county treasurer" may receive, "under like provisions as in section 53," the amounts of the taxes. *Held*, that the latter section does not authorize the recovery of taxes

paid to the "county treasurer" under protest.—*Weston v. Luce County* (Mich.) 61 N. W. 15.

[*e*] (Mich.; 1895.)

In an action to recover taxes paid under protest, the question of whether the land could be assessed to plaintiff, the state having bid it in for taxes of former years, cannot be considered, protest not having been made on this ground.—*Hinds v. Township of Belvidere* (Mich.) 65 N. W. 544.

[*f*] (Minn.; 1896.)

One who is assessed in two counties for the same personality, and pays the tax in the county in which he is not taxable, cannot recover the payment until he has exhausted his statutory remedies for setting aside the assessment.—*Clarke v. Board of Com'rs of Stearns County* (Minn.) 69 N. W. 25.

[*g*] (Neb.; 1897.)

That part of a county tax which is above the constitutional limit is levied for an "illegal and unauthorized purpose," within the meaning of Comp. St. c. 77, art. 1, § 144, authorizing the recovery of such taxes when paid.—*Chicago, B. & Q. R. Co. v. County of Nemaha* (Neb.) 69 N. W. 958.

[*h*] (Neb.; 1897.)

One who has paid, under protest, a county tax exceeding the constitutional limit, may, under Comp. St. c. 77, art. 1, § 144, recover it back by action without presenting his claim to the county board.—*Chicago, B. & Q. R. Co. v. County of Nemaha* (Neb.) 69 N. W. 958.

[*i*] (Wis.; 1896.)

Under *Sanb. & E. Ann. St.* § 1164, declaring that any person "aggrieved" by the collection of an unlawful tax may recover the same if he had paid "more than his equitable share," proof of illegal and void additions to the assessment, which increased plaintiff's taxes, is not sufficient to entitle him to recover, if it appears that, had he made a truthful return of his property, he would have been properly taxed for the whole or a material part of the illegal tax.—*Day v. Town of Pelican* (Wis.) 69 N. W. 368.

See, also, "Payment," § 17.

§ 51. Trover against collector.

(Mich.; 1896.)

A tax collector is not liable for the value of a chattel which was seized for taxes under a warrant fair upon its face, even though demand for the return thereof be made before sale.—*Curtiss v. Witt* (Mich.) 67 N. W. 1106.

§ 52. Replevin of property seized.

(Mich.; 1895.)

In an action to replevy partnership property seized for taxes assessed against one of the members of the firm, evidence that portions of the tax were illegally assessed is inadmissible.—*Fletcher v. Post* (Mich.) 62 N. W. 574.

104 Mich. 424.

§ 53. Tender of taxes due.

[*a*] (Mich.; 1895.)

Where a tax is a valid claim, and is legally assessed, but there are defects arising in the course of the enforcement of its collection rendering the levy invalid, the taxpayer is entitled to have the levy removed, as a cloud on his title, only on condition of payment of the tax.—*Hamilton & Merryman Co. v. Township of L'Anse* (Mich.) 65 N. W. 282.

[*b*] (Wis.; 1895.)

Superior City Charter, § 102 (Laws 1891, c. 124), provides that different city officials shall file statements of the amount required in the several departments of the city government, "and the remainder of the general fund," and the city council shall levy such sums as may be sufficient for the several purposes for which taxes are authorized. Section 112 provides that no error or informality in the levy of taxes not affecting the substantial justice of the tax shall vitiate the tax. *Held*, that a tax levied for the

"general fund," without a statement of the items making up such fund, is not so invalid that equity will set aside a tax sale based thereon, without requiring the payment of the tax as a condition for such relief.—*Hayes v. Douglas County* (Wis.) 65 N. W. 482.
92 Wis. 429.

§ 54. Waiver of objections.

(S. D.; 1896.)

Where, before the city council had equalized the city assessment, the county board attempted to levy taxes for state and county purposes upon the city assessment roll, an owner of city property illegally assessed waived no rights by failing to appear before the county board at such session.—*Dakota Loan & Trust Co. v. County of Codington* (S. D.) 68 N. W. 314.

VII. LIEN.

Rights of defeated tax title holder, see post, § 118.

§ 55. Of taxes assessed on personalty.

[a] (Neb.; 1895.)

The taxes assessed on personal property are not confined, as a lien, to the property on which they are assessed, but are a lien on all personal property owned by the person assessed, during the existence of the taxes, from delivery of the tax list to the treasurer for collection.—*Reynolds v. Fisher*, 61 N. W. 695, 43 Neb. 172.

[b] (Neb.; 1896.)

Taxes assessed on personal property are a lien from and after the delivery of the tax list to the county treasurer upon all the personal property owned by the person assessed.—*Reynolds v. Fisher* (1895) 61 N. W. 695, 43 Neb. 172, followed.—*Farmers' Loan & Trust Co. v. Memminger*, 66 N. W. 1014, 48 Neb. 17.

[c] (N. D.; 1895.)

A lien for taxes on personal property does not arise until after the tax has been assessed and levied, and the tax books have been received by the county treasurer. Laws 1890, c. 132, §§ 51, 90.—*Swenson v. Greenland* (N. D.) 62 N. W. 603.
4 N. D. 532.

§ 56. Priorities.

[a] (Iowa; 1897.)

Code, § 865, does not make the lien for taxes on personalty prior to the lien of a previous mortgage executed by the owner. Given, J., dissenting.—*Bibbins v. Polk County* (Iowa) 69 N. W. 1007.

[b] (Neb.; 1895.)

The lien on personal property, for taxes, is superior to that of a chattel mortgage executed subsequently to the delivery of the tax list to the county treasurer.—*Reynolds v. Fisher*, 61 N. W. 695, 43 Neb. 172.

[c] (Neb.; 1895.)

The lien on personal property, for taxes, is paramount to the liens of levies of attachment which were made subsequent to the delivery of the tax list to the county treasurer.—*Reynolds v. McMillin*, 61 N. W. 699, 43 Neb. 183.

[d] (Neb.; 1896.)

The lien of taxes assessed on personalty is paramount to the lien of a chattel mortgage executed after the delivery of the tax list to the county treasurer.—*Farmers' Loan & Trust Co. v. Memminger* (Neb.) 66 N. W. 1014.
48 Neb. 17.

§ 57. How devested—Effect of delinquencies in enforcing.

[a] (S. D.; 1896.)

The failure of the auditor to bring forward personal taxes for preceding years, and extend the same upon the real-estate tax list,

or of the treasurer to sell the land on which they were a lien, does not, as against subsequent incumbrancers of the land, release the land from the lien. Fuller, J., dissenting.—*Iowa Land Co. v. Douglas County* (S. D.) 67 N. W. 52.

[b] (S. D.; 1896.)

Where a mortgage of land was taken prior to 1891, after personal taxes against the mortgagor became liens on the land,—power at that time being conferred on the treasurer, without limitation as to time, to sell land for personal taxes,—the failure of the treasurer to collect the taxes by distress of personalty, or by sale of the realty on which the lien existed, did not release the taxes, or preclude the treasurer from selling the real estate for the same in a subsequent year.—*Iowa Land Co. v. Douglas County* (S. D.) 67 N. W. 52.

VIII. PAYMENT.

Provision in mortgage as to payment of taxes, see "Mortgages," § 14.

Rights and liabilities of life tenants as to payment of taxes, see "Estates," § 3.

Voluntary payment of taxes, see "Payment," § 17.

§ 58. Tender of taxes—Mistake of treasurer.

[a] (Wis.; 1895.)

Where the landowner applies in good faith to the treasurer to pay his taxes, and receives a statement, and pays accordingly, and afterwards the land is returned and sold for taxes in arrear when such statement was furnished, the sale is invalid.—*Bray & Choate Land Co. v. Newman* (Wis.) 65 N. W. 494.
92 Wis. 271.

[b] (Wis.; 1895.)

In an action to set aside a tax sale, evidence that plaintiff's agent applied to the treasurer to pay the taxes on the land, and that a receipt was given for the taxes for that year, containing a statement of the divers taxes under proper headings, with the blank headed "Taxes Unpaid Previous Year" left blank, sufficiently proves that the treasurer failed to disclose the fact that taxes for a previous year were in arrear.—*Bray & Choate Land Co. v. Newman* (Wis.) 65 N. W. 494.
92 Wis. 271.

[c] (Wis.; 1896.)

If an owner of land in good faith applies to the proper officer for the purpose of paying the taxes thereon, and is prevented by the mistake or fault of such officer, the attempt to pay is considered the legal equivalent of actual payment, and title to the land will not pass by its subsequent sale for such tax; but this rule has no application where the officer applied to is not the one authorized to receive the tax.—*Edwards v. Upham* (Wis.) 67 N. W. 728.
93 Wis. 455.

§ 59. Sale for taxes of subsequent years.

(Iowa; 1896.)

A sale of land for taxes relieves the owner from liability for all prior taxes then due, and not included therein.—*Phillips v. Wilmarth* (Iowa) 66 N. W. 1053.

§ 60. Payment under wrong description.

(Iowa; 1895.)

A sale of land for unpaid taxes, levied according to the legal description of the land, is invalid where the same land had been taxed under a different description, which, though not technically correct, was sufficient to identify the property, and the taxes thus levied had been paid before the sale.—*Rath v. Martin* (Iowa) 61 N. W. 941; *Block v. Same*, id.
93 Iowa, 499.

§ 61. Effect of payment under void law. (N. D.; 1894.)

The payment by the N. P. R. Co. of the gross earnings tax under the void gross earnings law (Laws 1883, c. 99), and the acceptance of the same by the territory (said payment being made before the admission of North Dakota as a state), do not bar the right of the different counties in which that company's land grant is situated to levy taxes against such land.—*Northern Pac. R. Co. v. McGinnis* (N. D.) 61 N. W. 1032.

4 N. D. 494.

§ 62. Evidence.

(Minn.; 1896.)

On an issue whether one paid taxes on lands, the receipt of the county treasurer is prima facie evidence of payment.—*Board of Trustees of Ripon College v. Brown* (Minn.) 68 N. W. 837.

IX. COLLECTION OF TAXES.

Estoppel to enforce tax, see ante, § 19.

Injunction against collection, see ante, §§ 48, 49.

Mandamus to compel collection, see "Mandamus," 7.

1. IN GENERAL.

§ 63. In general.

[a] (Mich.; 1895.)

As Act 1891, in regard to taxation, did not require the transcript by the county treasurer of delinquent taxes to be forwarded to the auditor general, and as tax sales under such act were not predicated on such transcript, the failure of the county treasurer to attach to such transcript a certificate of correctness does not render the tax invalid.—*Auditor General v. Keweenaw Ass'n* (Mich.) 65 N. W. 288.

[b] (Mich.; 1896.)

In proceedings under Sess. Laws 1893, No. 206, for the collection of taxes, which permits the filing of objections, the allowance of an amendment specifying the objections more in detail is within the discretion of the court, and will not be reviewed.—*Auditor General v. Chandler* (Mich.) 66 N. W. 482.

[c] (Mich.; 1896.)

An order fixing the term for a hearing on a petition of the auditor general against land for delinquent taxes is sufficient where it follows the form provided by the statute.—*Waldron v. Auditor General* (Mich.) 67 N. W. 136.

[d] (Mich.; 1896.)

Under Pub. Acts 1893, p. 398, §§ 95, 96, providing that the auditor general shall make a statement of rejected taxes, and forward the same to the county treasurer, the amounts being charged back to the county, and that, if they have not been paid, the rejected taxes may be reassessed either upon the identical lands or upon the township at large, taxes which were rejected by the adjudication of the court may be charged back and reassessed, as well as those rejected because of irregularities discovered by the auditor general.—*Auditor General v. Gurney* (Mich.) 67 N. W. 525.

[e] (Mich.; 1896.)

On petition by the auditor general to enforce a lien for taxes, where a part of the taxes were for the previous year, the taxes for which had been declared illegal by the court on the ground that there was no lawful equalization, and, on being charged back to the county, had been reassessed, a decree rejecting such taxes should include only that portion which was subject to and dependent upon the equalization, and could not apply to township, school, or other legal taxes, the rate of which is definitely fixed by law.—*Auditor General v. Gurney* (Mich.) 67 N. W. 525.

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§ 64. Description of property in tax books.

(Minn.; 1896.)

In the absence of more controlling features to distinguish the two undivided halves of a tract of land respectively entered on the tax books as belonging to different owners, the names of the owners furnish sufficient signs for distinguishment.—*Wray v. Clark* (Minn.) 67 N. W. 72.

64 Minn. 309.

§ 65. Entries as to lands already sold.

(Iowa; 1895.)

Code, § 845, providing that the treasurer, on receipt of the tax list, shall enter opposite each parcel of property the taxes remaining unpaid for the preceding years, and that any sale for delinquent taxes not so entered shall be invalid, does not require the treasurer, in case the land has been sold for the delinquent taxes for the preceding year before he receives the list, to enter such taxes opposite the property as delinquent.—*Hoben v. Snell* (Iowa) 62 N. W. 739; *Ringland v. Same*, Id.

§ 66. Demand.

(Minn.; 1895.)

Where an officer is required to demand the payment of taxes before levying a distress warrant for the same, it is presumed, after he has made the levy, that, before he did so, he made such demand.—*C. N. Nelson Lumber Co. v. McKinnon* (Minn.) 63 N. W. 630.

61 Minn. 219.

§ 67. Designation of newspaper to publish matters.

(Mich.; 1896.)

Where, under Laws 1893, Act 206, § 63, the auditor general designated the "Muskegon Chronicle" as the newspaper in which an order and petition against lands for delinquent taxes should be published, and two newspapers were published, known as the "Muskegon Daily Chronicle" and the "Muskegon Weekly Chronicle," a publication of the order and petition in the Muskegon Weekly Chronicle, which was treated by the auditor general as a compliance with his designation, and acted on, was a sufficient and legal publication.—*Waldron v. Auditor General* (Mich.) 67 N. W. 136.

§ 68. Publication of delinquent list.

(Minn.; 1895.)

The failure of a delinquent tax list, filed under Gen. St. 1894, § 1631, in a proceeding to collect delinquent taxes for different years, to state the amount of taxes for each year separately, was waived by failure of the landowner to assert it as a defense.—*Taxes in Hennepin County v. Baldwin* (Minn.) 65 N. W. 80.

62 Minn. 518.

§ 69. Entry of delinquent tax list on books.

(Mich.; 1895.)

Under Pub. Acts 1891, No. 200, § 86, providing that no tax shall be void on account of any irregularity that does not prejudice the property owner, the failure of the county treasurer to enter the delinquent tax list furnished by the township treasurers on the books in his office for that purpose, as required by section 46, does not invalidate the tax, the delinquent list returned being preserved in the county treasurer's office.—*Auditor General v. Keweenaw Ass'n* (Mich.) 65 N. W. 288.

§ 70. Return of delinquent taxes.

(Minn.; 1895.)

Under Sp. Laws 1864, c. 18, § 1, requiring the city clerk of St. Anthony to return to the county auditor of Hennepin county a list of all taxes assessed on certain lands by the city of St. Anthony for the year 1863 or any previous years which remained "unpaid and de-

linquent," a return of a list of taxes which remain "delinquent or unpaid" is insufficient, and a deed based on a sale thereunder is void.—*In re East River Bank Parkway (Minn.)* 62 N. W. 618; *O'Connor v. Finnegan, Id.* 60 Minn. 455.

§ 71. Distress—Necessity of statute.

(Wis.; 1897.)

The tools, fuel, etc., used by a railway company in the operation of its road, are not subject to distress for taxes, in the absence of a special statute authorizing such seizure.—*Chicago & N. W. Ry. Co. v. Forest County (Wis.)* 70 N. W. 77.

§ 72. Replevin.

(Neb.; 1895.)

A county treasurer may maintain replevin to recover property for the purpose of enforcing a tax lien thereon, where the property is in possession of a third person; there being no statutory remedy in such case.—*Reynolds v. Fisher, 61 N. W. 695, 43 Neb. 172.*

§ 73. Limitation of action.

(S. D.; 1896.)

A proceeding for the enforcement of the payment of taxes which are a lien on land, by the sale thereof by the treasurer, is not an action on a liability created by statute (Comp. Laws, § 4850), and therefore is not barred in six years.—*Iowa Land Co. v. Douglas County (S. D.)* 67 N. W. 52.

§ 74. Parties defendant.

(Mich.; 1895.)

Under Laws 1889, Act 195, § 33, providing that, when a tax is assessed upon shares of capital stock of any bank, the treasurer shall demand payment thereof of the cashier of such bank, and thereupon it shall be the cashier's duty to pay the same, an action to collect a tax assessed against a bank stockholder, upon the cashier's refusal to pay, cannot be brought against the cashier, it being the bank's duty to pay such tax. Grant, J., dissenting.—*City of Muskegon v. Lance (Mich.)* 62 N. W. 158. 104 Mich. 19.

§ 75. Pleading.

(N. D.; 1895.)

A complaint in an action to foreclose a tax lien on personalty is defective if it fails to allege that the tax was levied, and that the tax books in the year in question were delivered to the county treasurer, as required by Laws 1890, c. 122, § 51.—*Swenson v. Greenland (N. D.)* 62 N. W. 603.

4 N. D. 532.

§ 76. Discontinuance of proceeding.

[a] (Minn.; 1895.)

It did not operate as an abandonment or a dismissal of a proceeding to enforce delinquent taxes under Gen. St. 1894, § 1631, that another proceeding was subsequently commenced under section 1579, for taxes, which included those sought to be enforced by the first proceeding.—*Taxes in Hennepin County v. Baldwin (Minn.)* 65 N. W. 80.

62 Minn. 518.

[b] (Minn.; 1895.)

Gen. St. 1894, § 1586, providing that in proceedings to enforce delinquent taxes the answer shall stand for trial at the same or next general or special term of court, being directory, a delay on the part of the state to bring such a proceeding for trial for over six years did not operate as a discontinuance of the proceedings, or entitle the defendant therein to a dismissal.—*Taxes in Hennepin County v. Baldwin (Minn.)* 65 N. W. 80.

62 Minn. 518.

§ 77. Judgment.

[a] (Mich.; 1895.)

On the trial of an action to vacate a tax judgment, the testimony of the publisher of a newspaper that the notice of the pendency of a petition for such judgment was published in his paper is not a compliance with How. Ann. St. § 11704, which provides that proof of such publication shall be made before any final order on the petition is made.—*Benedict v. Auditor General (Mich.)* 62 N. W. 364.

104 Mich. 269.

[b] (Mich.; 1895.)

How. Ann. St. § 11704, providing that no tax sale shall be invalid because any record or paper cannot be found in the proper office, does not apply to the affidavit of publication of the notice of application for a tax judgment.—*Benedict v. Auditor General (Mich.)* 62 N. W. 364.

104 Mich. 269.

[c] (Minn.; 1896.)

Where a judgment in proceedings to enforce taxes on real estate is in the form required by statute, the presumption in favor of its validity is not overcome by the mere fact that no affidavit of publication has been filed.—*Hoyt v. Clark (Minn.)* 66 N. W. 262.

64 Minn. 139.

[d] (Minn.; 1896.)

A tax judgment cannot be impeached collaterally by showing that entries made therein were made after the rendition of the judgment.—*Gribble v. Livermore (Minn.)* 67 N. W. 213.

64 Minn. 396.

§ 78. Warrants for collection.

[a] (Minn.; 1895.)

The fact that the words, "Clerk of Said County," were added to the signature of the clerk of district court on a personal tax warrant, or that the court seal was not affixed thereto, did not vitiate the warrant.—*C. N. Nelson Lumber Co. v. McKinnon (Minn.)* 63 N. W. 630.

61 Minn. 219.

[b] (Neb.; 1895.)

Where the tax list was prepared by transcribing the assessment into two books, and the warrant directing the treasurer to collect the taxes was attached to but one of the books, and the two books constituted the tax list for the year, the warrant attached to the one book was a sufficient authorization to the treasurer to collect any taxes in the list, as shown in either book, under Comp. St. 1893, c. 77, § 80, requiring the assessment to be transcribed into "a suitable book," and (section 83) "a warrant attached" thereto.—*Reynolds v. Fisher (Neb.)* 61 N. W. 695, 43 Neb. 172.

§ 79. Taxes on estate of decedent.

[a] (Mich.; 1897.)

Under Acts 1893, No. 206, § 14, subd. 5, providing that personal property of decedents in the hands of executors shall be assessed to them "until they shall give notice that the estate has been distributed," and section 47, authorizing the township treasurer to sue the person to whom a personal property tax is assessed, a tax properly assessed against an executor may be recovered in a personal suit against him, though he has distributed the estate since the assessment.—*Orion Tp. v. Axford (Mich.)* 70 N. W. 417.

[b] (Minn.; 1895.)

A tax was not ascertained and levied, within Gen. St. 1894, § 1569, providing that an administrator, discharged from his trust before the amount of taxes on property belonging to the estate shall have been ascertained and levied, shall not be liable for such taxes until the auditor completed the tax lists and turned them over to the treasurer, as required by section 1562, in the absence of evidence when the tax

was extended by the auditor on the tax list.—*Nelson v. Becker* (Minn.) 65 N. W. 119.
63 Minn. 61.

§ 80. Right of appeal.

(Minn.; 1896.)

The only statutory method of reviewing a tax judgment, real or personal, in the proceedings on which it is based, is that prescribed by Gen. St. 1894, § 1589. Hence an appeal does not lie from an order denying a new trial, after findings of fact and an order of judgment in favor of the state have been filed in proceedings to enforce the collection of a personal property tax.—*State v. Faribault Waterworks* (Minn.) 68 N. W. 35.

§ 81. Penalties—Interest.

(Minn.; 1895.)

Since Gen. St. 1894, § 1613, provides for charging interest on taxes only after sale on judgment, the fact that the landowner interposed an answer to a proceeding to enforce delinquent taxes under section 1631, which was overruled on the trial, or that the state neglected to bring the issues raised by answer to trial within the time contemplated by statute, did not authorize a charge of interest on the taxes from the time at which judgment would have been entered under the statute had no answer been interposed, and the inclusion thereof in the judgment.—*Taxes in Hennepin County v. Baldwin* (Minn.) 65 N. W. 80.
62 Minn. 518.

2. SALE FOR NONPAYMENT.

§ 82. Statutory provisions.

(Mich.; 1897.)

Pub. Acts 1893, No. 206, § 60, which provides that all lands which have been returned as delinquent for taxes, under that act or prior acts, shall be subject to disposition for the enforcement of tax liens "in the method and manner as hereafter provided," is not inconsistent with section 125, which reserves all rights which have accrued to any person under the previous tax law.—*Muirhead v. Sands* (Mich.) 69 N. W. 826.

§ 83. Jurisdiction.

(Mich.; 1897.)

The provisions of Pub. Acts 1889, No. 195, § 59, that a petition filed by the auditor general for a decree for the sale of lands for delinquent taxes, if from any cause not heard on the day fixed, shall stand continued from day to day during the term; and that if, from any cause, no decree is entered thereon, the auditor general shall file a new petition,—do not continue the case beyond the term; and, where the court adjourns without having entered an order of continuance, it loses jurisdiction until a new petition is filed.—*Muirhead v. Bergland* (Mich.) 70 N. W. 143.

§ 84. Order pro confesso.

(Mich.; 1895.)

Omission of an order pro confesso, before decree for tax sale, is a mere irregularity.—*Jenkinson v. Auditor General* (Mich.) 62 N. W. 163.

104 Mich. 34.

§ 85. Power of officer after expiration of distress warrant.

(Wis.; 1896.)

A town treasurer who has levied on personal property, under a tax warrant valid on its face, for a tax appearing on his tax roll against the owner of such property, may proceed to complete the proceedings, though his distress warrant expire before the sale; his powers in respect to the sale being the same as given to sheriffs, under executions, by Rev.

St. § 2970.—*Keystone Lumber Co. v. Pederson* (Wis.) 67 N. W. 696; *Ashland Lumber Co. v. Same*, id.

93 Wis. 466.

§ 86. Sale of land for taxes on personalty.

[a] (S. D.; 1896.)

Comp. Laws, § 1609, provides that no demand of taxes shall be necessary, and the collection of taxes, on nonpayment by January 1st, shall be made by distress and sale. Section 1612 provides that taxes on realty are a perpetual lien thereon, and that taxes on personalty shall be a lien on any realty owned by the person from whom they are due. Section 1620 requires the treasurer to give notice of the sale for taxes, which shall contain a list of the lands to be sold, and the "amount of taxes." Section 1621 confers on the treasurer power to sell land which shall be liable for taxes of "any description." *Held*, that a sale of land for taxes on personalty was authorized. *Fuller, J., dissenting.*—*Iowa Land Co. v. Douglas County* (S. D.) 67 N. W. 52.

[b] (S. D.; 1896.)

Comp. Laws, § 1616, requiring the treasurer to file a return of his inability to make the personal taxes out of the personal property, and providing that on such return he shall be released from liability for further failure to collect such taxes, and section 1617, rendering him liable for the tax on failure to make the return, as in force prior to 1891, do not require such return as a condition to the right of the treasurer to sell land for payment of personal taxes.—*Iowa Land Co. v. Douglas County* (S. D.) 67 N. W. 52.

§ 87. Notice and advertisement of sale.

(Mich.; 1896.)

It is not ground for setting aside a decree for the sale of lands for delinquent taxes that there was not sufficient time, between the final publication of the order and petition and the time fixed for the hearing, to permit a non-resident landowner to reach the place of trial from the place of his residence.—*Waldron v. Auditor General* (Mich.) 67 N. W. 136.

§ 88. Collusive purchase.

(Iowa; 1896.)

That the purchaser at a tax sale, after receiving a deed to the land, conveyed to the person who was county treasurer at the time of the tax sale, and who was deputy treasurer at the time of the conveyance to him, does not show fraud in the issuance of the tax deed.—*Shelley v. Smith* (Iowa) 66 N. W. 172.

§ 89. Private sale for state taxes.

(N. D.; 1896.)

In view of Laws 1890, c. 132 (Revenue Law), § 72, declaring that a tax sale shall not be set aside except for certain reasons, of which a sale for an excessive amount is not one, and of section 82, vesting in the owner the right to obtain from the auditor a warrant on the county treasurer for any amount paid into the treasury on a sale in excess of the amount due at the time of sale, a sale is not rendered invalid by reason of the auditor's selling for an amount in excess of the amount due.—*Shattuck v. Smith* (N. D.) 69 N. W. 5.

§ 90. Sale for tax partly illegal.

[a] (Mich.; 1895.)

An introduction in a tax levy of a sum illegally added to the salary of a county officer invalidates a tax sale made that year for delinquent taxes.—*Wagar v. Bowley* (Mich.) 62 N. W. 293.

104 Mich. 38.

[b] (Mich.; 1897.)

Pub. Acts 1893, No. 206, § 78, provides that "all lands heretofore or that may be hereafter bid off to the state for taxes, which have

not been redeemed or otherwise disposed of, shall be offered for sale by the county treasurer at the regular annual tax sales." Section 84 provides that any person might purchase "any state tax land by paying therefor the amount for which the same was bid off to the state, with interest," etc. The period for redemption is the same, whether bid off to the state or to an individual. *Held*, that a private sale of a "state bid" before the expiration of the period for redemption was within the meaning of section 84, authorizing a sale of "state tax lands."—*Muirhead v. Sands* (Mich.) 69 N. W. 826.

§ 91. Judgment or decree.

[a] (Mich.; 1897.)

Where a decree for the sale of certain lands for taxes is prefaced by the name of the court, venue, and parties, before reciting the statutory caption, the previous entitling may be treated as surplusage.—*Muirhead v. Sands* (Mich.) 69 N. W. 826.

[b] (Mich.; 1897.)

Pub. Acts 1893, No. 206, does not require personal service for a judgment for the sale of lands for delinquent taxes; and the questions whether there is a tax due to the state from the owner, whether it was properly assessed, and whether proper steps have been taken to charge the land after the assessment, are concluded by the decree.—*Muirhead v. Sands* (Mich.) 69 N. W. 826.

[c] (Mich.; 1897.)

It cannot be urged that a judgment in favor of the state against lands, for delinquent taxes, is void because on the petition and published list the dollar mark does not appear, where the figures were so divided as to indicate a place for dollars and cents, and are properly designated in the judgment.—*Muirhead v. Sands* (Mich.) 69 N. W. 826.

[d] (Mich.; 1897.)

Laws 1893, No. 206, providing that the decree in tax proceedings shall be countersigned by the county clerk, is sufficiently complied with where the decree is countersigned as by the register, the clerk being register ex officio.—*Mersereau v. Miller* (Mich.) 70 N. W. 341.

§ 92. Filing report of sale.

[a] (Mich.; 1895.)

Under Laws 1889, Act No. 195, § 66, providing that the county treasurer, within a certain time after a sale for taxes, shall make and file with the clerk of court a report of the sale, such filing is necessary to the validity of the sale and the deed thereunder.—*Jenkinson v. Auditor General* (Mich.) 62 N. W. 163.
104 Mich. 34.

[b] (Mich.; 1895.)

Such report, when attached to the tax record, which section 58 provides shall remain in the treasurer's office, cannot be regarded as having been filed in the clerk's office.—*Jenkinson v. Auditor General* (Mich.) 62 N. W. 163.
104 Mich. 34.

X. REDEMPTION.

§ 93. Right to redeem—Tender of amount due.

(Iowa; 1897.)

A defendant in an action to quiet title, who prays a cancellation of the tax deed under which plaintiff claims, and that he may be allowed to redeem, will not be denied the latter privilege because he failed to make a tender of the amount due which was sufficient at law, where, in his answer, he offered to pay the amount which might be found due.—*Crawford v. Liddle* (Iowa) 70 N. W. 97.

§ 94. Notice before obtaining tax deed.

[a] (Iowa; 1896.)

Notice of expiration of time to redeem from sale of land for taxes, which the statute provides shall be served on the person in whose name the land is taxed if he is a resident of the county, and may be served on a nonresident of the county by publication, is properly addressed, in the case of a nonresident, to the "Am. Ex. Bank," that being the name as it appeared on the lists to whom the land was taxed.—*American Exch. Nat. Bank v. Crooks* (Iowa) 66 N. W. 168; *Same v. Dugan*, *Id.*

[b] (Iowa; 1896.)

Defendants, to sustain the issue that a notice to redeem from tax sale was served August 13th, introduced the return of service, and the affidavit of defendant that he had served such notice on said day. The papers were in the handwriting of the defendant, except the signatures to the affidavit. The papers were marked filed in the treasurer's office as of such date. The dates, and the words, "Filed this 11th day of August," were in the handwriting of defendant. Plaintiffs were positive that the papers were not served until August 13th. The credibility of the person serving the papers was successfully attacked. *Held*, that a finding that the service was made on August 13th would not be disturbed.—*Waller v. Hintrager* (Iowa) 69 N. W. 431.

[c] (Iowa; 1897.)

Under Code 1873, § 894, providing that before a tax deed is issued the holder of the certificate shall serve on the person in possession and the person in whose name the land was taxed notice of the expiration of the time of redemption, and authorizing service by publication in the case of nonresidents, a service by publication where the owner was in fact a resident of the state, though defective, will not render the deed void.—*McQuitty v. Doudna* (Iowa) 70 N. W. 99.

[d] (Minn.; 1895.)

Under Gen. St. 1894, § 1654, requiring a notice specifying the time for redemption from a tax sale, and providing that such time shall be 60 days after the service of such notice, a notice that the time for redemption would expire on a certain date, "or within 60 days after the service of this notice," being in the alternative, is insufficient.—*Peterson v. P. P. Mast & Co.* (Minn.) 63 N. W. 168.
61 Minn. 118.

[e] (Minn.; 1895.)

A notice that the period for redemption from a tax sale would expire "60 days after service of the notice, in the manner prescribed by" a certain statute, was insufficient.—*State v. Halden* (Minn.) 64 N. W. 568.
62 Minn. 246.

[f] (Minn.; 1895.)

Gen. St. 1894, § 1662, extending the time of redemption from a tax sale from two to four years where the owner dies before the expiration of the original time, does not dispense with the giving of notice in such case, or absolutely limit the redemption period to four years, notwithstanding notice was not given.—*State v. Halden* (Minn.) 64 N. W. 568.
62 Minn. 246.

[g] (Minn.; 1895.)

Under Gen. St. 1894, § 1654, requiring notice of the expiration of the period for redeeming from a tax sale, where the name of the owner of the property sold is unknown, and no one is in actual possession, the notice must be made by publication.—*State v. Halden* (Minn.) 64 N. W. 568.
62 Minn. 246.

[h] (Minn.; 1896.)

The statute requiring notice to be given of the time when the redemption period will expire applies though the name of the owner is stated in the assessment book as unknown.—*Hoyt v. Clark* (Minn.) 66 N. W. 262.
64 Minn. 139.

[i] (Wis.: 1896.)

Plaintiff owned the fee of a strip of ground on which rested an easement for its use as an alley in perpetuity in favor of the owners of both plaintiff's and defendant's properties. The strip was erroneously assessed to defendant as a part of his property. He allowed his property to be sold for taxes, and procured it, together with the strip, to be bought for his benefit, and after the execution of a tax deed the tax title was conveyed to him, under which he claimed ownership of the alley. No notice of the application for a tax was served on plaintiff. *Held*, that the tax deed was void, and should be set aside on repayment by plaintiff of the taxes, as required by statute.—*Towne v. Salentine* (Wis.) 66 N. W. 395.
92 Wis. 404.

§ 95. — On whom served.

[a] (Iowa: 1895.)

The requirement of Code, § 894, that notice of the expiration of the right to redeem from a tax sale shall be served on the one in actual possession of the property, is not satisfied by serving the notice on one in whose wife's name the property stands.—*Medland v. Walker* (Iowa) 64 N. W. 797.

[b] (Iowa: 1896.)

When land is sold for taxes, the failure to serve upon the occupant notice of the expiration of the time for redemption, as required by Code, § 894, renders the tax deed invalid as to him.—*Shelley v. Smith* (Iowa) 66 N. W. 172.

[c] (Iowa: 1896.)

That the owner of a quarter section of land, only a portion of which was tillable, erected a house thereon, built fences, raised crops, and used a portion for pasture, shows that he was in "possession" (Code, § 894) of a portion thereof, which was sold for taxes, on which some of the breaking and fencing were, which was also pastured, and from which firewood and fence posts were cut.—*Shelley v. Smith* (Iowa) 66 N. W. 172.

[d] (Iowa: 1897.)

Code, § 894, requiring notice of expiration of time to redeem from a tax sale to be served on the person in whose name the land is taxed, applies to a city whose charter gives it full authority to provide by ordinance for taxation, sales, and the giving of certificates and of deeds, in view of the subsequently enacted Code provisions (McClain's Code, §§ 958, 959) making section 894 applicable to cities taxing under special charters, and providing that the city collector shall not make a deed unless the notice mentioned in said section is given; hence, when land taxed to a person by name by the county in which a city is located is sold for city taxes, the owner must be given said notice, though the city taxed the land to one "unknown."—*Crawford v. Liddle* (Iowa) 70 N. W. 97.

[e] (Iowa: 1897.)

Under Code, § 894, requiring notice of expiration of time for redemption from a tax sale to be served on the person in whose name the land is taxed, where land was taxed to "O. N. Hull Estate," the executors, who were invested with full power to sell and convey the real estate, and to make title thereto, were entitled to notice.—*Crawford v. Liddle* (Iowa) 70 N. W. 97.

§ 96. Time to redeem—Effect of mistake in purchaser's certificate.

(Mich.: 1897.)

Since Pub. Acts 1893, No. 206, § 74, fixes the period of redemption at one year, the original owner cannot be affected by a misrecital in the certificate of purchase of the date at which the purchaser will be entitled to a deed.—*Muirhead v. Sands* (Mich.) 69 N. W. 826.

§ 97. Action to redeem.

[a] (Iowa: 1895.)

A petition in an action to be allowed to redeem from a tax sale, after execution of a deed to the purchaser, which fails to allege the taxes have all been paid, as provided by Code, § 897, is demurrable.—*Medland v. Walker* (Iowa) 64 N. W. 797.

[b] (Iowa: 1896.)

An owner of land who, though offering to pay the taxes thereon, which were refused by the treasurer, through mistake, on the ground that they had been previously paid, knew of the sale of the land for nonpayment of such taxes before the expiration of the time for redemption, and failed to redeem, cannot thereafter bring suit to redeem.—*Easton v. Doolittle* (Iowa) 69 N. W. 672.

§ 98. After recording of tax deed.

(Wis.: 1895.)

Sanb. & B. Ann. St. § 1163, provides that the owner of land may redeem from a tax sale at any time before the tax deed is recorded. Rev. St. § 1176, authorizes the county clerk to execute a tax deed, in the name of the state and his county, only under his hand and "the seal of the county." *Held*, that the absence from the record of a tax deed, though the deed was properly executed, of anything representing the county seal, is such a defect in the record as to authorize the landowner to redeem.—*Hiles v. Atlee* (Wis.) 62 N. W. 940.
90 Wis. 72.

§ 99. Summary application to redeem part interest.

[a] (Minn.: 1895.)

Where the rights of one holding a lien on a portion of a tract of land sold for taxes, to redeem such portion by paying his proportionate part of the tax, may be "determined by the district court or a judge thereof on a summary application" (Gen. St. 1894, § 1604), such application may be heard at a special term of the district court.—*Wade v. Drexel* (Minn.) 62 N. W. 261.

60 Minn. 164.

[b] (Minn.: 1895.)

On a summary application under Gen. St. 1894, § 1604, to redeem by the holder of a lien on a divided part of land sold for taxes, there is no right to a jury trial, nor are formal pleadings as to the value of the parts of the tract to which the tax lien is to be apportioned necessary.—*Wade v. Drexel* (Minn.) 62 N. W. 261.

60 Minn. 164.

XI. TAX TITLES.

Adverse possession under tax title, see "Adverse Possession," § 28.

1. IN GENERAL.

§ 100. Who may acquire.

(Minn.: 1897.)

The grantee of a mortgagor, who has covenanted to pay the taxes, cannot acquire a tax title adverse to the mortgagee.—*American Baptist Missionary Union v. Hastings* (Minn.) 69 N. W. 1078.

§ 101. — County treasurer.

[a] (Wis.: 1895.)

Sanb. & B. Ann. St. § 1143, prohibiting a county treasurer from purchasing "property sold for taxes at any tax sale, or tax deed held by the county, or by any person * * * except for or on behalf of the county," or being "interested in the purchase of any property sold as aforesaid, at any such tax sale, or in the purchase of any tax certificates," applies to certifi-

ates issued before the treasurer assumed office. — *Gilbert v. Dutruit*, 65 N. W. 511, 91 Wis. 661.

[b] (Wis.; 1895.)

Where a new county was formed out of part of an old one holding tax certificates, and under the act creating the new county the tax certificates were assigned to it, the treasurer of the old county was not, by Sanb. & B. Ann. St. § 1143, prohibited from purchasing the certificates from the new county. — *Gilbert v. Dutruit*, 65 N. W. 511, 91 Wis. 661.

§ 102. Property covered.

(Minn.; 1896.)

C. owned an undivided one-half of a certain tract of land, which was taxed in the name of his grantors, he never having recorded his deed. He also held a void tax deed on the other one-half, which was separately taxed in his name. The tax became delinquent, and judgment was entered for the same. Thereupon he paid the tax on an undivided one-half, intending to pay it on the former half, but the treasurer wrote opposite the entries as to the latter one-half, "Judgment satisfied"; the other half was sold at tax sale, bid in by the state, and the words "Bid in for state" written opposite the entries as to that half in the judgment book. Subsequently, C. took a state assignment of this tax title, supposing it covered the undivided one-half standing in his name. *Held*, it did not. — *Wray v. Clark* (Minn.) 67 N. W. 72.

64 Minn. 309.

§ 103. Evidence as to transfer of certificate.

[a] (Iowa; 1896.)

Possession of a certificate of purchase at tax sale (which Code, § 888, declares shall be assignable by indorsement), indorsed with the name of the one to whom it was issued, is prima facie evidence of ownership. — *American Exch. Nat. Bank v. Crooks* (Iowa) 66 N. W. 168; *Same v. Dugan*, *Id.*

[b] (Iowa; 1896.)

The statement in a treasurer's tax deed of the fact of assignment of the certificate of purchase at a tax sale is, by express provision of Code, § 888, presumptive evidence of such assignment. — *American Exch. Nat. Bank v. Crooks* (Iowa) 66 N. W. 168; *Same v. Dugan*, *Id.*

§ 104. Foreclosure of lien or tax-sale certificate.

[a] (Neb.; 1895.)

Under the revenue law of 1879 (Comp. St. c. 77, § 181), on the foreclosure of a tax-sale certificate, plaintiff is entitled to recover the amount bid at the tax sale, and the several sums paid for prior and subsequent taxes, together with interest on said several amounts, from the date of payment, at the rate of 20 per cent. per annum until the expiration of two years from the date of purchase, and 10 per cent. per annum thereafter. — *Alexander v. Thacker*, 61 N. W. 738, 43 Neb. 494.

[b] (Neb.; 1895.)

An action to foreclose a tax lien is barred in five years after the time to redeem from the tax sale has expired. — *Alexander v. Thacker* 61 N. W. 738, 43 Neb. 494.

§ 105. Estoppel to assert.

(Wis.; 1896.)

The fact that a purchaser of land at tax sale, through mistake of fact, applied to the county to refund the amount paid, which was done, but afterwards, on discovering the mistake, returned the money, will not estop him to perfect and rely on the title under his purchase, where the former owner was in no way misled or influenced in his action by such fact, the elements of estoppel being wanting; nor will such fact operate as a cancellation of his deed,

which was in fact valid, the county board having no power, under the statute, to refund money received on a valid sale. — *Edwards v. Upham* (Wis.) 67 N. W. 728, 93 Wis. 455.

2. TAX DEED.

Notice of redemption before obtaining deed, see ante, §§ 94, 95.

Redemption after recording tax deed, see ante, § 98.

Tax deed as color of title, see "Adverse Possession," § 28.

§ 106. Necessity of notice of application for deed.

(Wis.; 1896.)

Plaintiff owned the fee of a strip of ground on which rested an easement for its use as an alley in perpetuity in favor of the owners of both plaintiff's and defendant's properties. The strip was erroneously assessed to defendant as a part of his property. He allowed his property to be sold for taxes, and procured it, together with the strip, to be bought for his benefit, and after the execution of a tax deed the tax title was conveyed to him, under which he claimed ownership of the alley. No notice of the application for a tax deed was served on plaintiff. *Held*, that the tax deed was void, and should be set aside on repayment by plaintiff of the taxes, as required by statute. — *Towne v. Salentine* (Wis.) 66 N. W. 395, 92 Wis. 404.

§ 107. Seal.

[a] (Neb.; 1895.)

As the legislature has failed to provide for an official seal for county treasurers, no tax deed executed under the revenue law of 1879 is of any validity. — *Larson v. Dickey* (1894) 58 N. W. 167, 39 Neb. 463, followed. — *McCauley v. Ohenstein*, 62 N. W. 232, 44 Neb. 89.

[b] (Neb.; 1895.)

The provision of the revenue law requiring the execution of tax deeds to be made under the official seal of the county treasurer, being mandatory, and no provision being made for a seal for that officer, a conveyance of land sold for taxes made by the county treasurer was invalid. — *Dickey v. Paterson* (Neb.) 64 N. W. 244, 45 Neb. 848.

[c] (Neb.; 1896.)

Under the present statutory provisions, a county treasurer's tax deed is invalid, either with or without a seal. — *Frank v. Seoville* (Neb.) 66 N. W. 1113.

48 Neb. 169.

§ 108. Fee for executing.

(Neb.; 1895.)

A county treasurer is not entitled, as a condition of the execution of a tax deed, to demand the fee allowed the register of deeds for recording the evidence on which the deed is made. — *Burnham v. Farmers' Loan & Trust Co.* (Neb.) 63 N. W. 45.

44 Neb. 438.

§ 109. Effect as evidence.

[a] (Iowa; 1896.)

Revision, § 739, provides that, on failure of the assessor to assess land, the board of supervisors, when the assessor's book is returned to it, is required to do so, and on its failure to do so section 747 requires the clerk of the board to do so, and on his failure section 752 requires the treasurer to do so, and on his failure section 753 requires the owner to do so. *Held*, that evidence merely that no valuation was placed on the land in the assessor's book for the year for which it was sold for taxes is insufficient to overcome the presumption arising from the deed, and show that no assessment was levied against

the land for that year, and entitle the owner, after the lapse of 20 years, to set aside the sale.—*Lathrop v. Irwin* (Iowa) 65 N. W. 972.

[b] (Iowa; 1897.)

Under Code, § 897, providing that a tax deed is presumptive evidence that the land was subject to taxation, and had been listed and assessed, the fact that the county records do not show that the land was assessed for the year 1870 will not overcome the presumption of validity of sale for taxes of such year, where a large part of the county records, including the assessor's books, were destroyed by fire in 1877.—*Barrett v. Kevane* (Iowa) 69 N. W. 1039.

[c] (Mich.; 1895.)

3 How. Ann. St. § 1170g6, providing that tax deeds shall convey absolute title, and be conclusive evidence thereof, applies only when the right to give the deed is shown by proof of a valid decree.—*McKinnon v. Meston* (Mich.) 62 N. W. 1014.

104 Mich. 642.

3. ACTIONS TO TRY AND TO CONFIRM.

§ 110. Method of attacking.

(Mich.; 1895.)

Where a purchaser at tax sale applies to the court, as allowed by statute, for writ of assistance, the person whose land was sold may file a petition in such proceeding to have the sale set aside, it not being necessary to institute an independent suit therefor.—*Jenkinson v. Auditor General* (Mich.) 62 N. W. 163.

104 Mich. 34.

§ 111. Conditions precedent to attacking.

(Mich.; 1895.)

In a proceeding to set aside a tax sale, petitioner should be required to pay the amount of the judgment for which the property was sold, though Laws 1889, Act No. 195, § 66, provides that, if a sale is set aside, the county treasurer shall refund to the purchaser the amount of his bid, with interest.—*Jenkinson v. Auditor General* (Mich.) 62 N. W. 163.

104 Mich. 34.

§ 112. Limitation of action to assail.

[a] (Iowa; 1895.)

In an action to quiet title, where plaintiff relies on a tax deed, and defendant fails to show title in himself, he cannot, under Code, § 902, which limits actions for the recovery of land sold for taxes to five years after the execution of the treasurer's deed, defeat a recovery by plaintiff.—*Baird v. Law* (Iowa) 61 N. W. 1086.

93 Iowa, 742.

[b] (Iowa; 1896.)

Code, § 902, providing that no action for the recovery of land for the nonpayment of taxes shall lie, unless brought within five years after treasurer's deed is executed and recorded, does not apply, where the deed was issued without notice to the occupant of the expiration of the time for redemption, as required by section 894.—*Shelley v. Smith* (Iowa) 66 N. W. 172.

[c] (Wis.; 1897.)

In an action to set aside a tax-sale certificate issued on a sale of plaintiff's land for delinquent special paving assessments, where part of the tax was for keeping the pavement in repair, and void, and the court could not separate the illegal portion of the tax, it was error to strike an answer which properly pleaded the statute of limitations (Sanb. & B. Ann. St. § 1210h), providing that any suit to cancel any tax certificate for any defect going to the validity of the assessment, and affecting the groundwork of such tax, shall be brought within a year after the tax sale.—*Levy v. Wilcox* (Wis.) 70 N. W. 1109.

[d] (Wis.; 1897.)

The joining of taxes void for defects going to the validity of the assessment, and affecting the groundwork thereof, with other taxes, which a court of equity will require paid as terms of granting relief against the illegal taxes, will not prevent the running of limitations as to such illegal taxes.—*Levy v. Wilcox* (Wis.) 70 N. W. 1109.

§ 113. Objections to title cured by limitation.

[a] (Iowa; 1895.)

Code, § 902, providing that an action for the recovery of land sold for nonpayment of taxes must be brought within five years after the treasurer's deed is executed, does not bar the action where the taxes for which the land was sold had in fact been paid.—*Rath v. Martin* (Iowa) 61 N. W. 941; *Block v. Same, Id.* 93 Iowa, 499.

[b] (Wis.; 1896.)

Under Sanb. & B. Ann. St. § 1210h, providing that every proceeding to set aside a sale of land for the nonpayment of taxes, or to cancel any tax certificate, for any error going to the validity of the assessment, shall be commenced within one year from such tax sale, it is only where there is a want of authority ab initio in the taxing officers, as where the property was exempt or without the taxing district, that the validity of a sale can be attacked after the expiration of one year.—*Pratt v. City of Milwaukee* (Wis.) 68 N. W. 392.

§ 114. State as party.

[a] (Wis.; 1897.)

Laws 1883, c. 287, requires plaintiff, as a condition precedent to recovery in an action to recover land conveyed to the state by any county holding a tax title thereto and afterwards sold by the state, to pay into the county treasury all taxes thereon from the date of sale. Laws 1885, c. 301, authorizes the state to take tax deeds where it held certificates subject to such deeds, and to take tax deeds valid in form in place of invalid tax deeds under which the county claimed title where the lands were conveyed to the state, and provides that such deeds shall vest in the state an estate in fee simple, be presumptive evidence of the truth of their recitals, and be conclusive evidence of absolute title, unless adjudged to be void in some action pending, or brought within nine months after the deeds are recorded, to which the state shall have been made a party. *Held*, that the further provision of Laws 1885, c. 301, for making the state a party to pending actions to recover such lands, did not contravene any constitutional right of plaintiff in any such action.—*Lombard v. McMillan* (Wis.) 70 N. W. 673.

[b] (Wis.; 1897.)

The relation of the state to such an action was not changed by Laws 1889, c. 74, providing that the title acquired by the state under deeds taken pursuant to the act of 1885, to lands conveyed to private persons before the taking of such new deeds, shall inure to the benefit of such persons.—*Lombard v. McMillan* (Wis.) 70 N. W. 673.

§ 115. Title necessary to contest tax title.

[a] (Iowa; 1895.)

In an action to quiet title, defendant's testimony: "I claim to own this land. I got my deed from C."—is not a showing of title, within Code, § 897, providing that no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he has title.—*Baird v. Law* (Iowa) 61 N. W. 1086.

93 Iowa, 742.

[b] (Iowa; 1895.)

Possession under a void deed is not evidence of title.—*Baird v. Law*, 61 N. W. 1086, 93 Iowa, 742.

[c] (Iowa; 1896.)

Title to land sold for taxes so as to enable the occupant to maintain an action for its recovery may be based on adverse possession against a grantee of the state, who has complied with all the conditions entitling him to a patent, though the patent was not issued until just prior to the tax sale.—*Shelley v. Smith* (Iowa) 66 N. W. 172.

[d] (Iowa; 1897.)

Code, § 897, prohibiting any one from questioning title acquired by a treasurer's deed without first showing that he, or the person under whom he claims, had title to the property at the time of the sale, applies to a suit by the state to quiet title to land claimed by defendant under tax deeds regular on their face.—*State v. Havrah* (Iowa) 70 N. W. 618.

[e] (Iowa; 1897.)

Title under a valid tax deed is sufficient to enable the holder to question the rights of one claiming under a subsequent tax deed under Code 1873, § 897, providing that no person can question the title acquired by a tax deed without first showing that he or the person under whom he claims had title at the time of the sale.—*McQuity v. Doudna* (Iowa) 70 N. W. 99.

4. RIGHTS OF DEFEATED TAX-TITLE HOLDERS.

§ 116. Reimbursement for taxes paid.

[a] (Minn.; 1896.)

Gen. St. 1894, § 1610, providing that, when a tax sale is declared void, the amount paid the state at the sale, or for the tax title, shall be refunded, does not apply to cases where, as between the purchaser and the owner, the purchase is merely a payment of the taxes.—*Easton v. Schofield* (Minn.) 69 N. W. 326.

[b] (Minn.; 1896.)

Where tax titles held by defendant in ejectment were declared void, and defendant had failed to assert another title on which he would have prevailed, and did not demand a second trial of the ejectment, and the land had greatly depreciated in value since he purchased, he was guilty of bad faith, and hence not entitled to refundment, under Gen. St. 1894, § 1610.—*Easton v. Schofield* (Minn.) 69 N. W. 326.

[c] (Neb.; 1896.)

When a tax deed is invalid because no seal is attached the holder is entitled to reimbursement for the amount paid on his purchase, and subsequent taxes paid, and in respect thereto to be subrogated to the rights of the public as to the liens of such taxes and interest.—*Frank v. Scoville* (Neb.) 66 N. W. 1113.

48 Neb. 169.

§ 117. — Limitations.

(Minn.; 1894.)

The 15-years statute of limitation applies to a claim under Rev. St. 1866, c. 11, § 155, of a purchaser at a tax sale to refundment from the county treasury of the amount paid, on a judgment of court that the tax was void, though the tax was not so declared void within that time.—*State v. Norton* (Minn.) 61 N. W. 458.

59 Minn. 424.

§ 118. Lien for taxes paid.

[a] (Minn.; 1895.)

Gen. St. 1878, c. 75, § 16 (Gen. St. 1894, § 5850), provides that in an action to try title of land the occupant may recover the amount of all taxes paid on the land by himself or those under whom he claims. *Held*, that one holding land under a tax title has no lien on it for taxes paid before he became a bona fide occupant thereof under color of title, though he afterwards became such occupant.—*Pfefferle v. Wieland* (Minn.) 62 N. W. 396.

60 Minn. 328.

[b] (Neb.; 1895.)

Though a sale of land for taxes is invalid, the purchaser has a lien on the land for taxes paid, and is subrogated to the right of the state to such land under such lien.—*Weston v. Meyers* (Neb.) 63 N. W. 117.

45 Neb. 95.

[c] (Neb.; 1896.)

While the holder of a certificate of purchase at a tax sale may foreclose his lien when the tax deed issued pursuant thereto is invalid by reason of an irregularity in the proceedings leading up to such sale, this rule cannot be invoked when, in his petition, such purchaser alleges that the treasurer made the sale to him without authority of law.—*Ledwich v. Connell* (Neb.) 66 N. W. 1108.

48 Neb. 172.

§ 119. Reimbursement by county.

[a] (Neb.; 1895.)

The holder of a tax lien, based on a valid tax sale, on obtaining a decree foreclosing the same, is entitled to an attorney fee of 10 per cent. of the amount of the decree. Comp. St. c. 77, § 181.—*Osgood v. Grant* (Neb.) 62 N. W. 894.

44 Neb. 350.

[b] (Wis.; 1896.)

A tax certificate is "invalid," within Rev. St. § 1184, declaring it the duty of the county board, in case of an invalid tax certificate, to order the repayment of the amount paid for it on surrender thereof for cancellation, not merely in a case where the tax sale is void for reasons affecting the ground work of the tax, but also in case of irregularities in the sale, notwithstanding that, by other statutory provisions, the original landowner can defeat the tax title, for irregularities in the sale, only on payment of the money which the certificate cost with a high rate of interest.—*Pier v. Oneida County* (Wis.) 67 N. W. 702.

93 Wis. 463.

§ 120. Action against county—Demand before suit.

(S. D.; 1895.)

Where it is alleged, in an action against a county, under Comp. Laws, § 1629, to recover money paid for land wrongfully sold at a tax sale by the county treasurer, that the money came into defendant's possession through the wrongful act of its treasurer, it is unnecessary to allege a demand before suit.—*Boynnton v. Faulk County* (S. D.) 64 N. W. 518.

TEACHERS.

See "Schools and School Districts," §§ 24-28.

TELEGRAPH COMPANIES.

Malice in transmitting telegram, see "Libel and Slander," § 11.

Taxation, interference with interstate commerce, see "Constitutional Law," § 49.

§ 1. Unjust discrimination.

[a] (Neb.; 1895.)

Comp. St. c. 89a, in so far as it prohibits all partiality or discrimination by telegraph companies between their patrons, is merely declaratory of the common law.—*Western Union Tel. Co. v. Call Pub. Co.* (Neb.) 62 N. W. 506.

44 Neb. 326.

[b] (Neb.; 1895.)

Const. art. 11, § 7, providing that "the legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion * * * and enforce such laws by adequate penalties," etc., limits the legislature in the regulation of telegraph companies to the correction

of abuses and prevention of unjust discrimination.—*Western Union Tel. Co. v. Call Pub. Co.* (Neb.) 62 N. W. 506.

44 Neb. 326.

[c] (Neb.; 1895.)

To constitute an unjust discrimination, within the meaning of Const. art. 11, § 7, empowering the legislature to pass laws to prevent unjust discrimination by telegraph companies, there must be a difference in rates under substantially similar conditions as to services.—*Western Union Tel. Co. v. Call Pub. Co.* (Neb.) 62 N. W. 506.

44 Neb. 326.

[d] (Neb.; 1895.)

In an action under Comp. St. c. 89a, against a telegraph company for unjust discrimination, where a difference in rates is shown, but there is also a substantial difference in the conditions affecting the service, it must be shown that the difference in rates is disproportionate to the difference in conditions.—*Western Union Tel. Co. v. Call Pub. Co.* (Neb.) 62 N. W. 506.

44 Neb. 326.

[e] (Neb.; 1895.)

It is not an undue preference, within Comp. St. c. 89a, forbidding partiality or discrimination by telegraph companies, to make a less rate to one patron than to another, where the conditions affecting the expense of performing the service are different.—*Western Union Tel. Co. v. Call Pub. Co.* (Neb.) 62 N. W. 506.

44 Neb. 326.

§ 2. Duty as public carrier.

(Neb.; 1895.)

A telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers.—*Western Union Tel. Co. v. Call Pub. Co.* (Neb.) 62 N. W. 506.

44 Neb. 326.

§ 3. Errors in transmission.

(Neb.; 1895.)

Where a telegraph company so changes a telegram in a material point in transmission that it contains incorrect information, it is liable to the sender for damages resulting therefrom.—*Western Union Tel. Co. v. Kemp* (Neb.) 62 N. W. 451.

44 Neb. 194.

§ 4. Statutory penalties.

[a] (Iowa; 1895.)

The statute of South Dakota allowing one whose telegram is delayed by negligence of the company to recover \$50 in addition to actual damages is a penal statute, and has no extra-territorial force.—*Taylor v. Western Union Tel. Co.* (Iowa) 64 N. W. 660.

[b] (Mich.; 1895.)

How. Ann. St. § 3706 (Acts 1851, Act No. 59, § 14), imposes the duty on telegraph companies to transmit messages with impartiality and good faith, under a penalty of \$100 for each neglect or refusal to do so. *Held*, that a judgment for the recovery of such penalty is erroneous where the finding of bad faith is not supported by the evidence, and there is a finding that the message was mislabeled by defendant's agent, and so escaped the attention of the operator.—*Weaver v. Grand Rapids & I. R. Co.* (Mich.) 65 N. W. 225.

§ 5. Stipulations modifying liability.

[a] (Mich.; 1894.)

Where a telegraph company employed the railroad operator to conduct its business at a small station, where a message came about once every two days, and it was shown that the operator was competent, and provided with suitable instruments, and that plaintiff's unrepeatable message was sent while such operator was on a vacation, and his place was filled by a competent temporary operator, the failure of such tempo-

rary operator to connect his instrument, for a few hours, with the line from the sending station, thereby causing delay in the delivery of the telegram, was not such gross negligence as would subject the company to liability notwithstanding the sender's contract releasing it therefrom.—*Birkett v. Western Union Tel. Co.* (Mich.) 61 N. W. 645.

103 Mich. 361.

[b] (Neb.; 1895.)

Comp. St. c. 89a, § 12, providing that a telegraph company is "liable for the nondelivery of dispatches entrusted to its care and for all mistakes in transmitting messages made by any person in its employ * * * and shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks," is not inequitable, and is binding on all telegraph companies in the state.—*Western Union Tel. Co. v. Kemp* (Neb.) 62 N. W. 451.

44 Neb. 194.

§ 6. — Time of presenting claim.

[a] (Iowa; 1896.)

Where a contract between a telegraph company and the sender of a message provides that the company will not be liable for damages, etc., where the claim is not presented in writing within 60 days, a waiver of such provision is not shown by mere verbal statements made to, and interviews with, the company's operators, and indefinite statements as to damages, in the absence of any claim for damages at the time, in the sense of a demand for payment of any sum.—*Albers v. Western Union Tel. Co.* (Iowa) 66 N. W. 1040.

[b] (Iowa; 1896.)

A contract, between a telegraph company and the sender of a message, that the company will not be liable for damages or statutory penalties where the claim is not presented in writing within 60 days after the message is filed with the company for transmission, is valid.—*Albers v. Western Union Tel. Co.* (Iowa) 66 N. W. 1040.

[c] (Neb.; 1895.)

A stipulation on a telegraph blank that the company would not be liable unless claims were presented within 60 days is in violation of Comp. St. c. 89a, § 12, expressly providing that the company shall not be relieved from liability for nondelivery of telegrams, or for mistakes in transmission, by reason of any clause, condition, or agreement contained in its printed blanks.—*Western Union Tel. Co. v. Kemp* (Neb.) 62 N. W. 451.

44 Neb. 194.

[d] (S. D.; 1895.)

A rule of a telegraph company requiring the sender to present a written claim for any damages he may sustain, or for the statutory penalty for failure of the company to transmit, or for delay in transmitting the message within 60 days from the time the message is filed with the company for transmission, is a valid regulation.—*Kirby v. Western Union Tel. Co.* (S. D.) 65 N. W. 37.

§ 7. — That message be repeated.

[a] (Mich.; 1894.)

A condition printed on telegram blanks, that the company should not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatable message, beyond the amount received for sending the same, is reasonable and valid, and relieves the company from liability, except for gross or willful negligence.—*Birkett v. Western Union Tel. Co.* (Mich.) 61 N. W. 645.

103 Mich. 361.

[b] (Mich.; 1894.)

Where the sender of an unrepeatable telegram signed the company's blank form, releasing it from liability for delay in the delivery of such a telegram, he cannot recover on the ground that

the delay would have occurred if the message had been repeated. *Birkett v. Western Union Tel. Co.* (Mich.) 61 N. W. 645.
103 Mich. 361.

§ 8. Action for damages.

[a] (Iowa; 1895.)

The addressee of a telegram may sue the telegraph company for damages caused to him by the negligent delay of the company in delivering the telegram. *Herron v. Telegraph Co.* (1894) 57 N. W. 696, 90 Iowa, 129, followed. —*Mentzer v. Western Union Tel. Co.*, 62 N. W. 1, 93 Iowa, 752.

[b] (Iowa; 1896.)

In an action to recover damages for the failure to promptly deliver a telegraphic message, where the answer contained a general denial, and plaintiff introduced no evidence showing when the message was delivered to defendant to be transmitted, or at what time it was received at the delivery office, a verdict for defendant was properly directed. —*Brumfield v. Western Union Tel. Co.* (Iowa) 66 N. W. 898.

[c] (Iowa; 1896.)

In an action for damages for delay in delivering a message, the petition must show that plaintiff complied with a valid provision as to filing notice of claim. — *Albers v. Western Union Tel. Co.* (Iowa) 66 N. W. 1040.

§ 9. Damages.

(Wis.; 1895.)

In an action against a telegraph company for a negligent delay of four days in the delivery of a telegram sent to plaintiff by a debtor of his, directing him to come at once to M., the place where the debtor was in business, it appeared that when plaintiff arrived at M. all of his debtor's property had been attached by other creditors, and plaintiff was unable to make his claim. In case the telegram had been promptly delivered, plaintiff could have gotten to M. two days before the attachments were levied. There was no evidence that the debtor would have voluntarily given plaintiff any security, or that plaintiff would have left immediately on receipt of the telegram. *Held*, that a nonsuit was properly granted. — *Hartstein v. Western Union Tel. Co.*, 62 N. W. 412, 89 Wis. 531.

§ 10. — Remoteness.

(Neb.; 1895.)

Plaintiff sent a message to the city of C., and received from defendant's agent a reply apparently responsive, but in fact having no connection with the original telegram. *Held*, that the statement of the agent that the city of G. was on the road to S., and not far therefrom, was not binding on the company, so as to render it liable for the expense of a useless trip by plaintiff. — *Western Union Tel. Co. v. Mullins* (Neb.) 62 N. W. 880.

44 Neb. 732.

§ 11. — Loss of expected profits.

(Neb.; 1896.)

Plaintiff's agent in Omaha negotiated a desired exchange of property between plaintiff and a third party, and delivered to a telegraph company at Omaha a message addressed to plaintiff, advising him of the fact, and requesting him to come to Omaha and bring an abstract and deed and a certain sum of money. *Held*, that the telegraph company having failed to deliver the message, and the exchange never having been consummated, because of the failure, and it appearing that had the message been delivered, the trade would have been effected, and that plaintiff would have made a profit thereon, the company was liable in damages to the amount of the profit which would have been made, had the exchange been consummated. — *Western Union Tel. Co. v. Wilhelm* (Neb.) 67 N. W. 870.

48 Neb. 910.

§ 12. — Mental anguish.

[a] (Iowa; 1895.)

In an action by the addressee of a telegram announcing the death of plaintiff's mother, for negligent delay in delivery, damages may be recovered for mental anguish due to plaintiff's inability to attend her funeral, though he suffered no physical injury. *Kinne, J.*, dissenting. — *Mentzer v. Western Union Tel. Co.* (Iowa) 62 N. W. 1.

93 Iowa, 752.

[b] (Iowa; 1895.)

Testimony of plaintiff that he was desirous of attending his mother's funeral, and that he felt "hard" because of the delay; that he telegraphed, after receiving the telegram, to see if he could be present at the funeral; and evidence that his efforts in inquiring for a telegram showed mental anxiety, and that when he called at defendant's office, after receipt of the telegram, he was excited, — warrant a finding that he suffered mental anguish. — *Mentzer v. Western Union Tel. Co.* (Iowa) 62 N. W. 1.

93 Iowa, 752.

TELEPHONE COMPANIES.

Poles and lines as additional servitude on street, see "Eminent Domain," § 26.

TEMPORARY INJUNCTION.

See "Injunction," §§ 25, 26.

TENANCY.

See "Landlord and Tenant"; "Tenancy in Common."

At will, see "Landlord and Tenant," § 38.

TENANCY IN COMMON.

Right of tenants to damages for land taken for public use, see "Eminent Domain," § 30.

§ 1. When relation exists—Crops.

(N. D.; 1895.)

An executory contract of sale of land, whereby the purchaser was given possession with full use of the premises, but was bound to pay a stipulated price therefor, and to pay each year "so much as the one-half of all crops on said land shall amount to," did not create a tenancy in common in regard to the crops. — *Moen v. Lillestal* (N. D.) 65 N. W. 694.

5 N. D. 327.

§ 2. Accounting—Right to compel contribution.

(Iowa; 1895.)

On a claim for contribution by a tenant against her cotenants for their proportion of \$440, moneys paid out by her for the estate, it appeared that the parties became cotenants of the land upon the death of their father, that their mother occupied the property as her homestead for 13 years after the father's decease, and that plaintiff resided on the premises with her mother, and paid no rent. *Held*, that a verdict of \$100 was a sufficient satisfaction of the claim upon the sale of the property by the referee for \$800. — *Sullivan v. Brennan* (Iowa) 63 N. W. 678.

§ 3. Disseisin.

[a] (Iowa; 1895.)

A conveyance by warranty deed by a tenant in common is an ouster of the others, so as to make the grantor liable to the other cotenants for the rents and profits, though none

were collected.—*Leach v. Hall* (Iowa) 64 N. W. 790.

[b] (Iowa; 1895.)

A mortgage executed by a tenant in common is not equivalent to a disseisin of the others.—*Leach v. Hall* (Iowa) 64 N. W. 790.

[c] (Minn.; 1895.)

Where one tenant in common demands that the other purchase and pay for his interest, and the latter refuses to do so, and retains exclusive possession, there is such an assertion of a hostile claim as to constitute an ouster, and ejectment will lie.—*Cameron v. Chicago, M. & St. P. Ry. Co.* (Minn.) 61 N. W. 814.

60 Minn. 100.

§ 4. — Question for jury.

(Mich.; 1896.)

In ejectment, where plaintiff contended that, as defendants' and plaintiff's grantors were co-tenants, there was no ouster upon which to base a claim of adverse possession, there was testimony that defendants' grantor, R., had occupied the land; that it was known as "R.'s Marsh," 30 years before the action was begun; that R. exercised such acts of ownership as the property admitted of; that in 1863 he procured a tax deed of the land, which he recorded; that upon R.'s death the land was divided among his heirs; that the possession of R. and his successors had been continuous, and during all this time plaintiff's grantors had made no claim to the land. Held, that under the evidence the question of ouster should have been left to the jury.—*La Fountain v. Dee* (Mich.) 68 N. W. 220.

§ 5. Adverse possession.

[a] (Mich.; 1895.)

Where one of two tenants in common quitclaimed the entire lot to parties from whom it successively passed to many others, and who went into possession, erected improvements, paid taxes, and remained there for 25 years before plaintiffs asserted any interest therein, or demanded partition thereof, and no action was brought until 9 years after said demand for partition, the original entry and subsequent possession were so adverse as to perfect defendant's title as against the other tenant in common and his grantees.—*Fuller v. Swensberg* (Mich.) 64 N. W. 463.

[b] (Wis.; 1897.)

Adverse possession by a tenant in common who has once acknowledged his co-tenant's title will only run from the time the latter acquired knowledge of the adverse claim, unless the exclusive use has been so long continued as to imply acquiescence therein by the co-tenant.—*Saladin v. Kraayvanger* (Wis.) 70 N. W. 1115.

§ 6. Purchase of outstanding title or claim.

[a] (Iowa; 1895.)

A tenant in common, who pays off a mortgage, is only entitled to contribution from her cotenants, and she cannot acquire an outstanding incumbrance as against them, so as to be subrogated to the rights of the mortgagee.—*Leach v. Hall* (Iowa) 64 N. W. 790.

[b] (Iowa; 1896.)

A tenant in common cannot extinguish the title of his co-tenant by acquiring a tax title to the common property, unless it is shown that the co-tenant has refused to contribute to the necessary expense; and, until such refusal, limitations will not run in his favor against his co-tenant.—*Phillips v. Wilmarth* (Iowa) 66 N. W. 1053.

[c] (Minn.; 1896.)

One tenant in common under a coal lease, who paid the whole amount of royalties on the land occupied by the tenants in common, and taxes thereon, in order to protect his own interests, was not thereby subrogated to all rights and remedies of the lessor against his co-

tenant in common for a failure to pay its proportion of the royalties and taxes.—*Ohio Iron Co. v. Auburn Iron Co.* (Minn.) 67 N. W. 221. 64 Minn. 404.

[d] (Minn.; 1896.)

The common-law rule that one tenant in common cannot acquire a tax title as against his co-tenant, and that his acquiring the same operates only as a payment of the taxes, is not changed by Gen. St. 1894, § 1599, declaring that, if the owner of land purchase at a tax sale thereof, the sale shall pass every right, title, and interest of every person, free from all incumbrances, except those which he may be equitably bound to protect against such sale.—*Easton v. Schofield* (Minn.) 69 N. W. 326.

[e] (S. D.; 1896.)

Where a father and children are tenants in common, a tax deed to the land, obtained for and with moneys furnished by the father, inures to the benefit of all.—*Johnson v. Brauch* (S. D.) 68 N. W. 173.

§ 7. Rents and profits.

(Neb.; 1896.)

A tenant in common, who alone occupies the common property, and holds possession adversely as sole owner, or who excludes his co-tenant from the enjoyment of the premises, is liable to his co-tenant for the rents and profits.—*Names v. Names* (Neb.) 67 N. W. 751.

48 Neb. 701.

§ 8. Actions between co-tenants.

(Mich.; 1896.)

An assertion of ownership in entirety by a tenant in common in possession of personal property, as against his co-tenant, amounts to a conversion, whether or not the property can be divided by weight or measure, and the co-tenant excluded may maintain assumpsit.—*Williams v. Rogers* (Mich.) 63 N. W. 240.

§ 9. — Ejectment.

[a] (Mich.; 1896.)

A plaintiff in ejectment against a cotenant in possession may prove ouster by the introduction of a pleading filed by defendant in another action, setting up title by adverse possession; and the ouster so shown will relate to the time when the pleading was filed, and not to the time when it is therein claimed the adverse possession began.—*Fenton v. Miller* (Mich.) 65 N. W. 966.

[b] (Wis.; 1895.)

One who has an undivided interest in a partition wall cannot, after the destruction of the wall, sue in ejectment one placing a building on the half of the land on which the wall stood next his own land.—*Duncan v. Rodecker* (Wis.) 62 N. W. 533.

90 Wis. 1.

[c] (Wis.; 1895.)

In ejectment by one of two tenants in common against the other, who is in possession, defendant may be reimbursed for half the money paid by him, while in possession, on account of mortgages, taxes, and interest thereon, and for half the value of repairs and improvements made by him.—*Stewart v. Stewart* (Wis.) 63 N. W. 586.

90 Wis. 516.

§ 10. — Conversion.

[a] (Mich.; 1896.)

Where one co-tenant excludes another from his right in the common property, and denies his right thereto, no demand is necessary before bringing an action for its conversion.—*Williams v. Rogers* (Mich.) 63 N. W. 240.

[b] (Mich.; 1897.)

Evidence that defendant, who was the owner in common with plaintiff of personal property, refused to give up the property to

plaintiff, or to pay him for his interest, will not support a recovery for the conversion of plaintiff's interest.—*McElroy v. O'Callaghan* (Mich.) 70 N. W. 441.

[*Id.* (S. D.; 1896.)

A tenant in common of personal property, to the actual possession of which he is entitled, may maintain an action for conversion against his co-tenant who denies his interest, and by whose acts the plaintiff has been deprived of the possibility of any enjoyment of the property.—*Wood v. Steinau* (S. D.) 68 N. W. 160.

[*Id.* (S. D.; 1897.)

Where one owning a half interest in notes and mortgages taken in his name assigns his property, including such notes and mortgages, for the benefit of creditors, his co-owner may sue him for conversion thereof, and need not resort to the assignee or the property.—*Grigsby v. Day* (S. D.) 70 N. W. 881.

TENDER.

Of amount due to redeem from tax sale, see "Taxation," § 93.

Of consideration received before rescission of contract in equity, see "Equity," § 39.

Of part of debt, effect on right to costs, see "Costs," § 11.

Of performance of contract, see "Contracts," § 38.

Of principal of debt, see "Usury," § 17.

Of satisfaction of judgment, see "Judgment," § 88.

Of taxes due, see "Taxation," § 53.

Sufficiency of tender to redeem from mortgage sale, see "Chattel Mortgages," § 53.

§ 1. Necessity.

(Neb.; 1896.)

A formal tender of money is never required where it is disclosed that if it had been made it would have been fruitless.—*Graham v. Frazier* (Neb.) 68 N. W. 367.

§ 2. Sufficiency.

[*a*] (Mich.; 1896.)

At the time for payment plaintiff came to defendant's office, and, he being absent, made tender to those in charge of the office, and, this being refused, he returned on the next week day and made tender to defendant. *Held*, that this was sufficient.—*Slesinger v. Bresler* (Mich.) 68 N. W. 128.

[*b*] (Minn.; 1895.)

A tender made to an attorney at law to whom the demand had been given for collection is good.—*Salter v. Shove* (Minn.) 62 N. W. 1126. 60 Minn. 483.

§ 3. — Payment into court.

(Iowa; 1895.)

To abate interest from the time of a tender of the principal and interest due, the tender must be kept good by bringing the money into court as offered.—*Deacon v. Central Iowa Inv. Co.* (Iowa) 63 N. W. 673.

§ 4. Time of making.

(Neb.; 1895.)

When a debt is payable on a day certain, the creditor is not required to accept payment before that day, and he loses no rights by a refusal of a tender made before the debt matured.—*Moore v. Kime*, 61 N. W. 736, 43 Neb. 517.

§ 5. Objections—Waiver.

(Mich.; 1896.)

Where payment is to be made in notes, and plaintiff tenders them, and asks defendant to examine them, and see if they are correct, and defendant put his refusal to accept merely

on the ground that he has changed his mind, he cannot afterwards claim that the tender was insufficient because of the place of payment specified in the notes.—*Slesinger v. Bresler* (Mich.) 68 N. W. 128.

§ 6. Effect.

(Wis.; 1896.)

In an action for rescission of a contract for sale of land, and removal of a cloud on title created thereby, a tender and payment into court is, for the tenderer, a conclusive admission of his right to the money tendered, and he is entitled thereto, though such tender was not necessary to the plaintiff's right to relief.—*Fox v. Williams* (Wis.) 66 N. W. 357.

92 Wis. 320.

TERMINATION.

Of lease, see "Landlord and Tenant," §§ 21-24.

TERMS.

For years, see "Landlord and Tenant," § 18.

Of court, see "Courts," § 9.

TERRITORIES.

Appeal from territorial admiralty court, see "Admiralty."

Taxation in, see "Constitutional Law," § 59.

Territorial courts, see "Courts," §§ 10, 11.

TESTAMENT.

See "Wills."

TESTAMENTARY CAPACITY.

See "Wills," §§ 1-6.

TESTIMONY.

See "Deposition"; "Evidence"; "Witness."

THEFT.

See "Larceny."

THREATS AND THREATENING LETTERS

Duplicity in indictment, see "Indictment and Information," § 25.

Duress by, see "Duress."

Evidence of, see "Homicide," § 28.

— of other crimes, see "Criminal Law," § 125.

§ 1. What constitutes offense.

[*a*] (Iowa; 1897.)

Any crime or offense which may be prosecuted within the territorial limits of the United States is within Code, § 3871, providing punishment for maliciously threatening to accuse a person "of a crime or offense with intent to compel him to do an act against his will."—*State v. Waite* (Iowa) 70 N. W. 596.

[*b*] (Mich.; 1894.)

Where threats to send the prosecuting witness to the penitentiary for life, if he did not sign a certain deed, were made in connection with statements calling his attention to

alleged false testimony that he had given, the jury may determine whether the language showed an intent to charge him with perjury.—*People v. Whittemore* (Mich.) 61 N. W. 13. 102 Mich. 519.

[c] (Mich.; 1894.)

Where threats of prosecution for perjury were made maliciously, and with intent to compel the one threatened to do an act against his will, the offense is complete, and it is immaterial whether the one threatened was guilty of perjury.—*People v. Whittemore* (Mich.) 61 N. W. 13.

102 Mich. 519.

§ 2. Malice.

(Iowa; 1897.)

In a prosecution for maliciously threatening to accuse the prosecuting witness of a crime in order to compel him to make an affidavit that certain letters purporting to have been written by him at a certain time were fraudulent, malice was properly inferred from evidence that defendant insisted on having the affidavit, and denounced the prosecuting witness and his wife, in their own home, as liars and perjurers, with only a suspicion of guilt on which to base the charge.—*State v. Waite* (Iowa) 70 N. W. 596.

§ 3. Indictment, information, or complaint.

[a] (Iowa; 1895.)

In an indictment for blackmail, it is not necessary to set out the threatening words used by defendant to prosecutor.—*State v. Lewis* (Iowa) 65 N. W. 295.

[b] (Iowa; 1897.)

Under Code, § 3871, providing punishment for maliciously threatening to accuse a person of a crime "with intent thereby to compel him to do an act against his will, an indictment which charges that the threat was made "in order to compel" the act is sufficient.—*State v. Waite* (Iowa) 70 N. W. 596.

[c] (Iowa; 1897.)

An indictment which charges that defendant did "threaten verbally to accuse one A., then and there being," etc., and describes the threat, and its purpose to compel A. to make an affidavit against his will, clearly indicates for whom the threat was intended, and that it was in the hearing of A.—*State v. Waite* (Iowa) 70 N. W. 596.

[d] (Mich.; 1894.)

On a prosecution for threatening to accuse another of perjury, where the body of the complaint shows to whom the threats were made, the fact that such person's name is not set out as the one to whom they were made is not fatal to the complaint.—*People v. Whittemore* (Mich.) 61 N. W. 13.

[e] (Mich.; 1894.)

A complaint stating that defendant threatened the prosecuting witness with a prosecution for perjury with intent to procure his signature to a deed against his will sufficiently alleges an intent to compel the one threatened "to do an act against his will."—*People v. Whittemore* (Mich.) 61 N. W. 13.

[f] (Mich.; 1897.)

An information alleging, in the words of the statute, that defendant did verbally, unlawfully, and maliciously threaten "to accuse" complainant of a crime (naming it), with intent to extort money, charges a threat to prosecute for a crime, and is sufficient.—*People v. Frey* (Mich.) 70 N. W. 548.

§ 4. Evidence.

(Mich.; 1894.)

On trial for threatening to charge the prosecuting witness with perjury, evidence that defendant had procured his arrest for perjury

is admissible on the question of intent.—*People v. Whittemore* (Mich.) 61 N. W. 13. 102 Mich. 519.

THRESHER'S LIEN.

See "Liens," § 4.

TICKETS.

See "Carriers," §§ 34, 35.

TIMBER CULTURE.

Entry on public lands, see "Public Lands," § 2.

TIMBER CUTTING.

Damages for trespass, see "Trespass," §§ 7, 8. License to cut, see "License," § 1. On public lands, see "Public Lands," §§ 21, 22. Right to costs in action for, see "Costs," § 9.

TIME.

Allegation in indictment, see "Embezzlement," § 7; "Indictment and Information," § 21.

Of amending pleading, see "Pleading," §§ 66-68. Of applying for change of venue, see "Venue in Civil Cases," § 22.

—sale of lands to pay debts, see "Executors and Administrators," §§ 41, 42.

—writ of error, see "Error, Writ of," § 2.

Of claiming exemption, see "Exemptions," § 18.

Of delivering goods sold, see "Sale," § 23.

Of filing affidavit for attachment, see "Attachment," § 16.

—assignments of error, see "Appeal," §§ 99, 100.

—bill of exceptions, see "Exceptions, Bill of," § 5.

—claims against assigned estate, see "Assignment for Benefit of Creditors," § 36.

—claims against insolvent estates, see "Insolvency," § 10.

—complaint in forcible entry, see "Forcible Entry and Detainer," § 2.

—lien, see "Mechanics' Liens," §§ 33, 34.

—mortgage, see "Chattel Mortgages," § 20.

—motion to dismiss appeal, see "Appeal," § 282.

—pleadings, see "Practice in Civil Cases," § 27.

—security for costs, see "Costs," § 17.

Of holding local option election, see "Intoxicating Liquors," § 5.

Of making motion for new trial, see "Criminal Law," § 192; "New Trial," § 7.

—motion to vacate judgment, see "Judgment," § 102.

—proofs of loss, see "Insurance," § 73.

—report by referee, see "Reference," § 5.

Of performance of contract, see "Contracts," § 41.

Of pleading in criminal cases, see "Criminal Law," § 26.

Of presenting claims against decedents' estates, see "Executors and Administrators," §§ 19-21.

Of return of service of process, see "Writs and Notice of Suits," § 20.

Of service of process, see "Writs and Notice of Suits," § 3.

Of serving notice of appeal, see "Appeal," § 55.

Of taking appeal, see "Appeal," §§ 47-52.

—exceptions to instructions, see "Trial," § 81.

—objections or exceptions, see "Appeal," § 76.

Of transmitting or filing record, see "Appeal," §§ 110, 111.

Of trial, see "Practice in Civil Cases," § 1.
 — in criminal cases, see "Criminal Law," §§ 45, 46.
 Provisions of contract, see "Contracts," § 32.
 Term time, see "Courts," § 9.
 To redeem, see "Mortgages," § 97.
 — from tax sale, see "Taxation," § 96.
 Variance between indictment and proof as to time of offense, see "Criminal Law," § 120.

§ 1. Computation.

[a] (Neb.; 1895.)
 The word "between," used in a mechanic's lien claim reciting that material was furnished "between August 21, 1890, and January 22, 1891," excludes the 21st; so that a mortgage on the property executed on that date has priority over the lien.—Weir v. Thomas (Neb.) 62 N. W. 871, 44 Neb. 507.

[b] (Wis.; 1895.)
 Sanb. & B. Ann. St. § 1702g, requiring an order to show cause why an assignor should not be discharged to be published for "six successive weeks prior to the day of hearing," does not require six weeks to elapse between the first and last publication.—Johnson v. Hill (Wis.) 62 N. W. 930, 90 Wis. 19.

§ 2. Excluding first or last day.

[a] (Minn.; 1895.)
 Sp. Laws 1891, c. 175, authorizes the village of Winnebago City to issue bonds for water-works, and provides that "not less than ten days' notice" of a special election to decide the matter should be given by publication. *Held*, that the day of publication should be excluded, and the day of election included, in computing the ten days.—Brady v. Moulton (Minn.) 63 N. W. 480, 61 Minn. 185.

[b] (Neb.; 1895.)
 Const. art. 3, § 24, provides that no act shall take effect until three calendar months after adjournment of the session at which it was passed. Code Civ. Proc. § 895, provides that in computing time the first day shall be excluded. *Held*, that the legislature which passed Act April 8, 1893, providing that the penalty for murder shall be death by hanging or imprisonment for life, in the discretion of the jury, having adjourned on that day, the act took effect on the following July 9th.—McGinn v. State (Neb.) 65 N. W. 46, 46 Neb. 427.

§ 3. Excluding Sunday.

(Mich.; 1896.)
 Under a statute requiring the citation to be served three days before the return day, a citation served on the 24th of the month and returnable on the 28th, a Sunday intervening between such dates, is insufficient.—First Nat. Bank v. Williams Milling Co. (Mich.) 67 N. W. 976.

TITLE.

See "Ejectment."

Acquired by adverse possession, see "Adverse Possession," § 30.

Color of title, see "Adverse Possession," §§ 26-29.

Entitling contempt proceedings, see "Contempt," § 11.

Estoppel by admissions or representations clothing person with title, see "Estoppel," § 15-18.
 — to assert after-acquired title, see "Estoppel," § 1.

— to assert or deny, see "Estoppel," § 26.

— to deny landlord's title, see "Landlord and Tenant," § 8.

Evidence of ownership of property, see "Evidence," § 113.

Expressing subject of statute in title, see "Statutes," §§ 10, 11.

Jurisdiction of equity where legal title is in dispute, see "Injunction," § 2.

Of vendor, see "Vendor and Purchaser," §§ 21-28.

Provision in policy as to change of title, see "Insurance," §§ 52-54.

Right to costs in actions involving title to land, see "Costs," § 8.

Slander of, see "Libel and Slander," § 33.

Tax titles, see "Taxation," §§ 100-120.

To right of way, see "Railroad Companies," § 3.
 To support action for trover or conversion, see "Trover and Conversion," § 2.

— action of partition, see "Partition," § 3.

— action to try tax title, see "Taxation," § 115.

— ejectment, see "Ejectment," § 2.

— suit to quiet title, see "Quieting Title—Removal of Cloud," § 3.

When title passes, see "Sale," §§ 18-22.

TITLE INSURANCE.

See "Insurance," §§ 12, 87.

TOLL ROADS.

See "Turnpikes and Toll Roads."

TOOLS.

Exemptions, see "Exemptions," § 3.

TORTS.

See, also, "Assault and Battery"; "Conspiracy"; "Death by Wrongful Act"; "Deceit"; "False Imprisonment"; "Forceful Entry and Detainer"; "Intoxicating Liquors"; "Libel and Slander"; "Malicious Prosecution"; "Malpractice"; "Negligence"; "Seduction"; "Trespass"; "Trover and Conversion"; "Waste."

Contribution between joint tort feasons, see "Contribution."

Executor de son tort, see "Executors and Administrators," § 52.

Form of action, tort or contract, see "Action," § 4.

Injunction against, see "Injunction," §§ 17, 18.
 Liability of city, see "Municipal Corporations," §§ 71-108.

— of corporation, see "Corporations," § 38.

— of county, see "Counties," §§ 41, 45.

— of firm for fraud of partner, see "Partnership," § 19.

— of railroad company, see "Railroad Companies," §§ 17-80.

— of town, see "Towns," §§ 5, 6.

Measure of damages, see "Damages," §§ 23-32.

Of insurer as defense to action on policy, see "Insurance," § 105.

Of servant, liability of master, see "Master and Servant," §§ 14-21.

Of wife, liability of husband, see "Husband and Wife," § 21.

Personal liability of county officers, see "Counties," § 45.

[a] (Mich.; 1895.)

Plaintiff, an inventor and machinist, entered into a contract with a firm to design and construct for them a machine which would produce certain results. Defendant was employed by the firm as their manager at their factory, and the tests to be made of the machine, in order to discover whether or not it satisfied the requirements of the contract, were to be made under his supervision. Maliciously, and without good cause, he persuaded the firm to reject the machine, which they would have accepted, but for his conduct. *Held*, that defendant was liable.—Morgan v. Andrews (Mich.) 64 N. W. 869.

[b] (Mich.; 1897.)

Two persons cannot be joined as defendants in conversion where the conversions were distinct, and neither was in any way concerned in the conversion of the goods by the other.—*Strawbridge v. Stern* (Mich.) 70 N. W. 331.

TOWAGE.

(Mich.; 1894.)

In an action to recover the value of a sailboat the evidence showed that while defendant was towing plaintiff's scow, to which the sailboat was fastened, the sailboat capsized, and plaintiff, who was on the scow, signaled defendant to stop his tug, which was done; that plaintiff then drew the sailboat alongside, and signaled defendant to start up the tug again; and that shortly after the sailboat "chawed her line off near the stem and drifted away." *Held*, that plaintiff could not recover.—*Wanner v. Mears* (Mich.) 61 N. W. 2. 102 Mich. 554.

TOWNS.

See, also, "Bridges"; "Counties"; "Highways"; "Municipal Corporations"; "Poor and Poor Laws"; "Schools and School Districts."

Apportionment of taxes, see "Taxation," § 5. Compensation of town marshal, see "Municipal Corporations," § 48.

Equalization of taxes as between townships, see "Taxation," §§ 40, 41.

Liability for defects in bridges, see "Bridges," § 4.

— for obstruction of highway, see "Highways," § 26.

— for support of paupers, see "Poor and Poor Laws," § 4.

Limitation of action to charge new township with debts of old, see "Limitation of Actions," § 15.

When villages become independent, see "Municipal Corporations," § 5.

§ 1. Organization.

(Neb.; 1895.)

Const. art. 10, § 5, requiring the legislature to provide for township organization whenever a majority of the county voters shall so determine, and providing that in any county adopting township organization the question of continuing the same may be submitted to a vote, leaves to the legislature authority to provide the details of township government without submitting the question to a vote, so that Laws 1895, c. 28, relating to township organization and government, is not repugnant to that provision.—*Van Horn v. State* (Neb.) 64 N. W. 363, 46 Neb. 62.

§ 2. Record of proceeding of town meeting.

(Mich.; 1896.)

The records of a certain township recited: "April 3, 1893. Proposed and carried that there shall be one-half of one per cent. raised for highway money. Proposed and carried that we raise \$1,000 for a contingent fund." The records were afterwards amended so as to show that the vote was taken at the annual township meeting. *Held* sufficient to show that the action was taken by the electors, and that it would be presumed that it was taken at the time provided by statute, the record bearing date the day of the annual township meeting.—*Auditor General v. Longyear* (Mich.) 68 N. W. 130.

§ 3. Officers.

(Mich.; 1896.)

Where the township treasurer resides in the township, an appointment of a deputy is not void, though he does not reside in the town-

ship.—*Auditor General v. Longyear* (Mich.) 68 N. W. 130.

§ 4. Issuance of bonds—Conditions precedent.

(Neb.; 1895.)

Under Comp. St. c. 45, § 14, it is necessary to confer jurisdiction on county commissioners to order an election on a proposition to vote bonds by a township in aid of internal improvements, that a petition be presented to such commissioners, signed by not less than 50 freeholders of the township.—*Hoxie v. Scott* (Neb.) 63 N. W. 387.

45 Neb. 199.

§ 5. Liability for torts.

[a] (Iowa; 1896.)

A town is not liable for the acts of its officers, under an illegal ordinance, attempting to enforce the police powers of the town.—*Easterly v. Incorporated Town of Irwin* (Iowa) 68 N. W. 919.

[b] (Wis.; 1895.)

The laying out of ditches by the supervisors, under Rev. St. c. 54, is the exercise of a police power, and the municipality cannot be held liable for their acts.—*State v. McNay* (Wis.) 62 N. W. 917.

90 Wis. 104.

§ 6. — Defective highway.

(Minn.; 1896.)

A statutory town is not liable in an action by a private person for injuries sustained by him while using its highway, which were caused either by its failure to repair or by direct acts of negligence of its officers in repairing the highway. *Altnow v. Town of Sibley* (1883) 14 N. W. 877, 30 Minn. 186, followed. *Peters v. Town of Fergus Falls* (1886) 29 N. W. 586, 35 Minn. 549, distinguished.—*Weltsch v. Town of Stark*, 67 N. W. 648.

§ 7. Taxation.

[a] (Mich.; 1895.)

An action cannot be maintained by a township on a valid assessed tax, when the town treasurer failed to make the statement required by Laws 1893, No. 206, § 55, providing that the town treasurer shall forward to the county treasurer a verified statement of the unpaid taxes on personal property and the amount of taxes collected.—*Township of Bangor v. Smith Transp. Co.* (Mich.) 64 N. W. 28.

[b] (Wis.; 1895.)

A tax levied to pay for the construction and operation of waterworks by a town after its incorporation will not be set aside as invalid merely for failure of the town to adopt a resolution not affecting the justice of the tax.—*Hixon v. Town of Eagle River* (Wis.) 65 N. W. 366, 91 Wis. 649.

§ 8. Actions.

(Wis.; 1895.)

Sanb. & B. Ann. St. § 776, subd. 2, provides that the qualified electors of each town shall have power to direct the institution and defense of all actions in which the town is a party, and to employ all necessary agents for that purpose, etc. Rev. St. § 819, authorizes the supervisors of each town to see that all injuries to the property of the town are prosecuted for, etc. *Held*, that an action by the town to enjoin defendant from obstructing a highway, and to recover damages therefor, cannot be maintained without authority from the electors.—*Town of Woodman v. Bohan* (Wis.) 64 N. W. 323, 91 Wis. 36.

§ 9. — Conditions precedent to action against.

[a] (Minn.; 1896.)

Filing of an itemized and verified claim against a town with its auditing board is a condition precedent to an action thereon, in view

of Gen. St. 1894, §§ 989, 990, declaring that the supervisors constitute a town board for the auditing of all accounts against the town, and section 687, declaring that, before any claim against a town shall be audited or allowed, the claimant shall file an itemized and verified statement thereof with the auditing board.—*Old Second Nat. Bank v. Town of Middletown* (Minn.) 69 N. W. 471.

[b] (S. D.; 1895.)

Comp. Laws, §§ 790-796, constituting the town supervisors an auditing board, and prescribing how accounts payable by the town may be presented, audited, and allowed, do not make the presentation of claims against the town to such board for audit a condition precedent to suing thereon.—*Short v. Civil Township of White Lake* (S. D.) 65 N. W. 432.

[c] (Wis.; 1896.)

Rev. St. § 824, provides that no action shall be brought against a town on a money demand unless a statement of the claim therefor shall be filed with the town clerk; and not until 10 days after the ensuing annual town meeting. Section 1339 prohibits the bringing of an action against a town for damage resulting from a defective highway unless, within 90 days after the happening of the event causing the damage, a notice in writing shall be given the supervisor stating the place and describing the defect. *Held*, that the fact that the statement of claim under section 824 was filed before the service of the notice required by section 1339, and on the same day, did not invalidate either.—*Groundwater v. Town of Washington* (Wis.) 65 N. W. 871.

92 Wis. 56.

[d] (Wis.; 1897.)

Rev. St. § 776, gives the electors of towns power to direct the institution of actions by the towns. Section 819 requires town supervisors to see that all breaches of official bonds to the town's damage are prosecuted. *Held*, that direction by the electors is not necessary to a suit by a town on the official bond of its treasurer.—*Town of Cady v. Bailey* (Wis.) 70 N. W. 285.

TOWN SITES.

See "Public Lands," § 5.

TRADE-MARKS AND TRADE-NAMES.

§ 1. Assignment and transfer.

[a] (Wis.; 1896.)

The trade-name under which a banking business has been profitably conducted for a number of years is a part of the good will, and as such is an assignable asset.—*Bank of Tomah v. Warren* (Wis.) 68 N. W. 549.

[b] (Wis.; 1896.)

T., who had profitably conducted a banking business for 15 years under the name of the "Bank of Tomah," made a voluntary assignment of "all and singular" his "lands, tenements, hereditaments, appurtenances, goods, chattels, * * * property and effects of every kind and description," and the assignee thereafter conveyed to plaintiffs the "building, fixtures, good will, and the name of the 'Bank of Tomah,' * * * thereby intending to sell and convey all the rights and privileges appertaining to said banking business enjoyed by" T. "while conducting said banking business in the city of Tomah." *Held*, that plaintiffs thereby acquired the exclusive right to the trade-name.—*Bank of Tomah v. Warren* (Wis.) 68 N. W. 549.

[c] (Wis.; 1896.)

The mere discontinuance of a banking business for eight months, while the same is in the hands of an assignee, will not preclude the as-

signee's vendee from asserting his right to use the former trade-name, which passed to him by the assignment and transfer.—*Bank of Tomah v. Warren* (Wis.) 68 N. W. 549.

§ 2. Injunction against wrongful use.

[a] (Wis.; 1896.)

The wrongful use of a trade-name may be enjoined without proof that any one has actually been deceived.—*Bank of Tomah v. Warren* (Wis.) 68 N. W. 549.

[b] (Wis.; 1896.)

Plaintiff was engaged in the importation and sale of dyes under the label "German Household Dyes." Defendants subsequently began the importation and sale of dyes made by a different manufacturer, under the label "Excellent German Household Dyes," which were put up in packages similar in size, shape, color, etc., to the packages sold by plaintiff. There was proof that the resemblance was calculated to, and actually did, deceive the public, damaging plaintiff's trade. *Held*, that plaintiff was entitled to relief by injunction.—*Opferman v. Waterman* (Wis.) 69 N. W. 569.

TRANSACTIONS WITH DECEDENTS.

Testimony as to, see "Witness," §§ 15-26.

TRANSCRIPT.

On appeal, see "Appeal," §§ 104-155.

TRANSFERS.

See "Assignment."

Of bills and notes, see "Negotiable Instruments," §§ 24-41.

Of causes from county to district court, see "Courts," § 22.

Of corporate stock, see "Corporations," §§ 58-62.

Of easements, see "Easements," § 3.

Of mortgaged property, see "Chattel Mortgages," §§ 58-60; "Mortgages," §§ 34-36.

Of plaintiff's cause of action pending suit, see "Abatement and Revival," § 1.

Of trade-names, see "Trade-Marks and Trade-Names," § 1.

TRESPASS.

I. RIGHT OF ACTION AND DEFENSES, §§ 1-3.

II. PLEADING, §§ 4, 5.

III. DAMAGES, §§ 6-9.

IV. CRIMINAL TRESPASS, § 10.

See, also, "Assault and Battery."

Assignability of cause of action, see "Assignment," § 4.

By highway officers, see "Highways," § 25.

Injunction against, see "Injunction," § 18.

Injuries to trespassers on track or trains, see "Railroad Companies," §§ 23-25, 46.

— to trespassing animals, see "Railroad Companies," § 55.

Lien on trespassing animals, see "Animals," § 1.

Negligence in injuring trespassers, see "Negligence," § 22.

Right to crops raised by trespasser, see "Crops."

Sheriff as trespasser ab initio, see "Sheriff's and Constables," § 7.

To land, right to costs, see "Costs," § 8.

I. RIGHT OF ACTION AND DEFENSES.

§ 1. When lies.

[a] (Mich.; 1895.)

A vendee in a land contract, having neither the actual nor constructive possession of the land, cannot sue for a trespass to the land.—*Gates v. Comstock* (Mich.) 65 N. W. 544.

[b] (Mich.; 1897.)

Trespass will not lie against one in actual possession of land under claim of title.—*Newcomb v. Love* (Mich.) 70 N. W. 443.

[c] (Neb.; 1895.)

The acts of a vendor in taking forcible possession of premises on the default of payment of the price by the vendee constitute trespass.—*Ellsworth v. McDowell* (Neb.) 62 N. W. 1082, 44 Neb. 707.

§ 2. Defenses.

[a] (Iowa; 1896.)

The fact that land is unfenced, and has been traveled by the general public with knowledge of the owner, is no defense to trespass by the owner for the unlawful occupation thereof.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

[b] (Mich.; 1895.)

In trespass for removing signs from the banks of a mill pond, forbidding people to fish therein, where it appears that the only right of plaintiff was to flow the land for milling purposes, while defendant held the fee, subject to plaintiff's easement, in common with another, the defense of title in defendant alone is sufficient, as he would have the same right to remove the signs, as tenant in common, as though sole owner.—*Sullings v. Carter* (Mich.) 63 N. W. 411, 105 Mich. 392.

§ 3. Possession in defendant.

[a] (Mich.; 1894.)

Trespass is not the proper remedy for one whose land, acquired by deed without reservation, is occupied by the spur track of a railroad company, under a parol arrangement with plaintiff's grantor, of which plaintiff knew before purchasing, though he has demanded that the track be removed, defendant having entered lawfully into possession when it was laid. *Hooker, J.*, dissenting.—*Scarvell v. Grand Rapids & I. R. Co.*, 61 N. W. 534, 103 Mich. 373.

[b] (Mich.; 1895.)

Defendant was in possession of land for over 12 years, and held title thereto by tax deed. Plaintiff, without defendant's consent or acquiescence, went on, and erected a house. Afterwards defendant peacefully entered, and cut the grass. *Held*, in an action *quare clausum* fregit, that defendant was entitled to a verdict under a plea of *liberum tenementum*.—*Vial v. Hofen* (Mich.) 64 N. W. 11.

II. PLEADING.

§ 4. Petition.

(Neb.; 1896.)

A petition charging an unlawful entry and damage to plaintiff's land states a cause of action for trespass, although it prays treble damages, and does not charge that the trespass was willful, as required by Code, § 636, as a basis for treble damages.—*Lundgren v. Crum* (Neb.) 66 N. W. 284, 47 Neb. 242.

§ 5. Pleas.

[a] (Iowa; 1896.)

Matter pleaded in justification of trespass cannot be urged in mitigation of damages.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

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[b] (Iowa; 1896.)

Where one division of an answer in trespass denies damages generally, a denial, in another division, of special damages, may be disregarded.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

[c] (Mich.; 1895.)

In trespass *quare clausum*, the general denial does not put in issue the title.—*Ostrom v. Potter* (Mich.) 62 N. W. 170.

104 Mich. 115.

III. DAMAGES.

§ 6. Measure.

[a] (Mich.; 1894.)

Where a drain was wrongfully dug on land, and it does not appear that the landowner will fill it up, he cannot recover the cost of doing so as damages for the trespass.—*Burtraw v. Clark* (Mich.) 61 N. W. 552, 103 Mich. 383.

[b] (Mich.; 1895.)

Where a street is graded under void proceedings, the actual damages to such land can be recovered by the abutting owner without regard to the benefit to his land in general by the grading of the street.—*Fisher v. Naysmith* (Mich.) 64 N. W. 19.

[c] (Wis.; 1896.)

Where a tenant is to pay his landlord as rent a specific portion of the crop after he has harvested it, but, while it is standing, the landlord and others, acting under him, go on the land, and remove the crop, the tenant is entitled to recover at least the value of his share as it stood, without any deduction for the expense of harvesting the landlord's share.—*Foley v. Southwestern Land Co.* (Wis.) 68 N. W. 994.

§ 7. Cutting timber.

[a] (Mich.; 1896.)

The vendors of certain timber land showed defendants, the purchasers, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a certain section, which belonged to plaintiffs, instead of the S. E. $\frac{1}{4}$ of such quarter section. Defendants located their lumber camps on the former, and cut and removed the timber therefrom. They also cut and removed the timber from the latter 40. Part of the timber cut from the S. W. $\frac{1}{4}$ was removed from it after defendants were notified by plaintiffs that they owned the land. *Held*, that the facts did not show that defendants were involuntary trespassers, and not liable to treble damages under 2 How. Ann. St. § 7957, providing that one who cuts or carries off any timber from the land of another, without the owner's leave, shall be liable to the owner in three times the amount of damages, etc.—*Longyear v. Gregory* (Mich.) 68 N. W. 116.

[b] (Wis.; 1895.)

Under Saub. & B. Ann. St. § 4269, providing that in actions to recover for timber wrongfully cut the highest market value of the timber, whether manufactured or unmanufactured, at any time before the trial, may be recovered, and that, if the defendant serve his affidavit that such cutting was by mistake and offer to allow judgment against him in a certain sum, and plaintiff fail to accept such offer, and on the trial it appears that such cutting was by mistake, then plaintiff can recover only the stumpage value of said timber, where defendants, in cutting timber on plaintiff's land under a contract, cut timber of a size expressly forbidden to be cut by said contract, and no affidavit of mistake was served by them, nor excuse made for failure to serve it, plaintiff may recover the value of said timber after it was manufactured into lumber by defendants.—*Everett v. Gores*, 62 N. W. 82, 89 Wis. 421.

§ 8. — Allowance of interest.

[a] (Wis.; 1896.)

Under Samb. & B. Ann. St. § 1269, allowing plaintiff to recover the highest market value of the manufactured product of timber wrongfully cut from his land, unless defendant files an affidavit that the cutting was done by mistake, it is error to allow interest on such value. *Smith v. Morgan* (1889) 41 N. W. 532, 73 Wis. 375, followed. — *Everett v. Gores*, 66 N. W. 616, 92 Wis. 527.

[b] (Wis.; 1896.)

Such rule was not intended to be changed by the former opinion in this case (62 N. W. 82, 89 Wis. 421); the words "with interest" being inserted inadvertently. — *Everett v. Gores* (Wis.) 66 N. W. 616, 92 Wis. 527.

§ 9. Mitigation.

(Mich.; 1891.)

Where defendants wrongfully dug a drain on plaintiff's land, and plaintiff has not filled up the ditch, they may show, in reduction of his damages for the trespass, that the drain was a benefit to the land. — *Burtraw v. Clark* (Mich.) 61 N. W. 552, 103 Mich. 383.

IV. CRIMINAL TRESPASS.

§ 10. Tearing down building on land of another.

[a] (Wis.; 1896.)

In a prosecution for willfully tearing down a building situated on the lands of another, in violation of Rev. St. § 4441, it is essential for the state to prove that the building in question was on the land of a person other than defendant, or the person under whom he seeks to justify the tearing down of the same, and for that purpose evidence of the legal title is admissible. — *Werner v. State* (Wis.) 67 N. W. 417, 93 Wis. 266.

[b] (Wis.; 1896.)

It is for the jury to determine, from all the evidence in the case, who had possession of the land upon which the offense was committed. — *Werner v. State* (Wis.) 67 N. W. 417, 93 Wis. 266.

[c] (Wis.; 1896.)

As used in section 4441, "wantonly" may be defined as in the reckless disregard of the lawful rights of the owner of the building; and, where the evidence shows that the act was willfully, maliciously, or wantonly done, a verdict of guilty will not be disturbed, though the complaint alleged that it was "willfully, maliciously, and wantonly" done. — *Werner v. State* (Wis.) 67 N. W. 417, 93 Wis. 266.

TRIAL.

I. CONDUCT OF TRIAL IN GENERAL, §§ 1-8.

II. RECEPTION OF EVIDENCE, §§ 9-20.

III. OBJECTIONS TO EVIDENCE AND RULINGS THEREON, §§ 21-35.

IV. CONDUCT, ARGUMENT, AND REMARKS OF COUNSEL, §§ 36-49.

V. INSTRUCTIONS, §§ 50-87.

1. In General, §§ 59-61.

2. Requests to Charge, §§ 62-65.

3. Pleadings and Evidence to support, §§ 66-68.

4. Reasons of Court and Jury, §§ 69-78.

5. Harmless Error—Construction as a Whole, §§ 79, 80.

6. Objections and Exceptions, §§ 81-87.

VI. TAKING CASE FROM JURY, §§ 88-92.

VII. DELIBERATIONS OF JURY, §§ 93-95.

VIII. VERDICT, §§ 96-118.

1. In General, §§ 96-102.

2. Special Interrogatories and Verdict, §§ 103-118.

IX. TRIAL BY COURT, §§ 119-126.

See, also, "Continuance"; "Evidence"; "Exceptions, Bill of"; "Judgment"; "Jury"; "New Trial"; "Practice in Civil Cases"; "Reference"; "Witness."

Adhering on appeal to theory pursued at trial, see "Appeal," § 181.

Allowance of supersedeas by trial court, see "Appeal," § 265.

Authority of attorney as to conduct of litigation, see "Attorney and Client," § 3.

Briefs on appeal, see "Appeal," §§ 102, 103.

Calling adversary for cross-examination, see "Witness," § 40.

Certifying questions for consideration of appellate court, see "Appeal," § 243.

De novo on appeal, see "Appeal," § 157.

Discretion of trial court in general, see "Appeal," §§ 202-208.

— as to setting aside default judgment, see "Judgment," § 17.

Disqualification of juror as ground for new trial, see "New Trial," § 18.

Examination of adverse party before trial, see "Discovery," § 3.

Findings in action for divorce, see "Divorce," § 15.

Interlocutory orders, when appealable, see "Appeal," § 21.

Limiting extent of cross-examination, see "Witness," § 39.

— number of witnesses in criminal cases, see "Criminal Law," § 68.

Misconduct of jury as ground for new trial, see "New Trial," §§ 19-22.

Necessity of obtaining ruling of lower court, see "Appeal," § 182.

Notice of trial, see "Practice in Civil Cases," §§ 11, 12.

Opinion of trial court as part of record, see "Appeal," § 134.

Order of trial of cases, see "Practice in Civil Cases," § 2.

Physical examination of person injured, see "Damages," § 44.

Power of trial court to stay proceedings pending appeal, see "Appeal," § 266.

Presumption as to action of trial court, see "Appeal," § 212.

Reasons for decision of lower court, see "Appeal," §§ 183, 242.

Recalling witness, see "Witness," § 42.

— in criminal cases, see "Criminal Law," § 72.

Right to demand or refuse jury trial, see "Jury," §§ 23-29.

— jury trial, see "Constitutional Law," §§ 37-39.

— trial or hearing in contempt proceedings, see "Contempt," § 14.

Stipulations, see "Practice in Civil Cases," §§ 22-26.

Submitting issues to jury in equity, see "Equity," § 59.

Sufficiency of exceptions, see "Appeal," §§ 77, 78.

Time of trial, see "Practice in Civil Cases," § 1.

Transfer from justice of causes involving title to land, see "Justices of the Peace," § 8.

— of cause from law to equity docket, see "Practice in Civil Cases," § 20.

Waiver of right to jury trial, see "Jury," § 28.

I. CONDUCT OF TRIAL IN GENERAL.

Conduct in criminal cases, see "Criminal Law," §§ 57-89; "Homicide," §§ 35-44.

§ 1. Severance of defendants.

(Iowa; 1895.)

Where a continuance is granted one defendant, the court may, in its discretion, order

a separate trial for the other.—*Reed v. Lane* (Iowa) 65 N. W. 380.

§ 2. Abandonment of issues.

(Wis.: 1896.)

Where the attorney for plaintiff concedes that the issue under the complaint was not a question in the case, such statement shows an abandonment of the issue.—*Rahr v. Manchester Fire Assur. Co.* (Wis.) 67 N. W. 725. 93 Wis. 355.

§ 3. View by jury.

[a] (Iowa: 1895.)

In an action for injuries sustained in a collision between a delivery wagon, in which plaintiff was driving, and one of defendant's engines, it was error to have granted defendant's motion to have the jury view the premises, and while there observe from different points the running of an engine over the track while seated in a wagon of the same height as that driven by plaintiff.—*Moore v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 61 N. W. 992. 93 Iowa, 484.

[b] (Mich.: 1896.)

In an action for personal injuries the court has discretionary power to refuse to allow the jury to visit the scene of the accident.—*Mulliken v. City of Corunna* (Mich.) 68 N. W. 141.

(Minn.: 1895.)

Allowing the jury in an action of ejectment to view the premises is within the discretion of the court.—*Brown v. Kohout* (Minn.) 63 N. W. 248.

61 Minn. 113.

[d] (Wis.: 1896.)

Requiring a party on a trial to produce objects for inspection of the jury, or sending the jury to view them, are matters resting in the sound discretion of the court.—*Groundwater v. Town of Washington* (Wis.) 65 N. W. 871.

92 Wis. 56.

[e] (Wis.: 1896.)

A jury may use their own knowledge, gained by an inspection or view of objects to assist them in reaching a conclusion, though such conclusion must be supported by the evidence.—*Groundwater v. Town of Washington* (Wis.) 65 N. W. 871.

92 Wis. 56.

Private view by jury as ground for new trial, see "New Trial," § 21.

§ 4. Withdrawal of documents put in evidence.

(Neb.: 1896.)

A trial court should never permit a document introduced in evidence to be withdrawn, unless the party so withdrawing it, at the time, leaves with the reporter a conceded correct copy of the document withdrawn; and the furnishing of such copy should be made a condition precedent for leave to withdraw the original document.—*McFarland v. West Side Imp. Co.* (Neb.) 66 N. W. 637.

47 Neb. 661.

§ 5. Conduct and remarks of court.

[a] (Iowa: 1896.)

In replevin, where the value of the goods was in issue, and a dispute arose as to the correctness of an answer, as read by plaintiff's attorney, in a deposition in which affiant testified as to the value, it was reversible error for the court to remark: "Upon listening to the reading of the deposition, I have no doubt but that Mr. B., plaintiff's attorney, was present at the taking of the deposition, or that the answers had been written out by him, or plaintiff's attorney."—*Shakman v. Potter* (Iowa) 66 N. W. 1045.

[b] (Iowa: 1896.)

It is reversible error for the court to ask a witness of defendant whether defendant's attor-

ney had talked to him as to the answers he should make when on the stand, nothing having developed to show such conduct on the part of the attorney.—*State v. Allen* (Iowa) 69 N. W. 271.

[c] (Iowa: 1897.)

Remarks of the court in a discussion with counsel as to the law applicable to the case, in the jury's presence, which announced a correct rule of law, do not constitute prejudicial error.—*Kreuger v. Sylvester* (Iowa) 69 N. W. 1059.

[d] (Mich.: 1895.)

There being evidence for the jury that escaping sparks from defendant's steamer set fire to plaintiff's property, remarks of the judge that there is nothing to show this constitute reversible error, though he finally concludes that there is some evidence which the jury may consider.—*Burrows v. Delta Transp. Co.* (Mich.) 64 N. W. 501.

[e] (Mich.: 1896.)

In an action for breach of warranty of a horse, defendant offered to show that the day before the trial he had offered plaintiff for the horse the price she paid, and the amount of the doctor's bill for treatment. Upon a statement that the proposition was one of compromise, the evidence was excluded. Defendant's counsel thereupon insisted that it was admissible to show value, and on his own responsibility made an offer for the horse in open court, in the presence of the jury. *Held*, that the court was justified in remarking that he could not have the trial interrupted by horse dickers.—*Connell v. McNett* (Mich.) 67 N. W. 344.

[f] (Mich.: 1896.)

It is not error for the court to decide at the close of plaintiff's direct examination that he has made out a prima facie case.—*Whitaker v. Engle* (Mich.) 69 N. W. 493.

[g] (Wis.: 1897.)

A judgment will not be reversed because of remarks made by a court to counsel in ruling upon the admission of evidence during a trial, unless prejudice is clearly made to appear.—*McMahon v. Eau Claire Waterworks Co.* (Wis.) 70 N. W. 829.

§ 6. Absence of judge or party.

[a] (Minn.: 1897.)

Where the answer does not set up a counterclaim, it is error to try the case in plaintiff's absence, and give judgment for defendant on the merits.—*Diment v. Bloom* (Minn.) 69 N. W. 700.

[b] (Wis.: 1897.)

The absence of the judge from the court room for a considerable time during the arguments to the jury, without the consent of the parties, is reversible error.—*Smith v. Sherwood* (Wis.) 70 N. W. 682.

§ 7. Reporting trial in shorthand.

(Neb.: 1894.)

In the absence of prejudice, the mere refusal of the court to require the service of a stenographic reporter for the trial of a cause is not reversible error.—*Home Fire Ins. Co. of Omaha v. Galley*, 61 N. W. 84, 43 Neb. 71.

§ 8. Waiver of objections.

(Mich.: 1896.)

Irregularities in the mode of procedure in the trial court are waived by failure to object.—*Safford v. Board of Health of City of Detroit* (Mich.) 67 N. W. 1094.

II. RECEPTION OF EVIDENCE.

Comment of counsel on failure to produce evidence, see post, § 40.

Error cured by instructions, see "Appeal," § 253. In criminal cases, see "Criminal Law," §§ 63-72.

§ 9. Offer of evidence.

[a] (Iowa; 1897.)

Where an offer to introduce in evidence a judgment, which by itself is admissible, includes also various papers which are clearly improper, the whole offer must be excluded.—*Widy v. Murray* (Iowa) 69 N. W. 1138.

[b] (Neb.; 1895.)

Error cannot be predicated on the refusal to permit a witness to answer a certain question, when there was no offer of proofs which would be elicited by the answer.—*Alter v. Covey* (Neb.) 63 N. W. 863.

45 Neb. 508.

[c] (Neb.; 1896.)

When a question is asked and excluded, and an offer of proof is thereupon made, the offer to be competent must correspond with the question.—*Keen v. Robertson* (Neb.) 65 N. W. 897, 46 Neb. 837.

[d] (Neb.; 1896.)

The rulings sustaining an objection made to the competency of testimony sought to be elicited by a question propounded to the complaining parties' own witness, cannot be reviewed unless an offer to prove the facts sought to be introduced is made in the trial court, and preserved by a bill of exceptions.—*Murry v. Hennessey* (Neb.) 67 N. W. 470.

48 Neb. 668.

[e] (S. D.; 1895.)

Where, on direct examination, a question to a witness is only preliminary, and does not indicate whether his answer would be material or not, or would necessarily disclose material evidence, and there is no offer to prove the facts sought to be elicited, it is not material error to exclude the question.—*Hanson v. Township of Red Rock in Minnehaha County* (S. D.) 63 N. W. 156.

[f] (S. D.; 1895.)

The sustaining of an objection to a preliminary question relating to an apparently immaterial subject must, in order to be reviewed, be followed by an offer to prove the facts sought to be elicited thereby.—*Tootle v. Petrie* (S. D.) 65 N. W. 43.

[g] (Wis.; 1896.)

The rejection of an offer of testimony of one not summoned as a witness, and not present in court, is proper, though the witness comes in while the offer is being made, if the court is not informed of his presence.—*Lewis v. Newton* (Wis.) 67 N. W. 724.

93 Wis. 405.

§ 10. — Duty to accept assurance of counsel.

(Iowa; 1895.)

Where the court, on objection to proposed evidence, ruled that it was admissible if it related to declarations of the testatrix concerning her will, and invited counsel to state whether such was its nature, it was improper to exclude the evidence after being assured by counsel that it came within the ruling.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, *Id.*

§ 11. Necessity of offer.

[a] (Iowa; 1896.)

A complaint which has been withdrawn and superseded by an amended pleading is not in evidence, unless it is introduced on the trial as other evidence.—*Leach v. Hill* (Iowa) 66 N. W. 69.

[b] (N. D.; 1895.)

Where the trial court, by its rule in excluding evidence, shows that plaintiff cannot recover on his theory, plaintiff is not bound, in the absence of notice that he must do so, to offer evidence of the other allegations of his complaint.—*Brundage v. Mellon* (N. D.) 63 N. W. 209.

§ 12. Party induced to not offer evidence.

(Iowa; 1896.)

Where counsel for a defendant make no objection when it is stated by a trial judge that, as he understands, there is no controversy as to the correctness of an account, and plaintiff therefore does not prove the account, such omission cannot be taken advantage of by defendant afterwards for any purpose.—*Wallerich v. Smith* (Iowa) 66 N. W. 181.

§ 13. Separation and exclusion of witnesses.

[a] (Mich.; 1895.)

The exclusion from the court room of certain witnesses is a matter within the discretion of the trial court.—*Johnston v. Farmers' Fire Ins. Co. of York* (Mich.) 64 N. W. 5.

[b] (Neb.; 1895.)

It was not error to permit a witness who disobeyed the rule to testify, where the witness was called on a branch of the case different from that testified on by previous witnesses.—*Gran v. Houston*, 64 N. W. 245, 45 Neb. 813.

[c] (Neb.; 1896.)

The refusal of an application to exclude witnesses from the court room is in the discretion of the trial court.—*Halbert v. Rosenbalm* (Neb.) 68 N. W. 622.

§ 14. Limiting number of witnesses.

[a] (Iowa; 1895.)

Where an order has been made limiting the number of witnesses on an issue, and a witness offered by one of the parties proves incompetent, such party is not entitled to offer another witness in his stead.—*Preston v. City of Cedar Rapids* (Iowa) 63 N. W. 577.

[b] (Iowa; 1895.)

The court in its discretion, in an action for damages for change of grade, can limit the number of the witnesses touching the value of the property to seven on each side.—*Preston v. City of Cedar Rapids* (Iowa) 63 N. W. 577.

[c] (Wis.; 1896.)

The exclusion of the testimony of the tenth witness called by a party to testify as to a defect in a highway is not an abuse of discretion.—*Larson v. City of Eau Claire* (Wis.) 65 N. W. 731.

92 Wis. 86.

[d] (Wis.; 1896.)

The limitation of the number of witnesses on a certain question is within the discretion of the trial court, though not made until the witness whose evidence was excluded was called.—*Larson v. City of Eau Claire* (Wis.) 65 N. W. 731.

92 Wis. 86.

§ 15. Cumulative evidence and repetition.

[a] (Iowa; 1897.)

Where the court permits a part of a party's evidence to be read to the jury, if the real effect of the evidence touching certain facts is not fairly presented in the portion read, the court should permit his entire evidence touching such matter to be read if he so desires.—*McConkie v. Babcock* (Iowa) 70 N. W. 103.

[b] (Mich.; 1894.)

It is not an abuse of discretion to permit plaintiff, in case of doubt, to repeat in rebuttal testimony given on the opening of his case.—*Chamberlain v. Detroit Stove Works* (Mich.) 61 N. W. 532.

103 Mich. 124.

[c] (Wis.; 1896.)

The reception of additional evidence to a fact already established by competent evidence is not prejudicial error.—*Sawyer v. Choate* (Wis.) 66 N. W. 689.

92 Wis. 533.

§ 16. Order of admission.

[a] (Iowa; 1896.)

The discretion of the trial court in receiving evidence out of the usual order will not be disturbed, where neither party was prevented from introducing admissible evidence.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

[b] (Iowa; 1896.)

Testimony of a defendant's breach of a contract is not rendered inadmissible because at the time it is offered plaintiff has not yet proven his own compliance with its terms.—*Peterson v. Walter A. Wood Mowing & Reaping Mach. Co.* (Iowa) 66 N. W. 96.

[c] (Iowa; 1896.)

In an action against a surviving husband, on his wife's note, it is proper to admit in evidence the verbal promise of the husband, made after her death, to pay the note, to be followed by evidence that the promise was made on a new consideration, such as to prevent and save the expense of administration.—*Leipird v. Storer* (Iowa) 66 N. W. 150.

[d] (Iowa; 1897.)

An appellate court will not interfere with the discretion of the trial court as to the order in which evidence is permitted to be introduced.—*Kramer v. Messner* (Iowa) 69 N. W. 1142.

[e] (Mich.; 1894.)

The exclusion of testimony which would be valuable only when supported by an agreement alleged to have been made between the parties until such agreement is proved is proper.—*Lungerhausen v. Crittenden* (Mich.) 61 N. W. 270.

103 Mich. 173.

[f] (Mich.; 1895.)

Where plaintiff, on examination in chief, denies having made a certain statement, and, on rebuttal, details the entire conversation in which the statement is alleged to have been made, it is in the discretion of the court to allow evidence on surrebuttal impeaching the plaintiff by proving that his reputation for truth is bad.—*Devonshire v. Peters* (Mich.) 63 N. W. 973.

104 Mich. 501.

[g] (Mich.; 1896.)

In an action by a mortgagee against other creditors of the mortgagor for wrongful seizure of the mortgaged property, it is not error to admit in evidence the mortgage, without the note which it was given to secure first being put in evidence.—*Louden v. Vinton* (Mich.) 66 N. W. 222.

[h] (Wis.; 1895.)

When the cross-examination of the plaintiff in an action on an implied contract brought out the fact that there was a written contract between the parties covering the subject-matter of the suit, it was not error to receive such written contract in evidence before the defendant entered upon his defense.—*Tietz v. Tietz* (Wis.) 62 N. W. 939.

90 Wis. 66.

[i] (Wis.; 1896.)

Where defendant denies that plaintiff is a bona fide purchaser of the note in suit, and also alleges a failure of consideration for the note, the court may admit evidence on both questions as it is offered by defendant.—*Warren v. Rosenberg* (Wis.) 69 N. W. 339.

§ 17. — Rebutting evidence.

[a] (Iowa; 1897.)

Where a case was ordered to be heard on depositions, and the court in its discretion allows one party, without notice to the other, to introduce documentary evidence, it was error to refuse to allow the latter to rebut it.—*Clapp v. Greenlee* (Iowa) 69 N. W. 1049.

[b] (Mich.; 1895.)

Where defendant offered evidence that decedent died from the effects of intoxication, which would avoid the policy sued on, it was in the discretion of the trial court to permit

plaintiff to introduce in rebuttal evidence of decedent's habits.—*Maier v. Massachusetts Ben. Ass'n* (Mich.) 65 N. W. 552.

[c] (Minn.; 1896.)

It is within the discretion of the trial court to refuse to allow in rebuttal evidence which should have been given in chief.—*Hale v. Life Indemnity & Investment Co.* (Minn.) 68 N. W. 182.

[d] (Wis.; 1895.)

The admission in rebuttal of direct evidence, which plaintiff knew existed, and for which he had a witness present before the close of his case, is not reversible error where the record does not show that it was withheld to surprise the adverse party, or that its admission was an abuse of the court's discretion.—*McGowan v. Chicago & N. W. Ry. Co.* (Wis.) 64 N. W. 591, 91 Wis. 147.

§ 18. Receiving testimony after parties have rested.

[a] (Iowa; 1895.)

After plaintiff rested, the court, on motion, announced its intention to direct a verdict for defendant. Plaintiff thereupon offered further testimony which was received. *Held*, that there was no error.—*Sawin v. Union Bldg. & Sav. Ass'n of Des Moines* (Iowa) 64 N. W. 401.

[b] (Mich.; 1895.)

When an application to open a case, after the evidence was in, for further proof, fails to point out what the testimony sought to be introduced will show, and the evidence would, under the pleadings, have been inadmissible in the first instance, there is an abuse of discretion in opening the case.—*Wagar v. Bowley* (Mich.) 62 N. W. 293.

104 Mich. 38.

[c] (Minn.; 1896.)

After a cause has been submitted to the court, it cannot, on its own motion, and without a hearing, open the same, and, on verbal notice to the attorney of the party whose interests are to be affected, take further testimony.—*Stein v. Roeller* (Minn.) 68 N. W. 1087.

[d] (Neb.; 1896.)

The granting or overruling of an application, by a party who has rested his case, to introduce further testimony, is within the discretion of the court; and where such an application has been allowed to admit testimony on certain subjects, and the party seeks to extend the privilege, so as to include other subjects, it is within the discretion of the court to grant or refuse such extension.—*Omaha Real Estate & Trust Co. v. Reiter* (Neb.) 66 N. W. 658.

47 Neb. 592.

§ 19. Experiments—Discretion of court.

[a] (Iowa; 1896.)

In an action for personal injuries an expert stated that the dilated condition of plaintiff's eyes was traceable to abnormal condition of the heart, and was permitted without objection to make certain experiments with the plaintiff's eyes in the presence of the jury. *Held*, that the refusal of the court to permit defendant to make the same experiments with some other person, to show that the same results would be produced, on the ground that the court did not have time to find a normal man, is within the discretion of the court.—*Homan v. Franklin County* (Iowa) 68 N. W. 559.

[b] (Neb.; 1897.)

It is not an abuse of discretion, in an action for injuries by reason of a defective sidewalk, to exclude evidence of experiments, made a year after the injury, tending to show that a light in an adjoining house, situated similarly to the light burning at the time of the accident, lighted the surface for a radius of several feet from the place of the defect.—*City of Ord v. Nash* (Neb.) 69 N. W. 961.

§ 20. Error cured.

(Neb.: 1896.)

Error in receiving the testimony of a witness who has not been shown to possess the requisite knowledge of the subject involved is cured when, by means of the cross-examination, a sufficient foundation is laid for such testimony.—(Chicago, B. & Q. R. Co. v. Shafer (Neb.) 68 N. W. 342.

III. OBJECTIONS TO EVIDENCE AND RULINGS THEREON.

Misconduct of counsel in offering or introducing evidence, see post, § 36.

In criminal cases, see "Criminal Law," §§ 73-78. Objections first raised on appeal, see "Appeal," § 200.

§ 21. In general.

[a] (Iowa: 1896.)

Where evidence has been properly admitted over objection, subject to being made competent by further evidence, the objector cannot urge the nonproduction of further evidence as error, unless he called the attention of the court to the omission.—Leipird v. Stotler (Iowa) 66 N. W. 150.

[b] (Iowa: 1896.)

Plaintiff cannot complain of rulings excluding exhibits attached to a deposition, where, after defendant withdrew all objection to such exhibits, plaintiff failed to read them to the jury.—Shakman v. Potter (Iowa) 66 N. W. 1045.

[c] (Minn.: 1897.)

To lay a foundation for the introduction of testimony given at a former trial, respondent offered an affidavit to which appellant's counsel objected. The court stated: "Evidence received subject to the objection." No other ruling was made, and the testimony given at the former trial was received without objection. *Held*, that the court merely took the objection under advisement, and therefore the question of the admissibility of the affidavits was not presented by the record.—Johanson v. Hoff (Minn.) 69 N. W. 705.

§ 22. Sufficiency and scope of objections.

[a] (Iowa: 1895.)

The objection that a question addressed to a witness has assumed a fact not proven cannot be urged on appeal on an objection going only to the incompetency of the witness.—Bussard v. Bullitt (Iowa) 64 N. W. 658.

[b] (Iowa: 1896.)

Where evidence was admissible against one of two defendants, an objection to it on the ground that it was incompetent, irrelevant, and immaterial did not raise the question of its admissibility against the other defendant.—Allen v. Barrett (Iowa) 69 N. W. 272.

[c] (Iowa: 1897.)

Objections to an offer of an account book, and especially of certain pages thereof: "To which offer the defendants object as incompetent, immaterial, as to each and every item in said testimony, and to each and every item on the book and on the pages referred to as incompetent and immaterial. The proper foundation has not been laid as for the introduction of the testimony offered."—is merely an objection for want of proper foundation, and does not raise the point that certain items of cash payments therein shown were not admissible to show payment of notes involved.—Mathews v. Heron (Iowa) 70 N. W. 136.

[d] (Mich.: 1894.)

A motion to strike out all of a witness' testimony is properly overruled where part of the same is competent.—Totten v. Burhans (Mich.) 61 N. W. 58.

103 Mich. 6.

[e] (Mich.: 1895.)

On an objection to evidence as incompetent, the incompetency of the witness cannot be urged.—Isaac v. McLean (Mich.) 61 N. W. 2.

[f] (Mich.: 1896.)

An objection that a question asked a witness is "incompetent," without more, will not be considered, unless the real point of objection was too palpable to require the assignment of more specific grounds to call the trial court's attention to it.—Rivard v. Rivard (Mich.) 66 N. W. 681.

[g] (Mich.: 1896.)

An objection to a question as "incompetent" is too general to raise any question for review unless the real objection is apparent.—Hynes v. Hickey (Mich.) 66 N. W. 1690.

[h] (Mich.: 1896.)

An objection to the admission of evidence on the ground of "incompetency and immateriality" is not sufficiently specific.—Ranson v. Weston (Mich.) 68 N. W. 152.

[i] (Mich.: 1897.)

Where, prior to the accident, plaintiff had been accustomed to go out nursing, and the only objection to evidence that she had since had three calls to go out nursing was that it was immaterial, defendant could not urge on appeal that the evidence was not admissible because plaintiff's calling was not set out in the declaration.—Heddle v. City Electric Ry. Co. (Mich.) 70 N. W. 1096.

[j] (Minn.: 1895.)

Under an objection to the admission of evidence on the ground that it was incompetent and immaterial, or that it showed the contract in suit to be embraced in a writing, the court could not consider whether the evidence was admissible under the pleadings.—Vaughan v. McCarthy (Minn.) 65 N. W. 249.

63 Minn. 221.

[k] (Minn.: 1897.)

The question of the competency of admissions of a person under guardianship, tending to bind his estate, is not presented to the supreme court by a record showing that when the admissions were received there was nothing before the court as to the fact of the guardianship except counsel's statement, after his objection that the admissions were "incompetent, irrelevant, and immaterial" had been overruled, that he wished it to appear of record that he would show that the person was under guardianship when the admissions were made; evidence of the appointment of the guardian not being given until the admissions were all in.—Johanson v. Hoff (Minn.) 69 N. W. 705.

[l] (Neb.: 1896.)

An objection to a hypothetical question, that it is "incompetent, immaterial, and irrelevant," is too general to raise the point that the question involves erroneous statements of evidence.—Chicago, R. J. & P. R. Co. v. Archer 65 N. W. 1043, 46 Neb. 907.

[m] (S. D.: 1896.)

On a second trial a witness was asked to state what a deceased witness testified to on the former trial with reference to certain facts, which was objected to on the ground that the evidence was incompetent, irrelevant, and immaterial, and that no proper foundation had been laid. *Held*, that the objection was too general to raise the question that no proper foundation was laid for such evidence by showing that the deceased witness was sworn, and that the witness could give the substance of the testimony of such deceased witness, both on direct and cross examination.—Tanderup v. Hansen (S. D.) 66 N. W. 1073.

[n] (Wis.: 1895.)

An objection to the certified copy of a record, on the ground of the form in which it was certified, should specifically point out the error.—Nicolai v. Davis, 61 N. W. 1001, 91 Wis. 370.

[o] (Wis.; 1896.)

Where a bundle of letters, offered at the same time, contained one written after the alleged alienation of the wife's affections, a general objection to them on the ground that they were privileged communications was properly overruled, since the objection to the one letter should have been specific.—*Horner v. Yance* (Wis.) 67 N. W. 720.

93 Wis. 352.

[p] (Wis.; 1896.)

Under a general objection to the admission of certain testimony, an assignment charging error in that the questions were not put in the proper form is not ground for reversal.—*Donovan v. Chicago & N. W. Ry. Co.* (Wis.) 67 N. W. 721.

93 Wis. 373.

[q] (Wis.; 1896.)

A general objection to a question asked a witness as being "incompetent, irrelevant, and improper" is not sufficient to raise the point on an assignment of error that it was too broad, and should have been confined by the court within more narrow limits.—*Pool v. Milwaukee Mechanics' Ins. Co.* (Wis.) 69 N. W. 65; *Same v. Farmers' Fire Ins. Co.*, *Id.*

§ 23. Motion to strike out.**[a] (Iowa; 1896.)**

In a proceeding, tried by the court alone, to recover from an administrator money alleged to have been paid on a note in excess of the amount due, it was not error to refuse to strike out testimony of decedent's son that the note, which was introduced to show that it bore the same indorsements before decedent's death as it did after, was in a locked drawer from the time of decedent's death until the examination of his father's papers, though the witness stated on cross-examination that he never inspected the drawer to ascertain if it was locked, and that he was not at the house on some days between the death of his father and the examination of said papers.—*Erusha v. Tomash* (Iowa) 67 N. W. 390.

[b] (Iowa; 1897.)

In an action for rent of a barn, a refusal to strike out evidence of an agreement made in plaintiff's absence, whereby her husband was to build the barn, and keep defendant's horses therein, in consideration of an advance in his salary as teamster, was proper, where further evidence was given tending to show that plaintiff afterwards learned of such agreement, and acquiesced therein.—*De Lay v. Carney Bros.* (Iowa) 69 N. W. 1053.

[c] (Mich.; 1896.)

Where testimony was received without objection, and a motion to strike it out gave no reason for the request, an order denying the motion will not be reviewed.—*Runnells v. Village of Pentwater* (Mich.) 67 N. W. 558.

[d] (Minn.; 1895.)

Where the cross-examination by defendant of an expert witness was confined to the point whether the opinion of the witness was based on an unsworn statement made out of court, defendant's motion "to strike out the testimony of this witness, for the reason that it appears to be based in part on the unsworn statement" of another, was sufficiently specific.—*Miller v. St. Paul City R. Co.* (Minn.) 61 N. W. 554.

62 Minn. 216.

§ 24. Evidence admissible for certain purposes.**[a] (Mich.; 1896.)**

Where evidence is admissible for any purpose, a general objection that it is irrelevant, incompetent, and immaterial, without stating the precise ground of exception relied upon, is not sufficient.—*John Hutchison Mann'g Co. v. Pinch* (Mich.) 66 N. W. 340.

[b] (Minn.; 1895.)

In an action on a note payable to order by an indorsee thereof, the complaint alleged, as to the transfer, merely that the note was "sold, assigned, and delivered" to plaintiff. The indorsement was admitted, over defendant's objection, to prove the transfer to plaintiff, and the court charged that if plaintiff bought the note in good faith, for value, without notice, he should recover. *Held*, that by failing to object to the charge defendant waived the objection that the indorsement was not admissible to give plaintiff the rights of a bona fide purchaser.—*Red River Valley Inv. Co. v. Cole* (Minn.) 64 N. W. 1149.

62 Minn. 457.

§ 25. Evidence partly admissible.**(Minn.; 1895.)**

It is proper to refuse a motion to strike out testimony when it applies to competent as well as to incompetent testimony.—*Roeller v. Hall* (Minn.) 64 N. W. 559.

62 Minn. 241.

§ 26. Change of objection on appeal.**[a] (Iowa; 1896.)**

Where the objection to the admission in evidence of the books of account of an hotel keeper, to prove payment of certain cash items contained therein, is on the ground merely that proper preliminary proof was not made, the objection that cash items in books of account of one not a broker or banker cannot be thus proven, cannot be raised on appeal.—*Mathews v. Herron* (Iowa) 67 N. W. 226.

[b] (Mich.; 1895.)

Error in the admission of testimony will not be considered on appeal unless the grounds of objection were stated at the time; and counsel will be limited to the reasons then given.—*Maluat v. Codle* (Mich.) 64 N. W. 194.

§ 27. Waiver of objections.**[a] (Iowa; 1896.)**

Where the court reserves its ruling on an objection to the admission of writings in evidence, the party objecting waives his objection, by failing to ask for the ruling reserved, in the event that the case goes to the jury with such writings.—*State v. Cavanaugh* (Iowa) 68 N. W. 452.

[b] (Iowa; 1896.)

Ruling on motion to strike out evidence not having been made or insisted on, any error in admitting the evidence is waived.—*Langhammer v. City of Manchester* (Iowa) 68 N. W. 688.

[c] (Iowa; 1896.)

A party who objects to the withdrawal of evidence admitted against his objections cannot complain of its admission.—*Geiger v. Payne* (Iowa) 69 N. W. 554.

[d] (Mich.; 1894.)

After a party has obtained one adverse ruling upon his objection to evidence, he may meet such evidence by counter proof without waiving the error.—*McKinnon v. Gates* (Mich.) 61 N. W. 74.

102 Mich. 618.

[e] (Minn.; 1896.)

Error in excluding on cross-examination a question which was properly asked could not be taken advantage of where counsel stated that the only purpose of the question was impeachment, for which purpose it was not proper.—*Colby v. Colby* (Minn.) 67 N. W. 663.

64 Minn. 549.

[f] (Minn.; 1897.)

Depositions were taken on a stipulation which waived all objections except to the competency, relevancy, and materiality of the testimony. The parties at the examination took and had noted certain objections to the testimony. *Held*, that a party could not, on the trial, object to other parts of the testimony.—*Pioneer Sav-*

ings & Loan Co. v. St. Paul Fire & Marine Ins. Co. (Minn.) 70 N. W. 979.

[a] (Neb.; 1896.)

The sustaining of an objection to a question put to one's own witness cannot be reviewed, where the complaining party failed to make an offer of the testimony indicating what he expected to prove by the witness.—Denise v. City of Omaha (Neb.) 69 N. W. 119.

[b] (Neb.; 1897.)

An exception well taken to the exclusion of evidence is not waived by a failure to present the same ground of objection by an exception to an instruction given or refused.—Rosenthal v. Ogden (Neb.) 69 N. W. 779.

§ 28. — Failure to specify ground of objection.

[a] (Iowa; 1895.)

Where an objection to testimony, or a motion to strike it out, is made without stating the grounds therefor, it should be overruled.—Stevenson v. Chicago & N. W. Ry. Co. (Iowa) 61 N. W. 961.

[b] (Iowa; 1896.)

Unless a party objecting to evidence states valid reasons for its exclusion, the objection is properly overruled, though a sufficient ground for excluding it may exist.—Puth v. Zimbleman (Iowa) 68 N. W. 895.

[c] (Mich.; 1894.)

The overruling of an objection to evidence will not be reviewed where no ground for the objection is stated.—Lungerhausen v. Crittenden (Mich.) 61 N. W. 270.
103 Mich. 173.

§ 29. — By admission of other evidence without objection.

[a] (Iowa; 1895.)

Where, on cross-examination, defendant is required, over objection, to testify to certain facts, he waives any error committed in overruling the objection by afterwards testifying to the same facts without objection.—State v. Eifert (Iowa) 65 N. W. 309.

[b] (Iowa; 1895.)

In an action against a city for injuries from a defective sidewalk, where a witness for plaintiff testified, over defendant's objection, as to repairs after the accident, and other witnesses, including one of defendant's, testified without objection as to such repairs, defendant was not prejudiced by the allowance of the questions.—Hunt v. City of Dubuque (Iowa) 65 N. W. 319.

[c] (Neb.; 1896.)

Error cannot be predicated on the admission of certain testimony, where ample testimony of the same nature was admitted without objection.—Hickman v. Layne (Neb.) 66 N. W. 298.
47 Neb. 177.

§ 30. — Delaying objection until after answer.

[a] (Iowa; 1895.)

Objections to the admission of testimony, made after questions have been answered, cannot be considered on appeal.—Duer v. Allen (Iowa) 64 N. W. 682.

[b] (Neb.; 1896.)

Where a question is asked a witness, in itself proper and not open to objection, the adverse party does not waive his right to object to an answer containing inadmissible matter by not objecting to the question itself.—Malm v. Thelin (Neb.) 66 N. W. 650.
47 Neb. 686.

[c] (S. D.; 1895.)

An objection interposed to a question after a responsive answer has been given comes too late to make an adverse ruling thereon available error.—Vermillion Artesian Well, Electric Light, Mining, Industrial & Improvement Co. v. City of Vermillion (S. D.) 61 N. W. 802.
6 S. D. 466.

§ 31. — Taking objection by motion to strike out.

[a] (Minn.; 1895.)

Where a party, though fully aware of the nature of the answer sought to be elicited, made no objection to the question, it was not error to overrule his motion to strike out the answer.—Barnes v. Christofferson (Minn.) 64 N. W. 821.
62 Minn. 318.

[b] (Neb.; 1895.)

Where no objection was made to the asking of a question and the answering of the same, it was in the discretion of the trial court to deny a motion to strike out the answer as incompetent.—Gran v. Houston (Neb.) 64 N. W. 245, 45 Neb. 813.

§ 32. — Necessity of motion to strike out.

[a] (Iowa; 1895.)

Where a witness, in answer to a proper question, and in connection with other statements admissible, testifies also as to a matter inadmissible, in evidence, in the absence of a motion to strike out the inadmissible testimony its admittance is not ground for reversal.—Bailey v. Bailey (Iowa) 63 N. W. 341.

[b] (Mich.; 1891.)

Where an objection to evidence is not made until the same has been admitted, an assignment based thereon cannot be considered in the absence of a motion to strike out such evidence.—Totten v. Burhans (Mich.) 61 N. W. 58.
103 Mich. 6.

[c] (Mich.; 1897.)

Where a witness gives an incompetent answer to a competent question, the adverse party waives the objection unless he moves to strike out the answer.—Weiser v. Welch (Mich.) 70 N. W. 438.

[d] (Neb.; 1895.)

The error of admitting improper evidence will not be reviewed in the absence of a motion to strike such evidence from the record.—Kissingner v. Staley (Neb.) 63 N. W. 55.
44 Neb. 783.

[e] (Wis.; 1895.)

In an action for personal injuries, the daughter of plaintiff, testifying as a witness for her, after an objection was overruled to the question, "Do you know of any complaint, or of the fact, of any peculiar feeling in the limb?" answered, "At times she feels very much numbed, she has said,—not much feeling in it." Defendant made no motion to strike out this answer. *Held*, that a judgment for plaintiff would not be reversed because the answer improperly included the complaints made by plaintiff.—Tebo v. City of Augusta (Wis.) 63 N. W. 1015.
90 Wis. 405.

[f] (Wis.; 1896.)

A party cannot predicate error on a statement volunteered by his own witness on cross-examination, which he did not ask to have stricken out.—Lindner v. St. Paul Fire & Marine Ins. Co. (Wis.) 67 N. W. 1125.
93 Wis. 526.

§ 33. Objections to evidence by party offering or eliciting.

[a] (Iowa; 1896.)

A party cannot complain of evidence elicited by himself.—Nagle v. Fulmer (Iowa) 67 N. W. 369.

[b] (Neb.; 1895.)

A party who asks his adversary to offer in evidence an instrument of doubtful competency cannot urge on appeal that the instrument was incompetent.—Smith v. Brown (Neb.) 64 N. W. 714, 46 Neb. 230.

§ 34. Estoppel raised by objections to competent evidence.

(Minn.: 1894.)

One whose objection to competent evidence to prove a fact is sustained is not estopped to say that the fact has not been proved.—*People's Bank v. Howes* (Minn.) 61 N. W. 457. 59 Minn. 420.

§ 35. Instruction to remove effect of error.

(Iowa: 1894.)

In an action on an accident policy conditioned that it shall not cover injuries received by the insured while fighting, it appeared that insured was shot in a difficulty. Plaintiff's counsel, against defendant's objection, stated, in the presence of the jury, that he proposed to show that the person by whom deceased was shot had several days before attempted to secure a pistol, and that such person had grabbed at insured's watch and money with a drawn revolver, and evidence as to the person's attempt to secure a revolver was introduced. The evidence was afterwards stricken out, and the jury were admonished to disregard the counsel's proposal and the evidence. *Held*, that it was error to refuse to direct the jury, in the instructions, to disregard the evidence and proposal, the previous admonition alone being insufficient to remove possible prejudice.—*Jones v. United States Mut. Acc. Ass'n of City of New York* (Iowa) 61 N. W. 485. 92 Iowa, 652.

IV. CONDUCT, ARGUMENT, AND REMARKS OF COUNSEL.

Matters necessary to review, arguments and remarks of counsel, see "Appeal," § 238.

§ 36. Misconduct in offering or producing evidence.

[a] (Iowa: 1896.)

After an objection had been sustained to plaintiff's offer to show that defendant offered money to the judge who was to have presided at the trial of the case,—saying to him at the time the offer was made, "Take this, so that you will give me a fair show."—plaintiff again, on defendant's denial on cross-examination of having made the statement, offered such evidence. *Held* no ground for reversal.—*Irlbeck v. Bierl* (Iowa) 67 N. W. 400.

[b] (Mich.: 1896.)

A judgment will not be reversed because of improper remarks made by counsel in offering testimony, where the testimony is excluded by the court as immaterial, and it appears improbable that the jury were influenced by the language used.—*Provost v. Brueck* (Mich.) 67 N. W. 1114.

§ 37. Misconduct in cross-examining.

(Iowa: 1895.)

Defendant's counsel, on cross-examination of plaintiff, asked numerous questions reflecting on plaintiff's moral character, after objection to questions of similar import were sustained, and in disregard of the rulings of the court. *Held* reversible error.—*Hood v. Chicago & N. W. Ry. Co.* (Iowa) 64 N. W. 261.

§ 38. Right to open and close.

[a] (Iowa: 1895.)

A defendant who admits the allegations of the complaint and seeks to defeat them by affirmative defenses is properly allowed the opening and closing arguments before the jury.—*Names v. Dwelling-House Ins. Co. of Boston* (Iowa) 64 N. W. 628.

[b] (Iowa: 1895.)

It was not error to deny the right to open and close to a party who made no claim

therefor until the opening statements of opposing counsel had been made.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

[c] (Iowa: 1897.)

In a suit on a firm note, the "burden of the issue" was on plaintiff, entitling him to the opening and closing argument to the jury (Code § 2780), where the answer was a general denial (except of the existence of the partnership), with certain specific denials.—*Milwaukee Harvester Co. v. Crabtree* (Iowa) 70 N. W. 704.

[d] (Neb.: 1895.)

Where, without objection, one party assumes the burden of proof, the refusal of the court to permit the other party to open and close the argument to the jury was proper.—*Burgess v. Burgess* (Neb.) 62 N. W. 242. 44 Neb. 16.

[e] (Neb.: 1896.)

The fact that the party holding the affirmative waived the opening argument did not deprive him of the right given by Code Civ. Proc. § 283, of closing the case after argument by his opponent.—*Hickman v. Layne* (Neb.) 66 N. W. 298. 47 Neb. 177.

§ 39. Improper arguments and remarks.

[a] (Iowa: 1895.)

While reference should not be made to the result of a former trial, judgment will not be reversed because counsel stated to the jury in argument that the case had been tried before, and that the verdict was in the record, and requested them to examine it on retiring.—*Miller v. Boone County* (Iowa) 63 N. W. 352.

[b] (Mich.: 1896.)

In his argument, counsel for plaintiff severely criticised defendant's witnesses. No exceptions to the argument were taken at the time, but, by permission of the court, they were made to the reporter. In the charge the court said: "I do not see any occasion for any criticism on the defense made in the case. It was perfectly legitimate, and, if it satisfies you, it must be final; but you are the sole judges upon that subject." *Held* that, upon the record as made, the argument was not ground for reversal.—*Phippen v. Bay Cities Consol. Ry. Co.* (Mich.) 68 N. W. 216.

[c] (Mich.: 1897.)

It is reversible error for counsel to state to the jury, over objection, what persons who were not called as witnesses would have testified to.—*Fringe v. Miller* (Mich.) 70 N. W. 345.

§ 40. Comment on failure to produce evidence.

(Mich.: 1894.)

In an action against a railroad company for personal injuries, plaintiff's attorney may read an order of the court to produce certain books, supposed to contain evidence of its ownership of the railroad, which defendant had failed to produce, and may comment on such failure.—*Williams v. Cleveland, C. & St. L. Ry. Co.* (Mich.) 61 N. W. 52. 102 Mich. 537.

§ 41. Arguments justified by evidence.

[a] (Iowa: 1896.)

A judgment will not be reversed because of counsel's denunciation of defendant's conduct and character, in his argument to the jury, if the proof tends to sustain, though it may not actually establish, the truth of the charges so made.—*Geiger v. Payne* (Iowa) 69 N. W. 554.

[b] (Mich.: 1895.)

In replevin for a piano, the price of which had been paid by defendant to one acting as plaintiff's agent, but who failed to turn over the money to plaintiff, evidence that such person agreed to send a piano to defendant's house, and that on the same day a piano from plaintiff's store was delivered at such house, though there was no di-

rect evidence that plaintiff delivered it to such person for delivery to defendant, will justify a statement by counsel in argument that it was so delivered.—*Warren v. Hailey* (Mich.) 61 N. W. 1058.

[c] (Mich.; 1895.)

In an action by an infant for injuries from falling into a hole in a sidewalk, a witness for defendant on cross-examination stated that plaintiff's counsel was being injured by his connection with the case; and it appeared that the village authorities sent for children who were witnesses, before the trial, and put to them leading questions, to ascertain what they knew about the accident. *Held*, that a statement by plaintiff's counsel to the jury that the village authorities had conspired to defeat the plaintiff's recovery, and that he had been threatened by witnesses of the defendant, and declared a "spotted" man, because he was acting as counsel for plaintiff, is ground for reversal.—*Strudgeon v. Village of Sand Beach* (Mich.) 65 N. W. 616.

[d] (Neb.; 1895.)

Where defendant's counsel was permitted, over plaintiff's objection, to state matters in his argument entirely foreign to the issues which were calculated to prejudice the jury, it was ground for reversal.—*Stratton v. Nye* (Neb.) 63 N. W. 928.
45 Neb. 619.

§ 42. Appeal to prejudice.

[a] (Iowa; 1895.)

During his argument, counsel for defendant remarked that plaintiff is "a wealthy foreign corporation, * * * and was not required to even file its articles of incorporation in this state"; that "sewing-machine companies were allowed to roam at will, and rob people as they please"; and that a corporation attempting to enforce a contract like the one in evidence "should have its property confiscated,"—and stated (without evidence to support it) that plaintiff had accepted another person as the payor of the note sued on, and "had taken an ironclad mortgage on everything he had." *Held* reversible error.—*Wheeler & Wilson Manuf'g Co. v. Sterrett* (Iowa) 62 N. W. 675.

[b] (Mich.; 1894.)

In an action against a railroad company for injuries received on a road leased to defendant, a remark of plaintiff's counsel that defendant was a sea serpent which had swallowed another smaller road, that it was a monster, and that it was trying to dodge liability by its claim that it was not operating the road at the time of the accident, are not ground for reversal.—*Williams v. Cleveland, C. & St. L. Ry. Co.* (Mich.) 61 N. W. 52.
102 Mich. 537.

[c] (Mich.; 1896.)

That plaintiff's counsel in his opening argument referred to the wealth of defendant, and stated that he was trying to crush his client, is not ground for reversal, the counsel not having persisted in such argument, and defendant having failed to request a charge in regard thereto.—*Londen v. Vinton* (Mich.) 66 N. W. 222.

§ 43. Replying to arguments of adversary.

(Neb.; 1895.)

Arguments of counsel based on facts not in evidence will not justify a reversal, when made in reply to argument of the complaining party.—*Stratton v. Dole* (Neb.) 63 N. W. 875.
45 Neb. 472.

§ 44. Evidence to rebut statement.

(Mich.; 1895.)

Evidence is not admissible to rebut a statement made by counsel, which there is no evidence to sustain.—*Munzer v. Stern* (Mich.) 63 N. W. 513.
105 Mich. 523.

§ 45. Reading statutes and decisions.

[a] (Minn.; 1896.)

Since Laws 1895, c. 173, defining the master's duty to the servant, is merely declaratory of the common law, it was not prejudicial error to read it to the jury as the law of the case, in an action by an employe for injuries, though it was not enacted until after the injury had been received.—*Hess v. Adamant Manuf'g Co. of America* (Minn.) 68 N. W. 771.

[b] (Neb.; 1895.)

In the absence of abuse of discretion, the action of the court in permitting an attorney to read to the jury from reported decisions will not be disturbed.—*Stratton v. Dole* (Neb.) 63 N. W. 875.

45 Neb. 472.

§ 46. Discretion of trial court.

[a] (Iowa; 1897.)

Whether an attorney, in his argument, may read transcribed portions of evidence taken by the official reporter, is in the discretion of the court.—*McConkie v. Babcock* (Iowa) 70 N. W. 103.

[b] (Mich.; 1891.)

License of speech of counsel in addressing the jury is largely within the discretion of the trial court.—*Rutter v. Collins* (Mich.) 61 N. W. 267.

103 Mich. 143.

[c] (Mich.; 1896.)

The exercise of the discretion of the trial court as to the language permitted to be used by counsel will not be interfered with unless the injury is apparent, or the abuse great.—*Lathrop v. Sinclair* (Mich.) 68 N. W. 248.

§ 47. Harmless error.

[a] (Neb.; 1897.)

Generally a judgment will not be reversed because of improper remarks by counsel in argument when, on objection made, the court interposes, the jury is directed to disregard the statement, and the improper remarks are not repeated.—*Golder v. Lund* (Neb.) 70 N. W. 349.

[b] (Wis.; 1895.)

Where the attention of the court is not called to improper remarks by counsel, and no prejudice results therefrom, they are not ground for reversal.—*Mayer v. Milwaukee St. Ry. Co.* (Wis.) 63 N. W. 1048.

90 Wis. 522.

§ 48. Waiver of objections.

(Iowa; 1896.)

Where defendant's counsel is erroneously permitted to comment on the original complaint, which has been superseded by an amended complaint, as evidence of admissions, without having introduced the pleading in evidence, that plaintiff's counsel in his concluding argument attempts to explain such admissions does not waive the error.—*Leach v. Hill* (Iowa) 66 N. W. 69.

§ 49. Cure of improper remarks by action of court and withdrawal.

[a] (Iowa; 1896.)

Misconduct of plaintiff's attorney in stating, on motion for a new trial of a replevin suit, that it had been agreed by defendant that, if his motion for a new trial was overruled, the court could enter judgment for the value of the goods as fixed by the verdict, no such agreement having been made, was not ground for reversal, where the court stated that counsel should not have mentioned the matter, and that the verdict would be reduced unless counsel for plaintiff would consent to give defendant a choice between a judgment for the return of the property or a money judgment.—*Leek v. Chesley* (Iowa) 67 N. W. 580.

[b] (Iowa; 1896.)

Where improper remarks are made by an attorney in his opening statement before the

jury, and on exception thereto are immediately withdrawn, as not warranted by the record, the trial court's ruling that no prejudice resulted will not be disturbed.—*Erb v. German-American Ins. Co. (Iowa)* 67 N. W. 583.

[c] (Mich.: 1895.)

In an action by a servant against his master for personal injuries, a statement by plaintiff's counsel in his opening statement that he intended to show that defendant had not gone near plaintiff after the injury, which remark was promptly stricken out, and an offer of evidence to such effect, which was also promptly excluded, are not ground for reversal, where there is nothing to show but that the counsel's claim that such evidence was admissible to show that plaintiff was entitled to exemplary damages was in good faith.—*Hoffman v. Adams (Mich.)* 64 N. W. 7.

[d] (Mich.: 1895.)

In an action against a street-railroad company for personal injuries to a passenger, plaintiff's counsel stated, as to defendant's conduct of its business, "You have only to go down on C. street, and you will break your wagon going across the street at any place." *Held* that, since the court rebuked counsel, the remarks would not require a reversal.—*Tunnicliffe v. Bay Cities Consol. Ry. Co. (Mich.)* 65 N. W. 226.

[e] (Mich.: 1896.)

It is proper to instruct the jury to disregard statements by counsel, not sworn as witnesses, as to their personal knowledge of adverse witnesses, made to discredit them.—*Van Alstine v. Kanieeki (Mich.)* 67 N. W. 502.

[f] (Mich.: 1896.)

On cross-examination of the defendant, some questions were asked tending to imply wrongdoing on his part, not connected with the matter in suit. In the discussion which followed between counsel, charges and counter charges were made. There was no objection made at the time, but the court, on his own motion, instructed the jury that remarks of counsel should be disregarded if unsupported by testimony. *Held*, that the defendant had no ground of complaint justifying the reversal of a judgment for plaintiff.—*Munroe v. Godkin (Mich.)* 69 N. W. 244.

[g] (Mich.: 1897.)

Where the court immediately declared language of counsel in the argument improper, in the presence of the jury, there is no presumption of injury.—*Wenzel v. Johnston (Mich.)* 70 N. W. 549.

[h] (Neb.: 1897.)

Where counsel making improper remarks in argument, upon being stopped by the court, admonishes the jury to disregard the remarks, such admonition is equivalent to one made by the court.—*Golder v. Lund (Neb.)* 70 N. W. 379.

[i] (S. D.: 1896.)

Improper remarks of counsel, which the jury are at once directed by the court to disregard, will not ordinarily constitute ground for reversal.—*City of Yankton v. Douglass (S. D.)* 66 N. W. 923.

[j] (Wis.: 1896.)

Where a fact is shown by the uncontradicted testimony of a witness, and the counsel for the opposing party, in his argument, states unqualifiedly that such fact was not shown, the court, at the request of the other party, should instruct that such fact was established, and that the jury could not find to the contrary.—*Davis v. Chicago, M. & St. P. Ry. Co. (Wis.)* 67 N. W. 16.
93 Wis. 470.

V. INSTRUCTIONS.

See, also, "Assault and Battery," § 9; "Assumpsit," § 10; "Attachment," § 62; "Breach

of Marriage Promise," § 3; "Ejectment," § 8; "Garnishment," § 26; "Libel and Slander," § 27; "Malicious Prosecution," § 8.

Removing effect of error in rulings on evidence, see ante, § 35.

Verdict against instructions, see post, § 98.

As to advice of counsel, see "Malicious Prosecution," § 10.

— agency, see "Principal and Agent," § 30.

— contributory negligence, see "Negligence," § 28.

— damages, see "Damages," §§ 47, 48.

— damages for malicious prosecution, see "Malicious Prosecution," § 18.

— negligence, see "Negligence," § 9.

— usury, see "Usury," § 24.

Assignments of error as to instructions, see "Appeal," § 90.

Bringing instructions into record on appeal, see "Appeal," § 139.

In action for alienating affections, see "Husband and Wife," § 41.

— for damages from fires set by engine, see "Railroad Companies," § 80.

— for injuries from defects in streets or sidewalks, see "Municipal Corporations," §§ 90, 100.

— for injuries to animals on track, see "Railroad Companies," § 63.

— for injuries to passengers, see "Carriers," § 52.

— for injuries to servants, see "Master and Servant," § 53.

— for malpractice, see "Malpractice," § 5.

— on bills and notes, see "Negotiable Instruments," § 88.

— on contracts, see "Contracts," § 73.

— on policies, see "Insurance," § 128.

— to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 37.

— under civil damage laws, see "Intoxicating Liquors," § 60.

Including several propositions in one assignment of error, see "Appeal," § 97.

In criminal cases, see "Criminal Law," §§ 127–168.

Review of instructions, necessity of making objection on motion for new trial, see "Appeal," § 84.

1. IN GENERAL.

§ 50. General rules.

[a] (Minn.: 1895.)

An erroneous charge on any one of several material issues is ground for setting aside a general verdict.—*Funk v. St. Paul City Ry. Co. (Minn.)* 63 N. W. 1099.

61 Minn. 435.

[b] (Neb.: 1895.)

A peremptory instruction is properly refused where the effect to be given certain evidence is therein misstated.—*Vaughn v. Crites (Neb.)* 62 N. W. 1098.

44 Neb. 812.

[c] (Neb.: 1895.)

An instruction by which the jury are informed that they may base their verdict on something not put in issue by the pleadings is erroneous.—*McCready v. Phillips (Neb.)* 63 N. W. 7.

44 Neb. 790.

[d] (Neb.: 1896.)

While instructions should not be submitted to the jury with authorities noted thereon, still prejudice will not be presumed from the mere citation or the instruction of a volume and page of the reports.—*Herzog v. Campbell (Neb.)* 66 N. W. 424.

47 Neb. 370.

[e] (Wis.: 1896.)

An instruction must be construed in the light of the evidence before the jury, and the issues on which the case was tried.—*Nemmann v. City of La Crosse (Wis.)* 68 N. W. 654.

§ 51. Requirement to be in writing.

(Iowa; 1895.)

Remarks of a trial judge, made at the time evidence was given, stating for what purpose it was admitted, and to enable the jury to give it the intended application, is not such an instruction as is required by the Code to be in writing.—*Farmer v. Thrift* (Iowa) 62 N. W. 801.

See, also, "Criminal Law," §§ 128, 129.

§ 52. Waiver of written instructions.

[a] (S. D.; 1891.)

One who sits by, and without objection allows the court to instruct the jury orally, the same being taken down by the stenographer, thereby waives written instructions.—*Frye v. Ferguson* (S. D.) 61 N. W. 161.
6 S. D. 392.

[b] (Wis.; 1897.)

Where one of the counsel for a defendant was present when the jury returned to the court room, and asked further instructions, and said nothing when the court stated that oral instruction could not be given except by consent of the parties, his silence will be deemed a consent, which waived a written charge.—*McMahon v. Eau Claire Waterworks Co.* (Wis.) 70 N. W. 829.

§ 53. On what points necessary.

[a] (Iowa; 1895.)

In a will contest, where the court charged that the expert evidence as to the testator's mental incapacity was to be considered in view of all the other testimony, it was not prejudicial to refuse to charge that if the hypothetical question propounded to the expert was, in important particulars, unfair and untrue, no weight could be given an opinion based upon it.—*Bever v. Spangler* (Iowa) 61 N. W. 1072.
93 Iowa, 576.

[b] (Iowa; 1895.)

An instruction that a county is not liable for a defective bridge approach unless it had actual notice of the defect, or the defect had existed such time that it should have known of it, is not necessary where there is no dispute that the board of supervisors knew of the condition of the defective approach.—*Miller v. Boone County* (Iowa) 63 N. W. 352.

[c] (Iowa; 1896.)

An instruction that defendant's claim that certain money was for traveling expenses was not sustained need not be given, where, under the instructions given, it would not avail defendant if such claim was sustained.—*Smith v. Jackson* (Iowa) 66 N. W. 80.

[d] (Iowa; 1896.)

Where the jury have been instructed that their verdict should be determined by the evidence which would best satisfy them of the truth of the claims made by the respective parties, and in regard to the effect of the testimony of a witness who had made statements out of court contradictory to those made on the trial, it is not error to refuse to charge farther in regard to the credibility of witnesses.—*Guthless v. Ripley* (Iowa) 67 N. W. 109.

[e] (Iowa; 1897.)

Where the court, on the admission of certain evidence, had stated in the hearing of the jury the purpose for which the evidence might be considered, it was not error for the court to fail of its own motion to give the statement as an instruction.—*Purcell v. Tibbles* (Iowa) 63 N. W. 1120.

[f] (Mich.; 1895.)

An instruction, in an action for the wrongful taking of property, that the jury are to determine the amount of property taken, is not erroneous because it does not expressly restrict the jury to the evidence.—*Isaac v. McLean* (Mich.) 64 N. W. 2.

[g] (Mich.; 1895.)

Defendant's arrest for violating the local option law having been caused by complainant, who purchased liquor from him with that object in view, it was unnecessary for the court to do more than inform the jury that such fact, if proved, was to be considered in determining the credit due to complainant's testimony.—*People v. Bennett* (Mich.) 65 N. W. 289.

[h] (Mich.; 1896.)

Where a declaration contains several grounds of negligence, the court should instruct the jury as to those on which alone recovery may be had, and eliminate the others.—*Heller v. Chicago & G. T. Ry. Co.* (Mich.) 66 N. W. 667.

[i] (Minn.; 1896.)

It is error to refuse to instruct on a theory of the case properly presented by the evidence.—*Defoe v. St. Paul City Ry. Co.* (Minn.) 68 N. W. 35.

[j] (Neb.; 1895.)

In an action on contract, against a partnership, where the contract was made by one partner, it was error to refuse to instruct that one partner might bind the firm by a contract within the scope of the partnership business.—*Farmers' & Merchants' Ins. Co. v. Malone* (Neb.) 63 N. W. 802.
45 Neb. 302.

§ 54. Statement of issues.

[a] (Iowa; 1896.)

The issues should be presented to the jury in the language of the court, and not by attaching copies of the pleadings to instructions.—*Robinson & Co. v. Berkey* (Iowa) 69 N. W. 434.

[b] (Neb.; 1896.)

Where pleadings contain matters of evidence, rather than ultimate facts, the court sufficiently states the issues by stating tersely the ultimate facts pleaded.—*Murphey v. Virgin* (Neb.) 66 N. W. 652.
47 Neb. 692.

§ 55. Emphasizing certain propositions.

[a] (Iowa; 1897.)

It is not error for the court to underseore words in its charge which are usually italicized in legal treatises.—*Philpot v. Lucas* (Iowa) 70 N. W. 625.

[b] (Neb.; 1895.)

Where it was necessary, in properly instructing the jury as to the different phases of the case, to embody a proposition in several instructions, the prominence thereby given that proposition did not constitute error.—*Gran v. Houston* (Neb.) 64 N. W. 245, 45 Neb. 813.

[c] (Neb.; 1896.)

It is not ordinarily ground for reversal that the court repeated a proposition of law in the instructions several times, where it was done in connection with facts or principles involved.—*Denise v. City of Omaha* (Neb.) 69 N. W. 119.

§ 56. Singling out and giving undue prominence to facts and evidence.

[a] (Mich.; 1896.)

When the court attempts to state to the jury the substance of a witness' testimony, it should state that which supports the theories of both parties, and not give undue prominence to that favorable to one party only.—*Banner v. Schlessinger* (Mich.) 67 N. W. 116.

[b] (Neb.; 1896.)

An instruction which gives undue prominence to subordinate elements of the issues, and is calculated to mislead the jury, is erroneous, and its giving may call for a reversal of the judgment.—*Rising v. Nash* (Neb.) 67 N. W. 460.
48 Neb. 597.

§ 57. Reference to pleadings.

[a] (Iowa; 1895.)

Where no part of the charge contained a statement of the issues, and the statement in the petition was such as to involve complicated questions as to the defendant's liability, a paragraph of the charge, directing the jury to the petition for the "particular statement of fact upon which the plaintiff must recover, if he is entitled to recover at all," was prejudicial error.—*Keatley v. Illinois Cent. R. Co.* (Iowa) 63 N. W. 560.

[b] (Iowa; 1896.)

In an action for the use of land and for trespass by such use, where the evidence designates the property with such certainty as to render a technical description unnecessary, a charge that plaintiff claimed to be the owner of certain lots "in said petition described," and subsequently therein referred to as "said premises or property," is not objectionable as referring the jury to the petition for a description of the property.—*Jenks v. Lansing Lumber Co.* (Iowa) 66 N. W. 231.

§ 58. Allowing jury to apply personal knowledge.

(Mich.; 1895.)

It is error to charge a jury to determine whether the use of a fire screen on a smoke-stack would have prevented a fire, by acting on their own judgment and experience and knowledge, instead of confining them to the testimony.—*Burrows v. Delta Transp. Co.* (Mich.) 64 N. W. 501.

§ 59. Contradictory, confused, and misleading instructions.

[a] (Mich.; 1895.)

Plaintiff claimed that deceased had given her a certain sum of money at the birth of her illegitimate child,—he being its father,—and that subsequently she had returned the money to him, to be invested. The court charged that if deceased had had the illicit relations with plaintiff, as pleaded, and had given her the sum mentioned for the support of herself and child, there was a sufficient consideration therefor, and that if he had subsequently taken the money for investment for her, promising to return it and account for it, plaintiff's claim against the estate was a valid one. *Held*, that the instructions were not calculated to mislead the jury into the idea that the illicit relations of the parties created any obligation against deceased.—*Frank v. Morley's Estate* (Mich.) 64 N. W. 577.

[b] (Mich.; 1895.)

A judgment will not be reversed because of inconsistencies in the charge which could not have misled the jury.—*Maier v. Massachusetts Ben. Ass'n* (Mich.) 65 N. W. 552.

[c] (Mich.; 1896.)

A statement by the court to the jury, in refusing an instruction, that he did not know as to the accuracy of the figures contained therein, is not an approval of the instruction in other respects, which is prejudicial, where the jury were fully and fairly instructed.—*Coombs v. Radford* (Mich.) 68 N. W. 123.

[d] (Minn.; 1897.)

A charge that plaintiff cannot rescind the contract "unless the jury are satisfied that defendant made fraudulent representations with intent to defraud plaintiff" is misleading, as it leaves the jury to infer how and to what extent it should be "satisfied" of the facts stated.—*Riggs v. Thorpe* (Minn.) 69 N. W. 891.

[e] (Wis.; 1896.)

The giving of contradictory instructions on a vital issue is cause for reversal.—*Bleiler v. Moore* (Wis.) 69 N. W. 164.

§ 60. Repetition.

[a] The refusal to give an instruction is not reversible error, though correct in principle,

where the court has already given substantially the same.

—(Minn.; 1896) *Schultz v. Bower*, 66 N. W. 139, 64 Minn. 123;

(Neb.; 1895) *Bushnell v. Chamberlain*, 62 N. W. 1114, 44 Neb. 751; (1896) *Beavers v. Missouri Pac. R. Co.*, 66 N. W. 821, 47 Neb. 761; (1896) *Woodworth v. Parrott*, 67 N. W. 761, 48 Neb. 675.

[b] Refusal of a special instruction substantially covered by the general charge is not error.

—(Mich.; 1897) *Canfield v. City of Jackson*, 70 N. W. 444;

(Neb.; 1897) *Linniger & Metcalf Co. v. Webb*, 70 N. W. 519.

(Wis.; 1896) *Seefeld v. Thacker*, 67 N. W. 1142, 93 Wis. 518.

[c] (Iowa; 1895.)

A defendant cannot complain that one of the issues raised by his answer was not properly embraced in the court's statement to the jury, where an instruction given at defendant's special request fully presented that issue.—*Tobey v. Burlington, C. R. & N. Ry. Co.* (Iowa) 62 N. W. 761.

[d] (Iowa; 1895.)

When, before a view by the jury, they are cautioned not to consider their own observations, and are properly instructed as to the purpose of the view, an instruction in regard to the same matter need not also be given at the close of the trial.—*Cox v. Chicago & N. W. Ry. Co.* (Iowa) 63 N. W. 450.

[e] (Iowa; 1896.)

The court may, in its charge, refer to other paragraphs thereof, without repeating them.—*O'Leary v. German American Ins. Co.* of New York (Iowa) 69 N. W. 686.

[f] (Neb.; 1897.)

It is not error for a district court to refuse instructions asked when the propositions of law embraced therein are included in instructions given by the court on its own motion.—*Jamison v. Kent* (Neb.) 69 N. W. 779.

[g] (Wis.; 1895.)

Where the general instruction in malicious prosecution fully describes malice, a special charge to the same effect is properly refused.—*Messman v. Ihlenfeldt*, 62 N. W. 522, 89 Wis. 585.

[h] (Wis.; 1897.)

Where the court has charged that the defense must be established by a preponderance of the evidence, a refusal to charge that the verdict must be according to "the weight of the evidence given in court" was properly refused.—*Agnew v. Farmers' Mutual Protective Fire Ins. Co.* (Wis.) 70 N. W. 554.

§ 61. Recalling jury for further instruction.

(Neb.; 1895.)

The recalling the jury for instructions is within the discretion of the trial court.—*McClary v. Stull* (Neb.) 62 N. W. 501.

44 Neb. 175.

2. REQUESTS TO CHARGE.

Objections and exceptions to refusal of requests, see post, §§ 84, 85.

§ 62. Necessity of request.

[a] (Iowa; 1894.)

A failure to instruct is not error where no instruction was asked.—*Dimmick v. Babcock* (Iowa) 61 N. W. 394.

92 Iowa, 692.

[b] (Iowa; 1896.)

The court need not instruct as to the purposes for which the jury may consider certain evi-

dence, unless such instruction be requested.—*Puth v. Zimbleman* (Iowa) 68 N. W. 895.

[*1c1*] (Mich.; 1895.)

Where the court, at defendant's request, charges that, if the collision was caused by the wrongful act of defendant's teamster beyond the scope of defendant's business, the verdict must be for defendant, defendant cannot complain of a failure to state what constitutes an act within the scope of employment, in the absence of a request by him for such explanation.—*Vernon v. Cornwell* (Mich.) 62 N. W. 175.

101 Mich. 62.

[*1d1*] (Mich.; 1895.)

A party, on failure to request any instructions, cannot complain that the court failed to intelligently present his case to the jury.—*Hitchcock v. Supreme Tent of Knights of Maccabees of the World* (Mich.) 65 N. W. 285.

[*1e1*] (Mich.; 1895.)

An objection that the court did not charge on a certain point cannot be heard, where no request for such instruction was made.—*Little v. Williams* (Mich.) 65 N. W. 568.

[*1f1*] (Mich.; 1896.)

Where defendant pleads infancy, and there is evidence supporting the plea, the failure of the court to submit the question to the jury is not error, in the absence of a request by defendant for the court to submit it.—*Lynch v. Johnson* (Mich.) 67 N. W. 908.

[*1g1*] (Minn.; 1896.)

In an action on a policy, plaintiff claimed that he had fully complied with all the conditions thereof but one, which he contended had been waived by a certain act. Such issue was submitted to the jury, who found for plaintiff, but it was an immaterial issue, for the reason that it conclusively appeared that defendant had waived compliance with the condition within the time limited by the policy by another act. *Held* that, though there was another material issue, defendant, by failing to call the court's attention thereto, waived the same and instructions on the same, so that, there being sufficient evidence to sustain the verdict, the judgment would not be disturbed.—*McCarvel v. Phenix Ins. Co. of Brooklyn* (Minn.) 66 N. W. 367.

64 Minn. 193.

[*1h1*] (S. D.; 1894.)

The court's failure to charge that the burden of proof is on plaintiff is waived by defendant's failure to request such instruction.—*Frye v. Forenson* (S. D.) 61 N. W. 161.

6 S. D. 392.

[*1i1*] (Wis.; 1896.)

Error cannot be predicated on an omission to charge on the burden of proof, where no instruction was asked, and the omission was not called to the attention of the trial court.—*Lampman v. Van Alstyne* (Wis.) 69 N. W. 171.

§ 63. — For fuller or more explicit instructions.

[*1a1*] (Minn.; 1896.)

It was no ground for reversal that a portion of the charge was ambiguous, where counsel did not raise that objection below, and asked no other instructions.—*McCormick v. Louden* (Minn.) 67 N. W. 366, 64 Minn. 509; *Boyle v. Same*, *Id.*

[*1b1*] (Minn.; 1897.)

The giving of a correct abstract proposition does not constitute error, in the absence of any request that it be explained or enlarged upon.—*Hanson v. Gaar, Scott & Co.* (Minn.) 70 N. W. 853.

[*1c1*] (Neb.; 1896.)

In order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topics.—*Carter White-Lead Co. v. Kinlin* (Neb.) 66 N. W. 536.

47 Neb. 409.

[*1d1*] (Wis.; 1896.)

An instruction that, if an act "led naturally to, and might have been expected to produce," a certain result, it would be the direct and proximate cause, is not so general as to be erroneous, in not confining the jury to what might have been reasonably expected by a man of ordinary intelligence and prudence, where no more definite instruction was requested.—*McKeon v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 175.

§ 64. When granted.

(Mich.; 1897.)

A request to charge should be granted where there is some evidence to support it, and the issue is not fully covered by the general charge.—*Carrell v. Kalamazoo Cold-Storage Co.* (Mich.) 70 N. W. 323.

§ 65. Manner of complying with request.

[*1a1*] (Iowa; 1895.)

Where the court, before reading certain instructions to the jury, stated that it gave them at the request of defendant, there was no error, although the better practice is to give all proper requests as emanating from the court itself.—*Stevenson v. Chicago & N. W. Ry. Co.* (Iowa) 61 N. W. 964.

[*1b1*] (Mich.; 1896.)

An instruction that testimony as to other defects in the sidewalk near the place where plaintiff was injured was admitted for the purpose of showing notice to the city is a substantial compliance with a request to charge that the consideration of such testimony should be limited to the subject of notice.—*Moore v. City of Kalamazoo* (Mich.) 66 N. W. 1089.

[*1c1*] (S. D.; 1896.)

Without writing on the margin of instructions requested the word "Given" or "Refused," as required by Comp. Laws, § 5048, the court, without the consent of counsel, materially changed the language, and gave the same to the jury as coming from defendant. *Held* reversible error.—*Pearl v. Chicago, M. & St. P. Ry. Co.* (S. D.) 66 N. W. 814.

[*1d1*] (Wis.; 1897.)

Refusal to give a correct instruction, as asked, and without modification (Rev. St. § 2853), is error, unless same was substantially given in the general charge.—*Guinard v. Knapp, Stout & Co. Company* (Wis.) 70 N. W. 671.

3. PLEADINGS AND EVIDENCE TO SUPPORT.

§ 66. In general.

[*1a1*] (Iowa; 1895.)

Where defendant did not claim on trial that the failure of plaintiff's decedent to use a stick in making a coupling, as required by a rule of the company, rendered him guilty of contributory negligence, an instruction to such effect is properly refused.—*Van Winkle v. Chicago, M. & St. P. R. Co.* (Iowa) 61 N. W. 929, 93 Iowa, 509.

[*1b1*] (Minn.; 1896.)

It is error to submit to the jury a question not in issue.—*Morrow v. St. Paul City Ry. Co.* (Minn.) 67 N. W. 1002.

§ 67. Pleading to support.

(Mich.; 1896.)

Where plaintiff's right to run a ferry depended on the question whether the land occupied was a part of the street or private property, it was proper to charge that, if plaintiff was on his own land, defendant had no right to interfere with his property, though the ownership of the land was not in issue.—*Runnells v. Village of Pentwater* (Mich.) 67 N. W. 558.

§ 68. Evidence to support.

[a] (Iowa; 1895.)

Where the only evidence of a contract between two parties was improperly admitted, an instruction that the statute of limitations would not apply to the contract, under certain conditions, was erroneous.—*Herring v. Herring's Estate* (Iowa) 62 N. W. 656.

[b] (Iowa; 1895.)

Though plaintiff alleged that he fell into an "elevator way," it was not error in charging to refer to it as an "area way," where the elevator occupied a part of the area way, and it was not claimed that plaintiff fell into any other part.—*Carbon v. City of Ottumwa* (Iowa) 64 N. W. 413.

[c] (Iowa; 1896.)

The fact that the preponderance of the evidence is against the existence of the facts on which an instruction is based will not support an objection that the instruction is not based on the evidence.—*Newbury v. Getchell & Martin Lumber & Manufacturing Co.* (Iowa) 69 N. W. 743.

[d] (Mich.; 1895.)

In an action to replevy property seized for taxes, a charge stating to the jury that it was not contested, but that the assessment was made against one of the plaintiffs while the property assessed belonged to a firm of which he was a member, was error, no direct evidence of the firm's ownership of the property having been presented.—*Fletcher v. Post* (Mich.) 62 N. W. 574.

104 Mich. 424.

[e] (Mich.; 1895.)

There was evidence that defendant, while being taught to write by plaintiff, signed his name upon several pieces of paper; that plaintiff or some one other than defendant had written the note sued on, payable to plaintiff, above one of the signatures; and that there was no consideration for the note. *Held*, that it was error to charge in effect that, if the note was signed by defendant, he was liable, and to refuse requests based on the above evidence.—*Trombly v. Trombly* (Mich.) 64 N. W. 56.

[f] (Mich.; 1896.)

In an action for personal injuries, where there was no theory that plaintiff was possessed of physical infirmities at the time of the injury that were aggravated thereby, it was not error to refuse to charge that if the troubles described in the declaration existed before, or were the direct results of physical conditions existing before, the time of the alleged accident, plaintiff could not recover for any aggravation of the same produced by the alleged accident.—*Phippen v. Bay Cities Consol. Ry. Co.* (Mich.) 68 N. W. 216.

[g] (Neb.; 1895.)

Requested instructions are properly refused where there is no evidence to support them.—*Brumback v. German Nat. Bank*, 65 N. W. 198, 46 Neb. 540.

4. PROVINCE OF COURT AND JURY.

§ 69. In general.

[a] (Iowa; 1895.)

After certain money had been furnished defendant's intestate, by plaintiff's mother, he, for some purpose, executed and signed a dated memorandum, stating that at some time deceased borrowed certain amounts from some person, but containing no acknowledgment of present indebtedness, and nothing from which a promise to pay could be rightfully implied. *Held*, that it was for the jury under all the evidence, and not for the court, to say for what purpose the memorandum was made, and what effect should be given it.—*Murphy v. Murphy* (Iowa) 63 N. W. 697.

[b] (Iowa; 1897.)

A charge that if the station was called, and the train soon stopped, "a person might safely

conclude that the train was arriving at the station," merely states what facts would warrant such conclusion, and does not take the question from the jury.—*Devine v. Chicago, M. & St. P. Ry. Co.* (Iowa) 69 N. W. 1042.

[c] (Mich.; 1896.)

An instruction is not erroneous because it states to the jury a matter of common knowledge.—*Lewis v. Bell* (Mich.) 66 N. W. 1091.

[d] (Mich.; 1897.)

In an action for breach of contract of employment, where the character of the contract was in question, an instruction as to the effect of plaintiff's testimony in determining the nature of the contract was properly refused; it being for the jury to determine the understanding of the parties.—*Chisholm v. Preferred Bankers' Life Assur. Co.* (Mich.) 70 N. W. 415.

[e] (Wis.; 1895.)

In giving an instruction it is error to tell the jury that they may use it so far as they find it applicable.—*Guinard v. Knapp, Stout & Co. Company* (Wis.) 62 N. W. 625.

90 Wis. 123.

[f] (Wis.; 1896.)

An instruction: "The defendants claim that, if the note was not indorsed by K. until after its delivery to B. and C., then it was indorsed pursuant to a previous agreement. If you find that is true, your verdict should be for the defendants."—leaves to the jury the question of an indorsement pursuant to a previous agreement.—*Sawyer v. Choate* (Wis.) 66 N. W. 689.

92 Wis. 533.

§ 70. As to general and special verdict.

[a] (Mich.; 1895.)

A statement by the court to the jury that "it is very important that the questions you are asked to answer be answered so that they correspond with your other verdict" was not erroneous, as directing the jury that their answers to special questions must correspond with their general verdict.—*Germaine v. City of Muskegon* (Mich.) 63 N. W. 78.

105 Mich. 213.

[b] (Wis.; 1895.)

It was error to tell the jury that if they answered "Yes" to a certain interrogatory the general verdict for plaintiff could not stand.—*Coats v. Town of Stanton* (Wis.) 62 N. W. 619.

90 Wis. 130.

§ 71. Questions of law.

(Iowa; 1896.)

In an action for breach of a contract to transfer certain property to plaintiff in exchange for land, it was not error for the court to charge that the title to said land was in plaintiff, as it was the province of the court to determine the question of title from plaintiff's documentary evidence, and as to whether the evidence showed the land to be free from incumbrances.—*Warren v. Chandler* (Iowa) 67 N. W. 242.

§ 72. Expressing or intimating an opinion.

[a] (Mich.; 1895.)

Plaintiff's assignor, after assigning to defendants a claim under an agreement, as claimed by defendant, that defendant should retain out of the sum the value of supplies to be furnished the assignor and the amount of certain notes previously given defendant by such assignor, provided such notes, which had been discounted by a bank, and were not yet due, could not be renewed, assigned to plaintiff his remaining interest in the claim. Defendant, on refusal of the bank to renew the notes, paid them before maturity. Plaintiff claimed that only the value of the supplies was to be retained. *Held*, that it was error to instruct that, if defendant could have renewed the notes by allowing them to lie in bank and mature easier than he could

get a new discount after paying the notes, his conduct injured plaintiff; that an undue note cannot be set up as a set off; and that, if the amount claimed by plaintiff to be due the assignor at the time of the assignment to him was due, plaintiff was entitled to a verdict.—Valin v. McKereghan (Mich.) 62 N. W. 340.

104 Mich. 213.

[b] (Minn.; 1896.)

It is not error to express an opinion to the jury on a disputed question of fact in a civil case, provided the question is fairly left to the jury for their decision.—First Nat. Bank of Decorah v. Holan (Minn.) 65 N. W. 952.

63 Minn. 523.

[c] (Neb.; 1896.)

The court, in overruling an objection to a hypothetical question, remarked: "I think it is a fair epitome of the evidence already given in the case." *Held*, that it was not error, as expressing an opinion.—Chicago, R. I. & P. R. Co. v. Archer, 65 N. W. 1013, 46 Neb. 307.

[d] (Neb.; 1896.)

The interruption by the court of the cross-examination of defendant's witness, with the statement to the jury "that this line of examination has developed the theory of the plaintiff," was not erroneous, as intimating an opinion as to what the judge regarded the theory of plaintiff to be, or that he regarded plaintiff's theory as the proper one.—Graham v. Frazier (Neb.) 68 N. W. 367.

§ 73. Assuming nonexistence of fact.

(Mich.; 1896.)

A charge assuming the nonexistence of facts as to which there is testimony is erroneous.—Wilson v. Crosby (Mich.) 67 N. W. 693.

§ 74. Assumption of facts.

[a] (Mich.; 1895.)

On an issue as to whether plaintiff supported defendant's daughter and her bastard child under a contract by defendant to pay for their support, a charge that, "in determining whether such contract was made," the jury should consider "the admitted fact that defendant had his wife take her [the daughter] to B.'s [plaintiff's]," was proper, though defendant testified that he objected to his wife's taking his daughter to plaintiff's house, where on the trial the fact that defendant had his wife take the daughter to plaintiff's was treated as an admitted fact.—Burt v. Long (Mich.) 64 N. W. 60.

[b] (Mich.; 1895.)

The court charged: "It is claimed that that testimony is confirmed by the evidence of R., whose testimony you have heard, and by the fact of the finding of the bolt there. That testimony you may consider." *Held*, that the court did not tell the jury, in substance, that the finding of the bolt, to which one witness testified, was an established fact.—Tunncliffe v. Bay Cities Consol. Ry. Co. (Mich.) 65 N. W. 226.

[c] (Mich.; 1896.)

On an issue as to whether defendants, who had purchased timber from plaintiffs under an agreement whereby the latter were to manufacture the same in workmanlike manner, had waived defects in the manufacture by paying some of the monthly estimates furnished by plaintiffs, an instruction that complete payments by defendants of the amounts claimed in the different months, with a view of waiving and accepting the fulfillment of the contract on the part of plaintiffs as they had fulfilled it up to that time, with knowledge of the manner in which the lumber was manufactured, would estop defendants from subsequently claiming that the contract was not performed by plaintiffs after that, so far as they had settled, etc., did not assume that the monthly payments were settlements, but left it to the jury to determine whether they were such, or only payments.—Lyon v. Watson (Mich.) 67 N. W. 512.

[d] (Neb.)

A charge assuming as true a controverted fact is erroneous.—(1895) Terry v. Beatrice Starch Co., 62 N. W. 275, 43 Neb. 861; (1895) Blue Valley Lumber Co. v. Smith, 67 N. W. 159, 48 Neb. 233.

[e] (S. D.; 1896.)

An instruction which assumes a matter in dispute, and as to which the evidence is conflicting, to be as claimed by one party, is misleading and prejudicial.—Wood v. Steinau (S. D.) 68 N. W. 160.

§ 75. — Uncontradicted facts.

[a] (Mich.; 1895.)

On a second trial, a witness who testified to a certain fact was not contradicted, and his credit was attacked only because he had previously been in defendant's employ, and the fact testified to was not brought out on the first trial. *Held*, that it was not ground for reversal for the court to assume that the fact was established.—Tunncliffe v. Bay Cities Consol. Ry. Co. (Mich.) 65 N. W. 226.

[b] (Neb.; 1895.)

An instruction assuming to be true a fact not proven is not erroneous where there is no controversy as to the existence of the fact.—Gran v. Houston, 64 N. W. 245, 45 Neb. 813.

§ 76. Charge or comment on weight and effect of evidence.

[a] (Iowa; 1896.)

In an action in which there was testimony offered that was not admitted, it was error for the court, in defining a preponderance of evidence, to speak of it as the greater weight of evidence, to be determined after a careful examination of all the evidence "tendered."—Hurlbut v. Bagley (Iowa) 68 N. W. 585.

[b] (Mich.; 1895.)

It is error to instruct the jury to consider the testimony of an expert as to the character of the sparks which under certain circumstances would come out of a smokestack, it being intended to show that a fire was set by another than defendant's steamer, and the testimony being that at the time no sparks were coming from such other vessel.—Burrows v. Delta Transp. Co. (Mich.) 64 N. W. 501.

[c] (Neb.; 1896.)

It is not error to refuse to give instructions directing the jury what degree of importance should be attached to particular evidence.—Murphy v. Virgin (Neb.) 66 N. W. 652.

47 Neb. 692.

[d] (Neb.; 1897.)

To a petition alleging that defendant railroad company negligently constructed ditches along its track through plaintiff's lands, so as to cause the surface waters to collect and be thrown on the land, injuring plaintiff's crops, and depreciating the value of the land by a deposit of clay and sand, defendant, in addition to the general denial that plaintiff had sustained any damages, and that defendant had been guilty of negligence in constructing its ditches, filed a plea that the damages claimed resulted from the rain storm so unprecedented as to amount to an act of God. *Held*, that it was error to charge that, if the company failed to establish such defense by a preponderance of evidence, plaintiff was entitled to a verdict.—Fremont, E. & M. V. R. Co. v. Harlin (Neb.) 70 N. W. 203.

[e] (Wis.; 1896.)

An instruction that the jury shall find the facts they believe "to be established by the fair weight of all the evidence" is not erroneous.—McKeon v. Chicago, M. & St. P. Ry. Co. (Wis.) 69 N. W. 175.

[f] (Wis.; 1897.)

It is misleading to instruct the jury to find for plaintiff if he "has proven his case by a fair preponderance of evidence, if his evidence weighs enough more than that of the defendant

to turn the scale on plaintiff's side, even if it be but little, if that little be perceptible," etc., instead of charging that they must be "satisfied," by a preponderance of evidence, of the existence of all facts essential to his right of recovery.—*Guinard v. Knapp, Stout & Co. Company (Wis.)* 70 N. W. 671.

§ 77. — On weight of expert testimony.

[a] (Iowa; 1895.)

In a will contest, where testator was alleged to have been mentally unsound, a charge that the jury should consider all the evidence, including that of experts, and if they were satisfied that testator was so afflicted that when he made the will he did not recollect his property, and the objects of his bounty, they should find against the will, was not improper, as directing the jury to give some weight to the opinions of experts, though some of the facts assumed in the hypothetical questions proved to be untrue.—*Bever v. Spangler (Iowa)* 61 N. W. 1072.

93 Iowa, 576.

[b] (Iowa; 1895.)

In a will contest, where the ground was testator's mental incapacity, it was proper to refuse to charge, as a matter of law, that the evidence of experts who knew and had treated deceased was entitled to greater weight than that of experts who founded their opinions upon hypothetical questions.—*Bever v. Spangler (Iowa)* 61 N. W. 1072.

93 Iowa, 576.

[c] (Mich.; 1896.)

The testimony of experts is to be treated like that of other witnesses, and it is for the jury to judge of the weight to which it is entitled, without discriminative instructions from the court.—*Rivard v. Rivard (Mich.)* 66 N. W. 681.

§ 78. — Credibility of witnesses.

[a] (Iowa; 1897.)

The province of the jury as to credibility of witnesses was not invaded by a charge that if plaintiff testified to the facts stated in the petition, and if he was a creditable witness, and if defendant denied such facts, and if he was an equally creditable witness, then there was no preponderance in favor of plaintiff, and that the fact that the parties disagreed in their testimony, if each honestly stated the facts as they appeared to him, would not of itself warrant the jury in discrediting either of them.—*Cottrell v. Platt (Iowa)* 70 N. W. 177.

[b] (Mich.; 1895.)

Where there is evidence that a witness has been convicted of a criminal offense, an instruction that the jury shall consider this fact in determining the credibility of his evidence is proper.—*Conkey v. Carpenter (Mich.)* 63 N. W. 990.

[c] (Mich.; 1895.)

It is error to charge that one testifying that he had never heard the reputation of a witness for truth and veracity questioned at all is not entitled to the same consideration as one who testifies that he has heard it questioned and discussed among the neighbors of such witnesses.—*Conkey v. Carpenter (Mich.)* 63 N. W. 990.

[d] (Mich.; 1897.)

Though it may not be error to call attention to the testimony of a particular witness, and give cautionary instructions as to its credibility, it is not the right of either party to insist that such course be taken, and it is sufficient if the court lays down general rules for the guidance of the jury in weighing testimony.—*Heddle v. City Electric Ry. Co. (Mich.)* 70 N. W. 1096.

[e] (Mich.; 1897.)

Where plaintiff testified to the manner of the accident and the extent of her injuries, and her testimony was corroborated as to the manner of the accident, it was not the absolute right of defendant to have a request given that, "if

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the jury find that [plaintiff] has knowingly misrepresented and exaggerated the extent and amount of her injuries, they may disregard the testimony upon the manner of the accident," omitting any reference to the question of corroboration.—*Heddle v. City Electric Ry. Co. (Mich.)* 70 N. W. 1096.

[f] (Neb.; 1895.)

An instruction that while defendants are competent witnesses, yet the jury have a right to take into consideration their interest in the result, and all the circumstances surrounding them, and give to their testimony only such weight as, in the judgment of the jury, it is entitled to, *held* proper.—*Earnby v. Wolfe (Neb.)* 62 N. W. 318.

44 Neb. 77.

[g] (Neb.; 1896.)

It is not error to advise the jury that, in determining the credit which should be given to the defendant's witnesses, their interest in the result of the suit may be taken into consideration.—*City of Harvard v. Crouch (Neb.)* 66 N. W. 276.

47 Neb. 133.

[h] (Wis.; 1895.)

An instruction that the weight of evidence does not depend on the number of witnesses, but on the amount of credit the jury gives to the testimony of one or all the witnesses, is not erroneous, where the court also correctly charges as to the general tests of credibility.—*Hardy v. Milwaukee St. Ry. Co. (Wis.)* 61 N. W. 771, 89 Wis. 183.

[i] (Wis.; 1895.)

An instruction that the jury should consider "the character of the witness, so far as you know it, as bearing upon the question whether a witness would be truthful and reliable, or not. My observation is that pretty good persons sometimes lie, and that pretty bad persons sometimes tell the truth,"—is erroneous.—*Johnson v. Superior Rapid-Transit Ry. Co.,* 64 N. W. 753, 91 Wis. 233.

[j] (Wis.; 1895.)

It is error to instruct that where two witnesses directly contradict each other the evidence is balanced, unless there is some other circumstance in evidence corroborating one side or the other.—*Sickle v. Wolf (Wis.)* 64 N. W. 1028, 91 Wis. 396.

[k] (Wis.; 1895.)

It is erroneous to charge the jury that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing did not exist, are equally credible.—*Smith v. Milwaukee Builders' & Traders' Exchange (Wis.)* 64 N. W. 1041, 91 Wis. 360.

[l] (Wis.; 1896.)

A court is not required to give instructions tending to cast doubt or suspicion on the testimony of any particular witness.—*McKeon v. Chicago, M. & St. P. Ry. Co. (Wis.)* 69 N. W. 175.

5. HARMLESS ERROR—CONSTRUCTION AS A WHOLE.

§ 79. Harmless error.

[a] (Iowa; 1895.)

In an action for injuries to a boy who, with others, was near defendant's wagon while it was being loaded with bananas from a car, for the purpose of obtaining fruit that might be dropped, where the instructions were explicit as to the duty of defendant's servants to exercise a degree of care that they would not have been required to exercise towards actual trespassers, and no defense that the boy was a trespasser was interposed, a statement in an instruction that such boys were trespassers was not prejudicial to plaintiff.—*Searcy v. Martin-Woods Co. (Iowa)* 61 N. W. 934.

93 Iowa, 420.

[b] (Iowa; 1895.)

Where two instructions are inconsistent, and under the evidence one is correct and the other incorrect, a judgment rendered on a verdict following the correct one will be sustained. —Hillebrant v. Green (Iowa) 62 N. W. 32.
93 Iowa, 661.

[c] (Iowa; 1895.)

Where no verdict as to general damages for breach of warranty is returned, error in instructions as to such damages is without prejudice. —National Horse-Importing Co. v. Novak (Iowa) 64 N. W. 616.

[d] (Iowa; 1895.)

Where no recovery is had on a counterclaim, error in instructing as to the measure of recovery thereon is not prejudicial. —White v. Ryan (Iowa) 64 N. W. 765.

[e] (Iowa; 1896.)

When an action for personal injuries caused by a defective bridge is tried on the theory of constructive notice to defendant of the defects, an instruction imposing liability on defendant if he had actual knowledge, or if the defect was obvious, is not prejudicial. —Homan v. Franklin County (Iowa) 68 N. W. 559.

[f] (Iowa; 1897.)

Defendant cannot complain of an instruction which required plaintiff to establish an immaterial fact, not alleged or proven. —Bixby v. Grand Lodge A. O. U. W. (Iowa) 70 N. W. 737.

[g] (Mich.; 1894.)

In replevin for a piano, where the jury do not assess damages for its detention, error in a charge as to the measure of such damages is not prejudicial. —Guerold v. Holtz (Mich.) 61 N. W. 278.
103 Mich. 118.

[h] (Mich.; 1897.)

It was harmless error for the court in a charge to mistakenly say that plaintiff said to defendant, "Mr. J., I am not going to give credit to Mr. L.," where he immediately added, "I take that back. The contention of the plaintiff is, that was the effect of what was said." —Wenzel v. Johnston (Mich.) 70 N. W. 549.

[i] (Minn.; 1896.)

Where the jury found that plaintiff was entitled to no damages whatever, the erroneous refusal of his request for an instruction as to exemplary damages was harmless. —Erickson v. Pomerank (Minn.) 69 N. W. 39.

[j] (Neb.; 1895.)

A slight error in an instruction will not cause a reversal, where no prejudice is shown. —Stein v. Vannice (Neb.) 62 N. W. 464.
44 Neb. 132.

[k] (Neb.; 1895.)

A judgment will not be reversed because of an instruction on a matter foreign to the issues, which merely imposes on the successful party an additional burden, in no wise prejudicial to the other party. —McClary v. Stull (Neb.) 62 N. W. 501.
44 Neb. 175.

[l] (Neb.; 1895.)

The refusal to give a correct instruction relating solely to the measure of damages was not prejudicial error, where the verdict showed that the jury was not brought to a consideration of damages. —Montgomery v. Willis (Neb.) 63 N. W. 794.
45 Neb. 434.

[m] (Neb.; 1895.)

A judgment will not be reversed for the giving of an erroneous instruction where the verdict is clearly right, and the only one which could have been rendered on the issue involved. —Stratton v. Dole (Neb.) 63 N. W. 875.
45 Neb. 472.

[n] (Neb.; 1895.)

Objections by plaintiff to instructions relating to the measure of damages will not be

considered where plaintiff failed to recover on his cause of action. —Olsen v. Meyer (Neb.) 64 N. W. 954, 46 Neb. 240.

[o] (Neb.; 1896.)

A verdict will not be set aside for error in instructions, when it is manifest that no other verdict should have been returned under the evidence. —Telegraph Co. v. Lowrey (1891) 49 N. W. 707, 32 Neb. 732, followed. —State v. Hill, 66 N. W. 541, 47 Neb. 456.

[p] (Neb.; 1896.)

It is not error calling for a reversal of a judgment to give an instruction which could not prejudice the rights of the complaining party. —Beavers v. Missouri Pac. R. Co. (Neb.) 66 N. W. 821.
47 Neb. 761.

[q] (Neb.; 1896.)

A defendant against whom judgment has been rendered cannot complain because the court instructed the jury to deduct from the damages recoverable by plaintiff the amount of a set-off not pleaded by defendant. —Butler v. Greene (Neb.) 68 N. W. 496.

[r] (Wis.; 1895.)

A judgment which is clearly right on the undisputed evidence will not be reversed because of erroneous instructions. —Rose v. Bradley, 65 N. W. 509, 91 Wis. 619.

§ 80. Construction as a whole, and cure by other instructions.

[a] (Iowa; 1895.)

In an action for injuries, a charge defining "negligence" abstractly is not prejudicial error, where the subsequent charges direct the jury to consider all the circumstances in determining the negligence. —Orr v. Cedar Rapids & M. C. Ry. Co. (Iowa) 62 N. W. 851.

[b] (Iowa; 1896.)

Instructions must be construed together, and where objections urged to them severally are removed by such construction, the objections will not be considered. —Kohn v. Johnston (Iowa) 66 N. W. 76.

[c] (Iowa; 1896.)

In an action for the use of land and for trespass by such use and for obstructing the highways in front of it, an instruction requiring plaintiff to prove all allegations denied, and on proof of any or all of the allegations to prove the amount she is entitled to recover by a preponderance of the evidence, is not objectionable as authorizing recovery on proof of any of such allegations, where other instructions plainly state the different causes of action, and the facts which would warrant a recovery thereon. —Jenks v. Lansing Lumber Co. (Iowa) 66 N. W. 231.

[d] (Iowa; 1896.)

Where an instruction fails fully to state the law applicable to the facts, but the law is fully set forth in a subsequent instruction, the error is without prejudice. —De Goey v. Van Wyk (Iowa) 66 N. W. 787.

[e] (Mich.; 1895.)

In an action for refusal to permit plaintiff to perform a contract to cut logs for defendant, defendant claimed a prior abandonment of the contract by plaintiff, and gave notice of recoupment therefor. On the trial, defendant asked no judgment against plaintiff, but only that damages be allowed him sufficient to set off any damages plaintiff might be entitled to. Held that, the court having instructed that plaintiff could not recover if he had broken the contract, it was not error to state in an instruction that defendant seemed to have abandoned his claim for damages. —Greenwood v. Davis (Mich.) 64 N. W. 26.

[f] (Mich.; 1896.)

In an action to recover a balance due on a note given by defendants for timber purchased from plaintiffs, together with an amount alleged to be due the latter under a contract by which they agreed to saw the timber in a

workmanlike manner, where defendants admitted the indebtedness, but claimed damages, by way of recoupment, on the ground that the timber was improperly sawed, an erroneous charge that the claim of damages for defective sawing had no connection with the claim on the note, and could only be shown in connection with plaintiffs' demand for sawing, was cured by a subsequent instruction that, if defendants established their claim to damages in a sum greater than the whole amount sued for (specifying such amount), they should have a verdict for the difference, and that, if the damage so sustained was less than plaintiffs' claim, the amount of such damage should be subtracted therefrom, and plaintiffs should have a verdict for the balance.—*Lyon v. Watson* (Mich.) 67 N. W. 512.

[g] (Mich.; 1896.)

A refusal to instruct that, if the jury believe that plaintiff testified falsely as to any material fact, they might consider the same in weighing his testimony, is not error where the court, in the general instruction, charged that, if any of the witnesses testified falsely in any particular, the jury should "consider that, and weigh their testimony as to that as they would any other fact in the case."—*Whitaker v. Engle* (Mich.) 69 N. W. 493.

[h] (Neb.; 1895.)

If one instruction describes one ground of liability, and another instruction sets forth a second, there is no necessity for a mention of both grounds in the same instruction.—*Nebraska Nat. Bank v. Burke* (Neb.) 62 N. W. 452.

44 Neb. 234.

[i] (Neb.; 1895.)

Instructions must be considered together, and not by selection of detached paragraphs.—*Stein v. Yannice* (Neb.) 62 N. W. 464.

44 Neb. 132.

[j] (Neb.; 1895.)

An instruction which mistakes the law is not cured by other instructions stating it correctly, as the jury would be left in doubt as to which instruction was correct.—*Richardson v. Halstead* (Neb.) 62 N. W. 1077.

44 Neb. 606.

[k] (Neb.; 1895.)

The error of giving an obscure instruction as to the burden of proof does not require a reversal, where other instructions on the same subject were clear.—*Bingham v. Hartley* (Neb.) 62 N. W. 1089.

44 Neb. 682.

[l] (Neb.; 1895.)

An instruction which required the jury to base its verdict on a matter forming only a portion of the evidence bearing on the principal issue is not cured by a subsequent instruction stating the issue correctly.—*Burlingim v. Bader* (Neb.) 63 N. W. 919.

45 Neb. 673.

[m] (Neb.; 1896.)

If an instruction, construed as a whole, states the law correctly, as applied to the evidence in the case, it is not erroneous, although a portion thereof, taken separately, may not have been accurate.—*Omaha & C. E. Railway & Bridge Co. v. Levinston* (Neb.) 67 N. W. 887.

[n] (Wis.; 1895.)

In an action by an employé for injuries received while oiling machinery, the court, after instructing that if defendant had learned the danger of the machinery, or ought to have known of the liabilities to accident by being entangled therein, he assumed the risk, and that it was plaintiff's duty to look at the machinery, and apprise himself of any danger which he could have discovered by a proper examination, or by the use of his sight or other means, and, if he failed to do so, he was not in the exercise of due care, added the erroneous remark that the jury might consider such instruction so far as they should find it applicable. *Held*, that such error was not cured by an instruction that a man

must use due diligence, and use his senses, and, if he fails to use such diligence as a man of ordinary prudence would, and thereby suffers an injury, he has not used ordinary care.—*Guinard v. Kuapp, Stout & Co. Company* (Wis.) 62 N. W. 625.

90 Wis. 123.

[o] (Wis.; 1895.)

An instruction that the jury should consider "the character of the witness, so far as you know it, as bearing upon the question whether a witness would be truthful and reliable, or not. My observation is that pretty good persons sometimes lie, and that pretty bad persons sometimes tell the truth."—is erroneous, and is not enred by another instruction that nothing is to be found "by conjecture," but that the verdict "must be based upon evidence," and facts inferable from the proofs.—*Johnson v. Superior Rapid-Transit Ry. Co.* (Wis.) 64 N. W. 753, 91 Wis. 233.

[p] (Wis.; 1895.)

Error in instructing that where two witnesses directly contradict each other the evidence is balanced unless one is corroborated, was not rendered harmless by a subsequent instruction that two witnesses did not necessarily outweigh one, and that the jury should consider all the circumstances surrounding each witness in determining his credibility.—*Sickle v. Wolf*, 64 N. W. 1028, 91 Wis. 396.

[q] (Wis.; 1897.)

The sufficiency of instructions must be determined by construing them as a whole.—*Hinkley v. Town of Rosendale* (Wis.) 70 N. W. 158.

[r] (Wis.; 1897.)

A charge to find for plaintiff if the burden of proof is in her favor is not prejudicial to defendant, where the court had charged that the burden of proof was on plaintiff, and inadvertently used the words "burden of proof" for the words "preponderance of evidence."—*Williams v. Hoehle* (Wis.) 70 N. W. 556.

6. OBJECTIONS AND EXCEPTIONS.

§ 81. Necessity and time of taking exceptions.

[a] An instruction will not be reviewed on appeal where no exception thereto was taken below.

—(Iowa; 1896) *Casey v. Ballou Banking Co.*, 67 N. W. 98;

(Wis.; 1896) *Simonds v. City of Baraboo*, 67 N. W. 40, 93 Wis. 40.

[b] (Iowa; 1895.)

An exception is necessary to the review of alleged errors in giving and refusing instructions.—*Keokuk Stove Works v. Hammond* (Iowa) 63 N. W. 563.

[c] (Iowa; 1896.)

The giving of time within which to file a motion for a new trial, and in arrest of judgment, does not extend the time for filing exceptions to instructions.—*Leach v. Hill* (Iowa) 66 N. W. 69.

[d] (Mich.; 1894.)

When the court, in defining the issues, makes an incorrect statement, and the parties do not call its attention thereto before submitting the case to the jury, they cannot object to the falsity of the statement on appeal.—*Wood v. Wells* (Mich.) 61 N. W. 563.

103 Mich. 320.

[e] (Mich.; 1895.)

The giving and refusal of instructions will not be reviewed unless the record discloses an exception to the ruling complained of.—*City of Chadron v. Glover*, 62 N. W. 62, 43 Neb. 732.

[f] (Mich.; 1895.)

The failure of the trial court to mark instructions "Given" or "Refused" cannot be com-

plained of, unless an exception was taken in the trial court on the ground that the instructions were not so marked.—*City of Chadron v. Glover*, 62 N. W. 62, 43 Neb. 732.

[g] (Mich.; 1896.)

A refusal to give instructions will not be reviewed where no exception was taken to the refusal.—*Runnells v. Village of Pentwater* (Mich.) 67 N. W. 558.

[h] (Mich.; 1896.)

Where the trial judge, in his instructions, makes a statement of fact, the party aggrieved must call attention thereto at the time; otherwise, the objection cannot be raised on appeal.—*Wolf v. Holton* (Mich.) 67 N. W. 1082.

[i] (Mich.; 1896.)

Where no exception is taken to an instruction, defendant cannot complain thereof on appeal.—*Longyear v. Gregory* (Mich.) 68 N. W. 116.

[j] (Mich.; 1896.)

An objection to the charge not called to the attention of the court will not be considered.—*Ransom v. Weston* (Mich.) 68 N. W. 152.

[k] (Neb.; 1895.)

An assignment of error in giving or refusing certain instructions will be overruled where it appears that no exception was taken to the giving or refusal.—*Sigler v. McConnell* (Neb.) 63 N. W. 870.

45 Neb. 598.

[l] (Neb.; 1896.)

A party cannot for the first time on appeal object to the giving or refusal of instructions.—*Keens v. Robertson* (Neb.) 65 N. W. 897, 46 Neb. 837.

[m] (Neb.; 1896.)

Instructions not excepted to when given cannot be reviewed in the appellate court.—*Romberg v. Hediger* (Neb.) 66 N. W. 283.

47 Neb. 201.

[n] (Neb.; 1896.)

In order to present for review the failure of the district court to properly number instructions, exception must, at the trial, have been taken on that special ground.—*Herzog v. Campbell* (Neb.) 66 N. W. 424.

47 Neb. 370.

[o] (Neb.; 1896.)

The propriety of an instruction cannot be reviewed unless the record discloses that the giving of the instruction was excepted to by the complaining party.—*Merrill v. Equitable Farm & Stock Imp. Co.* (Neb.) 68 N. W. 365.

§ 82. Noting exception.

(Neb.; 1895.)

Where counsel, when instructions were given, indicated in open court their desire to except thereto, and afterwards themselves noted their exceptions by a memorandum on the margin of the instructions, *held*, that the court, in overruling a motion to strike from the record such memorandum, ratified the notation, and, such notation being in accordance with the facts, there was no error in the ruling.—*Blumer v. Bennett* (Neb.) 63 N. W. 14.

44 Neb. 873.

§ 83. Sufficiency and scope.

[a] (Minn.; 1896.)

Where several separate and distinct "requests," each containing but a single proposition of law, are given, an exception "to each and all of them" is sufficient.—*Van Doren v. Wright* (Minn.) 68 N. W. 22.

[b] (Minn.; 1896.)

The court below charged the jury as to the law of custom or usage as applicable to the facts in evidence. The only exception taken was "to the explanation and enunciation of the law of custom, and the application thereof as applied to the facts in this case." *Held* too general.—*Finance Co. of Pennsylvania v. Old Pittsburgh Coal Co.* (Minn.) 68 N. W. 70.

[c] (Neb.; 1896.)

An exception "to the giving of instructions 2, 4, 5, 6, 7, 8, and 9, contained in the general charge of the court, and to the giving of each said instructions," is a separate and specific exception to each of said paragraphs of the charge, and is therefore sufficient. *Brooks v. Dutcher* (1888) 36 N. W. 128, 22 Neb. 611, and *Walker v. Turner* (1889) 42 N. W. 918, 27 Neb. 103, overruled.—*City of Omaha v. Richards*, 68 N. W. 528.

[d] (Wis.; 1891.)

An exception to the whole "charge, and to each and every part thereof," is too general to present for review errors in specific paragraphs.—*Luedtke v. Jeffrey* (Wis.) 61 N. W. 292, 89 Wis. 136.

§ 84. — To refusal of requests.

[a] (Minn.; 1896.)

Where there is but a single exception to the refusal of the court to give several requests, and some of the requests are properly refused, the exception is not well taken.—*McNamara v. Pengilly*, 67 N. W. 661, 64 Minn. 543.

[b] (Minn.; 1896.)

Where several separate requests for instructions, some of which were erroneous, were made, and all refused, except as given in the general charge, an exception to the refusal to give those portions which were not given nor covered by the general charge was insufficient.—*Lane v. Minnesota State Agricultural Soc.* (Minn.) 69 N. W. 463.

[c] (Neb.; 1897.)

Where several distinct requests to charge are denied, an exception to the refusal of all of them is insufficient, unless it appears that each should have been given.—*City of South Omaha v. Powell* (Neb.) 70 N. W. 391.

§ 85. — Where charge is in part correct.

[a] (Iowa; 1895.)

An exception in the abstract, at the end of instructions, "To all of which the plaintiff then and there excepted," is insufficient, if any one of the instructions is correct.—*Hallenbeck v. Garst* (Iowa) 65 N. W. 417.

[b] (Iowa; 1896.)

The exception, "To the giving of which instructions plaintiff * * * duly excepted," is insufficient to bring up for review any specific instruction, and the exception will not be sustained if any one of the instructions is good.—*Leach v. Hill* (Iowa) 66 N. W. 69.

[c] (Iowa; 1896.)

A general exception to the instructions en masse at the time they were given, and assignments of error on the specific instructions, raise no question, on appeal for review, if any of the instructions are good.—*Rowen v. Sommers* (Iowa) 66 N. W. 897.

[d] (Neb.; 1895.)

When the charge of a court involves more than one proposition, a general exception to it will be unavailing, if any portion of it be correct.—*Omaha Fire Ins. Co. v. Dierks* (Neb.) 61 N. W. 740, 43 Neb. 473.

[e] (Neb.; 1895.)

A general exception to a charge will be overruled unless the entire charge is erroneous.—*Redman v. Voss* (Neb.) 64 N. W. 1094, 46 Neb. 512.

[f] (Neb.; 1896.)

An exception to instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9, given by the court to the jury on its own motion, is not available on review if any one of the instructions was correct.—*Blue Valley Lumber Co. v. Smith* (Neb.) 67 N. W. 159.

48 Neb. 293.

[g] (Neb.; 1896.)

An exception to instructions en masse is unavailing unless each paragraph thereof is er-

roncous.—Union Pac. Ry. Co. v. Montgomery (Neb.) 68 N. W. 619.

[h] (Wis.: 1895.)

A general exception to the entire charge is not available if any part of the charge is correct.—Green v. Hanson, 62 N. W. 408, 89 Wis. 597; Tebo v. City of Augusta, 63 N. W. 1045, 90 Wis. 405.

§ 86. Failure to object before verdict.

(Mich.: 1896.)

Where the court, in the absence of counsel for either party, sends an instruction to the jury room, in answer to a question by the jury as to the effect of contributory negligence, and subsequently calls the counsel into court and informs them of such action, the failure to object thereto before verdict is rendered waives any error.—Le Beau v. Telephone & Telegraph Const. Co. (Mich.) 67 N. W. 339.

§ 87. Estoppel to object.

[a] (Iowa: 1894.)

Where a complaint charged negligence in starting an engine without signal, and starting it with a jerk, though there was no evidence that it was started with a jerk, an instruction cannot be complained of, on the ground that it submitted the matter to the jury, where defendant had requested an instruction that its liability depended on whether the injury to plaintiff was occasioned through defendant's negligence in the moving and conducting the engine.—Light v. Chicago, M. & St. P. Ry. Co. (Iowa) 61 N. W. 380.

93 Iowa, 83.

[b] (Iowa: 1895.)

A party cannot complain of an instruction in harmony with one previously requested by him.—Hamilton v. Hartinger (Iowa) 64 N. W. 592.

[c] (Iowa: 1895.)

Defendant, having requested an instruction, in which the question of ratification is asked to be submitted, cannot, though such instruction is refused, complain that the question is submitted in another instruction, notwithstanding plaintiff had not alleged ratification.—Whitam v. Dubuque & S. C. R. Co. (Iowa) 65 N. W. 403.

[d] (Mich.: 1895.)

Where defendant requested the court to direct the jury to find for defendant in case there was no fraud or duress in procuring a certain settlement, and the court so charged, defendant cannot on appeal contend that there was not sufficient evidence to warrant the submission of the questions of fraud or duress to the jury.—Boyer v. Soules (Mich.) 62 N. W. 1000.

105 Mich. 31.

[e] (Mich.: 1897.)

One cannot complain of inconsistency in a charge arising from the giving of some of his requests to charge which were too favorable to him.—Hess v. Preferred Masonic Mut. Acc. Ass'n of America (Mich.) 70 N. W. 460.

VI. TAKING CASE FROM JURY.

Directing verdict, see, also, "Negligence," § 48.
— in criminal case, see "Criminal Law," § 153.

— in replevin, see "Replevin," § 21.

§ 88. In general.

[a] (Iowa: 1895.)

In an action for defendant's malicious destruction of a cattle passway under a bridge which it was his duty as supervisor to repair, the petition asserted that plaintiff's grantor deeded certain property to the county for road purposes, reserving the right to attach fences to the bridge "which must necessarily be built

across Rock run before said road can be made passable," and that a bridge was built on the new road across a ravine, near the connection of the ravine with the run, and about 50 feet from a bridge already built. The answer denied none of these allegations, and the evidence showed that for many years plaintiff and his grantor had connected their fences with the bridge across the ravine, and that their cattle were allowed to pass under it. *Held*, that it was error to instruct for defendant on the theory that the bridge in question was not the one referred to in the grant.—Agne v. Seitsinger (Iowa) 64 N. W. 836.

[b] (Mich.: 1897.)

The fact that, when a plaintiff rests his case, the evidence is insufficient to establish his right to recover, will not defeat a recovery where the evidence lacking is introduced by defendant.—Barrett v. Cox (Mich.) 70 N. W. 446.

[c] (Minn.: 1895.)

An issue is properly submitted to the jury when there is any evidence in the affirmative thereof.—Young v. Ege (Minn.) 65 N. W. 249.

63 Minn. 219.

[d] (Minn.: 1896.)

It is prejudicial error to submit a case to the jury upon a point upon which there is no evidence.—Van Doren v. Wright (Minn.) 67 N. W. 668.

[e] (Minn.: 1896.)

Whether, when plaintiff rested, there was evidence sufficient to sustain the verdict, is immaterial if sufficient evidence was thereafter introduced.—Manahan v. Halloran (Minn.) 69 N. W. 619.

[f] (Neb.: 1896.)

If different inferences may be drawn by impartial minds from undisputed facts in evidence the question is one of fact.—Thomson v. Shelton (Neb.) 68 N. W. 1055.

§ 89. Dismissal and nonsuit.

[a] (Minn.: 1895.)

In an action against W. and S. for goods sold to W., a nonsuit as to S. is erroneous where the evidence shows that when the goods were delivered defendants were either partners, or that W. was agent and manager of S.'s business.—Sexton v. Steele (Minn.) 62 N. W. 392.

60 Minn. 336.

[b] (Minn.: 1896.)

Where part of plaintiff's testimony tended to prove his claim, though the other part tended to disprove it, it was error to rule on the question as one of law and dismiss the case on motion.—Keene v. Masterman (Minn.) 68 N. W. 771.

[c] (Wis.: 1897.)

The rule that a nonsuit should not be granted when plaintiff's evidence alone, viewed in the most favorable light, will support a verdict, applies to a nonsuit moved for at the close of plaintiff's evidence, but granted at the close of all the evidence.—Badger v. Janesville Cotton Mills (Wis.) 70 N. W. 687.

§ 90. Direction of verdict.

[a] (Iowa: 1895.)

Where, in a will contest, the evidence at the close of contestant's case is sufficient to warrant the submission of the question of decedent's mental capacity, it is error to direct a verdict for proponents after they have introduced their evidence.—Phillips v. Phillips (Iowa) 61 N. W. 1071.

93 Iowa, 615.

[b] (Iowa: 1895.)

It is proper for the court to direct a verdict, where the evidence is such that a verdict in favor of the party on whom the burden of proof rested should be set aside.—Reeder v. Dupuy (Iowa) 65 N. W. 338.

[c] (Iowa; 1896.)

On a trial where defendants opened, plaintiff moved for a verdict at the close of their evidence. The court overruled the motion. Plaintiff's evidence fully sustained her case, and, at the close, plaintiff's motion was renewed and sustained. *Held*, that there was no inconsistency in directing the verdict.—*Ward v. Dickson* (Iowa) 65 N. W. 997.

[d] (Iowa; 1896.)

A motion to direct a verdict should be sustained when, considering all of the evidence, it clearly appears to the trial judge that it would be his duty to set aside a verdict if found in favor of the party on whom the burden of proof rests.—*Barnhart v. Chicago, M. & St. P. Ry. Co.* (Iowa) 66 N. W. 902.

[e] (Iowa; 1897.)

A motion, made by defendant at the close of plaintiff's evidence, to direct a verdict, should be sustained, where it would be the duty of the court to set aside a verdict for the plaintiff.—*Hurd v. Neilson* (Iowa) 69 N. W. 867.

[f] (Mich.; 1895.)

In an action by an employé for injuries caused by the breaking of a saw, where defendant's evidence was that it was impossible for pieces of the saw to fly out in the room, on account of the guard; that the saw was suitable and safe; and that plaintiff was not struck by a piece of the saw, as claimed,—the court properly refused to direct a verdict for plaintiff, and leave only the question of damages to the jury.—*Lau v. Fletcher* (Mich.) 62 N. W. 357.

104 Mich. 295.

[g] (Mich.; 1895.)

A request by defendant for a verdict on the ground that plaintiff has failed to establish his cause by a preponderance of evidence is not equivalent to a request for a verdict on the ground that there was no evidence to support plaintiff's cause.—*McDonald v. Minneapolis, St. P. & S. M. Ry. Co.* (Mich.) 63 N. W. 966.

105 Mich. 659.

[h] (Mich.; 1895.)

Where the trial court directs a verdict, stating as its reason merely that the evidence will not support a verdict, the judgment will not be reversed on account of its failure to more specifically specify its reasons.—*Hanley v. Balch* (Mich.) 63 N. W. 981.

[i] (Mich.; 1895.)

In assumpsit on a debt originally payable in lumber at defendant's mill, it appeared that plaintiff was not at the mill when the debt matured; that subsequently defendant informed him that he had no lumber, and that he said he would take shingles; and that afterwards, on plaintiff's inquiring whether defendant had the shingles, defendant replied that he had sold them, and that he did not know that he should have any more. *Held*, that a refusal to direct a verdict for defendant because plaintiff failed to show that defendant did not have the lumber at the mill on maturity of the debt was proper.—*Stanley v. Anderson* (Mich.) 65 N. W. 247.

[j] (Mich.; 1895.)

The court should not take a case from the jury on the evidence unless it is very clear, and, when he does so, he should specify the particular ground of his ruling.—*Howey v. Fisher* (Mich.) 69 N. W. 741.

[k] (Minn.; 1895.)

In replevin by an administrator, where it is admitted by the answer that prior ownership and possession of the property was in decedent, in the absence of any evidence of a change of ownership, directing a verdict for defendant was error.—*Pound v. Pound* (Minn.) 62 N. W. 264.

60 Minn. 214.

[l] (Minn.; 1895.)

On an issue whether a lessee agreed to protect the leased premises from mechanics' liens on account of improvements, to be made by a sub-

lessee at the lessee's instance, the lessor testified that the lessee offered to give a bond to protect witness against liens. The lessee testified that he had no conversation with the lessor in regard to the improvements, but his testimony was badly shaken on cross-examination, and he admitted receiving a letter from the lessor, written immediately after the conversation, in which the lessor requested that the bond be given in accordance with the conversation, and testified that it was likely that he got the lessor to write the letter embodying that proposition, and it appeared that he took such a bond from the sublessee to protect himself. *Held*, that it was proper to direct a verdict for the lessor.—*Boston Northwest Real-Estate Co. v. Benz* (Minn.) 68 N. W. 602.

[m] (Minn.; 1897.)

Where plaintiff's claim is denied, and the opposite parties fail to appear, the trial court cannot direct judgment for the party appearing without hearing evidence to prove his cause of action.—*Newman v. Newman* (Minn.) 70 N. W. 776.

[n] (Neb.; 1895.)

When there was such a conflict in the evidence that a verdict might reasonably have been found in favor of the plaintiff, it was error to instruct the jury peremptorily to find for defendant.—*Hargraves v. Home Fire Ins. Co.* 61 N. W. 611, 43 Neb. 271.

[o] (Neb.; 1896.)

When the evidence is such that, had a finding been made thereon by the jury for plaintiff, it would be sustained, it is error to direct a verdict for defendant.—*McKinney v. Hopwood* 65 N. W. 1055, 46 Neb. 871.

[p] (Neb.; 1896.)

It is error to direct a verdict for the defendant, when the evidence is sufficient to warrant a finding and judgment for the plaintiff.—*Van Etten v. Edwards* (Neb.) 66 N. W. 1013, 48 Neb. 25.

[q] (Neb.; 1897.)

It is proper to direct a verdict, where, from the undisputed facts, but one conclusion can be drawn.—*Knapp v. Jones* (Neb.) 70 N. W. 19.

[r] (N. D.; 1897.)

Where there is a substantial conflict in the evidence, it is error to withdraw an issue of fact from the consideration of the jury.—*McRea v. Hillsboro Nat. Bank* (N. D.) 70 N. W. 813.

[s] (S. D.; 1895.)

In an action against a railroad company for killing animals, where the presumption of negligence from the fact of the killing is overcome by defendant's evidence, and the evidence of plaintiff in rebuttal raises a material conflict as to negligence, the refusal to direct a verdict for defendant is proper.—*Sheldon v. Chicago, M. & St. P. Ry. Co.* (S. D.) 62 N. W. 955.

6 S. D. 606.

[t] (S. D.; 1895.)

Where, in an action for damages resulting from fire set in the month of September, in violation of Comp. Laws, § 2392, there is evidence that the fire was set as a "fire break" around a tree claim, directing a verdict for defendant is error.—*Knight v. Towles* (S. D.) 62 N. W. 964.

6 S. D. 575.

[u] (S. D.; 1895.)

Where the jury might have found for plaintiff on a material issue, it was error to direct a verdict for defendant.—*Consolidated Land & Irrigation Co. v. Hawley* (S. D.) 63 N. W. 904.

[v] (S. D.; 1895.)

Where plaintiff introduced evidence making a prima facie case, and defendant refused to introduce evidence, it was proper, on motion of plaintiff, to direct a verdict.—*Yankton Fire Ins. Co. v. Fremont, E. & M. V. R. Co.* (S. D.) 64 N. W. 514.

[w] (Wis.: 1895.)

Plaintiff, having goods stored in defendant railway company's warehouse, ordered the same shipped, but was informed by defendant's foreman that the goods could not be shipped until the next day. Plaintiff replied, "All right; I will be there to load them." No receipt for the goods was taken at the time. That night the warehouse and goods were destroyed by fire. *Held*, on an issue as to defendant's liability as a carrier, that it was not so clear that the duty of transportation had not arisen previous to the fire, by reason of plaintiff's acquiescence in the delay in shipping, as to justify the direction of a verdict for defendant.—*Schmidt v. Chicago & N. W. Ry. Co.* (Wis.) 63 N. W. 1057.
90 Wis. 504.

[x] (Wis.: 1895.)

It is error, in an action for money had to plaintiff's use, to direct a verdict for defendant, where there is evidence from which the jury might, in any view of the case, find a verdict for plaintiff in any amount.—*Dirimble v. State Bank*, 65 N. W. 501, 91 Wis. 601.

[y] (Wis.: 1896.)

Where plaintiff's testimony, if believed, was sufficient to support a verdict in his favor, it was error to direct a verdict for defendant, though plaintiff's evidence was uncorroborated in any, and contradicted in many, material points, and he was shown to have made statements, purposely false, out of court, contradicting his testimony.—*O'Brien v. Chicago & N. W. Ry. Co.* (Wis.) 66 N. W. 363.
92 Wis. 340.

[z] (Wis.: 1897.)

On an issue whether a note was given by plaintiff as an accommodation, or for the purchase of property, where the testimony of the parties is conflicting, and each is corroborated by other evidence, it is improper to direct a verdict for plaintiff.—*Leiser v. Kieckhefer* (Wis.) 69 N. W. 979.

§ 91. — Motion to direct.**[a] (S. D.: 1896.)**

A motion to direct a verdict must state specifically the ground on which the motion is based.—*Tanderup v. Hansen* (S. D.) 66 N. W. 1073.

[b] (S. D.: 1896.)

A motion to direct a verdict because "no cause of action has been made against the defendant under the pleadings," and "under the evidence in this case the plaintiff is not entitled to recover," does not raise the question whether there was "evidence showing or tending to show that the plaintiff, before commencing this action, notified the defendant of any damage done by his cattle, or the probable amount thereof."—*Tauderup v. Hansen* (S. D.) 66 N. W. 1073.

§ 92. How insufficiency of plaintiff's evidence taken advantage of.**[a] (Mich.: 1894.)**

Defendant, by introducing evidence after his motion to direct a verdict in his favor has been overruled, waives an exception taken to such ruling.—*Totten v. Burhans* (Mich.) 61 N. W. 58.

103 Mich. 6.

[b] (Mich.: 1896.)

Where defendant moves for a nonsuit before resting, and, after the motion is denied, introduces testimony, he waives all rights under the motion.—*Lynch v. Johnson* (Mich.) 67 N. W. 908.

[c] (Neb.: 1896.)

Under the Code, the trial court cannot enter an involuntary nonsuit and judgment of dismissal because of failure of plaintiff's evidence, the proper practice being to direct a verdict.—*Zittle v. Schlesinger* (Neb.) 65 N. W. 892.
46 Neb. 844.

VII. DELIBERATIONS OF JURY.

Sending jury back to correct verdict, see post, § 102.

§ 93. Considering personal knowledge of matters in issue.**[a] (Iowa: 1896.)**

It is error for a juror to state, in the jury room, his own knowledge of facts bearing on a material issue in the case.—*Hathaway v. Burlington, C. R. & N. R. Co.* (Iowa) 66 N. W. 892.

[b] (Iowa: 1897.)

Where the issue was whether plaintiff had performed his contract to bore a well which would furnish an unfailing water supply, and the jury had been instructed to "consider all the evidence in the light of reason and common experience," the mere fact that, in the jury room, the jurors considered their experience in relation to such wells does not show that a fair and impartial trial was not had.—*Purcell v. Tibbles* (Iowa) 69 N. W. 1120.

§ 94. Taking papers to jury room.**[a] (Iowa: 1897.)**

An objection that the jury were not allowed to take to their room certain letters used in evidence cannot be raised for the first time on motion for new trial.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[b] (Neb.: 1897.)

The insured property consisting of a large number of articles, the court did not abuse its discretion in permitting jurors, during the trial, to make memoranda of such articles, and the value placed thereon by the evidence.—*Omaha Fire Ins. Co. v. Crighton* (Neb.) 69 N. W. 766.

[c] (Wis.: 1895.)

A refusal to allow the jury to take to their room written instruments offered in evidence is not ground for reversal, in the absence of any abuse of discretion.—*Starke v. Wolf* (Wis.) 63 N. W. 755.

90 Wis. 434.

§ 95. Coercing agreement.**(Iowa: 1897.)**

Where the foreman of a jury in a civil case informed the court that they could not agree, it was not improper for the court to state: "This case is submitted to you for decision, and not for disagreement. I think I will let you give it a further trial."—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

VIII. VERDICT.

Instructions as to general and special verdict, see ante, § 70.

Aider by verdict, see "Pleading," § 100.

Amending pleading after verdict, see "Pleading," § 67.

Assignability of verdict for personal injuries, see "Assignment," § 1.

Compelling reception of verdict, see "Mandamus," § 12.

Effect of verdict in will contest, see "Wills," § 28.

In action for injuries at crossing, see "Railroad Companies," § 43.

— for injuries to servants, see "Master and Servant," § 54.

— on bills and notes, see "Negotiable Instruments," § 89.

In condemnation proceedings, see "Eminent Domain," § 19.

Objections first raised on appeal, see "Appeal," § 201.

— to verdict, ground for new trial, see "New Trial," §§ 26-28.

Review of verdict, see "Appeal," §§ 222-224.

To sustain judgment, see "Judgment," § 26.

1. IN GENERAL.

§ 96. In general.

[a] (Iowa; 1896.)

In an action against a physician for malpractice in reducing a fracture of an arm, alleged to have resulted in rendering the limb useless, defendant denied negligence, claiming the injury was caused by a second injury to the arm after he had discharged the case, and counterclaimed for services in reducing the fracture. *Held* that, a verdict for plaintiff for \$1 would not, on appeal by him, be disturbed as inconsistent, as the jury may have found that the condition of the arm at the trial was in a large measure due to the second injury.—*Whitesell v. Hill* (Iowa) 66 N. W. 894.

[b] (Iowa; 1896.)

Where a cause of action is presented in two counts, it is not error to submit the case to the jury to find independently on each count.—*Robinson v. Berkey* (Iowa) 69 N. W. 434.

[c] (Neb.; 1896.)

A verdict which is responsive to all the issues submitted should not be rejected because of an unauthorized attempt by the jury to apportion the costs.—*State v. Beall* (Neb.) 67 N. W. 868.

48 Neb. 817.

[d] (Neb.; 1896.)

A verdict for defendants in trover is contrary to law, when defendants have not appeared, and their default has been entered.—*Herbert v. Wortendyke* (Neb.) 68 N. W. 350.

[e] (Neb.; 1897.)

Where plaintiff sued his agent and one who had guaranteed the performance of separate contract by the agent, and a liability in different amounts was shown as against the agent and the guarantor, a verdict was proper which assessed the amount of recovery against one defendant differently from that assessed against his co-defendant, under Code Civ. Proc. § 295, providing that when, by the verdict, either party is entitled to recover money, the jury must assess the amount of recovery.—*Lining & Metcalf Co. v. Webb* (Neb.) 70 N. W. 519.

[f] (Wis.; 1896.)

Where the court charges the jury to return a verdict for plaintiff on either of two grounds of negligence submitted to them, a general verdict for plaintiff will be reversed if one of the grounds was erroneously submitted, since the verdict may have been rendered solely on that ground.—*Leitch v. Chicago & N. W. Ry. Co.* (Wis.) 67 N. W. 21.
93 Wis. 79.

§ 97. Pleadings to sustain.

(Neb.; 1896.)

A verdict, in order to sustain a judgment, must respond to the issues made by the pleadings, or to the allegations of the successful party.—*Cannon v. Smith* (Neb.) 66 N. W. 999.
47 Neb. 917.

§ 98. Against instructions.

[a] (Iowa; 1895.)

Where the validity of a sale by an insane person was at issue, and the jury were instructed that if there was a present consideration for the sale, and if the purchaser could not be put in the condition he was before the sale, it was valid, the verdict against the sale was not justified where there was evidence that, in consideration of the sale, the purchaser paid several debts of the seller.—*Bokemper v. Hazen* (Iowa) 64 N. W. 773.

[b] (S. D.; 1894.)

Where the verdict of the jury is in disregard of unquestioned instructions, it will be

reversed.—*Drew v. Watertown Fire Ins. Co.* (S. D.) 61 N. W. 34.
6 S. D. 335.

§ 99. Construction and effect.

[a] (Iowa; 1896.)

In an action upon a note aided by attachment, where defendant alleges wrongful attachment, and denies the liability on the note, a general verdict for defendant for one dollar, with special finding that the attachments were wrongfully sued out, must be construed as a general verdict against the plaintiff on all the issues presented in the entire case.—*De Goey v. Van Wyk* (Iowa) 66 N. W. 787.

[b] (Wis.; 1896.)

A verdict is sufficient, though uncertain on its face, when it is rendered certain by being construed in connection with the issues joined by the pleadings.—*Bartlett v. Clough* (Wis.) 68 N. W. 875.

§ 100. Compromise verdict.

(Mich.; 1897.)

The verdict was insufficient where the jury, on coming into court, announced that they had agreed upon a compromise verdict if it would be received, and, on being polled, one of the jurors, in answer to the question, "Is this your verdict?" replied, "Compromise verdict."—*Ostrander v. City of Lansing* (Mich.) 70 N. W. 332.

§ 101. Amendment and correction.

[a] (Minn.; 1895.)

In an action for services claimed to be of the value of \$1,129, defendant pleaded a counterclaim of \$391.15, which was admitted by plaintiff, and the issue was the value of plaintiff's services. *Held* that, on the jury's returning a verdict for plaintiff of \$307, it was not error for the court to instruct that they could not find a verdict in that amount, and to ascertain by questioning them whether they intended that amount to represent the value of plaintiff's services, and, on their answering in the affirmative, to instruct them to deduct that amount from the counterclaim, and to compute interest on the balance.—*Aldrich v. Grand Rapids Cycle Co.* (Minn.) 63 N. W. 1115.
61 Minn. 531.

[b] (N. D.; 1896.)

When the value of plaintiff's interest in property sued for in claim and delivery is not found in the verdict, but it is not controverted, and can be ascertained by mere computation from the pleadings, the verdict may be amended by the court.—*Fletcher v. Nelson* (N. D.) 69 N. W. 53.

§ 102. Sending jury back to correct.

[a] (Neb.; 1895.)

Where the verdict in replevin failed to specify the damages, it was proper to instruct the jury as to how to find the damages, and send them back to correct the verdict.—*Smith v. First Nat. Bank* (Neb.) 63 N. W. 796.
45 Neb. 444.

[b] (Wis.; 1896.)

It appeared that the jury thought that in considering the special verdict submitted, after answering the first and second questions in the affirmative, it was unnecessary to answer the other three, and they sealed their verdict, which contained answers only to such questions, and returned it into court the following morning. *Held*, that it was not error to send the jury back to complete their verdict by answering the remaining questions.—*Olwell v. Milwaukee St. Ry. Co.* (Wis.) 66 N. W. 362.
92 Wis. 330.

Sending back to correct special verdict, see post, § 117.

2. SPECIAL INTERROGATORIES AND VERDICT.

In action on policy, see "Insurance," § 129.

§ 103. Questions submitted.

[a] (Iowa: 1896.)

It is proper to refuse to submit special interrogatories which do not call for questions of fact in any way decisive of the case.—*Barnes v. Town of Marcus* (Iowa) 65 N. W. 984.

[b] (Iowa: 1896.)

It was not reversible error for the court to refuse to submit a number of special interrogatories, none of which relate to questions of controlling importance in the case.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 67 N. W. 227.

[c] (Iowa: 1896.)

Interrogatories on the question of the validity of a sale, asking whether there was a delivery of the property, whether the delivery was conditional, and whether the seller was estopped to deny a delivery, are not objectionable as not calling for answers to ultimate facts.—*Clough v. Bennett* (Iowa) 68 N. W. 578.

[d] (Iowa: 1896.)

It is not error to refuse to submit to the jury interrogatories which call for evidentiary facts only, most of which are undisputed, and which, if answered as the party submitting them claims they should be, would not be conclusive.—*Runkle v. Hartford Ins. Co.* (Iowa) 68 N. W. 712.

[e] (Iowa: 1896.)

Code, § 2808, providing that the jury must be required, on the request of a party, to find specially on questions of fact stated to them in writing, does not require the court to submit interrogations as to immaterial facts, or facts necessarily determined by the general verdict.—*O'Leary v. German American Ins. Co. of New York* (Iowa) 69 N. W. 686.

[f] (Iowa: 1897.)

The submission to the jury of interrogatories not calling for findings of fact necessarily determinative of the case, is properly refused.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[g] (Iowa: 1897.)

It was not error to refuse to submit interrogatories to the jury if, in view of the evidence, they could not have controlled the general verdict.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

[h] (Mich.: 1895.)

In an action for injuries sustained by stepping through a sidewalk where a plank had been removed, the jury were asked, at defendant's request, to find specially whether the plank "was in and out of its place at various times immediately before the accident." *Held*, that the question was improper, and its answer could have no controlling effect on the general verdict.—*Germaine v. City of Muskegon* (Mich.) 63 N. W. 78.
105 Mich. 213.

[i] (Wis.: 1895.)

In an action against a railroad company for personal injury, caused by the sudden sinking of its track because of the defective condition of the roadbed, the refusal to submit the question for special verdict of whether defendant had any reason to apprehend such a sinking of the roadbed *held* reversible error.—*McGowan v. Chicago & N. W. Ry. Co.*, 64 N. W. 891, 91 Wis. 147.

[j] (Wis.: 1896.)

It is proper to refuse to submit to the jury interrogatories referring to evidentiary facts not necessary to be decided in the verdict.—*Pier v. Chicago, M. & St. P. Ry. Co.* (Wis.) 68 N. W. 464.

[k] (Wis.: 1896.)

There is no error in refusing to submit to the jury special interrogatories dependent on another which the court has rightly refused to submit.—*Pier v. Chicago, M. & St. P. Ry. Co.* (Wis.) 68 N. W. 464.

[l] (Wis.: 1896.)

It is not error to refuse to submit questions calling for findings on merely evidentiary facts.—*McKeen v. Chicago, M. & St. P. Ry. Co.* (Wis.) 69 N. W. 175.

§ 104. Repetition.

(Iowa: 1897.)

The refusal of special interrogatories is not ground for complaint, where the essential facts are embodied in another interrogatory, which is submitted.—*Union Mill Co. v. Prenzler* (Iowa) 69 N. W. 876.

§ 105. Estoppel to object to submission.

[a] (Mich.: 1895.)

An objection that there was no evidence on which to submit a question for a special finding cannot be urged by one who has, in a requested instruction, sought the submission of the same question.—*McDonald v. Minneapolis, St. P. & S. S. M. Ry. Co.* (Mich.) 63 N. W. 966.
105 Mich. 659.

[b] (Wis.: 1897.)

The submission of 38 interrogatories in the form of a special verdict, necessarily tending to confuse the jury, is not rendered unobjectionable because appellant requested the submission of a greater number of interrogatories, more objectionable than those submitted.—*Louis F. Fromer & Co. v. Stanley* (Wis.) 69 N. W. 820.

§ 106. Discretion of court.

(Wis.: 1896.)

The form of a special verdict rests largely in the discretion of the court, which will not be interfered with where the issues are covered.—*Lindner v. St. Paul Fire & Marine Ins. Co.* (Wis.) 67 N. W. 1125.
93 Wis. 526.

§ 107. Necessity of requesting findings.

[a] (Iowa: 1896.)

Appellant cannot complain that the jury found that certain of the notes in suit were usurious, without specifying which of them were so, where he made no request that the jury be instructed to so specifically find.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

[b] (Neb.: 1897.)

Error cannot be predicated on the court's failure to include, in the list of questions submitted to the jury for special findings, other questions, for the submission of which no request is made.—*Town v. Missouri Pac. Ry. Co.* (Neb.) 70 N. W. 402.

[c] (Wis.: 1896.)

Where, on the issue of a fraudulent preference of a creditor, the verdict and findings cover all the material, controverted, and issuable facts, a party cannot urge, on appeal, certain transactions in evidence from which a preference might have been found, where there was no request for the trial court to submit them to the jury for determination.—*Continental Nat. Bank v. McGeech* (Wis.) 66 N. W. 606.
92 Wis. 286.

§ 108. Form of interrogatory.

[a] (Wis.: 1895.)

On an issue as to whether defendant constructed a snow pile in a street, whereby plaintiff was injured, it was not error, in submitting special interrogatories to the jury, to assume the existence of the snow pile, when that fact was conclusively proven, and the form of previous interrogatories required the jury to find whether

it existed. *Mayer v. Milwaukee St. Ry. Co.* (Wis.) 63 N. W. 1048.

90 Wis. 522.

[b] (Wis.; 1897.)

Special questions submitted being in substance those proposed, complaint cannot be made of change of form thereof.—*John R. Davis Lumber Co. v. Home Ins. Co.* (Wis.) 70 N. W. 59.

§ 109. Submission of interrogatories to adversary.

(Iowa; 1896.)

The court is justified in refusing to submit special interrogatories, a copy of which has not been submitted to the counsel on the other side, as required by Code, § 2808.—*Barnes v. Town of Marcus* (Iowa) 65 N. W. 984.

§ 110. Answers to interrogatories.

[a] (Neb.; 1896.)

Where answers to special interrogatories are returned and recorded with the general verdict, without objection, it cannot afterwards be objected that they were not signed by the foreman of the jury.—*Thompson v. Thompson* (Neb.) 68 N. W. 372.

[b] (Wis.; 1894.)

The court, in passing upon the sufficiency of a special verdict, must treat material facts, uncontroverted at the trial, or established by undisputed evidence, as formally incorporated into such verdict, although they have been omitted therefrom.—*Murphy v. Weil* (Wis.) 61 N. W. 315, 89 Wis. 146.

[c] (Wis.; 1896.)

In an action for injuries on defendant's depot grounds, the jury was asked how far south of a switch was the place of the accident. The evidence, without conflict, showed it to be about 100 feet. The court wrote the answer "1,000 feet." *Held*, that the mistake was not misleading, there being no dispute that the accident occurred within the depot grounds.—*Mills & Le Clair Lumber Co. v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 68 N. W. 996.

§ 111. — Necessity of basing findings on pleadings and evidence.

[a] (Iowa; 1895.)

Where the jury found that the plaintiff, a real-estate broker, had negotiated the sale of a farm to a certain person on definite terms, and it appeared from undisputed evidence that such person had made all necessary arrangements to take the farm, a special finding that such purchaser was not "ready, able, and willing" to purchase and pay for the farm was error.—*Thompson v. Lenth* (Iowa) 62 N. W. 842.

[b] (Neb.; 1895.)

A special finding, unsustained by the evidence, must be disregarded, when the fact established by it is clearly irrelevant.—*Citizens' Nat. Bank v. Wedgwood* (Neb.) 63 N. W. 375.

45 Neb. 143.

[c] (Wis.; 1896.)

Findings of a special verdict, not based on the evidence, are properly stricken as surplusage.—*Rahr v. Manchester Fire Assur. Co.* (Wis.) 67 N. W. 725.

93 Wis. 355.

§ 112. Failure to answer interrogatories.

[a] (Minn.; 1897.)

A jury was directed, in addition to a general verdict, to answer two specific questions. An affirmative answer to both of these questions was necessary to sustain a general verdict in plaintiffs' favor. After being out 36 hours, without an agreement as to the specific questions, the court, of its own motion, and in the absence of defendant's attorneys, withdrew these special questions, and received a general verdict against the defendant. *Held* error.—*Ermantrant v. Providence-Washington Ins. Co.* (Minn.) 70 N. W. 572.

[b] (Neb.; 1895.)

It is not reversible error to receive a general verdict or finding, leaving unanswered special interrogatories submitted to the jury, when, if answered in the form most favorable to the complaining party, they would not have been inconsistent with the general verdict.—*McClary v. Stull* (Neb.) 62 N. W. 501.

44 Neb. 175.

[c] (Neb.; 1897.)

Failure of the jury to answer questions submitted, where the answers, in view of the pleadings and other findings, would have been immaterial, does not render a judgment on the general verdict prejudicial to the losing party.—*Town v. Missouri Pac. Ry. Co.* (Neb.) 70 N. W. 402.

[d] (Wis.; 1896.)

In an action for personal injury, where defendant asked a special verdict whether negligence of defendant was the direct cause of the injury, the failure of the jury to find on such special verdict is error, not cured by general verdict for plaintiff.—*Klatt v. N. C. Foster Lumber Co.* (Wis.) 66 N. W. 791.

92 Wis. 622.

§ 113. Special finding after judgment —Notice.

(Neb.; 1896.)

A special finding made at the request of one party, after judgment and without notice to the adverse party, is absolutely void.—*Wachsmuth v. Orient Ins. Co.* (Neb.) 68 N. W. 935.

§ 114. Inconsistent and conflicting findings.

[a] (Wis.; 1895.)

Special findings that the wind interfered with plaintiff's hearing defendant's engine; that a man of ordinary intelligence, driving across the tracks as plaintiff did, with his team at a trot, ought not to have reasonably expected that he would be unable to stop in time to avoid an approaching engine; that, under the circumstances, ordinary care did not require one of ordinary prudence, so driving, to stop and listen for an approaching engine; and that plaintiff was directed to cross the tracks by one on whose judgment he relied, and who ought not to have reasonably expected that a collision would follow,—are inconsistent with a finding that plaintiff was guilty of contributory negligence, and such inconsistency is ground for a new trial.—*Farley v. Chicago, M. & St. P. Ry. Co.*, 61 N. W. 769, 89 Wis. 206.

[b] (Wis.; 1895.)

In an action for the value of a horse killed by reason of a highway being covered with snow and ice, the jury were asked: "Was the highway reasonably safe and passable?" "If not, did defendant have sufficient notice of the defect?" "Was plaintiff guilty of negligence which contributed to the accident?" They answered the first and third questions, "Yes," and "No" to the second. *Held*, that there was no material inconsistency.—*King v. Town of Farmington* (Wis.) 62 N. W. 928.

90 Wis. 62.

[c] (Wis.; 1895.)

In an action by a servant against his master for personal injuries alleged to have been caused by defective machinery, findings that defendant did not use ordinary care in keeping the machinery in proper condition, that plaintiff knew the danger to be apprehended from the use of the machinery, and that plaintiff's injuries were the result of an accident occurring without the negligence of either party, are inconsistent, and require a new trial.—*Darcey v. Farmers' Lumber Co.* (Wis.) 65 N. W. 491, 91 Wis. 654.

[d] (Wis.; 1897.)

A train on which plaintiff was a passenger was stopped before reaching wrecked tanks containing burning naphtha, and the pas-

sengers were conducted to the other side of the wreck, 250 feet from the tanks, to await another train. Plaintiff thereafter went within 85 feet of the tanks, and was injured by an explosion. A special verdict found that if he had remained at the place designated for the passengers, "he would not have been seriously injured," and that he "unnecessarily, and from motives of curiosity and pleasure," went nearer to the tank, and that his injuries were caused by so doing; but also found that defendant, in the exercise of ordinary prudence, should have known of plaintiff's position in time to warn him of the danger, "and should have anticipated that he would go nearer to the tank." It also found that plaintiff was "not guilty of any want of ordinary care that contributed to his injury," and that a prudent man, in the same position, would not have expected an explosion, but that defendant ought to have expected an explosion, and did not use reasonable care, and was guilty of negligence, which was the proximate cause of the injuries. *Held*, that the verdict was too inconsistent to support a judgment for either party.—*Conroy v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 70 N. W. 486.

[c] (Wis.; 1897.)

Where parts of a special verdict, in an action for injuries to a passenger, are favorable to plaintiff, and are inconsistent with other parts favoring defendant, it is proper practice for defendant to move to set aside the parts not sustained by the evidence, and for judgment on the remainder and on the uncontradicted evidence.—*Conroy v. Chicago, St. P., M. & O. Ry. Co.* (Wis.) 70 N. W. 486.

§ 115. Change of special findings by court.

(Wis.; 1895.)

In an action by architects for services, where plaintiffs claimed \$3,900, and defendant alleged negligence in the work, and special damages, and a special verdict was rendered, to the effect that plaintiffs were architects, and rendered services, and that only a portion thereof had been paid for under the contract, and it was also found that plaintiffs were discharged for a good reason, and did not perform their agreement, and that nothing was due them, it was an invasion of the province of the jury to change such finding to one that \$2,360 were due.—*Conover v. Knight*, 65 N. W. 371, 91 Wis. 569.

§ 116. Power of court to amend findings.

[a] (Wis.; 1894.)

A court cannot, in an action at law, amend a special finding, but, if the verdict is not in accordance with the evidence, should award a new trial.—*Sheehy v. Duffy* (Wis.) 61 N. W. 295, 89 Wis. 6.

[b] (Wis.; 1895.)

The court cannot set aside certain findings in the special verdict, as unsupported by the evidence, and render judgment on the verdict, as it then stands.—*McFetridge v. American Fire Ins. Co.* (Wis.) 62 N. W. 938, 90 Wis. 138.

§ 117. Sending jury back to correct.

(Wis.; 1895.)

In a suit for personal injuries received on a defective highway the jury were required to answer—First, whether the highway was defective; and, second, whether plaintiff was guilty of any want of ordinary care which contributed to her injury. They returned a general verdict for plaintiff for \$250, and answered the second question, "There was some want of care." *Held*, that it was proper for the court to point out the uncertainties in the answer, and require the jury to make it definite.—*Coats v. Town of Stanton* (Wis.) 62 N. W. 619, 90 Wis. 120.

§ 118. Judgment on special verdict notwithstanding general verdict.

[a] (Iowa; 1895.)

Where the jury returned special findings in plaintiff's favor on every material fact in the case, and rendered a general verdict for defendant absolutely inconsistent with such findings, judgment should be rendered for plaintiff.—*Davis v. Campbell* (Iowa) 61 N. W. 1053, 93 Iowa, 524.

[b] (Iowa; 1895.)

Judgment on a special verdict as against the general verdict will not be granted unless it is inconsistent with the general verdict, and sufficient of itself to establish or defeat the right of recovery.—*Kerr v. Keokuk Waterworks Co.* (Iowa) 64 N. W. 596.

[c] (Wis.; 1895.)

Where defendant moved to set aside certain special findings in plaintiff's favor as against undisputed evidence, and for judgment on the remaining findings, and such findings were set aside, the court could enter judgment for defendant on the remaining findings and undisputed evidence, without granting a new trial.—*Menomonie River Sash & Door Co. v. Milwaukee & N. R. Co.*, 65 N. W. 176, 91 Wis. 447.

IX. TRIAL BY COURT.

Review of findings by the court, see "Appeal," §§ 227-229.

§ 119. Ruling on effect of evidence.

(Minn.; 1895.)

On a trial by the court of an action to rescind a sale of land for fraud, the court, after plaintiff had rested his case, and during the examination in chief of one of the defendants, ruled that the evidence already submitted wholly failed to show any fraud on the part of either of the defendants. Plaintiff did not intimate a desire to cross-examine the witness or offer any further evidence. *Held*, that the ruling was proper.—*Donnelly v. Cunningham* (Minn.) 63 N. W. 246, 61 Minn. 110.

§ 120. Effect of admitting improper evidence.

[a] (Minn.; 1895.)

The admission of immaterial evidence in a trial by a court without a jury is no ground for reversal.—*Johnson v. City of Stillwater* (Minn.) 64 N. W. 95, 62 Minn. 60.

[b] (Neb.; 1895.)

In a case tried to a court without a jury, the admission of improper evidence is not in itself a ground for reversal.—*Sharmer v. Johnson*, 61 N. W. 727, 43 Neb. 509.

[c] (Neb.)

The admission of incompetent evidence, in a case tried without a jury, is not reversible error.—(1895) *Tolerton & Stetson Co. v. McClure*, 63 N. W. 791, 45 Neb. 368; (1897) *Phoenix Ins. Co. v. Walter*, 70 N. W. 938.

[d] (Neb.; 1895.)

In an equitable action, the admission of immaterial evidence is harmless error.—*Blazer v. Rogner* (Neb.) 63 N. W. 846, 45 Neb. 588.

[e] (Neb.)

The admission of incompetent or irrelevant testimony in a trial without a jury is not reversible error.—(1895) *Pearce v. McKay*, 63 N. W. 851, 45 Neb. 296; (1895) *Scroggin v. Johnston*, 64 N. W. 236, 45 Neb. 714; (1896) *Stover v. Hough*, 66 N. W. 825, 47 Neb. 789.

[f] (Neb.; 1895.)

The admission of immaterial and incompetent evidence is not reversible error, where the trial was by the court, and there was sufficient

competent evidence to sustain the court's findings.—*Monroe v. Reid*, 64 N. W. 983, 46 Neb. 316.

[*g*] (Wis.; 1896.)

Improper admission of evidence is not ground for reversal in an equity case.—*Gross v. Gross* (Wis.) 68 N. W. 469.

[*h*] (Wis.; 1897.)

The admission of improper evidence in a suit in equity does not constitute error where there is other evidence sufficient to sustain either the finding or the judgment.—*Williamson v. Neeves* (Wis.) 69 N. W. 806.

§ 121. Findings of fact and conclusions of law.

[*a*] (Neb.; 1897.)

When questions of fact were tried by the court, and a request was made of the court to state in writing the findings of fact separately from conclusions of law, it was prejudicial error to deny such request.—*Lyman v. Waterman* (Neb.) 70 N. W. 921.

[*b*] (Wis.; 1895.)

Rev. St. § 2863, requiring, on a trial of a question of fact by the court, a decision in writing, stating the facts found and conclusions of law thereon, applies to equitable as well as legal actions.—*Dietz v. City of Neenah* (Wis.) 64 N. W. 299; 91 Wis. 422.

§ 122. Additional findings.

(S. D.; 1895.)

A court trying a case without a jury, which files its findings concurrently with the judgment based thereon, may seasonably make additional findings conforming more specifically to the decision as orally announced at the conclusion of the trial, and file the same as of the date of the filing of the original findings.—*Martin v. Minnekahta State Bank* (S. D.) 64 N. W. 127.

§ 123. Duty to make findings, and failure to find on certain points.

[*a*] (S. D.; 1895.)

It was not prejudicial error, in a trial by the court without a jury, for the court to fail to make findings of fact on incompetent evidence admitted over objection.—*Martin v. Minnekahta State Bank* (S. D.) 64 N. W. 127.

[*b*] (S. D.; 1896.)

In an action at law tried to the court without a jury, material issues tendered by the complaint, and admitted or not denied in the answer, require no findings of fact.—*Anderson v. Alseth* (S. D.) 66 N. W. 320.

[*c*] (S. D.; 1896.)

A failure to make a finding of fact on an issue expressly abandoned at the trial, and on which no evidence was introduced or finding requested, is not available on appeal.—*Roblin v. Palmer* (S. D.) 67 N. W. 949.

§ 124. — Finding ultimate facts.

[*a*] (Minn.; 1897.)

A finding of fact that "plaintiff owes the defendant the sum of \$450" is insufficient to support a judgment of \$450, there being no statement of the ultimate facts found.—*Newman v. Newman* (Minn.) 70 N. W. 776.

[*b*] (S. D.; 1896.)

Plaintiff executed to defendant a deed absolute in form, and received from him \$100. As part of the same transaction, defendant executed a similar deed, which, by agreement, was placed in escrow, to be delivered to plaintiff upon payment of \$125 within 60 days. *Held*, in an action to have the deeds adjudged to be mortgages, that the ultimate question of fact to be determined by the trial court before the supreme court could review the decision was, "What was the intention and understanding of the parties?" and that a finding that the deed from plaintiff to defendant was an absolute conveyance was not such a finding upon

such ultimate question of fact.—*McKenna v. Whittaker* (S. D.) 69 N. W. 587.

§ 125. Time of filing decision.

(S. D.; 1896.)

The failure of the court before which a question of fact is tried to file its written decision within 30 days after the submission of the cause, as required by Comp. Laws, § 5065, as amended by Laws 1893, c. 72, is not ground for reversal, in the absence of injury to the unsuccessful litigant.—*Roblin v. Palmer* (S. D.) 67 N. W. 949.

§ 126. Motion to dismiss.

(Iowa; 1895.)

In a trial by the court, on motion to dismiss for want of evidence, the question is whether, by a preponderance of the evidence, plaintiff was entitled to judgment.—*Hayward v. Jackman* (Iowa) 64 N. W. 667.

TROVER AND CONVERSION.

I. WHEN LIES—DEFENSES, §§ 1-4.

II. WHAT CONSTITUTES CONVERSION, §§ 5-8.

III. DEMAND, §§ 9-11.

IV. PLEADING AND PRACTICE, §§ 12-18.

V. DAMAGES, §§ 19-21.

See, also, "Replevin."

Action against purchaser for conversion, see "Sale," § 92.

—between co-tenants for conversion, see "Tenancy in Common," § 10.

—between mortgagees for conversion, see "Chattel Mortgages," § 28.

—by mortgagee for conversion, see "Chattel Mortgages," §§ 55, 57, 59.

—by mortgagor against mortgagee for conversion, see "Chattel Mortgages," § 41.

Conversion of logs, see "Logs and Logging," § 5.

Joint tortfeasors, see "Torts."

Liability of carrier for conversion, see "Carriers," § 7.

—of pledgee for conversion, see "Pledge," § 8.

Right to set off, see "Set-Off and Counterclaim," § 1.

I. WHEN LIES—DEFENSES.

§ 1. When action lies.

[*a*] (Iowa; 1894.)

Defendant, after wrongfully taking possession of goods, and refusing to surrender possession on demand, cannot defeat the owner's right to sue in trover for the value thereof by suing out a writ of attachment against the same.—*Guest v. Heintz* (Iowa) 61 N. W. 404. 93 Iowa, 183.

[*b*] (Mich.; 1895.)

In an action by an executor for the conversion of a note alleged to belong to the estate, defendant, one of testator's household, testified that testator indorsed the note, and gave it to her, and that she had no other income; and showed that, as the interest on the note was collected, deposits in equal amount were made by her on her bank account. Plaintiff introduced evidence that just after the funeral defendant told a legatee that the note was among testator's papers, and that afterwards she turned it over to the executor, together with such papers. Defendant denied the statement made to the legatee, and testified that she merely said the note was "all right." *Held* that, though it appeared that immediately upon the delivery of the note to the executor he returned it to defendant, saying that it was hers, and never afterwards demanded it, and that subsequently he told her to collect it, and keep the proceeds, she was liable

therefor in trover.—*Harris v. Cable* (Mich.) 62 N. W. 582.

104 Mich. 365.

[c] (Mich.: 1895.)

Trover for timber cut from land will lie against a person in possession claiming under void tax deeds, where such possession is fugitive, and for the purpose only of cutting the timber.—*Moret v. Mason* (Mich.) 64 N. W. 193.

[d] (Mich.: 1895.)

In trover for timber cut on unoccupied land, there was evidence that defendant agreed with one H., a third person, that H. should cut the timber, and defendant receive a certain sum per M. as stumpage; and that at H.'s suggestion, and with reference to such cutting, defendant procured a quitclaim deed from the holder of a void tax title, and then made such arrangement with H. It appeared that the timber was cut by H., and that defendant received the amount agreed on. *Held*, that whether or not defendant was a joint wrongdoer was for the jury.—*Moret v. Mason* (Mich.) 64 N. W. 193.

[e] (Minn.: 1895.)

Defendants falsely represented to plaintiff that they were negotiating for the purchase of certain property at a certain price, and were about to close a contract for it, and thereby induced him to form a partnership agreement with them to purchase the property, by the terms of which each was to pay one-third of the price, and own one-third of the property. He accordingly paid them his share of the price, which they took with no intention of applying it on any such purchase, the statements having been made by them merely in order to obtain his money. *Held*, that an action for the conversion of the money would lie.—*Holland v. Bishop* (Minn.) 61 N. W. 681.

60 Minn. 23.

[f] (Neb.: 1893.)

An owner or party entitled to goods which have been converted, who subsequently has them, or a portion thereof, returned to him, or receives a portion of the proceeds of a sale of the goods, or some of them, is not thereby barred of his right of action for the original wrongful taking.—*Coburn v. Watson* (Neb.) 67 N. W. 171.

48 Neb. 257.

[g] (S. D.: 1896.)

The grantee of mortgaged land conveyed it to C., for the former's use and benefit, and afterwards obtained from the mortgagee's agent a certificate of satisfaction executed by the mortgagee, which the agent had procured by fraud. After the mortgagee demanded of such grantee a return of the certificate, the latter delivered it to C., who had it recorded. *Held*, that an action of conversion against such grantee would not lie, since the mortgagee's right to foreclose was not affected.—*Wyllie v. Grigsby* (S. D.) 70 N. W. 1049.

§ 2. Title or right to possession.

[a] (Mich.: 1895.)

One to whom goods are sold in fraud of creditors, though having a title voidable as to the creditors, may sue an officer for unlawful seizure and conversion thereof.—*Terry v. Metevier* (Mich.) 62 N. W. 164.

104 Mich. 50.

[b] (Mich.: 1895.)

Where property was attached and taken from the possession of a first mortgagee on the ground that the first mortgage was fraudulent, but subject to subsequent mortgages, which recognized the validity of the first, and said first mortgagee's demand for the return thereof was refused, but the attachment was afterwards dissolved, and the property returned to the first mortgagee, the junior mortgagees, not having any right to the possession thereof, cannot maintain trover against the attaching creditors.—*McGraw v. Sampliner* (Mich.) 64 N. W. 1060; *Wiles v. Same*, *id.*

[c] (Mich.: 1896.)

Where potatoes were raised on shares by two persons, one of whom left them in possession of his wife and the other, with permission to the wife to use as many as she needed for herself and family, the wife could not join in her own name with such other as plaintiff in trover against an attaching officer.—*Janaushek v. Eddy* (Mich.) 65 N. W. 752.

§ 3. Who liable.

[a] (Mich.: 1896.)

Persons who knowingly assist another in the fraudulent disposition of goods purchased by false representations are jointly liable with him for conversion, though they receive no direct benefit.—*Banner v. Schlessinger* (Mich.) 67 N. W. 116.

[b] (Neb.: 1897.)

Every person who abets in the conversion of the property of a third person is liable for the value of the property converted.—*D. M. Osborne & Co. v. Plano Maunf'g Co.* (Neb.) 70 N. W. 1124.

§ 4. Defenses.

[a] (Mich.: 1895.)

In trover by the assignee of a mortgage on chattels against an attaching officer, the defense that the attachment was issued before plaintiff's assignment was made is without merit, where it appears that there was also a subsequent conversion by defendant.—*Hull v. Bernatz* (Mich.) 64 N. W. 473.

[b] (Neb.: 1895.)

It was no defense to an action by the owner of a dividend, against one who drew the same without authority, that defendant was instructed to draw the dividend by one who had no interest in the same, and that he subsequently paid the same to such person.—*Cook v. Mouroe* (Neb.) 63 N. W. 800.

45 Neb. 349.

[c] (Neb.: 1896.)

The fact that property has been taken from a party who converted it under or by virtue of legal process, or in any manner, presents no defense to an action against him by the owner or person entitled to it, for its conversion, unless it further be shown that such owner or person entitled to the property has received it, or the proceeds of any sale which may have been made of it.—*Coburn v. Watson* (Neb.) 67 N. W. 171.

48 Neb. 257.

[d] (Wis.: 1897.)

In an action for conversion it is no defense that the title to the property is outstanding.—*Gauche v. Milbrath* (Wis.) 69 N. W. 999.

II. WHAT CONSTITUTES CONVERSION.

§ 5. In general.

[a] (Iowa: 1895.)

A plaintiff who dismisses a garnishment of goods claimed by the garnishee under a mortgage given by defendant, and subsequently attaches the goods in the mortgagee's hands, is not liable for conversion.—*Toledo Sav. Bank v. Johnston* (Iowa) 62 N. W. 748.

[b] (Mich.: 1895.)

Plaintiff agreed to sell railroad ties to A., to be of sound timber, and to conform to Chicago inspection, to be made at any port to which they should be consigned, no ties rejected on the inspection to be paid for. When the ties were being loaded on a vessel from plaintiff's wharf, defendant, A.'s agent, refused to receive on board certain of the ties, some of which plaintiff claims were good, and plaintiff's foreman, who had charge of the loading, threw them into the lake. *Held*, that, even if the inspection should have been made at the port of destination, and though the ties rejected and thrown

into the lake were good, defendant was not liable for their conversion.—*Turnbull v. Widner* (Mich.) 61 N. W. 784.

[c] (Mich.; 1895.)

An invalid attempt to foreclose a chattel mortgage, the mortgagee bidding in and retaining the property, is not a conversion thereof.—*Brown v. Mynard* (Mich.) 65 N. W. 293.

[d] (Minn.; 1896.)

Acceptance by a creditor from his debtor of a preferential security, voidable under the insolvent law, is not a conversion.—*Hay v. Tuttle* (Minn.) 69 N. W. 696.

[e] (S. D.; 1894.)

Where, in an action in claim and delivery, property is specifically described in the affidavit, and the statutory indorsement is made thereon, signed by plaintiff's attorney, and the officer takes the property so described, plaintiff is liable for the value of the property to a third party who was the actual owner thereof.—*Feury v. McCormick Harvesting Mach. Co.* (S. D.) 61 N. W. 162.

6 S. D. 396.

§ 6. Of money or checks.

[a] (Mich.; 1896.)

Plaintiff employed defendant as an attorney to bring suit on a claim, and sent a check, payable to defendant's order, to cover disbursements. Defendant cashed the check, but, having induced the debtor to promise payment without suit, used the proceeds for his own purposes. *Held*, that trover for conversion of the check, or of the proceeds thereof, would not lie.—*Shrimpton & Sons v. Culver* (Mich.) 67 N. W. 907.

[b] (Neb.; 1896.)

Money taken forcibly, and without the consent of the owner, may be recovered back, though the owner was indebted to the wrongdoer in an amount as great as the sum taken.—*Murphy v. Virgin* (Neb.) 66 N. W. 652.

47 Neb. 692.

§ 7. Of fixtures.

[a] (Mich.; 1895.)

The institution of a chancery suit by a landlord, praying for an order restraining a tenant in arrears from removing certain articles from the premises, the tenant meanwhile remaining in actual possession, is not an act of conversion with reference to those fixtures.—*Felcher v. McMillan* (Mich.) 61 N. W. 791.

103 Mich. 494.

[b] (Mich.; 1895.)

The fact that, after a tenant had voluntarily yielded possession of the premises, the attorney to whom the landlord referred a demand by him through his attorney for the right to remove certain articles failed to reply at the hour he had promised, does not constitute a conversion thereof by the landlord, where the reply was actually made within 24 hours of the demand, Sunday excepted.—*Felcher v. McMillan* (Mich.) 61 N. W. 791.

103 Mich. 494.

§ 8. Of certificates of stock.

[a] (Mich.; 1895.)

A demand and refusal to deliver a certificate of stock which defendant honestly believes has been burned does not show conversion.—*McDonald v. Mackinnon* (Mich.) 62 N. W. 560.

104 Mich. 428.

[b] (Mich.; 1895.)

Where one refuses, on demand, to deliver a certificate of stock, honestly thinking it burned, a conversion thereof does not take place until he afterwards discovers the certificate and refuses to deliver.—*McDonald v. Mackinnon* (Mich.) 62 N. W. 560.

104 Mich. 428.

[c] (Mich.; 1895.)

An indorsement of a certificate of mining stock by the holder thereof, at the request of

the owner, to a third person, as security for his indorsement of the owner's notes, constitutes an actual delivery of the stock to the owner, and relieves the one indorsing it from liability for a conversion of the stock in not delivering it to the owner in person.—*McDonald v. Mackinnon* (Mich.) 62 N. W. 560.

104 Mich. 428.

III. DEMAND.

§ 9. When necessary.

[a] (Mich.; 1897.)

In trover for the conversion of money, proof of a formal demand is not necessary, where defendant testifies that he told plaintiff she owed him, thereby denying her right to the fund in his possession.—*Pierce v. Underwood* (Mich.) 70 N. W. 419.

[b] (S. D.; 1895.)

Where one who took personal property denied the owner's title thereto, it was not necessary for the owner, before suing for conversion, to demand the property.—*Consolidated Land & Irrigation Co. v. Hawley* (S. D.) 63 N. W. 904.

§ 10. Sufficiency.

(Wis.; 1895.)

Where a vendor has converted and mingled with his own the logs of another, a notice by such other to the vendee of the conversion, and that the vendor is delivering the converted logs mingled with his own to him, and a demand by him for payment for the converted logs, made after part of the logs have been delivered, is sufficient to render the vendee liable in conversion for those delivered after, as well as before, the demand.—*Anderson v. Sutherland*, 65 N. W. 365, 91 Wis. 585.

§ 11. Necessity of proving demand and refusal.

[a] (Minn.; 1896.)

Refusal to restore goods on demand is only evidence of conversion, and, whenever the conversion can be otherwise proved, it is not necessary for the plaintiff to allege or prove a demand and refusal.—*Adams v. Castle* (Minn.) 67 N. W. 637.

64 Minn. 505.

[b] (Minn.; 1896.)

When a conversion can be otherwise proved, it is not necessary to prove a demand and a refusal to deliver.—*Hogan v. Atlantic Elevator Co.* (Minn.) 69 N. W. 1.

IV. PLEADING AND PRACTICE.

Evidence as to damages, see post, § 20.

§ 12. In general.

(Neb.; 1897.)

In replevin, where the property is returned to defendant and the action proceeds as one for conversion, and the jury find generally for plaintiff in response to allegations of ownership by it, the fact that they unnecessarily find as to the right of possession is immaterial.—*Baum Iron Co. v. Union Sav. Bank* (Neb.) 69 N. W. 939.

§ 13. Complaint or petition.

[a] (Minn.; 1895.)

In an action for the conversion of a building erected by plaintiff on premises belonging to defendant, which plaintiff leased from a third person, the complaint alleged that, before making the lease, defendant had knowledge that plaintiff was about to make the same, and falsely represented that such third person was the owner; that defendant knew such representations were false, and that plaintiff would rely on them;

that, in reliance on such representations, plaintiff accepted the lease, made the improvements, and paid the rent; that plaintiff was ignorant of the true ownership,—and alleged his damages. *Held* to state a cause of action.—*Norman v. Eckern* (Minn.) 63 N. W. 170.

60 Minn. 531.

[b] (Minn.: 1896.)

A complaint alleging that plaintiff furnished an undertaker's wagon to the defendant city for the purpose of conveying sick persons, and that defendant caused the same to be remodeled into an ambulance, and converted the same to its own use, and has ever since used the same, but failing to allege that a return had been demanded, or that defendant had used the wagon for any other purpose than that for which it was obtained, did not state a cause of action.—*Kendall v. City of Duluth* (Minn.) 66 N. W. 1150.

64 Minn. 295.

[c] (Neb.: 1896.)

In an action for conversion, a general allegation that the defendant unlawfully and wrongfully converted the property is sufficient.—*Sanford v. Jensen* (Neb.) 69 N. W. 108.

§ 14. Reply.

(Neb.: 1897.)

In an action in the nature of trover against a sheriff, who justified under a levy against plaintiff's vendor, it was competent for plaintiff to plead in reply that, prior to the levy, defendant had seized the property under another writ against the same vendor, that plaintiff had replevied it, and that the replevin suit was still pending.—*Beagle v. Smith* (Neb.) 69 N. W. 956.

§ 15. Burden of proof.

(Iowa: 1896.)

In an action for the conversion of certain notes taken by plaintiff's agent in payment for property of plaintiff, and transferred to defendant by the agent, the burden was on plaintiff to show that defendant did not receive the notes in good faith.—*Warder, Bushnell & Glessner Co. v. Cuthbert* (Iowa) 68 N. W. 917.

§ 16. Admissibility of evidence.

[a] (Iowa: 1896.)

In an action for conversion, a schedule of the goods alleged to have been converted, attached to plaintiff's petition as an exhibit, which was shown to have been made by a person competent to make it, and to be correct, was admissible in evidence as showing the character and general description of the property.—*Casey v. Ballou Banking Co.* (Iowa) 67 N. W. 98.

[b] (Mich.: 1895.)

In an action by a wife, for conversion, against a person to whom the property had been mortgaged by the husband, who had been permitted by the wife to use it in his business, evidence as to the motive of the husband in stating to his former partner that the property belongs to him is immaterial.—*Little v. Williams* (Mich.) 65 N. W. 568.

[c] (Neb.: 1896.)

Evidence of the careful conduct of a sale, which, as to plaintiff's rights, constituted a conversion, was properly excluded.—*Imhoff v. Richards* (Neb.) 67 N. W. 483.

48 Neb. 590.

§ 17. Sufficiency of evidence.

(Minn.: 1896.)

In an action by a wife, as administratrix of her deceased husband, against the father of the husband, for conversion of property of the deceased, it appeared that the property was transferred to the father by bill of sale for \$6,000, a large part of which was to be paid by the father's assumption of the son's debts; that it was then agreed that the son should carry on the business for the fa-

ther at a salary; and that he did so carry it on until his death. Plaintiff claimed that there was in fact no sale, and that the transfer was made to defraud her of her rights in the property,—it appearing that, at the time of the transfer, deceased was having trouble with her; that shortly after the transfer deceased transferred a life insurance policy to his father, who collected \$3,000 thereon after his death; that shortly thereafter real estate was conveyed by the son and his wife to the father, subject to a mortgage of \$3,000, which the father paid; and that deceased had declared that his reason for transferring the property was to preclude his wife from getting any money out of his estate when he died. *Held*, that a verdict for plaintiff was not warranted by the evidence.—*Pound v. Pound* (Minn.) 67 N. W. 200.

64 Minn. 428.

§ 18. Costs.

(Wis.: 1896.)

An action for conversion of property of a third person under execution is substantially the old action of trover, in which plaintiff must recover at least \$50 damages in order to be entitled to costs (Rev. St. § 2918, subd. 5); and, where plaintiff recovers only 6 cents, defendant was entitled to costs, as provided by section 2920.—*Engbee v. Lombard* (Wis.) 68 N. W. 958.

V. DAMAGES.

Exemplary damages for conversion, see "Damages," § 4.

Measure of damages for conversion by mortgagee, see "Chattel Mortgages," § 42.

—in action between mortgagees for conversion, see "Chattel Mortgages," § 28.

Recoverable by mortgagee, see "Chattel Mortgages," § 57.

§ 19. Measure of damages.

[a] (Iowa: 1895.)

Damages for wrongful conversion of notes does not include expenses of an unsuccessful defense to an action thereon by defendant's transferee, but merely the value thereof, which, in the absence of other evidence, is the face value thereof.—*Dean v. Nichols & Shepard Co.* (Iowa) 63 N. W. 582.

[b] (Neb.: 1895.)

Where property is left with a party to be cared for and sold, and, after deducting expenses, the proceeds to be delivered to the owner, and, after disposing of it, the party appropriated the proceeds to his own use, in an action against him for the conversion the measure of damages would be the amount of such proceeds.—*McCready v. Phillips* (Neb.) 63 N. W. 7.

44 Neb. 790.

[c] (Neb.: 1896.)

Where a note providing for annual payments of interest was converted by one who collected the annual installments as they became due, and appropriated them to his own use, the owner could recover of such person the aggregate amount of interest so collected.—*Halbert v. Rosenbalm* (Neb.) 68 N. W. 622.

[d] (Neb.: 1897.)

In replevin, where the property is returned to defendant for plaintiff's failure to give the statutory undertaking, and the action proceeds as one for conversion, the measure of plaintiff's damages, if the right of property and possession are found in his favor, is the market value of the property, with interest.—*Baum Iron Co. v. Union Sav. Bank* (Neb.) 69 N. W. 939.

[e] (Wis.: 1897.)

The measure of damages for conversion of paving cedar, which is an article of general merchandise, is not its value as firewood.—*La Chapelle v. Warehouse & Builders' Supply Co.* (Wis.) 70 N. W. 589.

§ 20. Evidence as to value of property converted.

[a] (S. D.; 1897.)

The face value of notes and mortgages is presumed to be their real value in an action for their conversion, under Comp. Laws, § 4615, providing that for the purpose of estimating damages the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner.—*Grigsby v. Day* (S. D.) 70 N. W. 881.

[b] (Wis.; 1897.)

On an issue as to the cost of property converted, evidence of the price paid therefor by plaintiff, whose purchase was in open market, is admissible, where there is evidence of the condition of the property at the time of conversion, as compared with its condition when purchased.—*Ganche v. Milbrath* (Wis.) 69 N. W. 999.

§ 21. Excessive damages.

(Iowa; 1896.)

In conversion, where there was evidence to the effect that the goods converted were worth from \$1,800 to \$2,000, that the rent of the store building during the time plaintiff was deprived of it was worth \$175, and that the accounts were worth over \$1,000, a verdict allowing plaintiff \$2,500 damages was not excessive.—*Casey v. Ballou Banking Co.* (Iowa) 67 N. W. 98.

TRUST COMPANIES.

See "Banks and Banking," § 7.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

I. EXPRESS TRUSTS. §§ 1-4.

II. IMPLIED TRUSTS, §§ 5-15.

1. In General, § 5.
2. Resulting Trusts, §§ 6-11.
3. Constructive Trusts, §§ 12-15.

III. APPOINTMENT OF TRUSTEES—POWERS, DUTIES, AND LIABILITIES, §§ 16-20.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY, §§ 21, 22.

V. ACCOUNTS AND COMPENSATION OF TRUSTEE, §§ 23, 24.

VI. BENEFICIARIES — CESTUI QUE TRUST, §§ 25-31.

VII. EQUITY JURISDICTION—PLEADING, §§ 32, 33.

See, also, "Charities"; "Depositories"; "Executors and Administrators"; "Guardian and Ward"; "Wills."

Combinations of carriers, see "Carriers," § 1.

Creation by will, see "Wills," § 53.

Deposits as trust funds, see "Banks and Banking," § 10.

Limitation of actions involving, see "Limitation of Actions," § 26.

Parol trust for benefit of creditors, see "Assignment for Benefit of Creditors," § 9.

Power of city to act as trustee, see "Municipal Corporations," § 11.

—of corporation to act as trustee, see "Corporations," § 3.

Secret trust, see "Assignment for Benefit of Creditors," § 10.

Trust companies, see "Banks and Banking," § 7.

Trustees as proper parties plaintiff, see "Parties," § 8.

I. EXPRESS TRUSTS.

§ 1. Creation and validity.

[a] (Mich.; 1896.)

Complainant sent money to defendant, for whom she had worked, with the understanding that it was to be used by defendant to purchase a home, and that complainant was to be paid 5 per cent. interest; and a letter from defendant was introduced, which read: "This morning's mail brought us word that you were willing to lend us \$2,500 at 5 per cent. * * * Let me know when we can have the money, as we want to secure lots." After receiving the money, for which no security was given, defendant purchased a home, the title being taken in her husband's name. *Held*, that the advance was a loan, and not a trust.—*Price v. Dawson* (Mich.) 69 N. W. 650.

[b] (Mich.; 1896.)

A person, after telling his wife to give \$1,000 to H., died, leaving all his property to his wife. She made payments from time to time to H., and told persons that she should follow her husband's wishes, and give H. \$1,000; that she should give it in small payments, so H. would use it for her own personal use, though H. wanted it all at once; that she should pay it as soon as she could make arrangements; that she should pay interest until she did give it to her; and, finally, that she should give \$500 of it when certain money was paid her, before which time she died. *Held*, that no trust was created.—*Hamilton v. Hall's Estate* (Mich.) 69 N. W. 484.

[c] (Mich.; 1897.)

A deed for a church site, which, as a part of the consideration therefor, provided that "said church, when on said site, shall, when not in use by the party of the second part hereto, be open for use to the following orthodox denominations, to wit," created a valid trust in the property in favor of the denominations named, which may be enforced in equity.—*White v. Rice* (Mich.) 70 N. W. 1024.

[d] (Minn.; 1894.)

Fifteen days after the making of a deed by decedent, the grantee therein wrote decedent that he would hold the property in trust for him, and subject to his order; and a few days before decedent's death such grantee again wrote him, asking for detailed arrangements as to what should be done with the property, and suggesting that he deed it back to decedent. Before this, decedent had written a letter to said grantee, that in case of decedent's death the property should be deeded to intervener, and gave the letter to the latter, who retained it till decedent's death. *Held*, that the property was held in trust for decedent, and not for intervener, the letter directing a conveyance to the latter being purely testamentary in character.—*Conrad v. Douglas* (Minn.) 61 N. W. 673. 59 Minn. 498.

§ 2. Agreement to hold for use of another.

(Mich.; 1895.)

Where deceased, in his lifetime, inclosed in separate envelopes certain negotiable instruments, with bills of sale thereof to his daughter and grandson, respectively, and indorsed their respective names on each envelope, and declared that he had set them apart and held them in trust for said persons, a trust was thereby created, though deceased, during his life, retained said instruments in his possession, and collected the interest thereon.—*O'Neil v. Greenwood* (Mich.) 64 N. W. 511; *Warner v. Same*, Id.

§ 3. Validity of oral trusts.

[a] (Iowa; 1896.)

Evidence of a verbal agreement by an administrator to buy at execution sale, on a judgment against his decedent, for the benefit of the

heirs, and to convey to them when the rents equaled the price paid at the sale, is inadmissible to establish an express trust, since Code, § 1934, provides that trusts in realty, other than resulting trusts, must be executed in the same manner as deeds.—*Maroney v. Maroney* (Iowa) 66 N. W. 911.

[b] (Minn.: 1895.)

A verbal declaration of trust, when there is no bad faith except that which arises from the refusal to carry out the promise, is void.—*Luce v. Reed* (Minn.) 65 N. W. 91.

63 Minn. 5.

§ 4. Requirements of statute of frauds.

[a] (Iowa: 1894.)

A statement by a husband, after selling land conveyed to him by warranty deed, that the proceeds of sale belong to his wife, and that he intends to buy a farm for her therewith, will not create in her favor a trust in the land bought with such proceeds.—*Acker v. Priest* (Iowa) 61 N. W. 235.

92 Iowa, 610.

[b] (Iowa: 1895.)

Defendants, who held a second mortgage on plaintiff's property, agreed to pay the debts against the property, and to hold the land as security, they to have right to take a deed from the purchaser at the foreclosure sale of the first mortgage, and to foreclose their own mortgage, and take a deed thereunder to cut off other lien holders, and as collateral security. Leases of the premises were to be made, under which the plaintiff was to pay defendants a sum of money each year, to be applied on the debt due from plaintiff, and, on payment of the entire amount advanced by defendants, defendants were to reconvey to him the premises. *Held*, that this was a contract to create an express trust, which, under Code, § 1934, must be in writing.—*Dunn v. Zwilling* (Iowa) 62 N. W. 746.

[c] (Iowa: 1896.)

Under McClain's Code, § 3105, which requires all declarations or creations of trusts in relation to real estate to be executed in the same manner as deeds of conveyance, an assignor of a judgment and decree of foreclosure in his favor by a written assignment, absolute on its face, cannot establish a resulting trust by parol in the mortgaged property after its purchase by the assignee under the decree.—*Hemstreet v. Wheeler* (Iowa) 69 N. W. 521.

[d] (Mich.: 1895.)

Where complainant purchased land in his wife's name, with the parol understanding that it was to be occupied as a home by complainant and wife, so long as each should live, but the wife devised the property to others, complainant cannot enforce a trust against the devisees, as How. Ann. St. § 6179, provides that no estate or trust in lands shall be created unless by operation of law or deed in writing.—*Chapman v. Chapman* (Mich.) 65 N. W. 215.

[e] (Minn.: 1895.)

A verbal declaration of trust in lands is void.—*Luce v. Reed* (Minn.) 65 N. W. 91.

63 Minn. 5.

[f] (Neb.: 1896.)

A parol agreement by a grantee to reconvey real estate to his grantor is within the statute of frauds, and does not create an express trust in such real estate, in favor of the grantor.—*Thomas v. Thomas* (Neb.) 67 N. W. 182.

48 Neb. 266.

II. IMPLIED TRUSTS.

1. IN GENERAL.

§ 5. In property conveyed by husband to wife.

(Neb.: 1897.)

Where a husband has conveyed property to his wife, holding other property still in his

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own name, and there is no evidence that he at any time claimed that his wife held this property in trust for him, or any explicit declaration by the wife that she so held it, the evidence is insufficient to establish a trust in the property in behalf of the husband's estate.—*Kobarg v. Greder* (Neb.) 70 N. W. 921.

2. RESULTING TRUSTS.

§ 6. In general.

[a] (Minn.: 1896.)

Before actual organization of a corporation, an incorporator, who subsequently became president, agreed with his associates to purchase a site for the plant of the corporation, and that the sum paid therefor should be credited on his subscription. After organization he purchased the site pursuant to previous negotiations with the owner, taking the deed in his own name without the corporation's knowledge, and subsequently he entered on the site as general manager of the corporation, and, by its authority, and with its money, erected thereon a plant for it. *Held*, that he holds the legal title in trust for the corporation.—*Nester v. Gross* (Minn.) 69 N. W. 39.

[b] (Neb.: 1897.)

Where a husband conveyed to his wife certain land, with the intent that she should hold title, and the place should be kept as a home for the enjoyment of the husband and wife and the other members of the family, and the wife continued to live on the property and managed it for several years during the absence of the husband, there was no such resulting trust in favor of the husband as would entitle him to a decree for reconveyance.—*Klump v. Klump* (Neb.) 70 N. W. 525.

[c] (Neb.: 1897.)

Where a husband seeks a reconveyance of land from his wife on the ground of a resulting trust, he cannot question the validity of the conveyance by him to his wife on the ground that she did not join in the conveyance.—*Klump v. Klump* (Neb.) 70 N. W. 525.

[d] (Wis.: 1896.)

Where the consideration for a parol sale of land has been paid in part, and the purchaser let into possession, the vendor, to the extent of the purchase money received, holds the legal title in trust for the purchaser.—*Bartz v. Paff* (Wis.) 69 N. W. 297.

§ 7. Ineffective declaration of trust.

(Iowa: 1896.)

In an action by heirs to recover land, there was evidence that it had been fraudulently conveyed by decedent, and that his administrator had bought it in at execution sale, on a judgment against decedent, while it was in possession of the fraudulent grantee; that the decree subjecting the land to such judgment did not divest the title of such grantee; that the purchase was made under a verbal agreement with such grantee and one of the plaintiffs that the administrator should hold the land in trust for plaintiffs until the rents should equal the price paid, and should then convey it to plaintiffs. It was shown that no part of the price was taken from decedent's estate, that the value of the land was not materially greater than the price paid, and that the administrator had improved the property and treated it as his own. *Held*, that a resulting trust did not arise in favor of plaintiffs.—*Maroney v. Maroney* (Iowa) 66 N. W. 911.

§ 8. Voluntary conveyance with intention to retain equitable interest.

(Mich.: 1895.)

Where a mortgage is assigned without consideration, and with the understanding that the beneficial interest is to remain in the assignor, a trust vests in favor of the assignor, which, on his death, passes to his estate.—*Rice v. Rice* (Mich.) 65 N. W. 103.

§ 9. Payment of consideration for conveyance to another.

[a] (Iowa; 1895.)

Evidence that defendant husband contracted for the purchase of lands, and paid part of the price; that the contract was not recorded, and title was taken in defendant wife's name; and that afterwards defendants contracted to sell the land, and the purchaser paid part of the price to defendants,—is sufficient to sustain a finding that the land was defendants', as against one claiming to be the equitable owner through payment of the price.—*Goldsmith v. Alexander* (Iowa) 63 N. W. 360.

[b] (Neb.; 1895.)

Where a husband buys land with his wife's money, and takes title in his own name without her consent, a trust arises in favor of the wife, which equity will protect against the husband's creditors unless the debts were contracted on the faith of his ownership.—*Hews v. Kenney*, 62 N. W. 201, 43 Neb. 815.

[c] (Neb.; 1895.)

One of several parties who furnished money to buy land, the title to which was taken in the name of one of the parties who contributed to the purchase, could enforce the trust in the land resulting in his favor against the holder of the title.—*Leader v. Tierney* (Neb.) 64 N. W. 226, 45 Neb. 753.

[d] (S. D.; 1896.)

Defendant's intestate purchased certain lands, the deeds being placed in escrow to await payment of the price. Under an arrangement with plaintiff, defendant's intestate drew upon him for the price of the land, depositing the proceeds of the draft in a bank to his own credit, in partial extinguishment of a large overdraft. The money was not paid over for the purchase of the land until nearly 18 months had elapsed. *Held*, that the evidence was insufficient to show that the consideration for the land was paid by plaintiff, within the meaning of Comp. Laws, § 2796, providing that when real estate is transferred from one person, the consideration being paid by or for another, a trust was presumed to result in favor of the person by or for whom such payment is made. *Corson, P. J.*, dissenting.—*Graham v. Selbie* (S. D.) 67 N. W. 831.

[e] (S. D.; 1896.)

In order to establish a resulting trust under Comp. Laws, § 2796, providing that when real estate is transferred to any person, the consideration being paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, the payment by or for one who seeks to enforce the trust must be established by substantial proof that the money was actually used for the purchase of the property with the intention that the title should be taken in trust.—*Graham v. Selbie* (S. D.) 67 N. W. 831.

§ 10. — Prohibition by statute.

[a] (Mich.; 1896.)

Under 2 How. Ann. St. § 5569, providing that where a grant is made to one person, and the consideration is paid by another, no use or trust shall result in favor of the person by whom the payment is made, a reconveyance cannot be enforced from a grantee to whom title is taken for convenience, though he paid no consideration, in the absence of a written declaration of trust.—*Tiffany v. Tiffany* (Mich.) 68 N. W. 127.

[b] (Minn.; 1895.)

A certificate of sale of school land, made by the commissioner of the state land office, pursuant to Gen. St. 1878, c. 38, § 8 (Gen. St. 1894, § 3967), is a "conveyance," within Gen. St. 1878, c. 43, § 7 (Gen. St. 1894, § 4280), prohibiting resulting trusts in favor of a third person paying the consideration for a conveyance.—*Haaven v. Hoas* (Minn.) 62 N. W. 110, 60 Minn. 313.

[c] (Minn.; 1895.)

Under Gen. St. 1894, § 4280, prohibiting resulting trusts in favor of a third person paying the consideration for a conveyance, where plaintiff, in purchasing school land, directed the certificate of sale to be made in the name of defendant without the latter's knowledge, no trust in the land resulted in plaintiff's favor.—*Haaven v. Hoas* (Minn.) 62 N. W. 110, 60 Minn. 313.

§ 11. Conveyance by father to daughter's husband—Trust in favor of daughter.

(Iowa; 1894.)

Where a wife's father, with her consent, for the purpose of making an equal distribution of his property among his children, causes land to be conveyed to her husband by a deed of general warranty, the land is not charged with any trust in favor of the wife.—*Acker v. Priest* (Iowa) 61 N. W. 235, 92 Iowa, 610.

3. CONSTRUCTIVE TRUSTS.

§ 12. What constitute.

[a] (Iowa; 1894.)

Where a mortgagor of cattle sells them with the consent of the first mortgagee, and deposits the proceeds to his own credit in a bank which is a second mortgagee, and applies the money to the payment of the debt due the bank, such bank does not hold the money in trust for such mortgagee, though before such sale the mortgagor agreed that the proceeds of the sale should be sent to such bank, to be applied on his mortgage, where the bank had no knowledge of such agreements.—*Smith v. Crawford County State Bank* (Iowa) 61 N. W. 378.

[b] (Neb.; 1897.)

The cashier of a bank used the bank's funds to purchase stock in another bank. *Held*, that equity would charge the stock with a trust in favor of the former bank.—*Tecumseh Nat. Bank v. Russell* (Neb.) 69 N. W. 763.

§ 13. Fraud

[a] (Iowa; 1895.)

A refusal to perform a parol agreement creating a trust, and a denial of its existence, do not constitute fraud, so as to authorize transactions under this agreement to be treated as creating a constructive trust.—*Dunn v. Zwillling* (Iowa) 62 N. W. 746.

[b] (Minn.; 1895.)

The fact that it appeared, in an action by a husband against the wife's administrator to have it declared that land conveyed to the wife by plaintiff's mother at his instance, and for his benefit, and constituting part of the wife's estate, was held in trust for plaintiff, that the wife represented, before the conveyance, to both plaintiff and his mother, that she was without relatives, so that on her death the land would go to plaintiff, did not require a finding of a trust *ex maleficio* in her.—*Luce v. Reed* (Minn.) 65 N. W. 91, 63 Minn. 5.

[c] (Neb.; 1895.)

Where a vendee purchased goods through fraud, and after disposing of the same, with other goods, at different times, assigned for the benefit of his creditors, equity would not, on the vendor's rescinding the sale, declare the entire estate of the insolvent a trust fund for the vendor.—*Farwell v. Kloman* (Neb.) 63 N. W. 798, 45 Neb. 424.

§ 14. Wrongful disposition of property. (Iowa; 1896.)

E., engaged in selling goods, received goods from D. under a contract by which E. was to be agent for D., and the goods and

proceeds of sales were to remain the property of D., and be treated as a special deposit for D. till finally settled for; there being provision for remittance of proceeds of sale immediately on receipt thereof. *Held*, that E. having, to the knowledge of D., without objection, retained and used the moneys received from such sales, and treated the money received therefrom, together with that received from other sources, as a common fund, D. could not claim it, against other creditors of E., as a trust fund, but had the rights only of a general creditor.—*Richards v. Schreiber, Conehar & Westphal Co. (Iowa)* 67 N. W. 569.

§ 15. Dealings between persons in confidential relations.

[a] (*Iowa*; 1894.)

Where a mortgagee of cattle consents to their sale by the mortgagor, the latter is not a trustee of the mortgagee, in the absence of an agreement that the sale shall be in the name of such mortgagee.—*Smith v. Crawford County State Bank (Iowa)* 61 N. W. 378.

[b] (*Mich.*; 1895.)

Defendant, with the consent of the owner, who was in failing circumstances, took possession of the latter's stock of goods under a bill of sale and agreement previously made between them. Defendant afterwards sold the stock at private sale to his brother for a sum less than the stock was claimed to be worth. *Held* that, if defendant agreed to account to the seller for any surplus proceeds of sale over his claim, the burden was on him to show that the sale to his brother was in good faith.—*Duffie v. Clark (Mich.)* 64 N. W. 57.

III. APPOINTMENT OF TRUSTEES—POWERS, DUTIES, AND LIABILITIES.

Power of courts to appoint trustee for charitable trust, see "Charities," § 4.

§ 16. Appointment of trustee.

(*Mich.*; 1895.)

The refusal of an "administrator," appointed by a member of a benefit association to collect the amount due him therefrom in trust for his wife and children, to perform the trust, will not defeat a recovery of such amount, and an action therefor may be brought by a subsequently appointed administratrix.—*Neville v. Detroit Firemen's Fund Ass'n (Mich.)* 62 N. W. 169.

104 Mich. 149.

§ 17. Powers.

[a] (*Mich.*; 1895.)

A provision in a deed of trust authorizing the trustee to borrow money to pay off certain enumerated liens on the property conveyed, and to repay the money so borrowed "out of any money that may come into his hands as trustee," vested in such trustee a power, to be exercised in his discretion, for the preservation of the estate, and did not entitle the holders of the liens named to require the trustee to apply to the payment of their liens money received from an insurance company for losses on property conveyed by the deed.—*First Nat. Bank v. Michigan Trust Co. (Mich.)* 63 N. W. 64.

105 Mich. 107.

[b] (*Neb.*; 1895.)

Where the powers of a trustee are clearly defined by the deed creating the trust, which is recorded, persons dealing with him in respect to the trust property are chargeable with notice of his powers.—*Stark v. Olsen (Neb.)* 63 N. W. 37.

44 Neb. 646.

§ 18. Contracts.

(*Minn.*; 1895.)

One employed by a trustee to render services beneficial to the trust estate could not, in the absence of a stipulation by the trustee against personal liability, or an undertaking by him to create a lien on the trust estate, hold the beneficiaries liable.—*Truesdale v. Philadelphia Trust, Safe-Deposit & Insurance Co. (Minn.)* 65 N. W. 133.

63 Minn. 49.

§ 19. — Borrowing money.

(*Mich.*; 1896.)

A testator, who had large business interests and outstanding obligations, by his will devised and bequeathed all his estate to his executors in trust, for the term of five years, with full power to sell and mortgage, the will containing the further recital: "My object in creating the aforesaid trust is in order that my estate may be kept together in the manner therein provided until my various business interests can be closed up advantageously to my said estate." *Held*, that the will created a trust, which authorized the trustees to extend and renew indebtedness of the testator, and to execute new notes binding on the estate for money to pay maturing indebtedness, in the legal discretion of the trustees.—*Packard v. Kingman (Mich.)* 67 N. W. 551.

§ 20. Investments.

(*Mich.*; 1896.)

Where a will creates a trust fund, and leaves the manner of its investment to the discretion of the trustees, the latter will be personally liable for any failure to exercise sound discretion and good faith.—*Caspari v. Cutcherson (Mich.)* 67 N. W. 1093.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 21. Sale.

[a] (*Minn.*; 1896.)

A contingent interest in trust property is bound by a sale, mortgage, or lease thereof, made by the court for the purpose of preserving the trust, when the court had before it all the parties that could be brought before it, and acted on the property according to the rights that appeared, without fraud.—*Mayall v. Mayall (Minn.)* 65 N. W. 942.

63 Minn. 511.

[b] (*Minn.*; 1896.)

For the purpose of preserving a trust, a court has jurisdiction to order a sale, mortgage, or lease of the trust property, though the instrument creating the trust contains no power so to do.—*Mayall v. Mayall (Minn.)* 65 N. W. 942.

63 Minn. 511.

§ 22. Delegation of trust.

(*Neb.*; 1896.)

Where a guardian executed a note and mortgage to a trustee to secure an indebtedness due the ward, and delegated his trust to the payee of the note and mortgage, the creditors of the guardian had no standing, in an action by the trustee against them for conversion of the mortgaged property, to object to the delegation of the trust.—*Plummer v. Green (Neb.)* 68 N. W. 500.

V. ACCOUNTS AND COMPENSATION OF TRUSTEE.

§ 23. Credits.

[a] (*Mich.*; 1895.)

Where a stock of goods was turned over to one under an agreement by him to satisfy a

claim against the owner, and the claim is put in judgment at the former's suggestion, he cannot add costs to the claim, and charge the owner with the total.—*Dullie v. Clark* (Mich.) 64 N. W. 57.

[b] (Mich.; 1896.)

A trustee against whom judgment has been rendered for taxes on credits held by him for a nonresident cestui que trust is entitled to pay the judgment from the trust fund, and credit himself with the amount so paid.—*City of Detroit v. Lewis* (Mich.) 66 N. W. 958.

§ 24. Compensation of trustees.

(Iowa; 1895.)

Trustees under a will, who are also named therein as executors, should be compensated for their ordinary services at the same rate as that at which they received compensation as executors, under Code, § 2494.—*In re Gloyd's Estate* (Iowa) 61 N. W. 975.

93 Iowa, 303.

VI. BENEFICIARIES—CESTUI QUE TRUST.

§ 25. Rights of beneficiaries.

(Wis.; 1895.)

Where a cestui que trust is unable to trace a trust fund, or the specific property into which it has been converted, into the hands of the assignee or receiver of a defaulting or insolvent trustee, the trust fails, and his claim will stand on the same basis as the claims of general creditors.—*Burnham v. Barth* (Wis.) 62 N. W. 96, 89 Wis. 362.

§ 26. Enforcing trust.

(Minn.; 1896.)

The heir of the grantor in a trust deed conveying property in trust for the grantor and his heirs is not entitled, 30 years after a reconveyance of the trust property to the grantor by the grantee, to have the trust enforced in his favor.—*Ewing v. Clark* (Minn.) 67 N. W. 669.

§ 27. — Jurisdiction of probate court.

[a] (Mich.; 1896.)

Where a trust has been created by a deed executed by legatees to carry out the provisions of the will, the will and the trust deed should be read together, to arrive at the full meaning of the deed; and therefore the probate court has jurisdiction of a controversy arising thereunder between the trustees and the heirs of the beneficiaries.—*In re Sweetser's Estate* (Mich.) 67 N. W. 130; *Sanborn v. Sanborn*, Id.

[b] (Minn.; 1895.)

In an action by a husband against his deceased wife's administrator to have land held by the wife in her lifetime, and constituting a part of her estate, declared to have been held in trust for plaintiff, it could not be determined whether plaintiff's statutory interest in the deceased wife's estate was subject to the claims of her creditors; that question being for the probate court.—*Luce v. Reed* (Minn.) 65 N. W. 91.

63 Minn. 5.

§ 28. Following trust property.

[a] (Mich.; 1895.)

When land is held in trust, the money arising from its sale is impressed with the trust in the hands of a third party who knows its character.—*McArthur v. Robinson* (Mich.) 62 N. W. 713.

104 Mich. 540.

[b] (Mich.; 1897.)

Where a debtor has transferred his property in trust to pay his debts, creditors are not estopped to pursue the trust fund in equity by the fact that they have taken judgment at law on their claims, and have sought to collect said

judgment by garnishment of another fund.—*Matthews v. Forslund* (Mich.) 70 N. W. 1105.

[c] (N. D.; 1896.)

The owner of trust property which has been converted by the trustee, who loaned the proceeds to a third person, cannot follow the money into the hands of the third person, but must look to the obligation of the borrower to the lender in the hands of the lender as the property of the beneficiary in a new form.—*Seybold v. Grand Forks Nat. Bank* (N. D.) 67 N. W. 682.

5 N. D. 460.

§ 29. — Mingling trust and private funds.

(Wis.; 1895.)

Where a trustee mingles trust money with his own, any money drawn from the common fund will be deemed to have been drawn by the trustee from his own, instead of the trust, funds.—*Burnham v. Barth* (Wis.) 62 N. W. 96, 89 Wis. 362.

§ 30. — Priorities in case of trustee's insolvency.

[a] (Wis.; 1895.)

A cestui que trust, in order to regain a trust fund out of the estate of a defaulting or insolvent trustee, must trace it into, and identify it—or the specific property into which it was converted—in, the hands of the assignee or receiver of the estate.—*Burnham v. Barth* 62 N. W. 96, 89 Wis. 362.

[b] (Wis.; 1895.)

Where a bank mingles trust funds with its own, and disperses all the money,—part of it by investing in securities or other property, taking the legal title thereto in its own name,—and subsequently becomes insolvent, there is no presumption that the trust funds are represented by the securities or property, the legal title to which is in the bank.—*Burnham v. Barth* 62 N. W. 96, 89 Wis. 362.

[c] (Wis.; 1895.)

One who has consigned merchandise for sale to a firm cannot recover the proceeds thereof, in an action against the receiver of the firm, where the funds could not be followed into any property or money which came into the hands of the receiver.—*Henika v. Heinemann* (Wis.) 63 N. W. 1047.

90 Wis. 478.

[d] (Wis.; 1895.)

Where an agent, who converted and mixed with his own funds money collected for his principal, made a general assignment of all his property for the benefit of creditors, the principal can prove only as a general creditor, when the money collected cannot be identified as money or traced into any specific property in the hands of the assignee.—*Gianella v. Momsen* (Wis.) 63 N. W. 1018.

90 Wis. 476.

§ 31. Rights and remedies of creditors of cestui que trust.

[a] (Mich.; 1895.)

How. Ann. St. § 6614, declaring that, when execution is returned unsatisfied, the judgment creditor may file bill for discovery, etc., of property held in trust for defendant, except where such trust has been created by some person other than defendant; construed with section 5575, providing that, when a trust is created to receive rents and profits, and no valid direction for accumulation is given, the surplus of the rents and profits, beyond the sum necessary for support of the cestui que trust, shall be liable in equity to claims of creditors of such person as other personal property which cannot be reached by execution,—does not prevent creditors of the cestui que trust from reaching the income, in excess of a fair support of the cestui que trust, from a trust created by will directing that the

surplus be paid the cestui que trust.—*Spring v. Randall* (Mich.) 64 N. W. 1063.

[b] (Mich.; 1895.)

A judgment creditor of a cestui que trust may reach income of the trust by petition to the court having jurisdiction of the trust estate, instead of by original bill.—*Spring v. Randall* (Mich.) 64 N. W. 1063.

[c] (Mich.; 1895.)

The court having jurisdiction of a trust estate may direct the trustee to pay a judgment against the cestui que trust out of the surplus income.—*Spring v. Randall* (Mich.) 64 N. W. 1063.

VII. EQUITY JURISDICTION—PLEADING.

§ 32. Jurisdiction.

[a] (Iowa; 1895.)

Defendant was director of a bank, and member of its investment committee, and sold a stock of goods owned by him to an irresponsible firm, taking its notes for the price, secured by a mortgage on the stock and additions thereto. The firm dealt with the bank, and borrowed large sums of money from time to time, with defendant's approval; but defendant never disclosed the firm's debt to him, and did not record his mortgage until the day before the bank sued the firm to recover the loans. Subsequently he took the stock in satisfaction of the notes, and the bank attached and sold the same, applied the proceeds on its claim against the firm, and sued defendant in equity for a decree declaring the stock subject to its attachment, and defendant's mortgage void as to it, for an injunction against defendant's claiming under the mortgage, and for an accounting, and a personal judgment against defendant for the balance due from the firm, which it alleged it lost through defendant's breach of trust. *Held*, that since Code, § 2508, authorizes one to prosecute his action by equitable proceedings in all cases where equity had jurisdiction before the adoption of the Code, it was proper to refuse to strike from the petition that part which sought to recover for defendant's breach of trust.—*Toledo Sav. Bank v. Johnston* (Iowa) 62 N. W. 748.

[b] (Minn.; 1896.)

The fact that the interests of an infant were involved in the administration of a trust did not give the probate court jurisdiction pro tanto.—*Mayall v. Mayall* (Minn.) 65 N. W. 942. 63 Minn. 511.

§ 33. Pleading.

(Minn.; 1895.)

It was not error to refuse to permit a complaint in an action to have defendant declared to hold certain land in trust for plaintiff, alleging that defendant was plaintiff's wife, and that the conveyances were made to her for his benefit, to be amended, so as to raise in plaintiff's favor a trust ex maleficio, by alleging that defendant never was plaintiff's wife, but that he always supposed she was, and that she fraudulently procured him to have the land conveyed to her by fraudulently holding herself out to him as his lawful wife.—*Luce v. Reed* (Minn.) 65 N. W. 91.

63 Minn. 5.

TUITION.

See "Schools and School Districts," § 28.

TURNPIKES AND TOLL ROADS.

Injunction against construction of plank road, see "Injunction," § 16.

Use of toll road by street-car company, see "Horse and Street Railroads," § 7.

§ 1. Forfeiture of charter—Effect.

(Mich.; 1895.)

Upon the forfeiture of its charter, and the abandonment of a plank road by the company maintaining it, the land becomes a public highway, and does not revert to the abutting owner.—*Commissioner of Highways of Pontiac Tp. v. Cobb* (Mich.) 62 N. W. 554.

104 Mich. 395.

§ 2. Defects and duty to keep in repair.

[a] (Mich.; 1895.)

The fact that a bridge constituting part of a plank-road company's road is destroyed without its negligence, does not relieve it from the duty to rebuild it.—*People v. Plainfield Ave. Gravel-Road Co.* (Mich.) 62 N. W. 998.

105 Mich. 9.

[b] (Mich.; 1895.)

A plank-road company extending its road by amendment of its charter is under the same liability to keep the part added by the amendment in repair as that originally included.—*People v. Plainfield Ave. Gravel-Road Co.* (Mich.) 62 N. W. 998.

105 Mich. 9.

[c] (Mich.; 1895.)

How. Ann. St. § 3598, providing that plank-road companies shall be subject to the provisions relating to general corporations so far as they are applicable and consistent with the act, one of which provisions empowers corporations to amend their charters, does not authorize a turnpike company to abandon a portion of its road which it has taken in by amendment, and thereby escape liability to keep the same in repair.—*People v. Plainfield Ave. Gravel-Road Co.* (Mich.) 62 N. W. 998.

105 Mich. 9.

[d] (Mich.; 1895.)

How. Ann. St. § 3624, provides that whenever any plank-road company shall have constructed any five miles of its road it may charge toll during the period of construction. Section 3649 provides that such companies, by failure to keep their roads in repair, shall forfeit their right to take toll. *Held*, that such a company cannot abandon a bridge constituting a part of its road, and thereby escape liability to keep the same in repair, though it still retains five miles of road.—*People v. Plainfield Ave. Gravel-Road Co.* (Mich.) 62 N. W. 998.

105 Mich. 9.

[e] (Mich.; 1896.)

Act 1877, No. 144, approved May 17th, and amendments, providing for the supervision of highways by the highway commissioner, empowers such officer to sue to compel a plank-road company authorized to maintain a plank road upon an existing highway to use the material required by law, in the repair of its road.—*Detroit & Erin Plank-Road Co. v. Macomb Circuit Judge* (Mich.) 67 N. W. 531.

TUTORS.

See "Guardian and Ward."

U.

ULTRA VIRES.

Acts of national banks, see "Banks and Banking," § 40.
 Contract of building association, see "Building and Loan Associations," § 6.
 — of city as to public improvement, see "Municipal Corporations," § 126.
 — of corporations, see "Corporations," § 25.
 — of railroad company, see "Railroad Companies," § 14.

UNCONSCIONABLE CONTRACT.

See "Building and Loan Associations," § 4.
 Rescission in equity, see "Equity," § 17.

UNDERTAKINGS.

In attachment, see "Attachment," §§ 18-23.
 On appeal, see "Appeal," §§ 61-70.
 — from justice, see "Appeal," § 163.

UNDUE INFLUENCE.

See "Wills," §§ 7-10.
 As ground for rescission of contract, see "Equity," § 33.

UNION SOLDIERS.

Preference in appointment to office, see "Office and Officer," § 2.

UNITED STATES.

See, also, "Admiralty"; "Bankruptcy"; "Patents for Inventions"; "Public Lands."

(Iowa: 1897.)

An officer of the general government, when not acting within the scope of his employment, is amenable to the laws of a state, when within its limits.—*State v. Waite* (Iowa) 70 N. W. 596.

UNIVERSITIES.

See "Colleges and Universities."

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

UNLIQUIDATED CLAIMS.

Right to set-off, see "Set-Off and Counterclaim," § 7.

USAGE.

See "Custom and Usage."

USE AND OCCUPATION.

Of insured premises, conditions in policy, see "Insurance," § 48.

(Mich.: 1895.)

Defendant went into possession of premises under a lease. In an action for rent, the

declaration, which was not demurred to, contained the common counts and a copy of the lease, which was made part of a special count for damages for breach of contract, but contained no count for use and occupation. *Held*, that plaintiff could recover for use and occupation, it being admitted that he went in under the lease.—*Twitchell v. Goebel* (Mich.) 64 N. W. 56.

USES.

See "Trusts."

USURY.

- I. WHAT CONSTITUTES, §§ 1-10.
- II. EFFECT ON CONTRACT, §§ 11, 12.
- III. PENALTIES AND FORFEITURES, §§ 13-16.
- IV. REMEDIES OF DEBTOR, §§ 17-20.
- V. USURY AS A DEFENSE, §§ 21-24.

In loan from building association, see "Building and Loan Association," § 7.
 Right to set off usury, see "Set-Off and Counterclaim," § 10.

I. WHAT CONSTITUTES.

§ 1. In general.

[a] (Iowa: 1895.)

A contract to build a house for a sum certain, represented by the owner's notes, payable at fixed times, is not rendered usurious by a provision therein that all unpaid notes will be surrendered and canceled in case of the owner's death before the maturity of the last note of the series, provided he has paid all notes due at his death.—*Missouri, K. & T. Trust Co. v. Gantt* (Iowa) 62 N. W. 791.

[b] (Minn.: 1894.)

Where the amount to be paid by the borrower of money as principal, interest, and cost of collateral insurance on his life for the benefit of the lender exceeds the amount of the loan, with legal interest thereon, and the actual cost of the insurance, the contract is usurious, though the lender agrees to cancel the debt in case of the borrower's death before maturity.—*Missouri, K. & T. Trust Co. v. McLachlan* (Minn.) 61 N. W. 560.
 59 Minn. 468.

[c] (Minn.: 1895.)

Where a cashier, in taking a note for a private bank, exacted more than the legal rate of interest, *held*, that the note was usurious in the hands of the bank.—*Cromb v. Olson* (Minn.) 63 N. W. 108.
 60 Minn. 534.

[d] (Minn.: 1896.)

Where a creditor holding a note for a debt actually due him indorses and delivers it to a bank at a rate of discount greater than the rate of interest allowed by law, but not greater than the rate provided for in the note, the transaction may or may not be a loan, in which the note is delivered as collateral, and hence it is not necessarily void as usurious.—*Becker's Investment Agency v. Rea* (Minn.) 65 N. W. 928.
 63 Minn. 459.

[e] (Minn.: 1897.)

The price of property sold in good faith may be included in the same security with money loaned, and the fact that the price was large,

and more than the property could have been sold for, does not necessarily condemn the transaction as usurious.—*Saxe v. Womack* (Minn.) 66 N. W. 269.

64 Minn. 162.

[f] (Minn.; 1897.)

A note not originally usurious cannot be made so by an agreement for an extension, subsequently entered into, in consideration of a payment of, or a promise to pay, usurious interest.—*Morse v. Wellcome* (Minn.) 70 N. W. 978.

[g] (Minn.; 1897.)

Plaintiff gave a note for \$350, receiving \$250 out of the loan made, and testified that, when he signed the note, it was for the sum of \$250. Defendant introduced evidence that \$250 was paid plaintiff, \$35 was retained as interest in advance, and that the other \$65 was delivered to a third person for the use of plaintiff and at his request. *Held* that, according to plaintiff's own evidence, it was not a case of usury, but of fraud.—*Chambers v. Gilbert* (Minn.) 70 N. W. 1077.

[h] (Neb.; 1897.)

A loan is not tainted with usury because the money is borrowed to pay a usurious debt, the lender not knowing that fact.—*Steen v. Stretch* (Neb.) 70 N. W. 48.

§ 2. Antedating note.

(Neb.; 1895.)

Where a note bearing interest from date at the highest legal rate was dated at a time prior to its delivery, and prior to the receipt of the money by the borrower, as a device to cover usury, the transaction was usurious.—*Vail v. Van Doren* (Neb.) 63 N. W. 787.

45 Neb. 450.

§ 3. Compound interest.

[a] (Neb.; 1896.)

A stipulation in a note, providing for compound interest, does not render the note usurious.—*Lewis Inv. Co. v. Boyd* (Neb.) 67 N. W. 456.

48 Neb. 604.

[b] (Neb.; 1896.)

Interest, when stipulated for, may be allowed on coupon interest notes after their maturity, when the amount of interest on both coupon and principal does not exceed the maximum legal rate of interest on the principal sum.—*Lewis Inv. Co. v. Boyd* (Neb.) 67 N. W. 456.

48 Neb. 604.

§ 4. Payment of interest in advance.

[a] (Neb.; 1894.)

Where a loan is agreed on at 10 per cent. interest, but the note draws interest only at 7 per cent., a payment of a sum in advance which, with the interest on the note, does not amount to more than 10 per cent. allowed by Comp. St. c. 44, § 1, does not constitute usury.—*Pierce v. Davy*, 61 N. W. 92, 43 Neb. 45.

[b] (Neb.; 1897.)

Under a statute allowing interest not exceeding 10 per cent., and the taking of interest in advance by agreement of the parties, it is not usurious to deduct interest on the face of the note at the rate agreed upon, if not greater than 10 per cent., paying the borrower the difference.—*Steen v. Stretch* (Neb.) 70 N. W. 48.

§ 5. Bonus or gift from borrower to lender.

[a] (Mich.; 1895.)

Execution was levied against a leasehold interest of defendant, who assigned his interest to plaintiff under agreement that he should purchase at the sale with money partly furnished by defendant, and reconvey to defendant on payment of all sums expended by plaintiff, and the value of all services rendered, with interest, and also an additional sum in the nature of a bonus. *Held* that, the contract be-

ing a mortgage, the provision for the bonus rendered it usurious.—*Anderson v. Smith* (Mich.) 65 N. W. 615.

[b] (Minn.; 1895.)

Any bonus or gift by the borrower to the lender, to induce the latter to make the loan, which makes the amount paid for the use of the money borrowed an amount in excess of the legal rate of interest, renders the transaction usurious.—*Phelps v. Montgomery* (Minn.) 62 N. W. 260.

60 Minn. 303.

§ 6. Increase of rate of interest after maturity.

(Neb.; 1896.)

A provision in a note that it shall bear interest after maturity at a certain rate greater than that which it bears before maturity does not render the contract usurious, nor is the increase of interest in the nature of a penalty.—*Omaha Loan & Trust Co. v. Hanson* (Neb.) 65 N. W. 1058, 46 Neb. 870.

§ 7. Transaction through agent.

[a] (Minn.; 1895.)

The fact that the lender's agent exacted from the borrower a greater than the legal rate of interest, and included the excess in the note given for the loan as part of the principal, without the knowledge and contrary to the instructions of the lender, did not save the note from taint of usury.—*Stephens v. Olson* (Minn.) 64 N. W. 898; *Same v. Olstad*, *Id.*

62 Minn. 295.

[b] (Minn.; 1896.)

The fact that an agent who loaned money of his principal at the maximum rate of interest retained a commission out of the proceeds of the loan did not require a finding of usury, where the commission was retained without the knowledge or consent of the principal, and he received no benefit from it.—*Brainerd v. Prouty* (Minn.) 69 N. W. 3.

§ 8. Failure to specify rate of interest.

(N. D.; 1896.)

The fact that notes given for a loan, and the mortgage securing the same, failed to specify the rate of interest agreed to be paid, does not render the transaction usurious, under Laws 1890, c. 184, § 4, providing that in all written contracts for the loan of money the exact amount agreed upon to be received for the use of the borrower shall be stated in the contract separate from the interest, and that, if the borrower receives a less sum than the principal sum so specified, the contract shall be deemed usurious; nor under section 10, providing that, whenever it shall satisfactorily appear that any evidence of debt has been received in violation of the chapter, the court shall declare the same void.—*Folsom v. Kilbourne* (N. D.) 67 N. W. 291.

5 N. D. 402.

§ 9. Evidence—Sufficiency.

[a] (Minn.; 1895.)

A fair preponderance of evidence is only necessary to establish the fact of usury.—*Phelps v. Montgomery* (Minn.) 62 N. W. 260.

60 Minn. 303.

[b] (Neb.; 1896.)

There being evidence that the note in suit, admitted to be usurious, was acquired by plaintiff's son with funds belonging to plaintiff, and that the son knew of the usury at the time of the purchase, a verdict against plaintiff in an action on the note was warranted.—*Sanders v. Wedeking* (Neb.) 66 N. W. 18.

47 Neb. 71.

§ 10. Province of court and jury.

[a] (Iowa; 1896.)

Where it was in issue as to whether plaintiff consented to certain indorsements on

notes executed by him to intervener, and whether the notes were thereby purged of usury, it was proper to submit said issue to the jury.—*Kassing v. Walter* (Iowa) 65 N. W. 832.

[b] (Iowa; 1897.)

Where a person buys a machine, and sells it to another at an advanced price, and takes his note for it, it is a question for the jury whether the transaction was a device to cover usury.—*Kassing v. Ordway* (Iowa) 69 N. W. 1013.

[c] (Minn.; 1896.)

Whether an agreement by the borrower to pay the lender a certain sum to indemnify him for loss in discounting securities to obtain the money loaned is a mere device to evade the usury laws is a question for the jury, and cannot be determined as a matter of law on demurrer.—*Stevens v. Staples* (Minn.) 65 N. W. 959.
64 Minn. 3.

II. EFFECT ON CONTRACT.

§ 11. Promissory note.

(Neb.; 1894.)

The payee cannot recover interest on a usurious note, but only the money loaned, less payments of both principal and interest.—*Brewster v. Bank of Ainsworth* (Neb.) 61 N. W. 94, 43 Neb. 79.

§ 12. Mortgage.

(Minn.; 1895.)

Under Gen. St. 1894, § 2212, providing that a provision in any instrument for an increase of the rate of interest on maturity shall work a forfeiture of the entire interest thereon, a mortgage was not rendered void by the fact that the note secured thereby contained such a provision.—*Chase v. Whitten* (Minn.) 65 N. W. 84.

62 Minn. 498.

III. PENALTIES AND FORFEITURES.

§ 13. Extent of forfeiture.

(Wis.; 1896.)

Rev. St. Ill. 1881, c. 74, providing that, if any person shall contract to receive a greater rate of interest than 8 per cent., he shall forfeit the whole of said interest, and shall be entitled only to recover the principal, imposes the loss of all interest,—both that which accrues before and that accruing after maturity of the principal obligation.—*Maynard v. Hall* (Wis.) 66 N. W. 715.

92 Wis. 565.

§ 14. Action for penalty—Pleading.

[a] (Wis.; 1896.)

A complaint under Rev. St. § 1691, authorizing the recovery by a borrower of treble the amount of usury paid for a loan, is not defective because it fails to allege in terms that the sum paid was for the use of the money borrowed for a specified time, where it alleges facts showing that the amount exacted and paid exceeded by a certain sum the lawful interest on the money for the time it was kept by the borrower.—*Mathieson v. Schomberg* (Wis.) 68 N. W. 416.

[b] (Wis.; 1896.)

An answer to a complaint to recover for usury paid, which alleges that the sum claimed to have been borrowed by plaintiffs was placed in their hands by defendant for investment, with money of their own, in certain property, and that the amount included in the notes taken by defendant in excess of the sum so advanced was agreed upon as defendant's share of the profits of the investment, shows the transaction to have been a loan, and states no defense.—*Mathieson v. Schomberg* (Wis.) 68 N. W. 416.

§ 15. Action against national bank.

[a] (Minn.; 1896.)

State courts have jurisdiction of actions against national banks to recover the penalty prescribed by Rev. St. U. S. § 5198, for taking greater interest than allowed by the laws of the state in which the bank is located.—*Endres v. First Nat. Bank* (Minn.) 68 N. W. 1092.

[b] (Minn.; 1896.)

A complaint for a penalty for taking usurious interest, which alleged that plaintiffs had paid, and defendant had knowingly received and retained, a rate of interest greater than that allowed by law, specifying the sums, sufficiently showed usury, though it was not alleged that the payment was made as interest, pursuant to a prior contract for the future use of money.—*Endres v. First Nat. Bank* (Minn.) 68 N. W. 1092.

[c] (Neb.; 1895.)

The payment of a usurious loan made by a national bank is not a condition precedent to the right of the borrower to maintain an action against such bank to recover double the amount of usurious interest paid on such loan.—*Exeter Nat. Bank v. Orchard*, 61 N. W. 833, 43 Neb. 579.

[d] (Neb.; 1895.)

Act Cong. March 3, 1887, § 4, relating to the removal of causes, as corrected by Act Cong. Aug. 13, 1888, providing that all national banks shall be deemed citizens of the states in which they are located for the purpose of all actions by or against them, does not subject national banks to the laws of the states in which they are located as to remedies of the debtor for exaction by the creditor of usurious interest.—*Norfolk Nat. Bank v. Schwenk*, 64 N. W. 1073, 46 Neb. 381.

[e] (Neb.; 1897.)

In an action against a national bank to recover the penalty for taking usury, it appeared that the transactions between the plaintiff and the bank consisted of a large number of loans evidenced by notes, many of which had been from time to time renewed. *Held*, that evidence of the whole course of transactions was material in order to trace the different debts and the interest reserved on each, although some transactions were not pleaded as usurious.—*First Nat. Bank v. Barnett* (Neb.) 70 N. W. 937.

[f] (Neb.; 1897.)

Under the national banking act, an action will lie against a national bank to recover back payments of usury, though the borrower has paid both principal and interest.—*First Nat. Bank v. Barnett* (Neb.) 70 N. W. 937.

§ 16. — Limitation.

(Neb.; 1895.)

An action against a national bank to recover the penalty provided in section 5198 of the Revised Statutes of the United States for knowingly taking and receiving usurious interest must be brought in two years from the time the usurious transaction occurred.—*Norfolk Nat. Bank v. Schwenk*, 64 N. W. 1073, 46 Neb. 381.

IV. REMEDIES OF DEBTOR.

§ 17. Tender of principal.

(Wis.; 1896.)

The rule of equity requiring, as a condition of relief against a usurious contract, a tender of the principal sum, does not apply where a borrower, in a suit to foreclose a mortgage, sets up usury as a defense, and does not seek equitable relief.—*Maynard v. Hall*, 66 N. W. 715, 92 Wis. 565.

§ 18. Set-off.

(Neb.; 1897.)

Usurious interest paid to a national bank cannot be set off in a suit by it for the sum loan-

ed, brought more than two years after such payment.—*Montgomery v. Albion Nat. Bank* (Neb.) 70 N. W. 239.

§ 19. Recovery back of usury paid.

[a] (Neb.; 1895.)

A petition to recover double interest paid, in which was included usury, is sufficiently definite in its statement of facts where it shows the dates and amounts of the several loans, the usurious rate of interest stipulated for, and the date and amount actually paid on the closing up of the series of transactions described.—*Ord Nat. Bank v. Wells* (Neb.) 61 N. W. 692, 43 Neb. 550.

[b] (N. D.; 1896.)

Where, on maturity of a usurious note, the maker paid the same to the payee, he could not recover the amount of the note, under Laws 1890, c. 184, providing that, when the original owner of a usurious note parts with the same before maturity without notifying the purchaser of the usury, the maker may recover of him the full amount of the note, with interest.—*Hanson v. Cummings State Bank* (N. D.) 69 N. W. 202.

[c] (S. D.; 1896.)

To entitle a party to recover usurious interest under Rev. St. U. S. § 5198, such interest must have actually been paid either in money or its equivalent; and the mere charging of such interest in a running account is not a payment of the same within the meaning of that section.—*Davey v. First Nat. Bank* (S. D.) 66 N. W. 122.

[d] (S. D.; 1896.)

Neither will the including of such usurious interest in a promissory note entitle the maker to recover it, until such note is in fact paid.—*Davey v. First Nat. Bank* (S. D.) 66 N. W. 122.

§ 20. Action against payee after transfer.

(Minn.; 1895.)

Under Gen. St. 1894, § 2214, providing that, where the original holder of a usurious note sells the same to an innocent purchaser, the maker may sue the original holder for the amount of principal and interest paid on the note, where a usurious note was transferred by the payee without indorsement, the transferee, though he took the note for value, without notice, not being an innocent purchaser, the maker, on paying the note, cannot recover of the payee the amount paid.—*Fredin v. Richards* (Minn.) 63 N. W. 1031.

61 Minn. 490.

V. USURY AS A DEFENSE.

§ 21. Limitations.

[a] (Neb.; 1896.)

Money paid as usurious interest to a national bank cannot be set off in a suit brought by the bank more than two years after such payment to recover the principal sum.—*Lanham v. First Nat. Bank*, 65 N. W. 786. 46 Neb. 663.

[b] (S. D.; 1895.)

Under Civ. Code, § 1100, as amended by Laws 1889, c. 70, providing that forfeited interest may be recovered in an action for that

purpose, or set off in an action to recover the principal, payments of legal interest made more than three years prior to the commencement of the action on the principal debt, and hence barred by Comp. Laws, § 4851, cannot be set off therein.—*Wilson v. Selbie* (S. D.) 64 N. W. 537.

§ 22. Pleading.

[a] (Mich.; 1895.)

When the contract sued on shows on its face that it is usurious, an answer alleging that the contract is usurious, in that it provides for a certain bonus, in the nature of usurious interest, sufficiently pleads usury, though it also alleges that plaintiff, by reason thereof, is not entitled to recover any interest, when by statute the effect of usury was to only prevent a recovery of the excessive interest.—*Anderson v. Smith* (Mich.) 65 N. W. 615.

[b] (Neb.; 1895.)

A plea of usury must state the contract claimed to be usurious, with whom it was made, its terms and character, and the amount of the agreed interest.—*Bell v. Stowe* (Neb.) 62 N. W. 456.

44 Neb. 210.

[c] (Neb.; 1897.)

A plea of usury is insufficient which alleges merely that plaintiff reserved a specified amount from the loan, but does not allege the intent with which it was reserved, or that there was any agreement that it should be reserved as interest on the loan.—*McKinley-Lanning Loan & Trust Co. v. Aldrich* (Neb.) 70 N. W. 390.

§ 23. Pleading and proof.

[a] (Neb.; 1895.)

It is error to admit evidence of usury under an answer which does not sufficiently plead it.—*Bell v. Stowe* (Neb.) 62 N. W. 456.

44 Neb. 210.

[b] (Wis.; 1896.)

Rev. St. § 1692, providing that a person, to be entitled to the benefit of a plea in usury, shall prove a tender of the principal sum, has no application to cases arising under, and governed by, the statutes of another state relating to usury.—*Maynard v. Hall* (Wis.) 66 N. W. 715.

92 Wis. 565.

§ 24. Instructions.

[a] (Iowa; 1897.)

In an action on a note which purported to have been purged of usury by an indorsement signed by the parties, plaintiff was entitled to an instruction that a contract may be so purged of usury.—*Kassing v. Ordway* (Iowa) 69 N. W. 1013.

[b] (Iowa; 1897.)

In an action on a note made before the passage of Act 1890, reducing the legal rate of interest, an instruction which permitted the inference that the note would draw only the reduced rate after the passage of the act was erroneous.—*Kassing v. Ordway* (Iowa) 69 N. W. 1013.

UTTERING.

Forged instrument, see "Forgery," §§ 2, 4, 6.

V.

VACANCY.

In office of clerk, see "Clerk of Court."
 — of judge, see "Judge," § 3.
 In a public office, see "Office and Officer," § 3.

VACATION.

Authority of judge in vacation, see "Judge," § 6.
 Issuance of execution in, see "Execution," § 4.
 Of appointment of receiver, see "Receivers," § 10.
 Of award, see "Arbitration and Award," § 7.
 Of foreclosure decree, see "Mortgages," §§ 79–81.
 Of highway, see "Highways," § 18.
 Of judgment, see "Judgment," §§ 95–105.
 — by default, see "Judgment," §§ 14–21.
 Of judicial sale, see "Judicial Sales," § 7.
 Of order granting new trial, see "New Trial," § 6.
 — settling assignee's account, see "Assignment for Benefit of Creditors," § 32.
 Of sale by advertisement, see "Mortgages," § 91.

VACCINATION.

Compulsory vaccination of school children, see "Health," § 6.

VALUE.

Evidence as to, see "Damages," § 45; "Evidence," §§ 59–61, 114.
 Of goods stolen, finding in verdict, see "Larceny," § 12.
 Of homestead, see "Homestead," § 9.

VARIANCE.

Between declaration and affidavit for attachment, see "Attachment," § 39.
 — indictment and complaint, see "Indictment and Information," § 15.
 — indictment and proof, see "Criminal Law," §§ 120, 121.
 — petition and writ of mandamus, see "Mandamus," § 27.
 — pleading and proof, see "Pleading," §§ 83, 84.
 — record and assignments of error, see "Appeal," § 101.
 — summons and judgment, see "Judgment," § 5.

VENDITIONI EXPONAS.

See "Execution."

VENDOR AND PURCHASER.

- I. THE CONTRACT, §§ 1–8.
- II. RIGHTS AND REMEDIES, §§ 9–35.
 1. In General, §§ 9–18.
 2. Quantity of Land—Deficit, §§ 19, 20.
 3. Vendor's Title and Defects Therein, §§ 21–28.
 4. Rescission and Abandonment, §§ 29–32.
 5. Actions for Price, §§ 33–35.
- III. VENDOR'S LIEN, § 36.
- IV. BONA FIDE PURCHASERS, §§ 37–40.

See, also, "Covenants"; "Exchange of Property"; "Frauds, Statute of"; "Fraudulent Conveyances"; "Specific Performance."

Adverse possession by vendee, see "Adverse Possession," § 21.
 Declaration of vendor to impeach vendee's title, see "Evidence," § 35.
 Estoppel of grantee by deed, see "Estoppel," § 2.
 Execution sales, see "Execution," §§ 19–29.
 Improvements by vendees, liability of vendor on mechanics' liens, see "Mechanics' Liens," § 6.
 Mortgage foreclosure sales, see "Mortgages," §§ 68–81.
 Oral agreements relating to lands, see "Frauds, Statute of," §§ 12–18.
 Rights of purchaser of party walls, see "Party Walls," § 4.
 Sale of mortgaged property, see "Mortgages," §§ 34–36.
 — of ward's land, see "Guardian and Ward," §§ 12–15.
 Tax sales, see "Taxation," §§ 82–92.

I. THE CONTRACT.

Abandonment of contract, see post, § 32.
 Rescission of contract, see post, §§ 30, 31.
 Rights on assignment of contract, see post, § 9.
 Assignment of land contract, effect as mortgage, see "Mortgages," § 8.
 Construction of contract, mortgage or conditional sale, see "Mortgages," § 7.

§ 1. What constitutes.

[a1] (Iowa; 1895.)

A mere verbal agreement by plaintiffs to accept defendant's proposition for the sale of certain realty owned by him, the terms of which required a certain proportion of the purchase price to be in cash, and performance of which was attempted by the tender of a different cash payment than that named, made after the revocation by defendant of the agency of him through whom the parties were acting, does not create a contract enforceable against defendant. —Naylor v. Butcher (Iowa) 61 N. W. 989. 93 Iowa, 340.

[b1] (Mich.; 1896.)

Defendant wrote to plaintiff that he desired to purchase land, stating, "I agree to pay \$25 March 20, and \$25 every six months. * * * and I agree to * * * improve it to the amount of \$50 worth the first year, * * * and also to set out fruit trees," etc., to which plaintiff replied, accepting the terms of the offer, agreeing to charge defendant with the land on book account, and credit payments, and to give him a deed when full payment was made. A subsequent letter from plaintiff to defendant had indorsed thereon the terms of the contract as stated in defendant's offer. Held, that these letters constituted a valid contract of sale. —Corning v. Loomis (Mich.) 69 N. W. 85.

§ 2. Proposal and acceptance.

[a1] (Mich.; 1896.)

After the withdrawal of the intending purchaser under an unauthorized contract of an agent, the vendor cannot bind him by a ratification of the contract. —Baldwin v. Schiappacasse (Mich.) 66 N. W. 1091.

[b1] (Mich.; 1897.)

Complainant wrote its agent that it would sell defendants "surface rights" of a certain 40 acres of land on certain terms of payment. The agent wrote defendants that "we will sell you surface rights" on different terms of payment, and that on receipt of the cash payment

complainant would make a contract accordingly. Defendants accepted the offer, and remitted \$1,000. Complainant then sent defendants a contract, which provided that the former should have the right to enter on the land to explore for ores and carry on the business of mining; and, for such purpose, to take so much of the land, and for such time, as it should deem expedient, paying defendants damages therefor. *Held* that, giving to the term "surface rights" the meaning in which it was used in the offer to sell, the contract tendered was not in accordance therewith.—*Keweenaw Ass'n v. Friedrichs* (Mich.) 70 N. W. 896.

§ 3. Construction and operation.

(Iowa; 1897.)

A contract for the sale of land on deferred payments, by the terms of which time is made an essential ingredient, and which provides that, on default in any payment, the contract, so far as it binds the vendor, shall be void, and all payments made shall be forfeited, does not leave performance optional with the purchaser; but, on default, the vendor may elect to insist upon the forfeiture, or to waive it and enforce the contract.—*Westervelt v. Huiskamp* (Iowa) 70 N. W. 125.

§ 4. Option—Election to take land.

(Mich.; 1897.)

A bill against the widow and children of a deceased vendee, and a railroad company, to enforce a contract for the sale of land by complainant to deceased, and to foreclose a vendor's lien, alleged that the two first payments were made; that the vendee took and held possession until his death; that his representatives, heirs, grantees, and assigns have since had possession; that, after such payments were made, defendant company took, and ever since held, possession of a right of way across the land; that complainant did not know and could not learn whether deceased acted for himself, or merely as agent for such company, what their relations were, what interest the company had in the land, or how it obtained its right of way; and that the other defendants claimed that the contract was a mere option, and they had not elected to take the land. *Held* that, though the contract was an option, the bill showed such acts by the vendee as amounted to an irrevocable election, and stated a cause for equitable relief.—*Proctor v. Plumer* (Mich.) 70 N. W. 1028.

§ 5. Extension of contract.

(Mich.; 1896.)

Under a contract for the sale of lands, the purchaser suffered a forfeiture by failing to make the second payment. He had sold to others an interest in the property, among whom was complainant. A new contract was entered into between the vendor and the other parties, by which it was agreed that the time should be extended, and an option granted to the second parties to purchase the property by paying up, at the expiration of the extension, all of the consideration which would have been due under the old contract. It further provided that the original purchaser should assign to the vendor a note made to him by complainant, "which, when paid, shall be credited by the said party of the first part upon the sum so to be paid as the consideration for a new contract of purchase." Before the extension expired the vendor reduced the note to judgment, a part of which complainant paid, and secured the balance. The new contract was also forfeited, and the payee of the note (the original purchaser) gave to complainant a release of his rights under the note. Complainant sought to restrain the collection of the judgment, and to recover the part paid. *Held*, that the note was assigned as a consideration for the extension, and that the agreement to credit the proceeds on the new contract, if com-

pleted, was only a conditional concession.—*Kelsey v. Pendill* (Mich.) 67 N. W. 327.

§ 6. Sufficiency of conveyance.

[a] (Iowa; 1897.)

A deed for land given in execution of a contract is not insufficient for that purpose because there is a variance between the descriptions of the land in the two instruments, if the deed is shown to cover the same land as the contract.—*Wilson v. Riddick* (Iowa) 69 N. W. 1039.

[b] (Minn.; 1896.)

A contract to convey land "by good and sufficient deed of conveyance" calls for a deed with the usual covenants.—*Fleckton v. Spicer* (Minn.) 65 N. W. 926.

63 Minn. 454.

[c] (Minn.; 1896.)

Under the terms of an ambiguous verbal contract, it was doubtful whether the vendor was to convey or cause a third party to convey. The vendee acquiesced in delay for a considerable length of time, and then, without making any sufficient demand for a conveyance, brought an action to recover back the purchase money paid by him, and in his complaint alleged that the defendant agreed to convey or cause to be conveyed to him the land in question. Thereupon the defendant caused the third party to make a conveyance, which the plaintiff refused to accept, not because it came from such third party, but because he claimed he had rescinded. The court charged that, if the contract was that the vendor should procure title in himself, and execute the deed to plaintiff, then plaintiff was not obliged to accept the deed of the third parties, and was entitled to recover. *Held* error, for the reason that if defendant was misled by plaintiff's assertion that the deed of the third party would be a performance of the contract, defendant's tender of such deed did not, under the circumstances, amount to an implied refusal on his part to procure title in himself and convey to plaintiff.—*McNamara v. Pengilly* (Minn.) 67 N. W. 661.

64 Minn. 543.

§ 7. Reservation of growing crops.

(N. D.; 1895.)

An executory contract of sale, whereby the purchaser was given possession with full use of the premises, and was bound to pay a stipulated price therefor, and to pay each year one-half of all crops raised on the land, and was required, on harvesting the crop, to deliver one-half of it at the elevator for the vendor, did not constitute a transfer of any part of the crop to the vendor, or a reservation by him of any title to or lien upon the crops.—*Moen v. Lillestal* (N. D.) 65 N. W. 694.

5 N. D. 327.

§ 8. Effect of nonperformance.

(Neb.; 1895.)

The default in payment by the vendee in a contract of purchase does not change the relation of the parties to that of landlord and tenant.—*Ellsworth v. McDowell* (Neb.) 62 N. W. 1082.

44 Neb. 707

II. RIGHTS AND REMEDIES.

1. IN GENERAL.

§ 9. On assignment of contract.

(Mich.; 1895.)

The conveyance by a vendor in a contract for the purchase and sale of land of the legal title to a third party, subject to the contract, did not of itself operate as an assignment of the contract, so as to permit a recovery thereon by

the grantee.—*O'Brien v. Evans* (Mich.) 65 N. W. 571.

§ 10. Possession.

[a] (Mich.; 1896.)

Though a contract for the purchase of land says nothing as to the purchaser's taking immediate possession, he is entitled to do so, where he agreed to improve the property to a certain extent during the first year, and to set out fruit trees.—*Corning v. Loomis* (Mich.) 69 N. W. 85.

[b] (N. D.; 1897.)

When the purchaser of land under a contract for a deed goes upon it and crops it for a number of years, and exercises all the acts of ownership and possession necessary to obtain the full beneficial use of the land, he is in actual possession thereof, although he may never have lived upon the land or fenced any portion thereof.—*Nearing v. Coop* (N. D.) 70 N. W. 1044.

§ 11. Payment of taxes and assessments.

[a] (Iowa; 1896.)

The contract required the lot sold to be clear of incumbrances, except special assessments, which were to be deducted from the cash payment. Before the contract was made, one D. learned from the vendee that he would buy the lot, and then induced the vendor to allow him to sell it and allow him \$500 to pay the special assessments and his commission. When the contract was made, the vendee paid \$500 to D., who agreed that such assessments should be paid out of the first or cash payment. When the deed was made, the vendee paid the vendor the balance of the cash payment. Neither D. nor the vendor paid such assessments. *Held*, that the vendor was not liable to the vendee for the amount of the assessments, in the absence of authority by D. to make him liable by a promise to pay them.—*Kelly v. Westcott* (Iowa) 66 N. W. 74.

[b] (Mich.; 1895.)

Where purchasers of an undivided half of wild timber lands, under a contract silent as to possession and payment of taxes, lumber the lands, and receive half the benefits of the lumbering, they are liable for one-half the taxes levied after the purchase.—*Thompson v. Noble* (Mich.) 65 N. W. 746.

[c] (Mich.; 1896.)

In a suit by a vendor to foreclose a land contract, the purchaser cannot interpose as a defense that taxes levied subsequent to the making of the contract (which it was his duty to pay) had not been paid, and that the land had been sold and a tax deed given therefor.—*Pringle v. Wagner* (Mich.) 68 N. W. 423.

[d] (Neb.; 1895.)

One who sells real estate after the 1st of April in any year is, under the statute, liable for the taxes thereon for that year.—*Campbell v. McClure* (Neb.) 63 N. W. 920.
45 Neb. 608.

[e] (Wis.; 1897.)

Where a vendor surrenders possession of a portion of the premises to the vendee, and covenants to execute a deed free and clear of all incumbrances when the purchase money is secured, but nothing is said as to liability for accruing taxes, the taxes assessed on the premises thereafter should be prorated according to the respective possessions.—*Williamson v. Neeves* (Wis.) 69 N. W. 806.

§ 12. Repairs and expenditures by purchaser.

(Minn.; 1895.)

The vendee was not entitled to recover for work done or expenditures made by him under the executory contract, on the ground that the vendor was unable to perform, where the vendee throughout insisted that he never made the contract, and never required performance,

and the vendor never repudiated the contract, though the legal title was not in the vendor.—*Mahan v. Close* (Minn.) 65 N. W. 95.
63 Minn. 21.

§ 13. Failure of performance by purchaser.

[a] (Neb.; 1896.)

In an executory contract for the sale of land, the vendor may, on default of the vendee, treat the contract as an ordinary real-estate mortgage, and foreclose it as such,—his right not being limited to a decree against the land alone.—*Hendrix v. Barker* (Neb.) 68 N. W. 531.

[b] (Wis.; 1895.)

Where the contract described the land sold as that occupied by the vendor, but stated that it contained a certain number of acres, and, on the tender of deed, the vendee refused to accept unless there was deducted from the price a sum proportionate to the number of acres less than that contracted for, and, after several years' litigation it was decided that he was not entitled to such deduction, and he then offered to pay the price, the pendency of the litigation, though carried on in good faith, did not excuse his delay in tendering performance, where meantime the value of the property had increased fivefold.—*Docter v. Furch*, 65 N. W. 161, 91 Wis. 464.

§ 14. — Forfeiture.

[a] (Iowa; 1895.)

An agreement for the sale of land provided that the vendee should assume a mortgage, as part of the consideration, and that in case of default in any payments required to be made to the vendor the contract should be void, and the vendee's interest in the land should cease, and become forfeited. *Held*, that the fact that the mortgagee knew of the agreement, and thereafter notified the vendee of maturing interest, did not preclude the vendor from declaring the contract forfeited for a default in payments.—*Miller v. Hughes* (Iowa) 63 N. W. 680.

[b] (Mich.; 1895.)

Plaintiff, who was assignee of a contract for the sale of premises against which there were liens for deferred payments, sold the contract to defendants, payments to be made partly in cash and partly in future installments. Defendants contracted with full knowledge of the state of the title. The agreement did not provide that plaintiff should own the title before the time to convey should arrive, and the balance to become due exceeded the amount of the liens against the property. *Held*, that plaintiff was entitled to a sale of the defendants' equitable interest, and a decree for the deficiency due under the contract.—*Gray v. Hill* (Mich.) 63 N. W. 77.
105 Mich. 189.

§ 15. — Notice of forfeiture.

[a] (Iowa; 1896.)

A contract for the sale of land, providing that the vendor might declare a forfeiture in case the vendee failed to pay the purchase money when due, was assigned to plaintiff on March 4, 1890, with the vendor's consent; and two of the notes, then past due, were paid to the vendor, who accepted the personal obligation of the vendee in lieu of the unmatured notes, the first of which was due on January 1, 1891. On July 23, 1891, the vendor assigned his contract to defendant, and indorsed to him the unmatured notes and the note due January 1, 1891, which had not been paid; and a few days later defendant canceled the contract for nonpayment of that note, without notice to plaintiff, and without offering to return the other notes. *Held*, that such cancellation was of no effect.—*Gaughen v. Kerr* (Iowa) 68 N. W. 694.

[b] (Mich.; 1896.)

When a contract for the sale of land is sufficient to give the vendee the right of possession, his failure to make the stipulated pay-

ments will not entitle the vendor to immediate possession, without notice of forfeiture or a demand.—*Corning v. Loomis* (Mich.) 69 N. W. 85.

[c] (Minn.; 1897.)

Though time is made the essence of the contract, the vendor cannot, after he has waived strict performance, enforce a forfeiture, without giving such notice of his intention to do so as will give the vendee reasonable opportunity to perform.—*Mo v. Bettner* (Minn.) 70 N. W. 1076.

§ 16. — Waiver by vendor.

[a] (Iowa; 1896.)

A vendor waives a provision in a contract of sale giving him the option to declare a forfeiture for default of the vendee in making payment when due, by failing to promptly exercise such right of election at the time of default.—*Gaughen v. Kerr* (Iowa) 68 N. W. 694.

[b] (Minn.; 1894.)

It was stipulated in a contract of sale that the vendee should break up 40 acres of the land in 1889, but only 36 acres were actually broken. He was to have possession December 1, 1889, and was actually given possession by the vendor in the following spring. *Held*, that the vendor waived the noncompliance with the provision as to breaking, by putting the vendee in possession of the farm.—*Strandberg v. Rossman* (Minn.) 61 N. W. 675.
59 Minn. 509.

[c] (Neb.; 1896.)

Where time is made the essence of a contract for the purchase of land, and a forfeiture is provided in case of default, the acceptance of part of overdue payments on the contract is a waiver of the right to declare a forfeiture as to all defaults then existing.—*White v. Atlas Lumber Co.* (Neb.) 68 N. W. 359.

§ 17. Remedies of purchaser.

[a] (Iowa; 1895.)

On defendant's refusal to carry out a contract to convey, plaintiff is entitled to a return of the money paid, and reimbursement for improvements on the land, made under the contract.—*Breja v. Pryne* (Iowa) 64 N. W. 669.

[b] (Iowa; 1896.)

In an action to recover for a breach of warranty of the quality of land conveyed, a portion of which was warranted to be equal to the average of land in the county, a question asking a witness for a comparison in quality between the entire tract and the lands in one-half the county, which the witness had seen, is improper.—*Smay v. Etnire* (Iowa) 68 N. W. 597.

[c] (Iowa; 1897.)

A purchaser of land, who has paid part of the price, and fails to carry out his contract, cannot recover the money paid, though the contract does not provide for a forfeiture.—*Downey v. Riggs* (Iowa) 70 N. W. 1091.

[d] (Neb.; 1897.)

Two or more persons who have contracted to convey lands to a third person cannot, by contract or conveyance among themselves, release any of their number from liability to the vendee for damages for breach of the contract.—*Seaver v. Hall* (Neb.) 70 N. W. 373.

[e] (Wis.; 1896.)

Where a contract for the purchase of land embraces a number of separate tracts, and the title to some of them is unmarketable, and not accepted, the measure of damages to the purchaser is such fractional part of the whole consideration agreed to be paid as the value of the tracts to which the title is found defective bore to the value of the entire quantity purchased when the contract was made, with such interest as the terms of the contract render equitable.—*Gates v. Parmly* (Wis.) 66 N. W. 253.
93 Wis. 294.

§ 18. — Eviction by title paramount.

[a] (Minn.; 1896.)

Though no writ was issued on a judgment in ejectment against a vendee of land by the holder of a paramount title, there was a constructive eviction where the vendee did not abandon possession until after the entry of the judgment, and after the vendor had apparently abandoned further defense.—*Fleckton v. Spicer* (Minn.) 65 N. W. 926.
63 Minn. 454.

[b] (Minn.; 1896.)

In an action by a vendee for an eviction by a paramount title, plaintiff alleged that she was induced to make the purchase by false representations of defendant, but failed to prove fraud. *Held*, that it was proper to permit a recovery for breach of the contract.—*Fleckton v. Spicer* (Minn.) 65 N. W. 926.
63 Minn. 454.

[c] (Minn.; 1896.)

In an action by a vendee against the vendor for an eviction by a paramount title, damages for loss on machinery purchased by plaintiff to carry on farming on the land were too remote to be recoverable.—*Fleckton v. Spicer* (Minn.) 65 N. W. 926.
63 Minn. 454.

[d] (Minn.; 1896.)

A vendee having been evicted by a paramount title is entitled, in an action against the vendor, to recover for the loss of his bargain and compensation for his improvements, to be measured by deducting the price of the land and the unpaid interest thereon up to the time of eviction, from the value of the land at that time, and also the taxes and installments of the price paid by him, with interest from the time of eviction, and the costs and damages against him in the ejectment suit.—*Fleckton v. Spicer* (Minn.) 65 N. W. 926.
63 Minn. 454.

2. QUANTITY OF LAND—DEFICIT.

§ 19. Abatement of price.

(Mich.; 1895.)

Where one, knowing that he has title to but part of the lot, gives a deed to the whole, and takes a mortgage for the price, and the grantee goes into possession, and makes improvements before learning of the defect in his title, the damage sustained by reason of such defect should be deducted from the amount found due on foreclosure of the mortgage.—*Rockwell v. Wells* (Mich.) 62 N. W. 165.
104 Mich. 57.

§ 20. Estoppel to assert shortage.

(Iowa; 1897.)

Defendant contracted to convey land to plaintiff at a fixed price per acre. The deed was submitted to plaintiff for examination, and it appeared therefrom that there was a small shortage in acreage. No objection was made by plaintiff, and the deed was deposited in escrow as agreed. *Held*, that plaintiff could not afterwards object to the shortage.—*Wilson v. Riddick* (Iowa) 69 N. W. 1039.

3. VENDOR'S TITLE AND DEFECTS THEREIN.

Defects in title as defense to action for price, see post, § 31.

§ 21. Furnishing abstract of title.

[a] (Wis.; 1896.)

When, at the time a deed to a large number of tracts of land was delivered, and one-half the purchase money paid, a further contract was made by which the vendor agreed by a specified date to furnish abstracts showing perfect title

to all the lands, or, in default, that no further payment should be held to be due him for the land, such condition of forfeiture is one from which he may be relieved in equity, giving damages as compensation if they can be ascertained.—*Gates v. Parmly* (Wis.) 66 N. W. 253. 93 Wis. 294.

[b] (Wis.; 1896.)

In such case one-half the purchase money retained by the purchaser, being so largely in excess of what might be the damages for a breach of the condition by the vendor in failing to show a perfect title to all the land, cannot be considered as liquidated damages for such breach, but must be held as having been intended as security for such damages as should be actually sustained.—*Gates v. Parmly* (Wis.) 66 N. W. 253.

93 Wis. 294.

§ 22. Approval by third person.

(Minn.; 1895.)

When a party has contracted to convey certain land to another, in satisfaction of a debt, the title to be made satisfactory to the attorneys of the latter, the attorneys cannot, in the absence of a substantial defect in the title, abruptly declare the contract at an end, after there has been performance to such an extent that canceling the contract will work injury.—*Boyd v. Hallowell* (Minn.) 62 N. W. 125.

60 Minn. 225.

§ 23. Sufficiency of title.

[a] (Mich.; 1895.)

Under a sale of land by an administrator with the will annexed, providing for refunding of the partial payment if the title was not "satisfactory," the purchaser may refuse to complete the purchase, because not satisfied that the administrator had authority to give title under the power given the executor in the will, there being decisions to justify him in refusing to be satisfied with the title he could give.—*Green v. Russell* (Mich.) 61 N. W. 885.

103 Mich. 638.

[b] (Mich.; 1897.)

A contract to convey land "in fee and unincumbered" is satisfied by the tender of a deed conveying a title which the grantor has acquired by adverse possession.—*Barnard v. Brown* (Mich.) 70 N. W. 1038.

[c] (Wis.; 1896.)

Where a deed, though recorded, was not entitled to record because of no attestation as to certain of the grantors, the grantee is not bound to accept the title.—*Harrass v. Edwards* (Wis.) 69 N. W. 69.

[d] (Wis.; 1896.)

A material defect in the title to land is such a defect as will cause a reasonable doubt in the mind of a prudent and intelligent person, acting on competent legal advice, and prompt him to refuse to take the deed at a fair value.—*Harrass v. Edwards* (Wis.) 69 N. W. 69.

§ 24. — Marketable title.

[a] (Minn.; 1895.)

A contract for the sale of land calling for a "good" title entitles the vendee to a "marketable" title, as well as one good in fact.—*Ladd v. Weiskopf* (Minn.) 64 N. W. 99.

62 Minn. 29.

[b] (Minn.; 1895.)

A title to land is not unmarketable, as between vendor and purchaser, when the only question involved is one of law arising as to the construction of a decree of distribution, which is conclusive on all parties interested in the estate.—*Ladd v. Weiskopf* (Minn.) 64 N. W. 99.

62 Minn. 29.

[c] (Wis.; 1896.)

An agreement by a vendor to furnish within a specified time an abstract showing a perfect title to the property conveyed binds him to furnish

a marketable title, although his deed had been delivered.—*Gates v. Parmly* (Wis.) 66 N. W. 253. 93 Wis. 294.

[d] (Wis.; 1896.)

Rev. St. § 1176, having provided that a tax deed shall vest in the grantee title in fee simple, and making it evidence of the regularity of all proceedings under which it is issued, such deed, if fair upon its face, is prima facie a marketable title, which the vendee is bound to accept as such unless specific objection is made, and on a hearing it is found not free from reasonable doubt.—*Gates v. Parmly* (Wis.) 66 N. W. 253.

93 Wis. 294.

[e] (Wis.; 1896.)

An outstanding contract of sale of standing timber on a tract of land passes an interest in the land, and constitutes a defect in the title of the holder of the fee, which is not rendered marketable by parol evidence that all the timber sold has been taken off, in an action to which the holder of the contract is not a party.—*Gates v. Parmly* (Wis.) 66 N. W. 253.

93 Wis. 294.

§ 25. — Incumbrances.

[a] (Mich.; 1895.)

Where a grantor of land agrees to pay all incumbrances thereon above a certain amount, the grantee assuming the balance, it is immaterial, as affecting his liability to reimburse the grantee money paid by the latter on incumbrances in excess of the agreed amount, whether he agreed to apply a certain fund in so reducing the incumbrances.—*Cummings v. Callahan* (Mich.) 62 N. W. 136.

104 Mich. 76.

[b] (Mich.; 1895.)

A vendee cannot complain of an incumbrance which was released to the vendor before damage resulted.—*Raffel v. Epworth* (Mich.) 64 N. W. 1052.

§ 26. Rights and remedies of purchaser.

[a] (Mich.; 1895.)

Where the title to timber land fails, the grantee may sue in assumpsit to recover the portion of the price paid for the timber.—*Fitzpatrick v. Hoffman* (Mich.) 62 N. W. 349.

104 Mich. 228.

[b] (Neb.; 1897.)

Where the vendor cannot make title, the vendee may, at his election, recover the purchase money paid, with interest, or damages for the loss of his bargain.—*Seaver v. Hall* (Neb.) 70 N. W. 373.

[c] (Wis.; 1896.)

When a warranted title is found defective, the purchaser is entitled to a deduction from the price of the land of the amount he has expended in perfecting the title, not to exceed the amount he would otherwise be entitled to, had the title not been perfected.—*Gates v. Parmly* (Wis.) 67 N. W. 739.

93 Wis. 294.

§ 27. Waiver of defects.

(Minn.; 1895.)

In the absence of fraud, one who accepts a quitclaim deed cannot refuse to pay the agreed price on account of a want of title on the part of his vendor.—*Hulett v. Hamilton* (Minn.) 61 N. W. 672.

60 Minn. 21.

§ 28. Estoppel to object to title.

(Iowa; 1897.)

Defendant contracted to convey land to plaintiff at a fixed price per acre. The deed was submitted to plaintiff for examination, and it appeared therefrom that title was not in defendant, but in his wife, who signed the deed. No objection was made by plaintiff, and the deed was deposited in escrow as agreed. Held, that plaintiff could not afterwards object to the

condition of the title.—*Wilson v. Riddick* (Iowa) 69 N. W. 1039.

4. RESCISSION AND ABANDONMENT.

§ 29. Rescission by vendor.

(Iowa; 1897.)

Evidence that plaintiff, who was over 70 years old, hired a real-estate broker to dispose of her land, and that he exchanged the same with defendant for a note secured by mortgage on 24 lots, and, without plaintiff's knowledge, secured an additional commission from defendant, and that her land was worth \$2,700, and that the mortgaged lots were worth about \$1 each, but that the broker and defendant fraudulently represented to plaintiff that they were worth \$200 each, and that the trade was made on the faith of such representations, will sustain a judgment setting aside the deed for fraud.—*Lillibridge v. Allen* (Iowa) 69 N. W. 1031.

§ 30. Rescission by vendee.

[a] (Iowa; 1897.)

One cannot rescind a contract for purchase of land merely because the vendor was unable, owing to refusal of a tenant to vacate, to deliver possession till seven or eight days after the time stipulated, such delay being unimportant, and being used merely as an excuse in aid of a desire to rescind.—*Armstrong v. Breen* (Iowa) 69 N. W. 1125.

[b] (Mich.; 1896.)

A mortgagee who accepts a deed of land in payment of his debt cannot rescind the contract, on the ground that the land deeded him was not the land viewed by him, where he could have discovered such fact by ordinary care, and the mortgagor was not responsible for his failure to discover it.—*Beebe v. Birkett* (Mich.) 67 N. W. 965.

[c] (Mich.; 1897.)

A land contract, executed March 1, 1893, described the tract as "containing 23.03 acres, more or less," the exact dimensions to be determined by a survey. This disclosed a fraction more than 23.03 acres, but the parties failed to agree, the purchaser being dissatisfied with the survey. September 10, 1894, the purchaser asked the vendor to consent to an assignment of the contract, as he had agreed to do, and to sign a receipt for interest to September 1st, "due on a certain contract for 23.03 acres of land," etc. The vendor declined to act on a basis of 23.03 acres, but signified a willingness to do so upon the basis of the actual acreage. September 24th the purchaser paid the interest to September 1st. The purchaser exercised acts of ownership, and no attempt was made by him to rescind the contract on account of the disputed acreage, or on account of the refusal to consent to the assignment, till March 18, 1895. *Held*, that the attempt to rescind was made too late.—*Bennett v. Hickey* (Mich.) 70 N. W. 900; *Hickey v. Bennett*, Id.

[d] (Minn.; 1895.)

The failure of the vendors to deliver a deed on demand and tender did not entitle the vendee to rescind, where before the demand the parties had negotiated settlements on different bases, so that the vendors did not know according to which mode of settlement to prepare the deed, and the demand was made late in the afternoon of the vendors' attorney, who stated that the deed was not prepared, that the vendors lived several miles away, in opposite directions, and that if the vendee would come the next day the deed would be ready.—*Malmsten v. Berryhill* (Minn.) 65 N. W. 88.

63 Minn. 1.

[e] (Minn.; 1896.)

Where the vendee had acquiesced in the delay in delivering the deed, requests made by him from time to time that the deed be delivered, which were not in the nature of formal

demands, or such as to indicate that, if the deed were not forthcoming, he would elect to rescind and recover back his purchase money, but rather indicated an intention to abide by the contract, and an anxiety to take the conveyance notwithstanding the delay, did not constitute a demand for the deed entitling him to rescind for failure to deliver the same.—*McNamara v. Pengilly* (Minn.) 67 N. W. 661.

64 Minn. 543.

§ 31. — Fraud and mistake.

[a] (Iowa; 1896.)

Where a vendor falsely represents that a certain proportion of the land is tillable, and insists on consummating the sale at once, knowing that the vendee has not examined the property and does not intend to, but takes it with the express understanding that the representations as to its quality are true, such vendee may rescind the contract, though the vendor may not have known that his representations were untrue.—*Brett v. Van Auken* (Iowa) 68 N. W. 891.

[b] (Iowa; 1897.)

A false representation by a vendor that land is not river land is not prejudicial; the only objection to river lands having been on account of the uncertainty of the title, and the title having been settled, so that such lands were regarded as of equal value with other lands at the time of the transaction.—*Armstrong v. Breen* (Iowa) 69 N. W. 1125.

[c] (Mich.; 1896.)

An action for deceit in a sale of land as to the price paid for it by the vendor will lie where the purchaser, ignorant of real-estate values in the locality, made inquiries as to the reputation of the vendor, and, finding it good, relied on the false representation.—*Stoney Creek Woolen Co. v. Smalley* (Mich.) 69 N. W. 722.

[d] (Minn.; 1896.)

The second lot north of F. avenue fronting east was pointed out to plaintiff by a disinterested party as being in defendant's hands for sale, while in fact the lot listed with defendant was the second one fronting west, being on the side of the street on which J.'s house was located. On plaintiff's inquiring of defendant as to the lot he had for sale defendant stated that the lot was the second one from F. avenue on the side of the street on which was J.'s house, but said nothing about the front, and plaintiff supposed he meant the lot which had been pointed out. Without further description being asked or given, or any writing being made, a price was agreed on, part of which plaintiff paid, the balance being payable on conveyance. Both parties acted in good faith. *Held*, that plaintiff was entitled to rescind the purchase and recover back the payment on the price, on the ground of mistake in identity of the property.—*Stong v. Lane* (Minn.) 68 N. W. 765.

[e] (Neb.; 1896.)

A purchaser cannot rescind for fraudulent representations of the vendor as to his title, where he accepted the deed with knowledge of the defects to which the representations related, and thereafter leased the premises to another, and enjoyed them for three months.—*Pollock v. Smith* (Neb.) 69 N. W. 312.

[f] (Neb.; 1897.)

A purchaser of land can rely on representations of the vendor as to its location and the improvements thereon, when not within his own knowledge.—*Mullen v. Kinsey* (Neb.) 70 N. W. 18.

[g] (S. D.; 1894.)

Where persons agree to purchase land jointly, paying equal amounts therefor, and one wrongfully misrepresents the price, the other can recover therefor, though on inquiry he might have learned that the representations were false.—*Davenport v. Buchanan* (S. D.) 61 N. W. 47.

6 S. D. 376.

§ 32. Abandonment.

(Iowa; 1894.)

Plaintiff agreed to buy of defendant a piece of land, but, on finding a defect in the title, refused to take the land unless defendant got a certain quitclaim deed. Defendant was unable to get the deed, and so stated to plaintiff, who said he could not take the land; and, on defendant's offering to return the earnest money, plaintiff wanted a few more dollars for damages, which defendant refused to pay. About two months afterwards, plaintiff demanded the earnest money, but defendant refused to pay it, claiming that, by not taking the land, plaintiff had forfeited it. Seven months later, the land having increased very much in value, plaintiff told defendant he was ready to comply with the contract. *Held*, that the parties had abandoned the contract.—*Giltner v. Rayl* (Iowa) 61 N. W. 225.

93 Iowa, 16.

5. ACTIONS FOR PRICE.**§ 33. When action lies.**

[a] (Mich.; 1896.)

Where a grantor conveys land in consideration of a certain sum in cash and all of the notes which he has made to the grantee, and the grantee, without the knowledge of the grantor, omits from the list of notes one which he had transferred to a stranger, the grantor may sue to recover the value of the outstanding note.—*Reed v. Reed* (Mich.) 66 N. W. 381.

[b] (Mich.; 1896.)

Where a vendor of land agrees to accept in payment stock owned by the vendee, at the price paid for it by him, and the vendee misrepresents the price paid, the vendor may treat the difference between the price actually paid by the vendee for the stock and that at which he accepted it from him as the balance due on the purchase, and maintain assumption therefor.—*Hidey v. Swan* (Mich.) 69 N. W. 225.

[c] (Neb.; 1896.)

The rights and liabilities of parties to a parol agreement for the conveyance of real property are not necessarily reciprocal. One who enters into possession of land under a parol promise by the owner to convey, the latter subsequently fully performing by the tender of a good and sufficient deed, may be liable in an action for the purchase price, although such possession be not of itself such part performance as would entitle him to an action for specific performance of the contract.—*Stephens v. Harding* (Neb.) 67 N. W. 746.

48 Neb. 659.

[d] (Wis.; 1896.)

A contract for the purchase and sale of land recited the conveyance of the land, and the payment of one-half the price, and, after a provision for the payment of the balance, provided that it should be construed as a personal contract between the parties, and that it should constitute no lien on the land conveyed. *Held*, that the vendor was not precluded from maintaining an action upon equitable grounds for the recovery of the unpaid price.—*Gates v. Parnly* (Wis.) 67 N. W. 739.

93 Wis. 294.

§ 34. — Tender of deed.

(N. D.; 1895.)

Plaintiff gave defendant a bond for a deed of land on full payment of the purchase price thereof according to the terms of notes given him by defendant. About the time the last note became due, plaintiff, without tendering the deed to defendant, sold and quitclaimed the land to another, who conveyed the same to defendant. When plaintiff quitclaimed the land, he retained possession of the notes. *Held*, that plaintiff could not recover on the notes against defendant without tendering to him a deed of the land.—*Corliss*,

J., dissenting.—*Shelly v. Mikkelsen* (N. D.) 63 N. W. 210.

5 N. D. 22.

§ 35. Defenses—Defects in title.

[a] (Neb.; 1896.)

The objection, in an action by a vendor against his vendee to recover the price of the land, that plaintiff is unable to convey a perfect title for the reason that the land was, prior to the date of the contract, sold for taxes, and remains unredeemed, cannot be sustained where the decree for the vendor allows a credit for the amount required to redeem from the tax sale.—*Stephens v. Harding* (Neb.) 67 N. W. 746.

48 Neb. 659.

[b] (S. D.; 1895.)

In the absence of anything to overcome the presumption that the vendor is able to respond in damages, a purchaser in peaceable possession, under a deed with covenants of general warranty, cannot, by showing a mere defect in the title, defeat an action for the price.—*Price v. Hubbard* (S. D.) 65 N. W. 436.

III. VENDOR'S LIEN.**§ 36. Waiver.**

(Wis.; 1896.)

In a contract between a vendor and purchaser of land which recited the conveyance of the land and the payment of one-half the purchase money, and provided for the payment of the remainder, a further provision that the contract should be construed as a personal one between the parties, and its terms and conditions should constitute no lien upon any real estate mentioned therein, was an express waiver of the right to a vendor's lien, which, in the absence of fraud, is binding on the vendor, though he may have been misinformed as to the legal effect of the language used.—*Gates v. Parnly* (Wis.) 66 N. W. 233.

93 Wis. 294.

IV. BONA FIDE PURCHASERS.**§ 37. Who are bona fide purchasers.**

[a] (Iowa; 1897.)

One who purchases from her brother land which he had procured by fraud is not a bona fide purchaser, if the only consideration was an antecedent debt due her for services.—*Lilli-bridge v. Allen* (Iowa) 69 N. W. 1031.

[b] (Mich.; 1894.)

At a sale under mortgage foreclosure, one of the heirs of the mortgagor paid part of the purchase price, and allowed title to be taken by a nominal purchaser, who gave the mortgagee a new mortgage for the balance. Such purchaser afterwards mortgaged the land to defendant, who had no notice of equities, for an antecedent debt; defendant, in consideration, extending the time of its payment. Such purchaser became bankrupt, and defendant purchased his interest, and discharged the mortgage against him. *Held*, in a suit by the heirs to redeem, that defendant was a bona fide purchaser to the extent of his mortgage.—*De Mey v. Defer* (Mich.) 61 N. W. 524.

103 Mich. 239.

[c] (Mich.; 1894.)

A creditor who, in consideration of the making of a mortgage to secure his debt, extends by three years the time of payment, takes the land mortgaged as a bona fide purchaser to the extent of the mortgage.—*De Mey v. Defer* (Mich.) 61 N. W. 524.

103 Mich. 239.

§ 38. Notice.

[a] (Mich.; 1895.)

Complainant went into possession of land under a deed containing a mistaken description,

and openly occupied it as a pasture, and paid taxes thereon. The boundaries were well marked by fences and a ditch, and defendant, a subsequent purchaser from the executor of complainant's grantor, knew that complainant had land in the vicinity. *Held*, that defendant was charged with notice of complainant's rights.—*Miner v. Wilson* (Mich.) 64 N. W. 874.

[b] (Mich.: 1897.)

Land was deeded to plaintiff in payment of a debt by one who had forged the certificate of record on the deed, and who had no other title than a contract of purchase, which he had previously assigned to a creditor. The grantor was arrested, and committed suicide, leaving a letter directing payment of part of the proceeds of his insurance to such assignee on condition that he deed the land to plaintiff. The assignee received the money, but executed a quitclaim deed to one who had been entrusted with the money, and with the duty of procuring the deed for plaintiff, and such grantee conveyed to defendant. Defendant was an intimate friend and a creditor of deceased, and had become bail after his arrest, and admitted that he knew of the letter. *Held*, that defendant had notice of plaintiff's claim.—*Hill v. Bate-man* (Mich.) 70 N. W. 434.

[c] (Mich.: 1897.)

The curative act (How. Ann. St. § 5727), making the record of certain defective instruments, executed in good faith "and for a valuable consideration," notice of the rights secured thereby, applies to a conveyance purporting to be made "for a valuable consideration and for love and affection," and for which one of the grantees agreed to furnish the grantor with certain supplies, which he did furnish.—*Lariverre v. Rains* (Mich.) 70 N. W. 583.

[d] (Mich.: 1897.)

Where a purchaser of land under an oral contract receives notice of a current lease thereon before he obtains an interest in the land under a written contract, he takes it subject to the lease.—*Oliver v. Olmstead* (Mich.) 70 N. W. 1036.

[e] (Minn.: 1895.)

A corporation purchasing land from one of its directors in good faith, relying on the showing of the record that the land is not in any manner incumbered, is not chargeable with the knowledge of the director that the land is subject to a vendor's lien, so as to render the lien enforceable against the corporation.—*Bang v. Brett* (Minn.) 63 N. W. 1067.
62 Minn. 4.

[f] (Minn.: 1897.)

The record of a judgment against "A. Anderson" is sufficient to put on inquiry the purchaser of lands the title to which is in the name of "Andrew Anderson."—*Nystrom v. Quinby* (Minn.) 70 N. W. 777.

[g] (Wis.: 1896.)

The recital in a deed, at the end of the covenant against incumbrances, "except a certain mortgage for \$900," is notice to the grantee, and those claiming under him, of such an unrecorded mortgage.—*Reichert v. Neuser* (Wis.) 67 N. W. 939.
93 Wis. 513.

[h] (Wis.: 1896.)

A grantee cannot claim as against an unrecorded mortgage, of which he was given notice by a recital in his deed, though the mortgagee kept the mortgage from record to escape taxation on account thereof.—*Reichert v. Neuser* (Wis.) 67 N. W. 939.
93 Wis. 513.

[i] (Wis.: 1897.)

Where a deed recited that it was given in consideration of the payment of a prior mortgage, and the support by the grantee of the grantor during her lifetime, and "decent burial when dead," every person acquiring a right in the premises after the recording of the deed

took subject to these provisions.—*Gilchrist v. Foxen* (Wis.) 70 N. W. 585.

§ 39. Rights against prior unrecorded deed.

[a] (Mich.: 1895.)

Where the purchaser at an executor's sale did not record his deed until a month after the sale, at which time he reconveyed the property, by special warranty, to the executor for a greater consideration than he originally paid, and the executor conveyed to one who went into and remained in possession for two years, and from whom defendant purchased, upon being advised by counsel that the title was perfect, defendant will be protected in his purchase.—*Otis v. Kennedy* (Mich.) 65 N. W. 219.

[b] (Neb.: 1896.)

A prior unrecorded deed, passing the legal title, made in good faith, for a valuable consideration, will take precedence of a title based on a judicial sale made under an attachment or execution, if such deed be recorded before the evidence of the title based on the judicial sale is recorded. *Harral v. Gray* (1880) 4 N. W. 1040, 10 Neb. 186, followed.—*Sheasley v. Keens*, 66 N. W. 1010, 48 Neb. 57.

[c] (Neb.: 1896.)

Comp. St. c. 73, § 16, provides that deeds shall be in force only from the time of their registration, as to creditors and subsequent purchasers without notice, whose deeds shall be first recorded. Section 45 defines a "purchaser" as any person to whom real estate or any interest therein shall be conveyed for value. By section 46 a deed is defined as any instrument in writing by which real estate or any interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected, in law or in equity, except wills, and leases for one year or a less time. Section 50 provides that every conveyance shall pass all the grantor's interest, unless a contrary intent can reasonably be inferred therefrom. *Held*, that the holder of a quitclaim deed, properly recorded, who purchased in good faith, and without notice of a prior unrecorded conveyance, took the title in preference to the grantee in the prior conveyance.—*Schott v. Dosh* (Neb.) 68 N. W. 346.

[d] (N. D.: 1895.)

One who, having knowledge of a mortgage on property which he was about to purchase, though the mortgagor therein named appeared by the record to have no title to the land, bought the land without investigation as to the title of the mortgagor, when such investigation would have led to a discovery of a prior unrecorded deed from his grantor to the mortgagor, was not a bona fide purchaser as against the mortgagor.—*Doran v. Dazey* (N. D.) 64 N. W. 1023.
5 N. D. 167.

§ 40. Estoppel to assert title.

(Minn.: 1895.)

A decree of distribution, after reciting that petitioner, claiming to be the sole heir, had filed a bond conditioned that petitioner should deliver the estate to any heir who could establish a superior title thereto, adjudged "that the above-mentioned real estate be, and the same is hereby, assigned" to petitioner, "as sole heir." Petitioner was not in fact an heir of deceased. *Held*, that a bona fide purchaser from petitioner was not estopped by the record, as against a true heir, from asserting title in himself.—*McNamara v. Casserly* (Minn.) 63 N. W. 880.
61 Minn. 335.

VENDOR'S LIEN.

See "Sale," §§ 57, 58; "Vendor and Purchaser," § 36.

VENIRE.

See "Jury."

Special venire, see "Grand Jury," § 5; "Jury," § 12.

VENUE IN CIVIL CASES.

I. LOCAL AND TRANSITORY ACTIONS, §§ 1-10.

II. CHANGE OF VENUE, §§ 11-23.

Of action before justice of the peace, see "Justices of the Peace," § 15.

I. LOCAL AND TRANSITORY ACTIONS.

§ 1. Joint plaintiffs or defendants.

[a] (Iowa; 1895.)

An action against township trustees and a road supervisor to enjoin the opening of a highway, and to declare its establishment void, is a personal action, within the meaning of Code, §§ 2586, 2587, requiring personal actions to be brought in a county wherein some of the defendants reside, and providing that, where such actions are brought against residents and nonresidents of the county, and the action is dismissed as to the resident defendants, the non-resident defendants may have the cause dismissed, with reasonable compensation for the trouble and expense of attending in the wrong county.—*Everett v. Board of Sup'rs of Pottawattamie County* (Iowa) 61 N. W. 1062. 93 Iowa, 721.

[b] (Neb.; 1895.)

Service of process in a personal action on a nominal defendant confers no authority on the court to bring in another party who resides in another county, by the issuance of summons to him in that county.—*Hanna v. Emerson* 64 N. W. 229. 45 Neb. 708.

[c] (Wis.; 1895.)

Under Rev. St. § 2609, providing that parties severally liable on the same instrument may be included in the same action, an action against a principal and guarantor on a contract for the payment of money may be brought in the county where the guarantor resides.—*Holm v. Colman*, 61 N. W. 767, 89 Wis. 233.

§ 2. Action for personal injuries.

(Wis.; 1896.)

An action to recover for personal injuries is transitory, and may be maintained in a state other than the one in which the injuries were inflicted where the cause of action is grounded on the principles of the common law, recognized in both states.—*Eingartner v. Illinois Steel Co.* (Wis.) 68 N. W. 664.

§ 3. Garnishment proceedings.

(Mich.; 1895.)

Where both plaintiff and the principal defendant are nonresidents of the state, and the latter is not personally served, garnishment proceedings within the state must be instituted in a county where defendant has property, or credits subject to garnishment, due him from a resident of such county.—*Stern v. Frazer* (Mich.) 63 N. W. 968. 105 Mich. 685.

§ 4. Actions concerning land.

(Mich.; 1895.)

Under How. Ann. St. § 6612, providing that every suit in chancery shall be commenced in the court for the county in which the property in dispute is situated, if the subject-matter is local, a suit by an assignee for the benefit of creditors, to set aside a conveyance by his

assignor as fraudulent, must be brought in the county in which the land is situated.—*Chapin v. Montcalm Circuit Judge* (Mich.) 62 N. W. 351. 104 Mich. 232.

§ 5. Enjoining issue of bonds by county. (Mich.; 1894.)

Under 2 How. St. § 6612, providing that the attorney general may commence any proceedings in chancery on behalf of the state in the circuit court of Ingham county where the office of the attorney general is located, and "said court shall have complete jurisdiction in the premises," it has jurisdiction of a suit brought by the attorney general, on the relation of taxpayers, to enjoin the issuance of bonds by another county.—*McMullen v. Ingham Circuit Judge* (Mich.) 61 N. W. 260. 102 Mich. 608.

§ 6. Action against benefit society.

(Iowa; 1895.)

An association which operated upon the assessment plan in paying benefits, and which designated its business as insurance, is an insurance company, within the meaning of Code, § 2584, providing that an insurance company may be sued in the county where the contract was made or where the loss occurred.—*Prader v. National Masonic Accident Ass'n* (Iowa) 63 N. W. 601.

§ 7. Action for penalty.

(Minn.; 1896.)

An action under Gen. St. 1894, § 2600, by a creditor of a corporation, to recover the amount of his debt from the corporate officers, on the ground of their fraud or unfaithfulness in the discharge of their duties, is not an action to recover a penalty, within section 5184, which is required to be tried in the county where the cause of action, or some part of it, arose. *Merchants' Nat. Bank v. Northwestern Manufacturing & Car Co.* (1892) 51 N. W. 117, 48 Minn. 349, overruled.—*Flowers v. Bartlett*, 68 N. W. 976.

§ 8. Action against public officer.

[a] (Iowa; 1896.)

Under Code, § 2579, requiring an action against a public officer for an act done by him under color of his office to be brought in the county in which the cause of action or some part thereof arose, a proceeding to compel the state board of medical examiners to recognize a medical college as in good standing must be brought in the county in which the official action of the board declaring the college as not in good standing was had, though, prior to such action by the board, a committee was appointed to report upon the college, and the secretary, prior thereto, was advised by each member of the board not to issue certificates or diplomas from the college.—*College of Physicians & Surgeons of Keokuk v. Guilbert* (Iowa) 69 N. W. 453.

[b] (Neb.; 1896.)

Code, § 54, providing that an action against a public officer for an act done by him under color of his office must be brought in the county where the cause, or some part thereof, arose, applies to actions against such persons begun after their terms of office have ceased, and they have removed to another county.—*Herbert v. Wortendyke* (Neb.) 68 N. W. 350.

§ 9. Action growing out of agency.

[a] (Iowa; 1896.)

That a principal, resident of P. county, employed a real-estate agent, residing in W. county, to trade for him a stock of goods situated in P. county for farm land, without regard to the situation of the land, does not show that the principal had an "agency" (Code, § 2583) for the transaction of business in W. county, so as to authorize suit by the agent for his commission in W. county.—*Wickens v. Goldstone* (Iowa) 66 N. W. 896.

[b] (Iowa; 1896.)

Defendants were owners of a steamboat which ran regularly between K. and Q., and had an agent, H., at K., who solicited freight, and collected bills therefor for them. On a Sunday, two pleasure trips, which were not within the ordinary business of the boat, were made from K. to a point where there was an encampment. H. had no agency in regard to the trips, and was in no way connected with them, the passengers going on the boat, and paying their fares to the clerk thereof. *Held*, that an action for wrongfully landing plaintiff from the boat, on one of the pleasure trips, could not be brought in the county in which K. was located, under Code, § 2585, providing that any suits growing out of or connected with the business of an office or agency may be brought in the county where such office or agency is located.—*King v. Blair* (Iowa) 69 N. W. 261.

§ 10. Waiver of objections.**(Neb.; 1895.)**

A corporation waives its right to be sued in a particular county by failure to challenge the jurisdiction of the court on a special appearance, or alleging the wrongful venue as a defense.—*Exeter Nat. Bank v. Orchard* (Neb.) 61 N. W. 833, 43 Neb. 579.

II. CHANGE OF VENUE.

Appealable order, see "Appeal," § 15.
Notice of trial on change of venue, see "Practice in Civil Cases," § 12.

§ 11. In general.**[a] (Iowa; 1896.)**

Where the trial court improperly denies a motion for change of place of trial, its subsequent proceedings are unauthorized, and will not be reviewed on appeal from the final judgment.—*Kell v. Lund* (Iowa) 68 N. W. 593.

[b] (Minn.; 1896.)

Where an action commenced in one county is removable to another, under Gen. St. 1894, § 5188, as amended by Laws 1895, c. 28, the service by defendant of his affidavit of residence and demand for change of venue to the county of his residence, and the filing with the clerk of the court in which the action was commenced of proof of such service, ipso facto change the place of trial, without order of court.—*Flowers v. Bartlett* (Minn.) 68 N. W. 976.

[c] (Minn.; 1896.)

The mere denial of an application thereafter made to the court of the county in which the action was commenced to change the place of trial to the county of defendant's residence, and to order the clerk of the former county to transmit the files accordingly, does not change the place of trial back to the county in which the action was commenced.—*Flowers v. Bartlett* (Minn.) 68 N. W. 976.

[d] (Minn.; 1896.)

The question whether the place of trial has been legally changed may be raised by objecting to the hearing of a demurrer to the complaint in a county which, if the venue has been changed, is not the proper county.—*Flowers v. Bartlett* (Minn.) 68 N. W. 976.

[e] (Neb.; 1897.)

Unless empowered by statute to change the venue on its own motion, a court has no power to do so.—*Fisk v. Thorp* (Neb.) 70 N. W. 498.

[f] (S. D.; 1894.)

The provisions of the civil practice act relating to the change of the place of trial are not applicable to actions brought in the county courts.—*Austin, Tomlinson & Webster Manufg Co. v. Heiser* (S. D.) 61 N. W. 445.
6 S. D. 429.

§ 12. Who entitled to change.**(Iowa; 1896.)**

The court of P. county ordered the subscribers to stock of an insolvent corporation, without notice to them, to pay to the assignee the sums subscribed and unpaid, and authorized the assignee to bring suit therefor. The assignee afterwards brought an equitable suit in P. county against L., who resided in K. county, and the other subscribers, to enforce payment of the subscriptions, which were not payable in P. county. *Held*, that L. was entitled to have the place of trial changed, as to him, to K. county.—*Kell v. Lund* (Iowa) 68 N. W. 593.

§ 13. — Real party in interest.**(Iowa; 1897.)**

A check drawn by plaintiff bank on defendant bank, and payable to a supposed borrower from the former, was delivered by it to such borrower's ostensible agent, who obtained the amount thereof from intervener bank on a forged indorsement of the borrower's name, and defendant paid the check, and charged it to plaintiff's deposit. *Held*, that plaintiff's cause of action was against defendant, and not against intervener, so that the latter was not entitled to a change of venue to the county of its residence, on the ground that it was the real party in interest.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

§ 14. By one defendant.**(Minn.; 1896.)**

A defendant who procured a default judgment against him to be set aside on the ground of nonservice of summons, was entitled to have the action removed to the county of his residence on showing that default had been entered against all his co-defendants but one, and that the latter had never answered.—*Suter v. Page* (Minn.) 67 N. W. 67.
64 Minn. 444.

§ 15. Action brought in wrong county.**[a] (Iowa; 1895.)**

Under McClain's Code, § 772, making the superior court a court of record, and applying to it all statutes in force respecting venue of the district court, and *Id.* § 3794, providing that, where suit is brought in the wrong county, a change of venue to the proper county shall be ordered, if the defendant, before answer, demands the same, one sued in a superior court not of the county of his residence may have the venue changed to the district court of the county of his residence.—*Day v. Greenwood* (Iowa) 64 N. W. 789.

[b] (S. D.; 1896.)

Under Comp. Laws, §§ 4890, 4891, the right of a defendant to have the place of trial changed to the proper county is absolute, if the demand and motion therefor are duly made, and the court cannot retain the case on the ground of the convenience of witnesses.—*Smail v. Gilruth* (S. D.) 66 N. W. 452.

§ 16. On appeal from municipal court.**(Wis.; 1895.)**

Sanb. & B. Ann. St. § 2624, declaring that where an action begun in the municipal court is pending on appeal in the circuit court, defendant may have the place of trial changed to the county where he resides, if he resided there when the action was commenced, secures an absolute right to change of venue in such case, and it is not modified or repealed by Laws 1891, c. 139, § 2, providing that the petition for a laborer's lien shall be filed in the county where the labor was performed, or, when the property has been taken to another county, that the petition may be filed, and an action to foreclose the lien brought, in such county.—*Rayson v. Horton* (Wis.) 63 N. W. 278.
90 Wis. 367.

§ 17. Effect of bringing in party pending motion.

(Iowa; 1895.)

Where, in an action against a husband for necessities furnished his wife, pending a motion to transfer the action to the county of defendant's residence, the complaint is amended by making the wife a party, she having remained in the county in which the action was brought, the motion is properly denied.—*Tibbetts v. Wadden* (Iowa) 62 N. W. 693.

§ 18. Effect of stipulation.

(Wis.; 1897.)

Under the provision of Sanb. & B. Ann. St. § 2622, that "the court, or the presiding judge thereof, may change the place of trial * * * when the parties or their attorneys shall stipulate in writing to change it," a court cannot be ousted of its jurisdiction of a cause by a stipulation without an order made by the court or judge, and a court to which the cause is transferred on a stipulation alone acquires no jurisdiction, though the parties appear and try the action therein without objection.—*Swan v. Porter* (Wis.) 70 N. W. 1068.

§ 19. In justice's court.

(a) (Neb.; 1895.)

When an affidavit by a defendant for a change of venue of a cause pending before a justice of the peace is filed, and the costs have been paid, under Code Civ. Proc. § 958a, it is mandatory on the justice to transfer the cause to the nearest justice of the county to whom the objections stated in the affidavit do not apply.—*Paul v. Ziebell*, 61 N. W. 630, 43 Neb. 424.

(b) (Neb.; 1895.)

Where defendant has filed an affidavit of prejudice, for a change of venue from a justice, under Code Civ. Proc. § 958a, plaintiff cannot show prejudice of the nearest justice in order to prevent defendant from procuring a change of venue.—*Paul v. Ziebell* (Neb.) 61 N. W. 630, 43 Neb. 424.

(c) (Neb.; 1895.)

In an affidavit for a change of venue from a justice, under Code Civ. Proc. § 958a, defendant may set up a well-founded objection disqualifying the nearest or any other justice in the county.—*Paul v. Ziebell* (Neb.) 61 N. W. 630, 43 Neb. 424.

§ 20. Local prejudice.

(a) (Iowa; 1897.)

It is not an abuse of discretion to deny a motion for change of venue, where the affidavits tending to show prejudice are met by an equally large number of counter affidavits.—*Union Mill Co. v. Prenzler* (Iowa) 69 N. W. 876.

(b) (Iowa; 1897.)

Under Code, § 2591, requiring an application for change of venue on the ground of local prejudice to be made before a continuance is had, except when the grounds were unknown before the continuance, an application made after a third continuance, on grounds not shown to have been unknown prior to the first continuance, was properly overruled.—*German Sav. Bank v. Citizens' Nat. Bank* (Iowa) 70 N. W. 769.

(c) (Wis.; 1896.)

Where affidavits in support of a motion for a change of venue on the ground of local prejudice, stating that certain persons had been heard by affiants to express the opinion that such prejudice existed, were contradicted by affidavits of most of the persons named, stating a contrary opinion, and by other affidavits that no prejudice existed, a denial of the motion was not an abuse of the court's discretion.—*Pool v. Milwaukee Mechanics' Ins. Co.* (Wis.) 69 N. W. 65; *Same v. Farmers' Fire Ins. Co.*, *Id.*

§ 21. Convenience of witnesses.

(Wis.; 1895.)

Under Rev. St. 1878, § 2622, providing for a change of venue when the convenience of witnesses and the ends of justice would be promoted by the change, a change may be granted to suit the convenience of witnesses, though it does not otherwise appear that the ends of justice will be promoted.—*Kopf v. Encking* 61 N. W. 318, 91 Wis. 15.

§ 22. Time of application for change.

(Wis.; 1896.)

The parties having stipulated that defendant might demand a struck jury, and that one day's notice thereof should be sufficient, defendant on the same day demanded of the clerk of court that a struck jury be drawn; and a list of talesmen was accordingly made, and a jury struck, who were summoned by the clerk. On the return day of the summons, the presiding judge being absent, no proceedings were had; but on the following day the jury and parties attended before the judge, and, before any other proceedings were had, plaintiff filed his affidavit that the judge was disqualified to preside at the trial, and moved for a change of venue. *Held*, that the motion was in time.—*Peterson v. Daniel Shaw Lumber Co.* (Wis.) 67 N. W. 1118.

93 Wis. 500.

§ 23. Waiver of right.

(Minn.; 1897.)

Where defendant demands a change of venue, and plaintiff's attorney consents, but the papers filed in the action are not transmitted to the court to which the change is granted, and defendant after such demand serves his answer, admits service of defendant's papers, all of which were entitled and filed in the district court of the first county, and a trial is had, and after verdict in favor of plaintiff he serves notice of taxation of costs, and enters judgment in such first-named county, defendant waives his right to a change of venue.—*Nystrom v. Quinby* (Minn.) 70 N. W. 777.

VENUE IN CRIMINAL CASES.

See "Criminal Law," §§ 38-44.

VERDICT.

See "Criminal Law," §§ 180-182; "Trial," §§ 96-118.

Aider by, see "Pleading," § 100.
In replevin, see "Replevin," § 23.**VERIFICATION.**

See "Affidavit."

Of affidavit for attachment, see "Attachment," § 12.

Of claims against county, see "Counties," § 48.
Of lien claim or statement, see "Mechanics' Liens," § 29.

Of pleading, see "Pleading," §§ 44, 45.

VESSELS.

See "Admiralty"; "Shipping."

VESTED INTERESTS.

Created by will, see "Wills," § 50.

VESTED REMAINDERS.

Creation by deed, see "Deed," § 18.

—by will, see "Wills," § 51.

VESTED RIGHTS.

See "Constitutional Law," §§ 32-36.

VETO.

Power of mayor, see "Municipal Corporations," § 23.

VEXATIOUS APPEAL.

See "Appcal," § 277.

VICE PRINCIPALS.

See "Master and Servant," §§ 56-66.

VICIOUS ANIMALS.

See "Animals," §§ 3, 4.

VIEW BY JURY.

See "Trial," § 3.

Private view as ground for new trial, see "New Trial," § 21.

VILLAGES.

See "Municipal Corporations."

When villages become independent of town, see "Municipal Corporations," § 5.

VINDICTIVE DAMAGES.

See "Damages."

VIS MAJOR.

See "Negligence," § 20.

VOIR DIRE.

Examination of juror, see "Jury," § 18.

VOLUNTARY.

Associations, see "Associations."

Confessions, see "Criminal Law," § 109.

Nonsuit, see "Practice in Civil Cases," §§ 4, 5.

Payment, see "Payment," §§ 11-17.

VOTERS.

See "Elections and Voters."

W.

WAGERS.

See "Gaming."

WAGES.

See "Master and Servant," §§ 10-13.

As preferred claims against insolvent corporations, see "Corporations," § 94.

Exemptions, see "Exemptions," §§ 16, 21.

WAIVER.

See "Estoppel."

By vendor of nonperformance of contract, see "Vendor and Purchaser," § 16.

Of appeal bond or defects therein, see "Appeal," § 70.

Of breach of warranty, see "Sale," §§ 32-34.

Of conditions in policy, see "Insurance," §§ 64-71.

— of ticket, see "Carriers," § 35.

Of defect in goods sold, see "Sale," § 36.

— in vendor's title, see "Vendor and Purchaser," § 27.

— of parties, see "Parties," § 5.

Of defense of statute of frauds, see "Frauds, Statute of," § 33.

Of error, see "Appeal," § 189.

Of forfeiture of lease, see "Landlord and Tenant," § 30.

Of formal arraignment, see "Criminal Law," § 25.

Of lien, see "Mechanics' Liens," §§ 44-47.

— for freight, see "Carriers," § 32.

— maritime lien, see "Maritime Liens," § 3.

— on logs or lumber, see "Logs and Logging," § 10.

Of limitations, see "Limitation of Actions," § 42.

Of notice and proofs of loss, see "Insurance," §§ 76-81.

Of objections by action or nonaction on appeal, see "Appeal," § 261.

— by appearance, see "Appearance," § 5.

— not raised below, see "Appeal," §§ 193-201.

— to argument of counsel, see "Trial," § 48.

— to criminal complaint, see "Criminal Law," § 16.

— to depositions, see "Deposition," § 9.

— to erroneous taxation, see "Taxation," § 54.

— to evidence, see "Criminal Law," § 77;

"Trial," §§ 27-32.

— to highway proceedings, see "Highways," § 16.

— to indictment, see "Criminal Law," § 24.

— to jurisdiction, see "Abatement and Revival," § 3.

— to misconduct of jury, see "Criminal Law," § 177.

— to parties, see "Parties," § 10.

— to pleading, see "Pleading," §§ 86-100.

— to preferences, see "Corporations," § 93.

— to reference, see "Reference," § 3.

— to tender, see "Tender," § 5.

— to transfer from law to equity docket, see "Practice in Civil Cases," § 21.

— to venue, see "Venue in Civil Cases," § 10.

Of performance of contract, see "Contracts," § 46.

Of preliminary examination, see "Criminal Law," § 20.

Of presentment, protest, and notice, see "Negotiable Instruments," § 66.

Of privilege of witness, see "Witness," § 48.

Of right to appeal, see "Appeal," §§ 12-14.

— to bring proceedings for dissolution, see "Corporations," § 103.

— to change of venue, see "Venue in Civil Cases," § 23.

Of right to discharge servant, see "Master and Servant," § 6.
to jury trial, see "Jury," §§ 28, 29.
Of vendor's lien, see "Sale," § 58; "Vendor and Purchaser," § 36.

WALLS.

See "Party Walls."

WARD.

See "Guardian and Ward."

In city, see "Municipal Corporations," §§ 14, 15.

WAREHOUSEMEN.

When carriers liable as warehousemen, see "Carriers," § 13.

§ 1. Contracts for storage.

(Minn.: 1895.)

Where one brings wheat to an elevator, and, on being asked if he wishes to sell, replies in the negative, and then deposits the wheat and takes a ticket for it, the transaction cannot be converted into an implied contract of sale by evidence of the practice of the elevator owner to ship grain from the elevator to a mill owned by him, to be ground as he needed it, without regard to the amount of outstanding tickets issued for wheat deposited in the elevator.—Weiland v. Krejnick (Minn.) 65 N. W. 631.

63 Minn. 314.

§ 2. Warehouse receipts.

[a] (Minn.: 1895.)

Where a warehouseman delivered wheat deposited with him to another, for whom he was engaged in buying wheat, as wheat bought for the latter, he could not, on redeeming tickets issued by him to his depositors, recover the wheat of his principal, on the ground that he had no right to deliver it to the latter.—Weiland v. Sunwall (Minn.) 65 N. W. 628.

63 Minn. 320.

[b] (Wis.: 1897.)

Storage warrants in the usual form of warehouse receipts, issued by a furnace company on iron in its yards, are not warehouse receipts, the company not being in the storage or warehousing business.—Geilfuss v. Corrigan (Wis.) 70 N. W. 306.

§ 3. Mixing grain.

[a] (Minn.: 1895.)

Where different amounts of grain were deposited by different persons with a warehouseman, and commingled by him, and part thereof converted, no one of the bailors could, as against the others, on the warehouseman's assignment, recover more than his pro rata share of grain left in the warehouse.—Weiland v. Sunwall (Minn.) 65 N. W. 628.

63 Minn. 320.

[b] (Minn.: 1895.)

The facts that mill owners who operated an elevator with each of their mills, and were in partnership in the operation of a third elevator, at which they received wheat for storage, divided the stored wheat, and put the respective parts in the respective elevators owned by them individually, where it was commingled with their own wheat, and that they intended subsequently to buy such stored wheat, did not require a finding that the wheat was bought by, instead of stored with, them.—Weiland v. Sunwall (Minn.) 65 N. W. 628.

63 Minn. 320.

WARRANT.

Authorizing judgment by confession, see "Judgment," § 11.
City warrants, see "Municipal Corporations," § 177.
For arrest, see "Arrest," § 6.
For collection of taxes, see "Taxation," § 78.
For payment of claims against county, see "Counties," § 46.
In criminal cases, see "Arson," § 1; "Criminal Law," § 16.
Of attachment for contempt, see "Contempt," § 13.
Of school district, see "Schools and School Districts," § 23.
State warrants, see "States and State Officers," § 17.

WARRANTY.

See "Covenants," §§ 4, 6-8; "Deed"; "Sale," §§ 27-42.

In application for insurance, see "Insurance," §§ 28, 34.

Parol warranty, see "Frauds, Statute of," § 13.

WASTE.

[a] (Neb.: 1895.)

A life tenant may remove timber, so as to fit the land for pasture or cultivation, if he does not thereby damage the inheritance.—Disher v. Dishar (Neb.) 63 N. W. 368.

45 Neb. 100.

[b] (Neb.: 1895.)

The reversioner in an action to stay threatened waste by a tenant for life may recover for waste previously committed, provided there be some connection between the injury done and the acts threatened.—Disher v. Dishar (Neb.) 63 N. W. 368.

45 Neb. 100.

WATER COMPANIES.

Power of city as to supplying water to inhabitants, see "Municipal Corporations," § 8.

Regulating water supply, act impairing obligation of contracts, see "Constitutional Law," § 30.

§ 1. Contract with city.

[a] (Iowa: 1897.)

Under an ordinance constituting a contract between a city and a water company, by which the company agreed to furnish to the city and its inhabitants water of good quality, and the city agreed to pay the company for the maintenance of a certain number of fire hydrants, the city council had power, acting in good faith, and for the best interests of the city, to waive strict compliance with the contract as to the quality of the water furnished; and where it audited the bills of the company under the contract during an unusual season, which affected the source of supply, and during which the water furnished was not of the required standard of purity, its action constituted an acceptance of the water furnished which was binding on the city.—Creston Waterworks Co. v. City of Creston (Iowa) 70 N. W. 739.

[b] (Iowa: 1897.)

Under the provisions of McClain's Code, § 643, requiring a city council to fix the limits of the benefit or protection afforded by waterworks each year before levying the special tax on property within such limits to pay the water rents therefor, an ordinance by which a city entered into a contract with a waterworks company to maintain fire hydrants is not invalid because it fixes a distance of 2,000 feet from a

hydrant as a standard by which such limits shall be determined, where it also provides for the fixing of such limits annually by the council.—*Creston Waterworks Co. v. City of Creston* (Iowa) 70 N. W. 739.

[c] (Iowa; 1897.)

The power of a city or town to contract with an individual or company operating waterworks "to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties," given by McClain's Code, § 641, is not limited by section 643, providing that a city or town making such a contract shall levy and collect a special tax on property within the limits of the benefit or protection afforded, sufficient to pay the water rents so agreed to be paid, but not exceeding five mills on the dollar for any one year; and, when the fund arising from such special tax is insufficient to meet the obligations of the city under its contract, it may meet the deficiency from its general revenues.—*Creston Waterworks Co. v. City of Creston* (Iowa) 70 N. W. 739.

[d] (Neb.; 1897.)

A petition alleging that the amount of water rents accruing to plaintiff under its contract with defendant city during certain years was smaller than the amount which might have been raised by the levy which the city was authorized to make for paying such rents, and showing a balance due and unpaid, states a cause of action.—*North Platte Water Works Co. v. City of North Platte* (Neb.) 70 N. W. 393.

§ 2. Water rates and charges.

[a] (Iowa; 1895.)

The stipulation in an ordinance that a water company shall furnish water to the city and its citizens at the average price paid therefor in other cities of the United States having efficient waterworks operated by private companies, and that if the city and company cannot agree on the rate it shall be left to arbitrators, is void; the method being indefinite, and the arbitrators having power only to determine what such average rate is. The rate should be fixed by the court, in the absence of an agreement by the parties, on the basis of what is reasonable compensation.—*City of Des Moines v. Des Moines Waterworks Co.* (Iowa) 64 N. W. 269; *Des Moines Waterworks Co. v. City of Des Moines*, Id.

[b] (Iowa; 1895.)

An ordinance fixing rates at which a water company shall furnish water is, in an action by the company to recover for water furnished, *prima facie*, a schedule of reasonable rates.—*City of Des Moines v. Des Moines Waterworks Co.* (Iowa) 64 N. W. 269; *Des Moines Waterworks Co. v. City of Des Moines*, Id.

[c] (Iowa; 1895.)

A city, though authorized to fix rates for water, cannot arbitrarily fix an unreasonable rate, at which a water company must supply the city and its citizens.—*City of Des Moines v. Des Moines Waterworks Co.* (Iowa) 64 N. W. 269; *Des Moines Waterworks Co. v. City of Des Moines*, Id.

[d] (Iowa; 1897.)

An ordinance by which a city authorized a waterworks company to construct and operate waterworks for a period of 25 years, and to charge to consumers during such term the rates fixed in the ordinance, "or other rates that may be established by the grantee, and approved by said council," does not abridge the statutory right of the council to establish different rates when those fixed shall be found to be unreasonable.—*Creston Waterworks Co. v. City of Creston* (Iowa) 70 N. W. 739.

[e] (Neb.; 1895.)

A rule of a water company supplying the inhabitants of a city, that if water rents are

not paid within 30 days after they fall due the water will be turned off, and not turned on again until all back rents are paid, including a charge of one dollar for turning the water off and on, is unreasonable, discriminatory, and void as to the charge of one dollar, so that the refusal of a consumer, whose water was turned off for nonpayment of rental, to pay one dollar in addition to back rent, for turning the water on again, was no ground for the company's refusal to turn the water on.—*American Waterworks Co. v. State*, 64 N. W. 711, 46 Neb. 191.

[f] (Neb.; 1896.)

The affirmative grant of power to a city of the second class having less than 5,000 inhabitants, and owning and maintaining waterworks, to fix and collect charges for the use of water meters (Comp. St. c. 14, art. 1, § 69, subd. 15), excludes, by implication, the power to compel a citizen, as a condition precedent to the use of water, to purchase a meter, and place it in position at his own expense.—*Albert v. Davis* (Neb.) 68 N. W. 945.

WATERS AND WATER COURSES.

I. WATER RIGHTS AND EASEMENTS, § § 1, 2.

II. WATER COURSES—POLLUTION, DIVERSION, AND OBSTRUCTION, § § 3-8.

III. ARTIFICIAL COLLECTION OF WATERS—MILLDAMS, § § 9-12.

IV. SUBTERRANEAN AND PERCOLATING WATERS, § 13.

V. ICE, § 14.

See, also, "Drainage"; "Navigable Waters"; "Riparian Rights"; "Surface Water."

Liability of city for obstruction of water course, see "Municipal Corporations," § 106.

Limitation of actions for flowage and diversion, see "Limitation of Actions," § 17.

Power of city as to supplying water to inhabitants, see "Municipal Corporations," § 8.

Streams and waters as boundaries, see "Boundaries," § § 1, 2.

Title to land under water, see "Riparian Rights," § 3.

I. WATER RIGHTS AND EASEMENTS.

§ 1. Appropriation of waters on public lands.

[a] (S. D.; 1896.)

Where the lands on which one makes a water-right location are in fact unoccupied public lands of the United States, it is immaterial that it is at the time erroneously contended by another that the location is on lands claimed by him.—*Scott v. Toomey* (S. D.) 67 N. W. 838.

[b] (S. D.; 1896.)

Where one makes a water-right location on unoccupied public lands of the United States opened up to settlement, his rights there, under Rev. St. U. S. §§ 2339, 2340, as against one who thereafter settles thereon and pre-empt the lands, are not affected by the fact that, while the lands were part of an Indian reservation, such pre-emptor built a cabin thereon, he having gone away before it was opened up for settlement, and not returned till after the water-right location was made; and it is immaterial that he left an agent in possession, as by section 2259 a pre-emptor must make settlement in person.—*Scott v. Toomey* (S. D.) 67 N. W. 838.

§ 2. Rights of state—Taking water for water power.

(Wis.; 1895.)

Where a canal extending from above to below a dam in a stream is maintained by the

state for the purpose of navigation, the state has no right, under Act 1848, § 16, providing that a water power created by reason of any dam erected or other improvement made shall belong to the state, to divert the water of the stream from the riparian owners below the dam, by cutting sluiceways in the banks of the canal solely to create a water power.—*Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.* (Wis.) 61 N. W. 1121.
90 Wis. 370.

II. WATER COURSES — POLLUTION, DIVERSION, AND OBSTRUCTION.

§ 3. What constitutes water course.

(Neb.; 1897.)
To constitute a water course, the size of the stream is not material. It must be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous.—*Town v. Missouri Pac. Ry. Co.* (Neb.) 70 N. W. 402.

§ 4. Pollution.

(Wis.; 1896.)
The operation of a starch factory so as to pollute the waters of a natural stream and render them unfit for watering stock and ordinary domestic use will be enjoined at the instance of a riparian owner who is deprived of such use of the water.—*Middlestadt v. Wau-paca Starch & Potato Co.* (Wis.) 66 N. W. 713.
93 Wis. 1.

§ 5. Diversion or detention.

[a] (Iowa; 1897.)
The erection of a dam on a nonnavigable stream by a riparian owner to form a pond from which to harvest ice in winter is not such unreasonable use of the water as will entitle a lower mill owner to an injunction; it appearing that ordinarily but 25 per cent. of the power used by the mill was furnished by the water, and that it took only two days and a night to fill the upper owner's pond, after which the water flowed down again with no material diminution.—*Gehlen v. Knorr* (Iowa) 70 N. W. 757.

[b] (Mich.; 1896.)
Where a riparian proprietor has maintained a dam across a stream for a time long enough to acquire a prescriptive right to divert a portion of the stream to his house and barns for domestic uses, he will be allowed to maintain it for such uses, though, for cause shown, he may be enjoined from diverting the water for any other purpose.—*Mastenbrook v. Alger* (Mich.) 68 N. W. 213.

§ 6. Obstructions.

(Mich.; 1895.)
A mill owner has a cause of action against one who, by piling logs in the river above the mill, ready for driving in the spring when the stream becomes navigable, interrupts the natural flow of the stream to the mill.—*Wooden v. Mt. Pleasant Lumber & Manuf'g Co.* (Mich.) 64 N. W. 329.

§ 7. Actions.

(Mich.; 1895.)
One not injured by the maintenance of a dam by which a mill is operated cannot, when sued by the mill owner for obstructing the natural flow of the stream to the mill, defend by setting up that the dam was constructed by plaintiff without proper authority.—*Wooden v. Mt. Pleasant Lumber & Manuf'g Co.* (Mich.) 64 N. W. 329.

§ 8. — Injunction.

(Mich.; 1896.)
Where the volume of water furnished by a stream is barely sufficient to sustain the stock

of complainant, a lower proprietor of lands, of defendant, an upper proprietor, and other riparian proprietors along the stream, and to supply proprietors with water for their natural wants and for domestic use, defendant will be enjoined from diverting water from the stream for the purposes of irrigation.—*Mastenbrook v. Alger* (Mich.) 68 N. W. 213.

III. ARTIFICIAL COLLECTION OF WATERS—MILLDAMS.

§ 9. Prescriptive right of flowage.

[a] (Mich.; 1895.)
A person by maintaining for 15 years a dam so as to flow the land of another, without complaint from the latter, acquires a prescriptive right of flowage in the land.—*Williams v. Barber* (Mich.) 62 N. W. 155.

104 Mich. 31.
[b] (Minn.; 1896.)
The building of a dam across a river, and the continued adverse use of the dam, whereby the water of the river was obstructed, and thereby overflowed plaintiff's land during the months of April, May, and June in each year, for the purpose of sluicing logs, for a period of fifteen years, was sufficient to create an easement in plaintiff's premises by prescription during the said three months in each year.—*Swan v. Munch* (Minn.) 67 N. W. 1022; *Johnson v. Same, Id.*; *Hoten v. Same, Id.*; *Carlson v. Same, Id.*

[c] (Wis.; 1897.)
Where the natural outlet of a lake is closed, and an artificial outlet made, near which a dam for milling purposes is constructed and maintained for 40 years, whereby the water is caused to flow back over the lands of other riparian owners, rendering said lands valuable as pleasure resorts, the dam owner, so long as he retains his easement, has no right to lower the water below the level of the lowest point at which it has been during said period, so as to leave the shores marshy and unhealthful, and impair the value of the riparian property.—*Smith v. Youmans* (Wis.) 70 N. W. 1115.

[d] (Wis.; 1897.)
Nor has a lessee of the water power created by said dam any right to so lower the level of the lake by using the dam and bulkheads as a reservoir to accumulate water in order to discharge it irregularly, and in great volumes, for the use of a mill which he owns on a stream below.—*Smith v. Youmans* (Wis.) 70 N. W. 1115.

§ 10. Injuries by flowage.

[a] (Iowa; 1896.)
In an action by a mill owner against the owner of another mill, situated lower down on the same stream, to enjoin defendant from maintaining his dam at such a height as to damage plaintiff's property by backwater, where plaintiff does not show by a preponderance of the evidence that defendant's dam, as constructed at the time of the trial, interfered with plaintiff's legal rights, he is not entitled to an injunction.—*Matthews v. Metcalf* (Iowa) 66 N. W. 189.

[b] (Minn.; 1896.)
A deed granted "the use and enjoyment of the M. river, the water thereof, and the land covered thereby, for the purpose of booming and holding logs, lumber, and timber therein," which the grantors had by reason of their being the owners in fee simple of a certain farm bordering on that river. Following the description, the deed recited, "Hereby granting to the said parties of the second part, their heirs and assigns, the sole, exclusive, and perpetual right to erect and construct all piers and booms; to drive and place all posts and piling that may be necessary and proper for the exercise of the right and privilege of booming and holding logs, lumber, and timber hereinbefore granted; said parties of the second part, their heirs and as-

signs, having the right to place said piers, posts, and pilings, as well as whatsoever else may be necessary and proper for the booming and holding of logs, lumber, and timber as aforesaid, either in said river, or on the shore thereof, upon the real estate hereinbefore described." *Held* not to entitle the grantees to deprive the grantors of the beneficial use of their farm by maintaining booms and assorting works at a point two or three miles down stream, whereby log jams were formed, and the water set back on the farm.—*Rasicott v. Little Falls Imp. & Nav. Co.* (Minn.) 68 N. W. 212.

§ 11. Actions for injuries—Injunction.

(Mich.; 1895.)

Owners of a dam privilege by prescriptive right, who have no right by purchase to overflow adjoining lands, will be restrained from maintaining the water in such dam at such a level that the adjoining lands are subject to a greater overflow than existed during the period of prescription.—*A. P. Cook Co. v. Beard* (Mich.) 65 N. W. 518.

§ 12. — Proceedings and review.

[a] (Mich.; 1896.)

In an action for injuries to plaintiff's dam by a flood caused by the breaking of defendant's dam higher up the stream, where there was evidence that it was caused by its negligent construction and failure to keep it in repair, a request to direct a verdict for defendant was properly refused.—*Darling v. Thompson* (Mich.) 65 N. W. 754.

[b] (Mich.; 1896.)

In an action for damages by breaking of defendants' dam through their negligence, an instruction that failure of plaintiff to make efforts which would be futile to prevent such damages does not render him guilty of contributory negligence is proper.—*Darling v. Thompson* (Mich.) 65 N. W. 754.

[c] (Mich.; 1896.)

In an action against A. and B., as owners of a dam, for injuries caused by its breaking, A. testified that he owned the dam. There was evidence that B., of whose affairs A. had charge, owned the land on which it was erected. It was not shown how A. acquired title. *Held*, that whether B. was an owner, and therefore chargeable with neglect, was for the jury.—*Darling v. Thompson* (Mich.) 65 N. W. 754.

IV. SUBTERRANEAN AND PERCOLATING WATERS.

§ 13. Springs.

[a] (S. D.; 1895.)

The waters of a spring formed and fed by the percolation of water through the surrounding soil belong to the owner of the soil so far as to entitle him to the exclusive use and disposition of the same.—*Metcalf v. Nelson* (S. D.) 65 N. W. 911.

[b] (S. D.; 1895.)

In the absence of evidence as to the source of a spring, it is presumed that the spring was formed and fed by the percolation of water through the surrounding soil, and not that it was the outbreak of a subterranean stream.—*Metcalf v. Nelson* (S. D.) 65 N. W. 911.

V. ICE.

§ 14. Cutting and removing.

[a] (Mich.; 1897.)

The owner of the land on the side of a meandered stream has the right to cut all the ice which forms on that portion of the stream owned by him, and may lease the privilege to

another.—*Oliver v. Olmstead* (Mich.) 70 N. W. 1036.

[b] (Wis.; 1896.)

The lessee of a mill with water power and rights of flowage appurtenant thereto, not being a riparian proprietor upon the millpond, cannot sue for the removal of ice therefrom, his right of flowage or water power not being lessened thereby.—*Reysen v. Roate* (Wis.) 66 N. W. 599.

92 Wis. 543.

WEALTH.

Evidence of in action for breach of marriage promise, see "Breach of Marriage Promise," § 4.

WEAPONS.

See "Pointing Fire Arms."

Assault with deadly weapon, see "Assault and Battery," § 6.

WEIGHTS AND MEASURES.

(Iowa; 1895.)

On a prosecution for using false weights the falsity of the weight used may be proved by comparison with any standard weight shown to be correct, though the state provides a test standard weight by which the correctness of all weights is to be determined.—*State v. Frolick* (Iowa) 64 N. W. 264.

WHARVES.

(Minn.; 1896.)

The legislature may grant, or authorize the granting, to any person having traffic with craft navigating the contiguous waters, the exclusive use of so much of a public levee as is reasonably necessary for his business with such craft, provided it does not unreasonably interfere with the use of the levee by the public.—*City of St. Paul v. Chicago, M. & St. P. Ry. Co.* (Minn.) 68 N. W. 458.

63 Minn. 330.

WITHDRAWAL.

Of pleas of not guilty, see "Criminal Law," § 28.

WIDOW.

See "Dower."

Allowance to, see "Executors and Administrators," §§ 45, 46.

Election by, see "Dower," § 6.

Provision in will for support, see "Wills," § 57.

Right to build monument, see "Cemeteries."

WIFE.

See "Husband and Wife."

WILLS.

I. TESTAMENTARY CAPACITY, §§ 1-6.

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VI. CONSTRUCTION, §§ 33-53.

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2. Ambiguous and Uncertain Provisions, §§ 39, 40.
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VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES, §§ 54-63.

VIII. CONTRACT TO MAKE WILL, § 64.

See, also, "Descent and Distribution"; "Executors and Administrators."

Children omitted from will, see "Descent and Distribution," § 4.

Defect of parties in bill to subject land to payment of legacy, see "Equity," § 56.

Devise in lieu of dower, see "Dower," §§ 5, 6. — of homestead, charge of debts and legacies, see "Homestead," § 21.

Election by widow to take devise in lieu of dower, see "Dower," § 6.

Power of city to accept devise for library, see "Municipal Corporations," § 12.

Probate courts, see "Courts," §§ 19-21.

Testamentary powers, see "Powers," § 2.

Validity of charitable bequests, see "Charities," § 1.

I. TESTAMENTARY CAPACITY.

§ 1. What constitutes capacity.

(Mich.; 1896.)

On the issue of testator's capacity to make a valid will, it is error to charge that: "In order to possess testamentary capacity it is not necessary that one should know the number and conditions of his relations or their claim upon his bounty, or that he should know or understand the reason for giving or withholding his bounty to or from any relative." *Spratt v. Spratt* (1889) 43 N. W. 627, 76 Mich. 395, distinguished.—*Moriarty v. Moriarty*, 65 N. W. 964.

§ 2. Evidence.

[a] (Iowa; 1895.)

Where the mental disease, if it existed at all, was of long standing, and its development progressive, testimony as to testator's actions and manner for a connected period of six years after he made the will is admissible on the question of his mental capacity at the time the will was made.—*Bever v. Spangler* (Iowa) 61 N. W. 1072.

93 Iowa, 576.

[b] (Iowa; 1896.)

On an issue as to testatrix's mental capacity, evidence of how she acted when her mental condition was spoken of in her presence was admissible.—*In re Fenton's Will* (Iowa) 66 N. W. 99.

[c] (Iowa; 1896.)

In a will contest, an adjudication in proceedings setting aside a guardianship over testatrix, declaring her to be of sound mind, is not conclusive evidence of mental capacity up to the date of its entry.—*In re Fenton's Will* (Iowa) 66 N. W. 99.

[d] (Mich.; 1894.)

Testimony of one who visited testatrix in the evening of the day the will was executed, that testatrix recognized her, and talked intelligently to her, and that she seemed to be competent and to understand, and that her mind seemed to be clear, is admissible to disprove evidence tending to show that testatrix had

lost the power of speech. *McHugh v. Fitzgerald* (Mich.) 61 N. W. 351.

103 Mich. 21.

[e] (Mich.; 1896.)

To invalidate a will because testator's father was excluded, evidence that testator had quarreled with his father because of an alleged attempt to cheat him of bequests from his mother, and that afterwards he cherished an insane delusion against his father, is not admissible, where the will in suit was made many months before testator's controversy with his father, and no delusion existed at that time. *Haines v. Hayden* (1893) 51 N. W. 911, 95 Mich. 345, distinguished.—*Sharp v. Merriman*, 66 N. W. 372.

[f] (Wis.; 1897.)

A judgment denying probate of a will for mental incapacity and undue influence will not be disturbed where there is evidence that, for a few years before executing the will, testator did not take care of his property as carefully as before; that his health was impaired; that his habits of life had changed; that he associated with immoral women, including the sole legatee; and that she had tried to ingratiate herself in his affections.—*Bryant v. Pierce* (Wis.) 70 N. W. 297.

§ 3. — Presumption and burden of proof.

[a] (Iowa; 1895.)

Where it appeared in a will contest that testator was afflicted with senile dementia, it was incumbent upon proponents to show that, at the time the will was made, testator was of sound mind.—*Bever v. Spangler* (Iowa) 61 N. W. 1072.

93 Iowa, 576.

[b] (Iowa; 1896.)

One under guardianship for insanity is, prima facie, incapable of making a will.—*In re Fenton's Will* (Iowa) 66 N. W. 99.

§ 4. — Declarations.

[a] (Iowa; 1895.)

Declarations of a testator as to how he should dispose of his property, and as to his failing memory, are admissible, in logical connection with other evidence, to show his mental condition when the will was executed.—*Bever v. Spangler* (Iowa) 61 N. W. 1072.

93 Iowa, 576.

[b] (Mich.; 1894.)

On the contest of a will on the ground of mental incapacity, declarations of a legatee as to testator's mental capacity are inadmissible.—*Renand v. Pageot* (Mich.) 61 N. W. 3.

102 Mich. 568.

§ 5. — Opinions of witnesses.

[a] (Iowa; 1895.)

The opinion of a party to a will contest, as to testatrix's mental condition, based on personal observation of her habits and conduct, is admissible.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, 1d.

[b] (Iowa; 1895.)

The exclusion of testimony of the contestant as to whether he had noticed actions of the testatrix indicating feebleness of mind, and his statements that her mind "seemed weak," and that she seemed to grow "weak-minded," was error.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, 1d.

[c] (Iowa; 1896.)

A stenographer who was for two hours engaged in taking testatrix's statements for a deposition, and who testified that she hesitated in her answers, and was frequently prompted by another, could state that, in his opinion, she was feeble-minded.—*In re Fenton's Will* (Iowa) 66 N. W. 99.

[d] (Mich.; 1894.)

Where a physician, who knew testatrix for several years, and attended her in her last sickness, testifies fully as to her condition on

the day the will was executed, stating that her mind seemed clear, and that she answered all questions intelligently, and appreciated everything that was going on about her, he may state that, in his opinion, she was competent to make a will.—*McHugh v. Fitzgerald* (Mich.) 61 N. W. 354.

103 Mich. 21.

[e] (Mich.; 1896.)

The weight of a witness' opinion as to the mental capacity of testator depends on the opportunity the witness has had to form such opinion.—*Sharp v. Merriman* (Mich.) 66 N. W. 372.

§ 6. Facts showing capacity or incapacity.

[a] (Iowa; 1895.)

In a proceeding to set aside a will for incapacity of the testator, where there was evidence as to an injury causing physical and mental sickness, and evidence of forgetfulness and great mental weakness, the question of testator's mental incapacity was for the jury.—*Bever v. Spangler* (Iowa) 61 N. W. 1072.

93 Iowa, 576.

[b] (Neb.; 1895.)

Where the testator's mind is not so controlled by his peculiar views as to prevent the exercise of a rational judgment touching the disposition of his property, the will should be sustained, however absurd or irrational such views may be.—*McClary v. Stull*, 62 N. W. 501, 44 Neb. 175.

[c] (Neb.; 1895.)

A belief in spiritualism is not conclusive evidence of a want of testamentary capacity, if testator is not affected by any delusion on matters of fact connected with the making of the will or the objects of his bounty.—*McClary v. Stull* (Neb.) 62 N. W. 501.

44 Neb. 175.

II. FRAUD AND UNDUE INFLUENCE.

§ 7. Evidence.

[a] (Mich.; 1894.)

Evidence of the relations which existed between testatrix and proponents, who were her sisters, and statements by her that she intended to give her property to them, are competent to show a reason for the disposition made in the will.—*McHugh v. Fitzgerald* (Mich.) 61 N. W. 354.

103 Mich. 21.

[b] (Mich.; 1896.)

To show B.'s undue influence on testator, testimony that, "as to B.'s manner, he always looked shy, and generally confused," etc., is inadmissible, where not confined to any particular occasion where the appearance of B. was a part of the res gestæ.—*Sharp v. Merriman* (Mich.) 66 N. W. 372.

[c] (Mich.; 1896.)

Evidence that one who formerly lived in testator's family, and was in straitened circumstances, was a more worthy object of testator's bounty than those named in the will, is inadmissible.—*Sharp v. Merriman* (Mich.) 66 N. W. 372.

[d] (Mich.; 1896.)

A former will of testatrix bequeathed the residue of her property to her brothers in trust. At the time the will in issue was drawn one of the brothers, who was the attorney, and of the brothers, expressed a doubt as to the validity of the trust, and suggested that it be omitted, but did not explain that the property would then pass to the devisees absolutely, nor suggest any way in which her intentions as to the trust could be carried out. Testatrix also desired to provide for an only grandchild, the issue of her only son, but feared the property might come into the control of the child's mother. The brother gave no advice as to how this might be done. Testatrix had

great confidence in her brother's integrity and ability. *Held*, that the evidence justified a finding that the residuary clause was the result of the undue influence and fraudulent concealment of the brother.—*Lyon v. Dada* (Mich.) 69 N. W. 654.

[e] (Mich.; 1897.)

Evidence as to the conduct of the proponent and of those active in her interest in having the will executed, the condition of the testatrix at the time, and the execution of two former wills different from the one in issue, was admissible on the question of undue influence.—*Sullivan v. Foley* (Mich.) 70 N. W. 322.

[f] (Minn.; 1897.)

That the will of a member of an incorporated charitable order, bequeathing property to the order, was made in fulfillment of a vow by testatrix, required by the by-laws of the order, is not proof of duress or undue influence, where it is not shown that testatrix ever expressed regret that she had taken the vow.—*In re Will's Estate* (Minn.) 69 N. W. 1090; *Will v. Sisters of Order of St. Benedict*, Id.

§ 8. — Presumption and burden of proof.

[a] (Mich.; 1896.)

Where the evidence shows that the relations between testator and his next of kin were strained, undue influence will not be presumed from his failure to give all his property to his near relatives.—*Sharp v. Merriman* (Mich.) 66 N. W. 372.

[b] (Mich.; 1897.)

The proponent has no ground of complaint where the jury were instructed that testatrix was at liberty to select at discretion the object of her bounty, and it was not for them to inquire whether the will was in itself suitable; that undue influence must amount to force or coercion, and to constraint too great to be resisted; that advice, persuasion, or appeals to the affections do not constitute undue influence; that undue influence will not be presumed because the property was given elsewhere than to testatrix's immediate relatives, nor because the person charged with exercising it had ample opportunity therefor; but the burden of proof is on the contestant to establish influence by a fair preponderance of evidence.—*Sullivan v. Foley* (Mich.) 70 N. W. 322.

§ 9. — Declarations.

[a] (Iowa; 1895.)

Declarations of the testatrix made five months prior to the execution of her will relative to the intended distribution of her estate may be given in evidence by the contestant, who took no part in the conversations, to show that the will was procured by undue influence.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, Id.

[b] (Iowa; 1895.)

Testimony of disinterested parties as to declarations of the testatrix, both before and after the execution of the will, as to her feelings towards contestant, and the disposition she desired to make of her estate, are admissible to show undue influence.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, Id.

[c] (Wis.; 1897.)

Declarations of testator are admissible to show his state of mind and consequent susceptibility to undue influence.—*Bryant v. Pierce* (Wis.) 70 N. W. 297.

§ 10. Question for jury.

[a] (Mich.; 1896.)

A testator, who had made a will dividing his property between his seven children, from time to time added codicils, the effect of which was to so change the will that the most of his property was given to two sons. On appeal

from the probate of the will there was evidence that one of the two sons resided with his father during the later years of his life, and the other was a frequent visitor; that after interviews with this son the testator talked against another son, and spoke of fixing matters differently. *Held*, that such evidence justified the court in submitting the question of undue influence to the jury.—*Rivard v. Rivard* (Mich.) 66 N. W. 681.

[b] (Mich.; 1896.)

On the contest of a will by testator's daughters, whom he had practically disinherited, leaving all his real estate to his sons, G. and W., evidence that testator had made statements showing his fear of G.; that the latter had once ordered one of the daughters out of her father's house, saying that she was after the property; that testator had said he could not do as he wanted to, and that he did not know how to make his will, and wished G. was there; and that, when the will was read, and one of the daughters remarked that G. must have known something about the will before, W. said "they had got it fixed," and that the daughters "would never get a cent of it," etc.,—is sufficient to take the case to the jury.—*In re Seymour's Estate* (Mich.) 69 N. W. 494.

III. REQUISITES AND VALIDITY.

§ 11. Signature.

[a] (Neb.; 1896.)

Under Comp. St. c. 23, § 127, a will other than a nuncupative must be signed by testator, or in his presence by his direction; mere knowledge that his name is being signed by another, or that the signing was acquiesced in, not being sufficient.—*Murry v. Hennessey* (Neb.) 67 N. W. 470.

48 Neb. 608.

[b] (Neb.; 1896.)

Comp. St. c. 23, § 127, providing that a will must be signed by testator, or by some person in his presence, does not require the words composing the name of an illiterate testator to be written at the end of his will, either by himself or by another at his direction; it being sufficient if testator makes a mark at that place, with the intention of making a will, which he adopts as his signature.—*Thompson v. Thompson* (Neb.) 68 N. W. 372.

§ 12. Attestation.

[a] (Neb.; 1896.)

Comp. St. c. 23, § 127, requiring a will to be attested and subscribed in the presence of testator by two or more witnesses, does not require the subscription to be only at the express request of testator.—*Thompson v. Thompson* (Neb.) 68 N. W. 372.

[b] (Wis.; 1896.)

An instrument bearing the signature of testatrix, subscribed before the signing by the witnesses, and not in their presence, is valid, where it was subscribed by the witnesses in the presence of the testatrix.—*Skinner v. American Bible Soc.* (Wis.) 65 N. W. 1037.

§ 13. — Competency of attesting witness.

(Minn.; 1897.)

Members of an incorporated charitable association, the by-laws of which require each member to give to the corporation, without compensation, all her present and future property and services, are not incompetent as subscribing witnesses to the will of a member bequeathing her property to the corporation, by reason of Gen. St. 1894, § 4428, which declares void all devises and legacies to subscribing witnesses.—*In re Will's Estate* (Minn.) 69 N. W. 1000; *Will v. Sisters of Order of St. Benedict*, Id.

§ 14. Codicils.

(Wis.; 1896.)

Where a codicil duly executed had adopted and incorporated into it a former codicil, which was insufficiently executed, the former codicil became a part of the latter.—*Skinner v. American Bible Soc.* (Wis.) 65 N. W. 1037.

92 Wis. 209.

IV. REVOCATION AND REVIVAL.

§ 15. Revocation—By codicil.

(Iowa; 1895.)

The execution and loss of a codicil, the contents of which are unknown, does not defeat the establishment of a last, duly-executed, and published will, in the absence of evidence that the codicil revokes some part thereof.—*In re Sternberg's Estate* (Iowa) 62 N. W. 734; *Appeal of Reed*, Id.

§ 16. — By subsequent will.

[a] (Mich.; 1895.)

On an issue as to whether a second will, which was destroyed, revoked a former will, it is incumbent upon the party who claims that the second revokes the first will to establish that it contained a clause of revocation.—*Cheever v. North* (Mich.) 64 N. W. 455.

[b] (Wis.; 1897.)

Under Rev. St. § 2294, making the probate of a will conclusive as to its due execution, the probate of two separate wills as one instrument, in the absence of any appeal, precludes the contention that the second will revoked the first.—*Dicke v. Wagner* (Wis.) 70 N. W. 159.

§ 17. — By marriage or divorce.

[a] (Minn.; 1896.)

The fact that, under the statute, the wife may inherit from the husband (Gen. St. 1894, §§ 4470, 4471, 4477), does not change the common-law rule that the will of a man is not revoked by his subsequent marriage without the birth of issue (section 4430).—*In re Hulett's Estate* (Minn.) 69 N. W. 31; *Carey v. Hulett*, Id.

[b] (Neb.; 1896.)

An absolute revocation of a will is not implied by law from the obtaining of a divorce from testator by his wife after the making of the will, the death of one of his children, for whom provision was made in the will, and the birth of three children to such deceased child, prior to testator's death.—*Baacke v. Baacke* (Neb.) 69 N. W. 303.

§ 18. Revival.

(Mich.; 1895.)

The testator's destruction of a second will, not containing an express revocation, operates to revive a former will, which has been preserved; and this rule is not affected by How. St. § 5793, providing that "no will nor any part thereof shall be revoked except * * * by some other will or codicil in writing," duly executed.—*Cheever v. North* (Mich.) 64 N. W. 455.

V. PROBATE AND CONTEST.

Admissibility of declarations of legatee, see "Evidence," § 27.

Estoppel to contest, see "Estoppel," § 24.

Laches in bringing bill to set aside probate, see

"Equity," § 50.

Testimony as to transactions with decedents, see "Witness," § 19.

§ 19. Notice.

(Mich.; 1895.)

The probate of a will is valid, as against debtors of the testator, though some of the heirs are residents of a foreign country, and the notice

required by 3 How. Ann. St. § 6812, to a consul of such country, had not been given.—*Rice v. Hosking* (Mich.) 63 N. W. 311.
105 Mich. 303.

§ 20. Parties.

[a] (Iowa: 1896.)

One may maintain an action to set aside a probated will, though not an heir, but claiming under a prior, unprobated will, which by her petition she claims to be entitled to probate.—*Kosteletzky v. Scherhart* (Iowa) 68 N. W. 591.

[b] (Neb.: 1896.)

Where an instrument offered for probate expressly gave all the property of testatrix to proponent, and the testimony disclosed that testatrix owned a farm, and that contestants were children of a deceased brother of testatrix, and were her only "near relatives living, except consins," a sufficient interest in contestants was shown to give them a standing to object to the probate of the instrument.—*Murry v. Hennessey* (Neb.) 67 N. W. 470.
48 Neb. 608.

[c] (Wis.: 1896.)

Under Rev. St. § 3791, authorizing the county court to take proof of the execution and validity of a will lost or destroyed by accident or design, and to establish the same, the legatees, devisees, and heirs are all parties.—*In re Valentine's Will* (Wis.) 67 N. W. 12.
93 Wis. 45.

§ 21. Lost wills.

[a] (Neb.: 1897.)

Declarations of the testator as to the contents of a lost will are competent only to corroborate more direct evidence.—*Clark v. Turner* (Neb.) 69 N. W. 843.

[b] (Neb.: 1897.)

The contents of a lost will cannot be proved solely by testator's declarations.—*Clark v. Turner* (Neb.) 69 N. W. 843.

[c] (Neb.: 1897.)

Testimony, as to the contents of a lost will, by a witness who has not inspected it, but has only heard the testator read it, is in effect only testimony as to the testator's declarations, and is therefore incompetent.—*Clark v. Turner* (Neb.) 69 N. W. 843.

[d] (Wis.: 1897.)

Where it is established that testatrix executed a valid will, and left it with a notary, the presumption of revocation arising from the fact that it could not be found after her death, and from the evidence of the notary that she had it in her possession last, is rebutted by the frequent declarations of testatrix, up to within three days of her death, that the will was with the notary, and warrants its establishment as a lost will.—*In re Steinke's Will* (Wis.) 70 N. W. 61.

§ 22. Foreign wills—Probate.

[a] (Mich.: 1895.)

How. Ann. St. § 5806, provides that when a copy of a foreign will, duly probated and authenticated, shall be produced by a person interested in such will, the court shall appoint a hearing to probate same. *Held*, that it was sufficient for the petitioner for probate to allege that he was "interested as a subsequent purchaser of the estate of the deceased" and that it was not necessary for him to set forth the proofs of his interest.—*Mower v. Verplanke* (Mich.) 63 N. W. 302.
105 Mich. 398.

[b] (Minn.: 1895.)

Where, after a will was probated at the domicile of testator in another state, and the executors there qualified, the executors conveyed land in Minnesota under the power of sale in the will, *held*, the foreign probate conclusively established the validity of the will; and, when afterwards probated in Minnesota, it related back

and perfected the sale so made under the power.—*Babcock v. Collins* (Minn.) 61 N. W. 1020.
60 Minn. 73.

§ 23. — Issue of letters of administration.

[a] (Minn.: 1895.)

Prob. Code, § 50 (Gen. St. 1894, § 4457), providing that "when a will is duly proved and allowed, the probate court shall issue letters testamentary thereon to the executor named therein if he be legally competent," etc., applies only to domestic wills.—*Hardin's Estate v. Hardin* (Minn.) 61 N. W. 1018.
60 Minn. 112.

[b] (Minn.: 1895.)

Prob. Code, § 34 (Gen. St. 1894, § 4441), providing for the granting of letters testamentary under a foreign will, does not require the court to issue such letters to the foreign executor, if there is a good reason for not doing so, such as adverse interest or acts of bad faith on the part of such executor.—*Hardin's Estate v. Hardin* (Minn.) 61 N. W. 1018.
60 Minn. 112.

§ 24. Evidence.

[a] (Iowa: 1896.)

In an action to set aside a will, refusal to allow defendant to introduce it in evidence is not error, the petition having set it out and admitted that it was probated.—*Kosteletzky v. Scherhart* (Iowa) 68 N. W. 591.

[b] (Minn.: 1897.)

In the contest of a will bequeathing property to the religious order of which testatrix was a member, and reciting that the bequest was in fulfillment of a vow taken by testatrix, as required by the by-laws, it was not error to receive evidence tending to prove that she was not required to take such vow, as such evidence only denies a fact recited in the will by way of inducement.—*In re Will's Estate* (Minn.) 69 N. W. 1090; *Will v. Sisters of Order of St. Benedict*, Id.

[c] (Neb.: 1896.)

The burden of proof is upon the proponent of a will to establish the execution of the will and the testamentary capacity of the testatrix. *Seebrock v. Fedawa* (1899) 46 N. W. 650, 30 Neb. 424, followed.—*Murry v. Hennessey*, 67 N. W. 470, 48 Neb. 608.

§ 25. — Declarations of testator.

[a] (Mich.: 1894.)

Declarations of deceased as to the intended disposition of his property are admissible though made a considerable time before the execution of the will, the remoteness of time affecting the weight of such testimony rather than its admissibility.—*Renaud v. Pageot* (Mich.) 61 N. W. 3.
102 Mich. 568.

[b] (Wis.: 1896.)

Where it is established that the testatrix properly executed a valid will, and the same was last known to be in her possession, but cannot be found on her death, declarations made by her subsequent to the making of the will are admissible on the question of its existence.—*In re Valentine's Will* (Wis.) 67 N. W. 12.
93 Wis. 45.

§ 26. — Sufficiency.

[a] (Mich.: 1895.)

Evidence that the testator, in his lifetime, showed the witness a paper which he said made a slight alteration in his will, and that it was properly witnessed, was sufficient to authorize the jury to find that said paper was a codicil to the will.—*Cheever v. North* (Mich.) 64 N. W. 455.

[b] (Mich.: 1896.)

In a proceeding to probate a will the court charged that the testator's capacity to

make the will must be established "by a fair preponderance of proof," and in explanation stated that, "if there is more of the evidence, taking the paper and everything into consideration, on the side of the contestants, then the weight of the evidence is on the other side, and the will ought to be overruled." *Held* error.—*Moriarty v. Moriarty* (Mich.) 65 N. W. 964.

[c] (Wis.; 1897.)

Rev. St. § 3788, providing that where there is no contest the court may grant probate of a will on the testimony of one subscribing witness, if he shall testify that the will was executed as required by statute, and that testator was of sound mind, does not contemplate that a contested will cannot be probated on the testimony of one subscribing witness; and a contested will, executed by an illiterate testatrix by making her mark, is sufficiently established by the testimony of one subscribing witness, showing that all statutory requisites were complied with, and that the other subscribing witness signed in his presence, corroborated by testimony that the will was drawn according to written memoranda approved by testatrix, and that she afterwards acknowledged it as her will, where there was evidence satisfactorily accounting for the absence of the other subscribing witness.—*In re Jones' Will* (Wis.) 70 N. W. 685; *Jones v. Roberts*, Id.

§ 27. Hearing or trial.

(Mich.; 1896.)

In a suit to set aside a will, the question whether testator's disposition of the property was unnatural or unjust is not for the jury.—*Sharp v. Merriman* (Mich.) 66 N. W. 372.

§ 28. — Effect of verdict.

[a] (Wis.; 1897.)

The verdict of a jury in a will contest has the same effect as a verdict on a feigned issue in chancery, so that exceptions to evidence cannot work a reversal.—*Bryant v. Pierce* (Wis.) 70 N. W. 297.

[b] (Wis.; 1897.)

Since the verdict of a jury in a will contest is merely advisory, the fact that the court charged erroneously, or urged the jury to agree on a verdict, is immaterial.—*In re Jones' Will* (Wis.) 70 N. W. 685; *Jones v. Roberts*, Id.

§ 29. Review.

[a] (Iowa; 1896.)

Where the decision in a will contest that testatrix was without testamentary capacity was fully supported by the evidence, the fact that a further finding that the will was procured by undue influence was not supported by evidence, will not authorize a reversal.—*In re Fenton's Will* (Iowa) 66 N. W. 99.

[b] (Neb.; 1895.)

Proponent and the scrivener testified to having witnessed the execution by decedent of the will, which purported to have been made at a certain place, and signed, "Carl Julius Gasch." The widow and son, the only heirs of decedent, testified that the signature to the will was not that of decedent; that he at all times signed his name "Julius Gasch"; that he had never been in the town where the will purported to have been made, except once, many years before; that decedent had stated that he never made a will. *Held*, that a verdict that the proposed will was not that of decedent will not be disturbed.—*Risse v. Gasch* (Neb.) 61 N. W. 616. 43 Neb. 287.

§ 30. — Harmless error.

[a] (Iowa; 1896.)

On an issue as to the mental capacity of testatrix, error, if any, in admitting testimony outside the issue, as to when witness heard of her death, was harmless.—*In re Fenton's Will* (Iowa) 66 N. W. 99.

[b] (Mich.; 1895.)

An offer by proponent to show that the contestant destroyed the second will of the testator, which fact, for the purpose of the case, was admitted by contestant, was not prejudicial, inasmuch as the court charged that, if the will was destroyed by any other person, it was still the will of deceased.—*Cheever v. North* (Mich.) 64 N. W. 455.

§ 31. Attorneys' fees and costs.

[a] (Mich.; 1895.)

How. St. § 6791, provides that the court may award costs to either party, to be paid by the other, or out of the estate in controversy. Id. § 8982, provides that costs on appeal shall be paid as directed by the court, and that the court may, in its discretion, award damages for delay. *Held*, that the court's discretion in awarding costs to a contestant of a will after a finding against her is limited to the actual taxable costs.—*Cheever v. North* (Mich.) 64 N. W. 455.

[b] (Mich.; 1896.)

In a contested will case, in which judgment is rendered for contestants, the court can only award the executor his taxable costs, and not the amount of the actual expenses incurred by him.—*Brilliant v. Simpson* (Mich.) 67 N. W. 1101.

[c] (Neb.; 1895.)

The allowance of fees to counsel in a will contest is within the discretion of the court.—*McClary v. Stull* (Neb.) 62 N. W. 501.

44 Neb. 175.

[d] (Neb.; 1895.)

Where the attorneys for contestants had contracted for 20 per cent. of the fund in controversy in the event of success, and the result is adverse, they cannot insist on compensation out of such fund.—*McClary v. Stull* (Neb.) 62 N. W. 501.

44 Neb. 175.

[e] (Neb.; 1897.)

Attorney's fees cannot be allowed, in contest proceedings, to an unsuccessful proponent.—*Clark v. Turner* (Neb.) 69 N. W. 843.

§ 32. Estoppel to contest.

(Iowa; 1896.)

A person, by receiving from an executor property bequeathed to her, is not necessarily estopped to contest the will; it having been also given her by a former will of testatrix, under which she claims, and it also being claimed by her that she took it for storage at the request of the executor.—*Kostecky v. Scherhart* (Iowa) 68 N. W. 591.

VI. CONSTRUCTION.

1. IN GENERAL.

§ 33. From what date will speaks.

(Wis.; 1895.)

Although, under the provision of section 2294, Rev. St., a will does not become effectual until proved, yet, when proved, it takes effect by way of relation so as to vest the title to property devised by it in the devisees immediately upon the death of the testator.—*Graves v. Graves' Ex'r* (Wis.) 63 N. W. 271.

90 Wis. 306.

§ 34. Intention of testator—Parol evidence.

[a] (Mich.; 1895.)

In explanation of a will, testimony of the draftsman as to his understanding of testator's intention is inadmissible.—*Wheeler v. Wood* (Mich.) 62 N. W. 577.

104 Mich. 414.

[b] (Mich.; 1896.)

Where the provisions of a will are not ambiguous, parol testimony as to the under-

standing or intention of testator, or as to the meaning in which words were used by the person who drew the will, is not admissible.—*De-freese v. Lake* (Mich.) 67 N. W. 505.

§ 35. Survivorship.

(Wis.; 1896.)

Where there is a devise to one person in fee, and, in case of his death without issue, to another, the death referred to is death during the life of the testator; and, in case the devisee survives the testator, he takes an absolute estate in fee.—*In re Lovass' Estate* (Wis.) 67 N. W. 605, 92 Wis. 616; *Lovass v. Olson*, Id.

§ 36. — Death without issue.

(Mich.; 1896.)

A will provided that the real estate should go to testator's wife for life, and after her death to his son J., and that in case J. died without heirs it should go to testator's daughters M. and J., and that if they died without heirs it should go to another daughter. *Held*, that under How. Ann. St. § 5538, providing that "when a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words heirs or issue shall be construed to mean heirs or issue living at the death of the person named as ancestor," on the death of the son without issue, after the death of testator, the fee passed to the two daughters M. and J., and on their subsequent death without issue it passed to the other daughter.—*Mullreed v. Clark* (Mich.) 68 N. W. 138.

§ 37. Partial invalidity—Separable provisions.

[a] (Iowa; 1894.)

Even if the provision in a will, after a devise in trust for certain charities, that a part of the fund might temporarily be diverted for the public good in case of fire, flood, epidemic, or other distress, is too indefinite to create a trust or to authorize the use of the funds for the purposes specified, it does not invalidate other parts of the will, being merely permissive, and in the nature of a condition subsequent.—*Phillips v. Harrow* (Iowa) 61 N. W. 434. 93 Iowa, 92.

[b] (Mich.; 1894.)

A will containing provisions which are void, as suspending the power of alienation for a longer period than two lives in being, does not render invalid provisions that advancements made to the sons shall be charged against the devises made to them.—*Dean v. Mumford* (Mich.) 61 N. W. 7. 102 Mich. 510.

[c] (Neb.; 1895.)

The fact that a particular bequest or devise is invalid on the ground that the beneficiary is incapable of taking the property does not affect the validity of the remainder of the will.—*McClary v. Stull* (Neb.) 62 N. W. 501. 44 Neb. 175.

§ 38. Action to construe—Parties.

(Neb.; 1895.)

A will devising real estate will not be construed in an action brought for that purpose by an heir and devisee against the executor as such, where it appears that the latter has no interest in the adjudication, and that an interpretation would be of no assistance to him in administering the estate, and that all persons in interest are not parties to the action.—*Kennedy v. Merrick*, 64 N. W. 969, 46 Neb. 260.

2. AMBIGUOUS AND UNCERTAIN PROVISIONS.

§ 39. Uncertainty.

(Mich.; 1896.)

A bequest to testator's executors, "to invest, and from time to time reinvest, the same

in such income-producing investments as they shall deem for the best interests of the trust," and after paying out of the income of such investment all taxes, losses, and expenses of the trust, including a specified compensation to the trustees, to pay the residue of said income, at stated times, to testator's daughter during her life, with directions for the disposal of the trust fund on her death, is not void for uncertainty because it fails to designate the securities in which the fund shall be invested.—*Caspari v. Cutcheon* (Mich.) 67 N. W. 1093.

§ 40. Conflicting clauses.

(Iowa; 1895.)

Testator gave to his wife his household furniture. By the next clause of his will he gave to his son a third of all the remainder of his estate, which consisted of personality of the value of \$27,000, and declared that, in case either his wife or son died before the son reached majority, he gave the "share of the one so dying" to the survivor, and, if both died before then, "said estate" should descend to and be inherited by those legally entitled to it under the laws of the state. By the next clause he gave all the rest of his estate to his wife, to have and to hold in her own right, title, and sole use. *Held*, that the will should be construed as though the gift of the residue to the wife preceded the provisions in case of the death of wife or son; that the words "the share of the one so dying" referred to the shares of the wife and son in the property which he divided between them; and that their shares therein constituted the "said estate"; and that testator intended that this should go to his heirs in case his wife and child died before the time limited.—*Jordan v. Wood-in* (Iowa) 61 N. W. 948.

3. DESCRIPTION OF DEVISEES AND LEGATEES.

§ 41. In general.

(Wis.; 1897.)

A provision that the bequest "to my said wife, A., * * * shall not be considered as part payment of her dower interest or thirds," but that, "she shall be entitled, besides the above bequest, to all under the law in such case made and provided, as my widow," entitles A., though not testator's lawful wife, to the same interest in his lands as she would have had under the statute, had she been such.—*Dicke v. Wagner* (Wis.) 70 N. W. 159.

4. DESCRIPTION OF PROPERTY.

§ 42. Personality—Stock.

(Mich.; 1896.)

Testator bequeathed to his wife, in trust for her maintenance and the maintenance of their unborn child, "12 shares in the steam barge J.": to the unborn child, in trust, 4 shares, which, should the child die before coming of age, were to be divided among four persons; to each of his daughters 4 shares; and to his two sisters 1 share, to be divided among four other legatees at their decease. It appeared that testator owned no such property as the barge referred to, which belonged to a transit company, and was its sole property; that testator owned 600 shares of stock in said company, of the par value of \$50; that he had always spoken of his interest as shares of \$1,000 each, and that when he drew his will he handed to the scrivener a memorandum in which he referred to the stock as "30 shares stock steamer J., \$30,000." *Held*, that "shares of stock in the steam barge J." should, in each bequest, be construed as 20 times that amount of stock in the transit company.—*Oades v. Marsh* (Mich.) 69 N. W. 251.

§ 43. Realty.

[a] (Iowa; 1896.)

A testator, intending each individual of two classes of devisees (one including eight, and the other seven, persons) to share equally, devised to one of the second class a tract of land, subject to the payment of \$4,000, its full value, the proceeds to go equally to the first class, two of whom were each charged with an advancement of \$250, thus making each share \$562.50, and to another of the same class the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 30, subject to the payment of six-sevenths of \$1,000, its value, the proceeds to go equally to the six others in his class, thus making each share of this class \$571.43; and then, having specifically devised all the rest of his realty, except the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 30, he gave the residue of his estate to the devisees comprising these two classes, equally. He did not own the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 30, while the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 30, which he did own, was not mentioned in his will. *Held*, that his devise of the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 30 must be construed as a devise of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 30. Kinne, J., dissenting.—*Stewart v. Stewart* (Iowa) 65 N. W. 976.

[b] (Minn.; 1896.)

Where a will makes no specific reference to after-acquired property, and contains no clause under which certain after-acquired realty would pass, even if testator had owned it when the will was made, as to such realty testator dies intestate.—*Bedell v. Fradenburgh* (Minn.) 68 N. W. 41.

§ 44. Residuary clause.

(Iowa; 1896.)

Testatrix, by the fourteenth clause of the will, directed that all her realty be divided among certain persons, and a clause of the codicil recited that in the fourteenth clause of the will it was stated that the real estate be divided into four parts, and that it was now testator's will that the same be divided into five parts; one part—the fifth part—to be given to F. The nineteenth clause of the will directed that the residue of testator's estate, real and personal, should be divided into four equal parts as described in the fourteenth clause of the will. *Held*, that F. took a fifth part in the residue of the realty, but not of the personalty.—*In re Newcomb's Will* (Iowa) 67 N. W. 587.

5. ESTATES AND INTERESTS DEVISED.

§ 45. Absolute estate.

(Wis.; 1896.)

In a bequest reciting, "I will and bequeath to my son, L., the sum of \$200, to be paid to him by my daughter within one year after the death of my wife, if she survive me," the words, "if she survive me," limit the time of payment, and not the nature of the estate, which is absolute.—*In re Lovass' Estate* (Wis.) 67 N. W. 605, 92 Wis. 616; *Lovass v. Olson*, 1d.

§ 46. Power of disposition.

(Iowa; 1895.)

A will devising an estate to a wife "during her life, with full power to sell, transfer, and dispose of same as much as may from time to time be needed for her support and the cancellation of any indebtedness now and hereafter existing," with the remainder at her death to the son, vests a life estate in the wife, with the power of disposal for the specified purposes, and a remainder in the son.—*In re Proctor's Estate* (Iowa) 63 N. W. 670; *Mack v. Proctor*, 1d.

§ 47. Life estate.

[a] (Iowa; 1895.)

A devise of land to one "during his natural life," and "at his death the premises to go

to, and be equally divided between, his heirs and next of kin," created a life estate. Nor was such estate enlarged by a direction that the devisee pay to another, for life, a certain sum per month, which was made a lien on the land.—*Zavitz v. Preston* (Iowa) 64 N. W. 668.

[b] (Iowa; 1896.)

A will gave plaintiff "all the estate" of the testator "for her sole use and benefit during her natural life"; afterwards to be divided. *Held*, that it gave plaintiff a life estate in the testator's real estate.—*Smith v. Runnels* (Iowa) 65 N. W. 1002.

[c] (Iowa; 1896.)

Under a will providing that "I * * * will and bequeath to my wife * * * my brick store building * * * and the proceeds arising therefrom, and all the loose property, at her death it goes to her daughter, A.," the wife takes only a life estate in the house.—*Rice v. Moyer* (Iowa) 66 N. W. 94.

[d] (Mich.; 1896.)

A will contained the following provision: "I give and bequeath to my wife * * * the sum of \$2,000, the interest on said sum of \$2,000 at the rate of seven per cent, to be paid to her annually each year during her natural life; and in case the \$140 per year shall not be sufficient for her comfortable support and maintenance, or if, in case of sickness or feebleness of health, she shall need more than the interest on said sum of \$2,000, then she shall use so much from the principal thereof as is necessary for her support and maintenance, and the payment of her needed medical attendance and funeral expenses." *Held*, that the bequest was for the use of the wife during her life only, and that, on her death, the part remaining became a part of the residuary estate of the testator.—*Godshalk v. Akey* (Mich.) 67 N. W. 336.

[e] (Mich.; 1896.)

A will devising certain land to the widow of the testator further provided, "After her decease the said real estate above described I give and bequeath to * * * my son, and after his decease said real estate to belong to his heirs." *Held*, that the son took a life estate only, with remainder in his heirs.—*De-freese v. Lake* (Mich.) 67 N. W. 505.

[f] (Mich.; 1897.)

A will devising lands and personalty in trust for a minor grandson of testator until he should attain majority, and directing the trustee to use only so much of the income therefrom for the support of the minor as should be made necessary by accident or misfortune (the grandson having a father living), and providing that, in case of the death of the grandson without heirs of his body, the land and property, with all its increase and accretions, should go to the children of testator, their heirs and assigns, creates a life estate only in the grandson on his attaining majority, with remainder in fee to his children, if any, and, if not, to testator's children or their heirs.—*Eldred v. Shaw* (Mich.) 70 N. W. 545.

[g] (Mich.; 1897.)

Under such will the income accumulated by the trustee during the minority of the grandson became, on his attaining majority, a fund taking the same course of descent as the property from which it was derived, the grandson being entitled to the income from it during his life.—*Eldred v. Shaw* (Mich.) 70 N. W. 545.

6. CONDITIONS AND LIMITATIONS.

§ 48. Conditions.

[a] (Iowa; 1896.)

A will, after devising the testator's entire estate in trust to his executor, to be invested so as to produce an income, provided that the income should be paid to his wife so long as she remained a widow; that, if she remarried, one half of his estate should be paid to her, and the

other half to his sister, or, if his sister was then dead, divided equally among his heirs at law by blood kinship. *Held*, that the sister, on the death of the wife without having remarried, was entitled to take only as an heir.—*Opel v. Shoup* (Iowa) 69 N. W. 560.

[b] (Wis.: 1895.)
A provision in a will that the land devised "shall in no wise ever be subject to any debt, liability, execution, attachment, or judgment against" the devisee, is void.—*Van Osdel v. Champion*, 62 N. W. 539, 89 Wis. 661.

[c] (Wis.: 1896.)
Where land is devised in fee, a condition that the devisees shall not dispose of it for a certain period is void.—*Zillmer v. Landgnth* (Wis.) 69 N. W. 568.

§ 49. Limitations.

(Iowa: 1897.)
Testator devised land to his daughter K., without words of limitation, but in subsequent clauses charged the devise with a payment to the other children in case certain bequests to them should not equal K.'s share, and gave to his wife, during widowhood, the use of the land until the children came of age. *Held*, that a later clause providing that, if any child should die before majority, his share should be equally divided between the survivors, was an effective limitation on the devise to K. Deemer, J., dissenting, on the ground that an absolute devise cannot be limited by a subsequent condition.—*Imas v. Neidt* (Iowa) 70 N. W. 203.

7. VESTED INTERESTS AND REMAINDERS.

§ 50. Vested interests.

[a] (Iowa: 1896.)
Under a clause in a will reciting, "When my youngest child arrives at full age, I desire that the real estate be equally divided between my children, their heirs, or survivors of them," said children took no vested interest in the land until the youngest child attained majority, and therefore a devise of her interest therein by one who died before that time passed no title thereto.—*McClain v. Capper* (Iowa) 67 N. W. 102.

[b] (Mich.: 1894.)
Testatrix gave to each of four children named one-fifth part of her estate, and to the child or children of her married daughter the other one-fifth, provided that none of the real estate should be sold until testatrix's youngest child was 21 years old, and that, in case such married daughter should die without leaving a child or children, their one-fifth should go to the four children first mentioned, share and share alike. When testatrix died, such daughter had one child living. Another child, D., was afterwards born to her, and thereafter the first child died. The daughter died soon after the death of such child. *Held*, that D., on the death of such daughter, was entitled to receive one-fifth of the estate without waiting until the youngest child of the testatrix became 21 years old.—*Moore v. Schindebette* (Mich.) 61 N. W. 62.

102 Mich. 612.

§ 51. Vested remainders.

[a] (Mich.: 1894.)
A devise of land providing that it shall be sold upon the maturity of the devisees, and the proceeds equally divided between them, and appointing executors, but vesting no title or power of sale in them, creates a present vested remainder in fee.—*Hogan v. Hogan* (Mich.) 61 N. W. 73.

102 Mich. 641.

[b] (Minn.: 1895.)
A devise to testator's father and mother, and the survivor of them, for life, with rights

to use, in addition to the income, rents, and issues thereof, so much of the personal estate as should be necessary for their personal comfort, and on the death of the survivor the property, or so much thereof as should remain to go to testator's brother and sisters absolutely, share and share alike, vested the absolute title to the rents and income in the parents and the survivor, so that on the death of the survivor no vested remainder passed to the other devisees.—*In re Gillam's Estate* (Minn.) 63 N. W. 1028; *Cowles v. Henry*, Id. 61 Minn. 459.

8. RULE AGAINST PERPETUITIES.

§ 52. Suspension of power of alienation.

[a] (Iowa: 1894.)
Code, § 1920, declaring void every disposition of property which suspends the absolute power of controlling it for more than a certain period, applies merely to the vesting of an estate, and does not affect its continuance after it has vested.—*Phillips v. Harrow* (Iowa) 61 N. W. 434.

93 Iowa, 92.

[b] (Iowa: 1895.)
A bequest to testator's wife and son, and, in case they died before the son's majority, then to testator's heirs, is not in violation of Code, § 1920, declaring void every disposition of property which suspends the absolute power of controlling it for more than the lives of persons in being, and 21 years thereafter.—*Jordan v. Woodin* (Iowa) 61 N. W. 948.

[c] (Mich.: 1894.)
Testator gave to his wife the homestead, furniture, etc., for life, and directed that the taxes and repairs on the homestead be paid by the executors "from my estate." He also gave her \$1,500 per annum, to be paid her by the executors during her natural life. He then bequeathed the residue of his estate to his five children. *Held*, that such taxes, repairs, and annuity were a charge on the estate so as to create a trust and suspend the power of alienation during the life of the widow.—*Dean v. Mumford* (Mich.) 61 N. W. 7.

102 Mich. 510.

[d] (Mich.: 1894.)
Testator, after providing for his wife, directed the remainder of his estate to be divided equally between his five children, or the survivors of them, and, in case any of them died leaving children, the interest of deceased should go to them; that the portions designated for his sons E., A., and H. be held in trust by the executors for such sons, "their wives and children," and the income he paid for the support of such sons, "their wives and children, during the lives of my said sons, and their wives," to go, "upon the death of my said sons and their wives," to the children of said sons severally, and their heirs. *Held*, that the power of alienation was not suspended for a longer period than two lives in being.—*Dean v. Mumford* (Mich.) 61 N. W. 7.

102 Mich. 510.

[e] (Mich.: 1894.)
Where, at the time such will took effect, H. was unmarried, the will should not be construed to relate to any wife H. might in the future marry so that the estate would not vest in the children or heirs until after the expiration of two lives in being, but to relate to any wife of H. living at the time of testator's death.—*Dean v. Mumford* (Mich.) 61 N. W. 7.

102 Mich. 510.

[f] (Mich.: 1895.)
Testator gave a life estate in separate tracts of land to each of his three children, with remainder over in each case to the body heirs of all such children, share and share alike. *Held*, that since such body heirs could not be ascertained until the death of all three children, the

remainders were void, as suspending the power of alienation during three lives in being.—*Trufant v. Nunneley* (Mich.) 61 N. W. 469.

[a] (Mich.; 1896.)

Within the meaning of How. Ann. St. § 5531, which provides that "the absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate," where an estate is devised with a remainder over in fee, the creation of the estate takes place at the testator's death, and the lives must be then in being.—*Mullreed v. Clark* (Mich.) 68 N. W. 989.

[b] (Wis.; 1895.)

A devise of land to two persons jointly, and to the survivor of them for life, with remainder over to another, and, in case the latter should die before attaining majority, the proceeds of sale of said estate to be distributed to persons named, did not, within the meaning of Rev. St. § 2038, suspend the absolute power of alienation for a longer period than during the continuance of two lives in being.—*Hughes v. Hughes*, 64 N. W. 851, 91 Wis. 138.

[c] (Wis.; 1895.)

A devise of land for life, with remainder over, and, in case the remainder-man should die before attaining majority, the proceeds of sale thereof to be distributed to persons named, was not obnoxious to Rev. St. § 2038, prohibiting the suspension of the absolute power of alienation for a longer period than two lives in being at the creation of the estate.—*Hughes v. Hughes*, 64 N. W. 851, 91 Wis. 138.

[d] (Wis.; 1897.)

Testator devised certain lands to a city, to be used as the location for a house for the aged and poor, and a certain other tract to be used as a driving park and agricultural grounds. Held that, as the evident intention of the will is that the lands so devised should be perpetually used for the purposes mentioned, the devises were void, under Rev. St. §§ 2038, 2039, forbidding the suspension of the power of alienation beyond two lives in being.—*Beurhaus v. City of Watertown* (Wis.) 69 N. W. 986.

[e] (Wis.; 1897.)

Testator bequeathed certain property in trust to his executors to pay the income to his wife and son, and on their death to convey to a city in trust for designated charitable purposes. The will provided that certain parcels of such real estate "shall not be sold or incumbered." Held, that the limitation as to the alienation applied only to the first executors during the lives of the widow and son, and was valid.—*Beurhaus v. City of Watertown* (Wis.) 69 N. W. 986.

9. ESTATES IN TRUST.

§ 53. Validity and operation.

[a] (Iowa; 1894.)

Testatrix devised her estate in trust to her son for the use of his two children should they survive him, or, in case testatrix and his said two children both survived said son, the two children to take the property in trust as he would have done, but for the use of their issue, and upon the death of both without issue it was to be divided as if she had survived both and died intestate. Testatrix's son was to have exclusive management, with as full right to sell or otherwise control the property "as executor" as though he had "acquired the absolute title to all of said property by purchase." Exempted from giving bonds, proving inventories, or obtaining approval or consent from any court, he was "to act as, in his judgment, may seem best for the interests of the residuary legatees," and, in case his children became trustees, their powers were to be the same. He died shortly after entering upon the trust, his children surviving. Held, that the two chil-

dren took the accumulations to the estate consequent upon their father's management thereof only, with the remainder in trust for their issue, in default of which, at their death, the whole would revert as provided.—*Saeger v. Stutz* (Iowa) 61 N. W. 397.

93 Iowa, 62.

[b] (Wis.; 1895.)

Where a testator bequeathed certain legacies to three sons and to "L. S., as trustee, upon the trusts hereinafter specified for my son J. and my daughter B.," and this was followed by a special trust provision in favor of his son J., but none in favor of his daughter B., held, the word "to" is to be supplied after the word "and," and B. takes the bequest free from any trust.—*In re Zentner's Estate* (Wis.) 63 N. W. 162, 90 Wis. 236; *Schintz v. Schintz*, id.

[c] (Wis.; 1897.)

A devise of a fund in trust for various charitable purposes is not invalid because it does not designate the amounts to be used for the respective trust purposes.—*Beurhaus v. City of Watertown* (Wis.) 69 N. W. 986.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

Limitation of action by legatee, see "Limitation of Actions," § 19.

§ 54. Acceptance of devise.

(Mich.; 1896.)

A second life tenant, whose term was to follow another life estate, during the life of the first tenant obtained a tax deed on the property, which he recorded. On the death of the first life tenant he took possession, and afterwards conveyed the property by warranty deed. Held, that the question whether he had accepted under the devise was for the jury.—*Defreese v. Lake* (Mich.) 67 N. W. 505.

§ 55. Cumulative or substitutional bequest.

(Wis.; 1895.)

A husband executed a bond for \$6,000, payable upon his death to the wife, or her heirs, "in full of all other demands of dower or otherwise" in his property, and secured the same by mortgage on his property. Subsequently he executed a will with a provision as follows: "I give, devise, and bequeath, in lieu of all other allowances, to my wife * * * the sum of \$6,000.00," for her own use and during her life. Held, that the bequest in the will was a substitute for the amount due by the bond.—*Graves v. Graves' Ex'r* (Wis.) 63 N. W. 271.

90 Wis. 306.

§ 56. General, demonstrative, and specific bequests.

[a] (Mich.; 1895.)

A will provided that a certain bequest should be paid out of personal property on hand after the death of the testator's wife, before any division of the personal property. Held to be a demonstrative, not a specific, legacy; and, there being nothing in the will to show an intent to charge with this legacy land specifically devised, it was not chargeable upon the real estate, upon failure of the personal property to pay it.—*Hibler v. Hibler* (Mich.) 62 N. W. 361.

104 Mich. 274.

[b] (Mich.; 1895.)

A gift in a will to a nephew, the owner of a tract of land, of \$400, "the said \$400 to be paid by my executor by assigning and transferring" to the legatee a certain mortgage on the land, is a specific legacy, and, in case the mortgage is discharged before testator's death, the legatee is not entitled to receive \$400 in money.—*Wheeler v. Wood* (Mich.) 62 N. W. 577.

104 Mich. 414.

[c] (Wis.: 1895.)

Where a testator bequeathed to his son a certain mortgage, and provided that, in case of his son's death before majority, certain legacies should be paid to persons named, without designating the fund from which they were to be paid, and which amounted to more than the entire personal estate, and a codicil provided that said legacies should be paid from the personal estate, the mortgage bequeathed to said son, on his decease before attaining majority, must be applied in payment of said legacies.—*Hughes v. Hughes*, 64 N. W. 851, 91 Wis. 138.

§ 57. Support of widow and children.**(Mich.: 1895.)**

Where a will directs the executrix (testator's wife) to apply the income of the estate to the support of herself and children, and, if the income is sufficient, to pay a certain sum annually to a child, the mere fact that the widow continued to live in the same manner as before testator's death, while her altered circumstances might warrant reduced expenses, will not entitle the child to an order that the executrix pay the annuity, or be removed from her office, in the absence of evidence that the income of the estate was extravagantly used.—*Roehm v. Clark* (Mich.) 61 N. W. 882.

104 Mich. 1.

§ 58. Control of property—Cutting timber.**(Mich.: 1894.)**

Where a will provides that the widow shall "have control" of certain land until the devisees become of age, and that she shall "have firewood off" a part thereof, she is entitled only to firewood from that part of the land, and cannot cut the more valuable timber into lumber, and buy fuel with the proceeds of the sale thereof.—*Hogan v. Hogan* (Mich.) 61 N. W. 73.

102 Mich. 641.

§ 59. Advancements.**[a] (Iowa: 1896.)**

A father devised to his three sons equally the residue of his estate, providing that, for purposes of distribution, the principal of all advancements should be considered as part of the residue in their hands, respectively, and that, in case of conveyances, the consideration named therein, or, if none was named, the actual cash value at the time of distribution, should be treated as the amount of the advancement. Several years before his death, he purchased for one son a farm, and put him in possession, but retained title thereto. This farm was allotted to such son by the executors. *Held*, that the cash value of the farm at the time of distribution should include the value of improvements made by the son while in possession, by his own labor and with money charged against him in the settlement as advancements; it not appearing that the father intended the value of the improvements to be credits against the advancements.—*Ballinger v. Connable* (Iowa) 69 N. W. 438.

[b] (Iowa: 1897.)

Under provision of a will that all advancements to testator's sons should be considered part of his estate in their hands, "the consideration named in the conveyance to be considered, for the purpose of settlement, the amount of the advancement, or, if no sum is named, the actual cash value of the same at the time of the division of the estate shall be considered its value," where testator had conveyed land to a son by deed reciting a consideration of one dollar and love and affection, and simultaneously the son executed to him a writing reciting the receipt of the conveyance, and the value at which the property was estimated, and that such sum was received by him as an advancement, and that he was to be charged with it if his father died intestate, the advancement will

be considered as of that value, and not as of the value of the land at time of division of the estate.—*Ballinger v. Connable* (Iowa) 69 N. W. 1023.

[c] (Iowa: 1897.)

Testator signed notes as surety for his son, with the understanding that, if compelled to pay same, the amount should be deducted from the son's share of the estate. Some of the notes were paid by testator, who kept them as memoranda, and others were paid by his administrator. *Held*, that the sums so paid were advancements.—*In re Pickenbrock's Estate* (Iowa) 70 N. W. 1094; *In re Jordan*, *Id.*

[d] (Mich.: 1897.)

A decree that sums paid by the testator to a legatee were advancements is erroneous, where there is no evidence that they were intended as such, and the money was given to the legatee, who was testator's daughter, in small sums, while she was in great financial distress.—*Carmichael v. Lathrop* (Mich.) 70 N. W. 575.

§ 60. Ademption, satisfaction, and lapse.**[a] (Mich.: 1895.)**

Testator's daughter was to receive, by his will, a bequest one year after the death of himself and wife, but the daughter died before the wife. *Held*, that the legacy did not lapse, but became vested in the daughter, upon the death of the testator, and should descend to her heirs.—*Hibler v. Hibler* (Mich.) 62 N. W. 361.

104 Mich. 274.

[b] (Mich.: 1896.)

By a will the three daughters of a testator were made equal residuary devisees and legatees of all his property at the death of his wife. He afterwards conveyed real estate to each of two daughters, and intended to do equally well by the third, but had made no conveyance to her at the time of his death. *Held*, the share of the personality receivable by each of the two daughters under the will being greater than the value of the realty conveyed to her, that the bequests to them should be considered adeemed to that extent.—*Carmichael v. Lathrop* (Mich.) 66 N. W. 350.

[c] (Mich.: 1896.)

A general bequest to a child, of a share of testator's personality, may be satisfied pro tanto by a conveyance of real estate during the life of the testator, where such is the clear intention; such conveyance not operating as a revocation of the bequest, but as a satisfaction.—*Carmichael v. Lathrop* (Mich.) 66 N. W. 350.

§ 61. Charge of legacies on estate and on land.**[a] (Iowa: 1894.)**

A testator devised lands to his son, to take effect at the death or remarriage of the widow, on payment by him of certain legacies when he reached the age of 21 years, "provided he is then entitled to possession of said lands; if not, at such time as by the terms of this will he shall come in possession thereof." *Held*, that the legacies were not due and payable while the widow was alive and unmarried, though the son had become of age, and had obtained a deed of the property from her.—*Ford v. Krambeer* (Iowa) 61 N. W. 174, 92 Iowa, 521; *Dunning v. Same*, *Id.*; *Thayer v. Same*, *Id.*

[b] (Iowa: 1896.)

Testator, after making certain legacies to be paid from the proceeds of the realty, gave other legacies, to be paid from the avails of personality, and subsequently gave the residuary estate, real and personal, to be divided among certain persons. *Held* that, in case the personal estate was insufficient for the payment of the legacies directed to be paid therefrom, such legacies, after payment of the legacies directed to be paid from the proceeds of the realty, should also be paid from the balance of

such proceeds.—*In re Newcomb's Will* (Iowa) 67 N. W. 587.

[*el*] (Iowa; 1896.)

A testator bequeathed to his daughter a pecuniary legacy, and devised to his son certain described real estate, and the residue of all his estate, real and personal. *Held*, that the legacy to the daughter was not a charge on the property of the estate specifically devised to the son.—*In re Peet's Estate* (Iowa) 68 N. W. 705; *Pitkin v. Peet*, Id.

[*ld*] (Iowa; 1897.)

After declaring that his widow, during her widowhood and the minority of the children, should have the use of the land devised to the latter, testator provided that, if she remarried, she should have \$50 a year for each child under 15 years of age, but that the land should go "to the use of the respective children as named in my will." *Held*, that said yearly sum was a charge against the estate, and not against the children or their land.—*Imas v. Neidt* (Iowa) 70 N. W. 203.

[*el*] (Mich.; 1895.)

Deceased was possessed, as he knew, of no property other than that mentioned in clause 10 of his will, and that devised to him by his uncle, whose wife had a life interest therein, with an expectancy of 20 years. He made several bequests mainly for the support and education of minor children, and then bequeathed the property mentioned in clause 10 to his sister, and also gave her the property left by his uncle, subject to certain charges. If paid out of the property left by his uncle, the legacies and other charges would nearly exhaust it. He wrote his sister a short time before his death that he had given her a liberal share of this property. *Held*, that it was testator's intention that the legacies should be paid out of the property mentioned in clause 10.—*Thurber v. Battey* (Mich.) 63 N. W. 995.

105 Mich. 718.

[*f*] (Mich.; 1895.)

A will devised all testatrix's "real estate, personal property, and household effects" to her nephew, subject to a provision that he pay certain legacies. *Held*, that such legacies were a charge upon testatrix's entire estate.—*Chase v. Warner* (Mich.) 64 N. W. 730.

§ 62. Effect of widow's election.

[*a*] (Iowa; 1896.)

Testator gave his wife certain personal property, and gave the residue of his estate, consisting largely of land, to other beneficiaries. She executed to the executors an instrument which recited that she thereby accepted the provisions in the will on condition that the executors pay her \$10,000, in addition to all the provisions made for her by such will. The residuary legatees relinquished their interest in \$10,000, and authorized its payment on condition that the widow should not waive the provisions of the will. The money was paid to her on such condition. *Held* to vest in the estate, for the benefit of the legatees and devisees other than the widow, all right to the real estate and other property which she might otherwise have claimed.—*Baldwin v. Hill* (Iowa) 66 N. W. 889.

[*b*] (Mich.; 1894.)

A will void because of its provisions as to testator's widow is not rendered valid by the election of the widow to take under the law.—*Dean v. Mumford* (Mich.) 61 N. W. 7.

102 Mich. 510.

§ 63. Priorities.

(Wis.; 1895.)

A testator in a codicil revoked a trust of "one-sixth of the rest, residue, and remainder" of his estate, after providing for the payment of several legacies, and "instead thereof" gave and bequeathed to the legatee "in her own right the said one-sixth of the rest" of his estate, "which shall remain after the death" of his wife. *Held*, the

legatee takes the bequest after, and not before, the payment of the other legacies.—*In re Zentner's Estate* (Wis.) 63 N. W. 162, 90 Wis. 236; *Schintz v. Schintz*, Id.

VIII. CONTRACT TO MAKE WILL.

§ 64. Performance.

(Mich.; 1897.)

An antenuptial contract provided that, on the husband's death, the wife, who had been his housekeeper, should be given a home and such amount monthly, quarterly, or yearly as would enable her to live in comfort, and as she had previously lived, and, in case of sickness, the amount necessary for care, medical expenditures, and other necessary expenditures, and, at her death, the expenses of the funeral. *Held*, that a devise to the wife, for life and during her widowhood, of what was left of the home farm after deducting the part devised to a nephew, with the right to firewood from all such farm, and of the household goods and two horses, and of a trust fund of \$5,000 for her use according to the trustee's discretion, was a sufficient performance of the contract.—*Thompson v. Tucker-Osborn* (Mich.) 69 N. W. 730.

WITNESS.

I. COMPETENCY, §§ 1-26.

1. In General, §§ 1-8.
2. Privileged Communications, §§ 9-14.
3. Transactions with Decedents, §§ 15-26.

II. EXAMINATION, §§ 27-42.

III. PRIVILEGE OF WITNESS—COMPELLING TESTIMONY, §§ 43-48.

IV. CREDIBILITY AND IMPEACHMENT OF WITNESS, §§ 49-74.

1. In General, §§ 49-54.
2. How Witness may be Impeached, §§ 55-68.
3. Who may be Impeached, §§ 69-71.
4. Corroboration of Witness and Rebuttal of Impeaching Testimony, §§ 72-74.

V. ATTENDANCE AND FEES, §§ 75-77.

Absence as ground for continuance, see "Continuance," §§ 3, 4; "Criminal Law," § 52.

—for new trial, see "New Trial," § 31.

Attestation of assignment, see "Assignment for Benefit of Creditors," § 6.

—of deed, see "Deed," § 5.

—of mortgage, see "Mortgages," § 10.

—of will, see "Wills," §§ 12, 13.

Contempt, see "Contempt," § 4.

Convenience of witness as ground for change of venue, see "Venue in Civil Cases," § 21.

Duty of state to call witnesses, see "Criminal Law," § 70.

Exemption from service of process, see "Writs and Notice of Suits," § 13.

Indorsing names on indictment or information, see "Indictment and Information," §§ 9-11.

Limiting number of witnesses, see "Criminal Law," § 68; "Trial," § 14.

Misconduct as ground for new trial, see "New Trial," § 25.

Recalling witnesses, see "Criminal Law," § 72.

Right of accused to be confronted by witnesses, see "Constitutional Law," § 75.

Separation and exclusion from court room, see "Criminal Law," § 69; "Trial," § 13.

I. COMPETENCY.

Of attesting witness, see "Wills," § 13.

Of expert, see "Evidence," §§ 53, 56, 60-63.

Qualification to give opinion, see "Evidence," § 45.

1. IN GENERAL.

§ 1. In general.

[a] (Iowa: 1897.)

One testifying to admissions of the parties before him as referee need not show his appointment, he having a right as a private person to testify to them.—*O'Brien v. Stambach* (Iowa) 69 N. W. 1133.

[b] (Neb.: 1895.)

A contract under which the work was done for which a mechanic's lien is claimed may be proved by an employé of the claimant.—*Blazer v. Rogner*, 63 N. W. 846, 45 Neb. 588.

§ 2. Mental capacity.

[a] (Mich.: 1894.)

Where a witness is sworn without inquiry by the court as to his sanity, but there is evidence that he is demented, it is proper to charge that, if the jury believe from the evidence that the witness is without sufficient mental capacity to understand what is going on, they are not at liberty to consider his testimony. *McGrath, C. J.*, dissenting.—*Bowdle v. Detroit St. Ry. Co.* (Mich.) 61 N. W. 529. 103 Mich. 272.

[b] (Minn.: 1895.)

Where a witness' sanity is attacked in order to impeach his competency or credibility, evidence of prior temporary delusions and of insanity of ancestors and relatives is insufficient to take the question of sanity to the jury, and it was hence not error to reject the same, in the absence of other evidence.—*State v. Hayward* (Minn.) 65 N. W. 63. 62 Minn. 474.

§ 3. Child.

(S. D.: 1895.)

Whether a boy 11 years old is able to discriminate between right and wrong, and knows the nature of an oath, so as to render him competent as a witness, are questions for the trial court.—*State v. Reddington* (S. D.) 64 N. W. 170.

§ 4. Juror.

[a] (Iowa: 1896.)

Code, § 4433, provides that, if a juror have any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court. On the statement by the court that, if any juror had any personal knowledge concerning any fact in controversy, it was his duty to disclose the same, a juror stated that he had such knowledge, and was sworn as a witness, and testified thereto. *Held*, that the proceeding was not objectionable.—*State v. Cavanaugh* (Iowa) 68 N. W. 452.

[b] (Iowa: 1896.)

The objection to placing a juror on the witness stand, that the case thereby proceeds to 11 jurors, is unfounded.—*State v. Cavanaugh* (Iowa) 68 N. W. 452.

§ 5. Grand jurors.

(Minn.: 1894.)

A grand juror is not competent to testify in a civil case as to the statements of a witness before the grand jury.—*Loveland v. Cooley* (Minn.) 61 N. W. 138. 59 Minn. 259.

§ 6. Husband and wife.

[a] (Iowa: 1896.)

In an action by a woman on a promissory note, her husband is not a competent witness for defendants, within Code, § 3641, making husband and wife incompetent witnesses one against the other, "except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other."—*Ward v. Dickson* (Iowa) 65 N. W. 997.

[b] (Neb.: 1895.)

Under Code Civ. Proc. § 331, providing that the wife can in no case be a witness against her husband, except in a criminal proceeding for a crime committed by one against the other, and Id. § 328, declaring that "neither husband nor wife can be examined in any case, as to any communication made by the one to the other while married," a wife cannot be examined as a witness against her husband, over his objection, in a suit by the latter against his son to obtain the rescission of a deed alleged to have been executed by the father to the son.—*Lihs v. Lihs* (Neb.) 62 N. W. 457. 44 Neb. 143.

[c] (Neb.: 1895.)

In an action by a wife against her husband and her son to cancel, for fraud, a joint deed of her husband and herself to the son, the husband being a mere nominal defendant, plaintiff may testify in her own behalf.—*Buckingham v. Roar* (Neb.) 63 N. W. 398. 45 Neb. 244.

[d] (Neb.: 1895.)

Under Code Civ. Proc. § 331, providing that neither husband nor wife shall be competent to testify against the other except in criminal proceedings, the wife is not a competent witness against the husband in an action by her against him for slander.—*Bohner v. Bohner* 64 N. W. 700, 46 Neb. 204.

[e] (Wis.: 1896.)

Evidence that a memorandum of a contract of sale was entered in the books of account of the vendee by his wife, acting as his bookkeeper, at his direction, in the presence of the parties, and then read over to them by her, will not render the wife competent to testify what the contract was.—*Hazer v. Streich* (Wis.) 66 N. W. 720. 92 Wis. 505.

[f] (Wis.: 1896.)

The husband of a legatee incompetent as a witness under Rev. St. § 4069, cannot testify in her behalf in a proceeding to which he is not a party.—*In re Valentine's Will* (Wis.) 67 N. W. 12. 93 Wis. 45.

[g] (Wis.: 1896.)

The wife of one of two defendants is not a competent witness in favor of the other defendant as to matters in which the defense of the two is the same.—*Bartlett v. Clough* (Wis.) 68 N. W. 875.

§ 7. — Action for alienating affections.

(Mich.: 1895.)

In an action against plaintiff's father-in-law for the alienation of the affections of her husband, evidence by the husband is inadmissible to contradict that of the wife, since How. St. § 7546, provides that the husband and wife cannot be witnesses against each other.—*Rice v. Rice* (Mich.) 62 N. W. 833. 104 Mich. 371.

§ 8. — Prosecution for adultery.

[a] (Mich.: 1895.)

On a prosecution for adultery, the husband of the woman with whom it is alleged to have been committed is incompetent to testify to facts tending to establish the offense.—*People v. Fowler* (Mich.) 62 N. W. 572. 104 Mich. 449.

[b] (Mich.: 1896.)

On a prosecution for adultery, the husband of the one with whom he is alleged to have committed the offense may testify to his marriage to her.—*People v. Isham* (Mich.) 67 N. W. 819.

[c] (Mich.: 1896.)

A wife who has instituted prosecution of her husband for adultery cannot testify that she is his wife; 2 How. Ann. St. § 7546, providing that in a proceeding instituted by the husband or wife in consequence of adultery

they shall not be competent to testify.—*People v. Isham* (Mich.) 67 N. W. 819.

[d] (Mich.; 1896.)

In a prosecution of a man for adultery, his wife cannot testify for the state as to her marriage to, and cohabitation with, defendant.—*People v. Innes* (Mich.) 68 N. W. 157.

2. PRIVILEGED COMMUNICATIONS.

§ 9. Communications to attorney.

[a] (Neb.; 1896.)

Information voluntarily intrusted to an attorney at law is not a privileged communication when the relation of attorney and client does not exist.—*Home Fire Ins. Co. v. Berg* 65 N. W. 780, 46 Neb. 600.

[b] (Neb.; 1897.)

Communications voluntarily made to an attorney after he has refused to accept employment in the case to which they relate are not privileged.—*Farley v. Peebles* (Neb.) 70 N. W. 231.

§ 10. — Relation of attorney and client.

[a] (Iowa; 1895.)

Code, § 3643, providing that no attorney, in giving testimony, shall disclose any confidential communication made to him in his professional capacity, does not prohibit an attorney from testifying, on an issue as to whether a deed to a decedent was intended as a mortgage, that he acted for decedent's administrator in collecting a note made by the grantor to decedent, and that on its payment the fund covered by the deed was reconveyed to the grantor.—*Caldwell v. Melvedt* (Iowa) 61 N. W. 1090, 93 Iowa, 730; *Same v. Tow*, Id.

[b] (Iowa; 1895.)

On an issue as to whether an agreement was made, at the time of the execution of a mortgage securing several debts, that its proceeds should be applied first to the payment of a specific debt, testimony of the attorney who drew up the mortgage as to the conversation between the parties at the time is competent, the matter not being privileged.—*Wyland v. Griffith* (Iowa) 64 N. W. 673.

[c] (Iowa; 1896.)

In a civil action for seduction, a witness for defendant testified that, prior to the alleged seduction, he had intercourse with plaintiff. Afterwards, she, her father, her attorney, and such witness had a conversation in her attorney's office as to a certain plan to relieve her from the effect of the witness' testimony in preventing her from obtaining employment as a school teacher; and such attorney agreed that, if witness was prosecuted, he would act as his attorney. *Held*, in a subsequent prosecution of such witness for perjury, that what was said by witness in such conversation in the hearing of such attorney, prior to their agreement, was not privileged.—*State v. Swafford* (Iowa) 67 N. W. 284.

[d] (Mich.; 1895.)

Communications to an attorney with reference to a matter between him and his client, made, in the client's presence, by one who retained him for the client, and was to pay him for his services, are not privileged, in an action by the client against the person making them.—*Frank v. Morley's Estate* (Mich.) 64 N. W. 577.

[e] (Neb.; 1895.)

Under Code Civ. Proc. § 328, subd. 4, and Id. § 333, making privileged communications between attorney and client, a communication to an attorney is not privileged unless the relation of attorney and client existed at the time it was made.—*Basey v. State* (Neb.) 63 N. W. 811, 45 Neb. 261.

[f] (S. D.; 1894.)

An attorney cannot, without the consent of his client, be examined as to any communica-

tion made by the client to him, or his advice given thereon, in the course of professional employment.—*Austin, Tomlinson & Webster Manuf'g Co. v. Heiser* (S. D.) 61 N. W. 445, 6 S. D. 429.

§ 11. Communications to dentist.

(Mich.; 1895.)

How. St. § 7516, providing that communications to persons authorized to practice medicine or surgery shall be privileged, relates to general practitioners, and dentists are not "surgeons," within the meaning of such act.—*People v. De France* (Mich.) 62 N. W. 709, 104 Mich. 563.

§ 12. Testimony of physicians concerning patient.

[a] (Iowa; 1895.)

Code, § 3643, providing that a physician shall not give in evidence any confidential communication properly intrusted to him in his professional capacity, extends to the knowledge acquired by personal examination of a patient.—*Prader v. National Masonic Accident Ass'n* (Iowa) 63 N. W. 601.

[b] (Iowa; 1896.)

Communications from one physician to another, made to secure the aid of the latter in the commission of an abortion, are not privileged.—*State v. Smith* (Iowa) 68 N. W. 428.

[c] (Wis.; 1897.)

The provision of Rev. St. § 4075, that no physician or surgeon "shall be compelled to disclose any information" acquired in his professional capacity which was necessary to enable him to prescribe for a patient, is for the benefit of the patient, and renders the information privileged, so that the physician not only cannot be "compelled" to disclose it, but will not be "allowed" to disclose it, without the patient's consent. *Newman, J., dissenting.*—*Boyle v. Northwestern Mutual Relief Ass'n* (Wis.) 70 N. W. 351.

§ 13. Communications to clergyman.

(Iowa; 1895.)

Code, § 3643, making confidential communications to a minister in his professional capacity privileged, does not prevent a minister to whom one accused of crime makes a voluntary statement in justification of his acts from testifying to such statements on the trial of such person on an indictment subsequently found, but based on the same facts as the first accusation.—*State v. Brown* (Iowa) 64 N. W. 277.

§ 14. Husband and wife.

[a] (Mich.; 1896.)

3 How. Ann. St. § 7546, providing that neither husband nor wife, during or after the termination of the marriage, "shall be examined as to any communication made by or to the other during marriage," does not preclude a husband, after the death of his wife, from testifying that she intrusted property to him with express instructions to turn it over to complainants on her death.—*Hagerman v. Wigent* (Mich.) 65 N. W. 756.

[b] (Minn.; 1895.)

Under Gen. St. 1894, § 5662, excluding, as privileged, communications between husband and wife, the widow of one killed at a railroad crossing, and plaintiff in an action for damages, cannot testify as to statements by deceased as to the dangerous character of the crossing.—*Newstrom v. St. Paul & D. R. Co.* (Minn.) 63 N. W. 253, 61 Minn. 78.

[c] (Neb.; 1895.)

Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married; nor shall they, after the marriage relation ceases, be permitted to testify as to such communications,

Code Civ. Proc. § 332.—*Buckingham v. Roar* (Neb.) 63 N. W. 398.
45 Neb. 244.

3. TRANSACTIONS WITH DECEDENTS.

§ 15. In general.

[a] (Mich.: 1895.)

It cannot be shown by statements made by deceased to his children, and by facts and circumstances that came within his knowledge, as well as their own, what disposition deceased made of certain property.—*O'Neil v. Greenwood* (Mich.) 64 N. W. 511; *Warner v. Same*, Id.

[b] (Neb.: 1896.)

The word "representative," as used in Code Civ. Proc. § 329, relating to testimony of transactions with a decedent, includes any person who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law.—*Kroh v. Heins* (Neb.) 67 N. W. 771.

48 Neb. 691.

§ 16. Interest of witness.

[a] (Mich.: 1895.)

In an action on an insurance policy after the death of insured, the testimony of a clerk in the office of an agent of the company is admissible as to the terms of an agreement between insured and the agent for a change in the policy, such person not being an interested party to the action.—*Krause v. Equitable Life Assur. Soc. of United States* (Mich.) 63 N. W. 440.
105 Mich. 329.

[b] (Minn.: 1895.)

Under Gen. St. 1878, c. 73, § 8 (Gen. St. 1894, § 5660), making one interested in the result of an action incompetent to testify as to conversations with or declarations by a deceased person relative to the matter in issue, an attorney for plaintiff in a suit to recover land, whose fee in case of success was to be an undivided interest in the land recovered, and who assigned the right to such fee shortly after suit was begun, to persons not lawyers, and retained control of the suit, is incompetent to testify as to conversations had by him with defendant's intestate relative to the title to the land, it appearing that the assignment was merely colorable.—*Tretheway v. Carey* (Minn.) 62 N. W. 815.
60 Minn. 457.

[c] (Neb.: 1896.)

In an action by heirs to determine the validity of a gift of money by their ancestor to children of one of the heirs, decedent's agent, who turned the money over to the children, it was claimed, by direction of decedent, was made a party defendant. *Held*, that since, if plaintiffs were successful, the agent would be required to account for the money, he was incompetent to testify in relation to transactions had with the decedent.—*Kroh v. Heins* (Neb.) 67 N. W. 771.

48 Neb. 691.

[d] (Neb.: 1896.)

In an action by heirs to determine the validity of a gift by their ancestor to minor children of one of the heirs, the parent heir, being also the guardian and trustee of the defendant children, was incompetent to testify in their behalf as to transactions with the decedent.—*Kroh v. Heins* (Neb.) 67 N. W. 771.

48 Neb. 691.

§ 17. Spouse of party.

[a] (Iowa: 1896.)

Code, § 3639, provides that no party to any action, and no husband or wife of any party, shall be examined as a witness in regard to any personal transaction between such witness and a person deceased. *Held*, in an action against an administrator to recover back money alleged to have been paid in excess of the

amount due on a note executed by a husband and wife, said wife, who alleged that she was present when her husband paid money to deceased, was not competent to testify that on one occasion, at decedent's request, she made the indorsement on the note for the money paid thereon.—*Erusha v. Tomash* (Iowa) 67 N. W. 390.

[b] (Mich.: 1896.)

3 How. Ann. St. § 7545, prohibiting the assignor of a claim from testifying, in a suit against the representatives of a decedent, as to matters which were equally within the knowledge of decedent, does not preclude a husband from testifying in behalf of his wife in an action by her against an estate for services rendered the decedent, where he had agreed with his wife, prior to the rendition of the services, that the remuneration should go to her.—*Slack v. Norton* (Mich.) 69 N. W. 497.

[c] (Minn.: 1897.)

The widow and beneficiary in a life insurance policy cannot, in an action by her on the policy, be questioned as to statements made to her by the insured in his lifetime.—*Beckett v. Northwestern Masonic Aid Ass'n* (Minn.) 69 N. W. 923.

[d] (Neb.: 1895.)

Under Code Civ. Proc. § 329, providing that no person having an interest in the result of any civil action, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction had between the deceased person and the witness, a wife cannot testify, in an action to establish the title of her husband in land, as to conversations with the decedent, whose representatives are the adverse parties to the action, though, being a joint heir, she had an interest not adverse to such representatives.—*Wylie v. Charlton* (Neb.) 62 N. W. 220, 43 Neb. 840.

§ 18. Heirs and distributees as witnesses.

[a] (Iowa: 1896.)

Under Code, § 3639, prohibiting a party to any proceeding from testifying against an executor as to transactions with a decedent, a son, entitled under his father's will to a farm which his father purchased for him and put him in possession of, without conveying it to him, as part of his distributive share, at its cash valuation, is not a competent witness, on trial of exceptions to the report of distribution, to show that he had paid for certain improvements on the land.—*Balinger v. Connable* (Iowa) 69 N. W. 438.

[b] (Wis.: 1896.)

A legatee who claims an interest in the property in controversy from and under the deceased is precluded by Rev. St. § 4069, from testifying "in respect to any transaction" had "personally" with the deceased, except where the opposite party has first offered evidence of such transaction.—*In re Valentine's Will* (Wis.) 67 N. W. 12.

93 Wis. 45.

§ 19. On probate or contest of will.

[a] (Iowa: 1895.)

Under Code, § 3639, providing that no party to, or person interested in, the result of an action, shall be examined as to any personal transaction or communication between himself and one at the commencement of such examination deceased, against the executor, legatee, devisee, etc., one contesting the probate of a will cannot testify as to conversations between himself and the testatrix relative to the disposition of her property.—*In re Goldthorp's Estate* (Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, Id.

[b] (Iowa: 1895.)

The contestant of a will cannot give his opinion of the mental capacity of the testatrix, based upon conversations which are inadmissible, under Code, § 3639.—*In re Goldthorp's Estate*

(Iowa) 62 N. W. 845; *Goldthorp v. Goldthorp*, Id.

[1c] (Iowa; 1896.)

The question asked a contestant of a will, "State what was the physical condition of [deceased] for two days before her death," is not objectionable as involving a personal transaction between deceased and witnesses, and therefore within the rule of disqualification of a witness prescribed by Code, § 3639. — *Kosteletzky v. Scherhart* (Iowa) 68 N. W. 591.

[1d] (Mich.; 1894.)

Testimony of one of the proponents that testatrix had stated to her that she intended to leave her property to them is not within the prohibition of Iow. St. § 7545, providing that the opposite party, in a proceeding by devisees or legatees of a deceased person, cannot testify in his own behalf to matters which, if true, must have been equally within the knowledge of deceased. — *McHugh v. Fitzgerald* (Mich.) 61 N. W. 354.

103 Mich. 21.

§ 20. When parties may testify.

[1a] (Mich.; 1895.)

Under Iow. Ann. St. § 7545, providing that, in proceedings by the heirs or personal representatives of a deceased person, the opposite party cannot testify on his own behalf as to matters within the knowledge of such deceased person, etc., in an action on a note executed by defendant to decedent, his father, and indorsed to plaintiff by defendant's sister, who was also made a defendant, testimony of the sister as to acts and statements of deceased, whereby ownership in the note was transferred to her, is competent, the estate itself not being a party to the action. — *Latourette v. McKeon* (Mich.) 62 N. W. 153.

104 Mich. 156.

[1b] (Neb.; 1895.)

Code Civ. Proc. § 329, does not render a party adversely interested to the representative of a deceased person incompetent as a witness in an action, but only renders his testimony as to transactions and conversations with deceased incompetent. — *Sharmer v. Johnson* (Neb.) 61 N. W. 727, 43 Neb. 509.

[1c] (Wis.; 1896.)

Evidence of any transaction between deceased and either of the parties, all of whom claim under him, is inadmissible. — *Gross v. Gross* (Wis.) 68 N. W. 469.

§ 21. What are transactions within prohibition of statute.

[1a] (Iowa; 1895.)

Under Code, § 3639, which provides that, where one of the parties to an action is deceased's personal representative, a transaction between deceased and the other party cannot be shown by the testimony of that other, a question asked plaintiff, in an action by a daughter to recover of her father's estate for services rendered him, whether he had ever paid her for her services before his death, was properly excluded. — *Ridder v. Ridder* (Iowa) 61 N. W. 994.

93 Iowa, 347.

[1b] (Mich.; 1896.)

In an action by an administrator on a note, plaintiff having introduced testimony that it was signed by defendant, in the presence of intestate, at a certain time and place, defendant, in support of his plea that he did not execute it, may testify that he never signed it, and that at the time mentioned he was at another place; this not being within the rule prohibiting a party from testifying to transactions with decedents, the facts testified to not being equally within the knowledge of deceased. — *Pillard v. Dunn* (Mich.) 66 N. W. 45.

[1c] (Mich.; 1896.)

So, too, plaintiff having introduced a letter written by defendant to deceased, and the

envelope in which it was inclosed, and testimony that the note was inclosed therein, defendant was competent to testify that the letter had no reference to the note. — *Pillard v. Dunn* (Mich.) 66 N. W. 45.

[1d] (Minn.; 1896.)

Gen. St. 1894, § 5660, prohibiting any party to an action, or interested in the event thereof, to give evidence of or concerning any conversation with or admission of a decedent relative to any matter at issue between the parties, applies only to spoken words. — *In re Hulett's Estate* (Minn.) 69 N. W. 31; *Carey v. Hulett*, Id.

[1e] (Neb.; 1896.)

An interested party is prevented from testifying, over the objections of the representative of decedent, to the receipt by him of a letter, written by such decedent, making a gift of his property, and to the contents thereof, since such letter constitutes a "transaction," within Code Civ. Proc. § 329. — *Kroh v. Heins* (Neb.) 67 N. W. 771.

48 Neb. 691.

[1f] (Wis.; 1896.)

In an action on a note, which was made by G. and indorsed by K., who has since died, the testimony of the maker and of the payee that K.'s indorsement was on the note when delivered to the payee, is not within Rev. St. § 4069, as in respect to a transaction had "personally" with a deceased person. — *Sawyer v. Choate* (Wis.) 66 N. W. 689.

92 Wis. 533.

[1g] (Wis.; 1896.)

The testimony of the payee, that he furnished the money on the credit of the maker and K., does not show a previous arrangement with K., or that the arrangement, if any, was with K. personally. — *Sawyer v. Choate* (Wis.) 66 N. W. 689.

92 Wis. 533.

[1h] (Wis.; 1896.)

A letter, written by K. to the maker, instructing him "to raise the money, and he would be here the first of the week to indorse paper," etc., is not a transaction had personally with K. — *Sawyer v. Choate* (Wis.) 66 N. W. 689.

92 Wis. 533.

[1i] (Wis.; 1896.)

Where defendant, in an action by an administrator for the price of lumber sold by his intestate, claimed damages for the poor quality thereof, a refusal to allow defendant to answer whether he notified the deceased of the defect was proper, on the ground that it was a personal transaction, where it did not appear that the notice was written. — *Hazer v. Streich* (Wis.) 66 N. W. 720.

92 Wis. 505.

[1j] (Wis.; 1896.)

Under Rev. St. § 4069 (providing that no person shall testify as to transactions with a decedent in an action in which the adverse party claims under the deceased, unless the adverse party first testifies to the same), it was error, in an action against an executor on a duebill, to allow plaintiff, in the first instance, to testify that a note of the deceased husband of the testatrix was delivered as a consideration for the duebill — *Campion v. Schinnick* (Wis.) 67 N. W. 11.

93 Wis. 111.

§ 22. Matters occurring after death.

(N. D.; 1895.)

In an action on a debt due an intestate, by an administrator appointed to succeed a deceased administrator, defendant was not precluded by Comp. Laws, § 5260, from testifying to a payment of the debt made by him to the deceased administrator. — *St. John v. Lofland* (N. D.) 64 N. W. 930.

5 N. D. 140.

§ 23. Transactions between decedent and another than witness.

[a] (Iowa: 1896.)

Code, § 3639, prohibiting the examination of any person interested in an action as to any communication or transaction had with a person then deceased, does not, in an action against a surviving husband (who has appropriated his wife's estate without administration) on a note of his wife, preclude the plaintiff from testifying to a conversation in which plaintiff took no part, and in which defendant's wife stated that she wanted him to give plaintiff a home.—Leipird v. Stotler (Iowa) 66 N. W. 150.

[b] (Iowa: 1896.)

Code, § 3639, providing that no party to any action, and no husband or wife of any party, shall be examined as a witness in regard to any personal transaction between such witness and a person deceased, in an action against an administrator to recover back money paid in excess of the amount due on a note executed by the husband and wife, it was competent for the wife to testify that she was present when her husband paid money to the decedent, and that decedent directed her husband to indorse the payments on the notes, none of the money paid having belonged to her.—Erusha v. Tomash (Iowa) 67 N. W. 390.

[c] (Neb.: 1896.)

Code Civ. Proc. § 329, relating to testimony as to transactions with a decedent, does not apply where the conversation constituting the transaction was not between the witness and the deceased person, but was between the latter and a third party, and was not taken part in by the witness.—Kroh v. Heins (Neb.) 67 N. W. 771.

48 Neb. 691.

§ 24. Matters gone into by other side.

[a] (Mich.: 1895.)

Plaintiff in replevin for wheat claimed the property under an agreement between defendant and his landlord, who was succeeded by plaintiff, that crops on the ground at the expiration of the term should belong to the landlord, and testified that, in a conversation with defendant after the landlord's death, the contract was adopted by plaintiff and defendant. Defendant denied both adoption and agreement, and testified that he sowed the wheat in suit on plaintiff's representation that he might go on the land after the expiration of the term to harvest the same. *Held*, that it was not error to permit defendant to testify what he said to plaintiff, in the conversation, as to his arrangements with the deceased landlord.—Ladd v. Brown (Mich.) 65 N. W. 529.

[b] (Neb.: 1896.)

Plaintiff, an executor, alleged that defendant had received from deceased in her lifetime \$1,000, to loan for her, that he falsely and fraudulently pretended to her that he had loaned it, and that he refused to repay the same. On a trial of the issue, letters of defendant were introduced by plaintiff, and defendant was required, as a witness, to identify them, and to state that he had received the money. *Held*, that the transaction between deceased and defendant was an entirety, and hence, plaintiff having called defendant as a witness (Code Civ. Proc. § 329), defendant could testify as to how little of said sum remained unpaid.—Taylor v. Ainsworth (Neb.) 68 N. W. 1045.

§ 25. Proof of claims against decedent's estate.

(Iowa: 1895.)

It was error to allow a plaintiff seeking to establish a claim against an estate for services performed with the knowledge and consent of the deceased to testify, under Code, § 3639, that he performed such services.—Herring v. Herring's Estate (Iowa) 62 N. W. 666.

§ 26. Waiver of objections to testimony. (Minn.: 1895.)

Right to object to the testimony of a witness as to conversations with a decedent, on the ground of incompetency by reason of interest in the result of the action, is not waived by asking him preliminary questions for the purpose of ascertaining such interest. *Foster v. Hess* (1894) 59 N. W. 193, distinguished.—*Tretheway v. Carey* 62 N. W. 815, 60 Minn. 457.

II. EXAMINATION.

Contradicting matters brought out on cross-examination, see post, § 70.

Cross-examination in action to set aside fraudulent conveyance, see "Fraudulent Conveyances," § 49.

— of experts, see "Evidence," § 69.

Misconduct in cross-examination, see "Trial," § 37.

Of deponent, see "Deposition," § 2.

Of expert, see "Evidence," §§ 66-69.

§ 27. Preliminary questions.

[a] (Iowa: 1896.)

The question, asked a witness, whether a certain person at any time wrote to or instructed him to do anything in regard to borrowing money, being of a preliminary character, objection thereto, that it calls for secondary evidence and the opinion or conclusion of the witness, should not be sustained.—*Baxter v. Rollins* (Iowa) 68 N. W. 721.

[b] (Mich.: 1896.)

On trial of one for murdering her husband to obtain insurance on his life, an insurance agent, who had testified that he demanded policies back from defendant, was asked why he demanded them. *Held* that, as a preliminary question, it was proper.—*People v. Pope* (Mich.) 66 N. W. 213.

§ 28. By grand jury.

(Iowa: 1895.)

Where a witness before a grand jury refuses to testify, it is proper for the court before whom the witness is brought, after declaring that the witness had the right to refuse to testify on the ground that his testimony might tend to incriminate him, to direct the witness to return for further examination before the grand jury, as the law exonerates him from answering self-incriminating questions only.—*State v. Lewis* (Iowa) 65 N. W. 295.

§ 29. Leading questions.

[a] The allowance of leading questions is in the discretion of the trial court.

—(Minn.: 1896) *Couch v. Steele*, 65 N. W. 946. 63 Minn. 504;

(Neb.: 1896) *Baum Iron Co. v. Berg*, 66 N. W. 8, 47 Neb. 21.

[b] (Iowa: 1895.)

In a prosecution for seduction, a question by the state, requiring prosecutrix to state whether or not defendant ever made to her a promise of marriage, is not objectionable as leading.—*State v. Wickliff* (Iowa) 64 N. W. 282.

[c] (Iowa: 1895.)

On trial for seduction, where it is difficult to induce the prosecuting witness to tell the story of the crime, it is not an abuse of discretion for the court to allow leading questions.—*State v. Bauerkemper* (Iowa) 64 N. W. 609.

[d] (Mich.: 1895.)

The allowance of leading questions is within the discretion of the court.—*Luengerhausen v. Crittenden* (Mich.) 61 N. W. 270.

103 Mich. 173.

[e] (Mich.: 1895.)

It is within the discretion of the court to permit the prosecutor, on cross-examination

of a particeps criminis of the defendant, to ask a leading question.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

[f] (Mich.; 1895.)

Leading questions may be put to a witness by the party who calls him, where his answers are evasive, and show a disposition to favor the adverse party.—*People v. Caldwell* (Mich.) 65 N. W. 213.

[g] (Mich.; 1896.)

A question whether an officer was instructed to go to a certain place for several days before the attachment in suit was levied is objectionable as leading.—*Goeschel v. Fisher* (Mich.) 65 N. W. 965.

[h] (Mich.; 1896.)

Where a witness for the state testifies reluctantly, and tries to screen the defendant, the court may properly allow leading questions.—*People v. Gillespie* (Mich.) 69 N. W. 490.

[i] (Wis.; 1895.)

It is within the sound discretion of the court to allow leading questions to be put to a witness.—*Porath v. State* (Wis.) 63 N. W. 1061. 90 Wis. 527.

§ 30. Refreshing memory.

[a] (Iowa; 1897.)

The admission of the testimony of a witness who is permitted to use a memorandum to refresh his recollection is not rendered erroneous because he shows, on cross-examination, that he has no independent recollection of the matters testified to, but a motion may then be made to exclude his testimony.—*State Bank of Tabor v. Brewer* (Iowa) 69 N. W. 1011.

[b] (Iowa; 1897.)

A witness may refresh his recollection from book entries made by him from memorandum slips made at the time of the transaction.—*State Bank of Tabor v. Brewer* (Iowa) 69 N. W. 1011.

[c] (Iowa; 1897.)

Witness cannot testify from certified copies of reports of a commercial agency where he neither made the reports nor the copies.—*Oberholtzer v. Hazen* (Iowa) 70 N. W. 207.

[d] (Mich.; 1895.)

In an action on a fire insurance policy, plaintiff's vendor may refresh his memory as to the goods sold from a list made by him from recollection shortly before the trial.—*Johnston v. Farmers' Fire Ins. Co. of York* (Mich.) 64 N. W. 5.

[e] (Mich.; 1896.)

A computation by an attorney of the amount due on certain mortgages, made while they were in his possession for the purpose of foreclosure, may be used as a memorandum by such attorney when a witness.—*Ford v. Savage* (Mich.) 69 N. W. 240.

[f] (Minn.; 1895.)

Where a stenographer is called to testify as to the evidence of a deceased witness on a prior hearing, he may use his notes to refresh his memory.—*State v. George* (Minn.) 63 N. W. 100. 60 Minn. 503.

[g] (Neb.; 1896.)

A memorandum which, it appears, was prepared at the time of the fact in question or soon afterwards, which the witness knew to be correct at the time it was made, may be used by the witness to refresh his memory.—*Railroad Co. v. Lawler* (1894) 58 N. W. 968, 40 Neb. 356, followed.—*City of Kearney v. Themanson*. 66 N. W. 996, 48 Neb. 74.

[h] (Wis.; 1896.)

A witness, after he has testified that he heard a contract of sale made; that the vendee's wife, acting as his bookkeeper, at his direction, wrote down a memorandum of the contract as dictated by him, in the presence of both parties, and then read it over to them; that he

stood close enough to see but not to read it,—should be allowed to identify the memorandum, and, if he identified it, to use it to refresh his memory.—*Hazer v. Streich* (Wis.) 66 N. W. 720. 92 Wis. 505.

§ 31. — Calling attention to former statements.

[a] (Iowa; 1896.)

It was not error to allow plaintiff to refresh the memory of a witness, who was an employé of defendant, by reading a transcript of his evidence given on a former trial of the cause; the witness being to some extent hostile to plaintiff.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 67 N. W. 227.

[b] (Mich.; 1895.)

The clerk of the court, who wrote the testimony of the complaining witness on a preliminary examination for assault, may refresh his memory therefrom.—*People v. Kennedy*, 63 N. W. 405, 105 Mich. 434.

[c] (Mich.; 1895.)

It is proper, for the purpose of refreshing the memory of a witness, to call his attention to testimony given by him at a former trial of the same case.—*People v. Palmer* (Mich.) 63 N. W. 656. 105 Mich. 568.

[d] (Mich.; 1895.)

Under *How. Ann. St.* § 9502, providing that members of the grand jury may be required by any court to testify whether the testimony of a witness before them is different from that given before such court, it is proper for the prosecuting attorney to refresh the memories of hostile witnesses by referring to their evidence before the grand jury.—*People v. O'Neill* (Mich.) 65 N. W. 540.

[e] (Mich.; 1896.)

The issue being whether defendant collected the proceeds of an insurance policy for plaintiff under an agreement not to make any charge therefor, it was within the discretion of the court to permit a witness to be asked, in order to refresh his recollection, whether, shortly before the trial, he did not say to plaintiff's attorney that defendant said to plaintiff that he (defendant) had not intended to charge much, if anything, for getting the money, but that now he would make it cost plaintiff as much as possible.—*Dillon v. Pineh* (Mich.) 67 N. W. 1113.

§ 32. — Necessity of testifying independently of memoranda.

[a] (Iowa; 1895.)

Where a witness, after identifying a memorandum, made by him as managing agent of a partner, of the amount of flour delivered to his firm, can, independently of it, recollect that the flour was delivered, but not the amount, and, after refreshing his memory by the memorandum, he is unable, independently of it, to recollect the amount, he cannot testify that the amount was that given in the memorandum.—*Waite v. High* (Iowa) 65 N. W. 397.

[b] (Iowa; 1896.)

A court stenographer may testify from his shorthand notes as to the testimony on another trial, though, independent of such notes, he has no knowledge of such testimony.—*State v. Smith* (Iowa) 68 N. W. 428.

[c] (Iowa; 1897.)

One having no personal recollection of what persons said before him, but who says that he took down their statements correctly, and that he can tell what they said by referring to his notes, may read from the notes.—*O'Brien v. Stambach* (Iowa) 69 N. W. 1133.

§ 33. Basing questions on previous testimony.

(Mich.; 1895.)

Where a witness on a prosecution for keeping a saloon open on Sunday was required

by law to be called by the people, and was apparently unwilling to testify, it was proper to allow the prosecution to use, as a basis of interrogation, statements subscribed and sworn to by the witness on the preliminary hearing of the case.—*People v. Case* (Mich.) 62 N. W. 1017.

105 Mich. 92.

§ 34. Explaining apparent hostility.

(Mich.; 1895.)

Where, from the acts of a witness in connection with the matters to which he testifies, there might be inferred the existence of motives unfavorable to the party for whom he testified, it is proper to allow the witness to give the reasons for such acts.—*Burt v. Long* (Mich.) 64 N. W. 60.

§ 35. Cross-examination.

[a] (Iowa; 1895.)

Where plaintiff sues for services rendered under a contract made on a specified date, cross-examination as to the exact date of his first conversation with defendant, which he states occurred during the preceding year, is properly excluded.—*Kelly v. Stone* (Iowa) 62 N. W. 842.

[b] (Iowa; 1895.)

A witness for the state testified that he knew defendant, and that, on the night of the robbery, defendant was at witness' place of business for a minute or two, and on cross-examination he said he was working for one L. Held, that it was within the discretion of the court to refuse to permit the witness to answer the question. "What business is conducted in that place?"—*State v. Osborne* (Iowa) 65 N. W. 159.

[c] (Iowa; 1895.)

On cross-examination by defendant's counsel of one jointly indicted with defendant, it was proper to exclude a question as to whether the witness thought it would benefit him to tell "that stuff."—*State v. Weems* (Iowa) 65 N. W. 387.

[d] (Iowa; 1895.)

Where, on a murder trial, a witness for the state testified only that defendant was at a certain house on the night of the homicide, defendant was not prejudiced by the exclusion of questions on cross-examination as to whether the house was not a sporting house, and the witness a prostitute, where it was not disputed that defendant was at the house at the time testified to, or that he was present when deceased was killed.—*State v. Weems* (Iowa) 65 N. W. 387.

[e] (Iowa; 1896.)

A witness jointly indicted with defendant for rape having testified that prosecutrix not only consented to the intercourse, but virtually seduced witness and defendant, he could be asked on cross-examination whether he did not ask a certain person, shortly before the alleged rape, if he could not inform witness and defendant where they could obtain sexual intercourse.—*State v. Philpot* (Iowa) 66 N. W. 730.

[f] (Mich.; 1895.)

Where plaintiff has offered testimony tending to corroborate a witness of his on a certain matter, it is error to refuse to permit the witness to be cross-examined in regard thereto, on the ground that the testimony is immaterial and irrelevant.—*Valin v. McKerregan* (Mich.) 62 N. W. 340.

104 Mich. 213.

[g] (Mich.; 1895.)

Questions to a prosecuting witness on cross-examination as to whether he had been arrested for being drunk, and how many times he had been drunk, since the trouble, are properly excluded as irrelevant.—*People v. Sutherland* (Mich.) 62 N. W. 566.

104 Mich. 468.

[h] (Mich.; 1895.)

Where, in a trial for bribery, the testimony of a state's witness showed that he had instigated another to advise defendant to sell his vote, and had then concealed himself with officers for the purpose of detecting the same, defendant could cross-examine as to witness' connection with the case, and the names of all who were concerned in the alleged detection.—*People v. Liphardt* (Mich.) 62 N. W. 1022.

105 Mich. 80.

[i] (Mich.; 1895.)

Where an accomplice has already testified on cross-examination as to his knowledge of the responsibility for his acts, the exclusion of the question, "Do you know that you are liable for what you did that night,—criminally liable?" is immaterial.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

[j] (Mich.; 1895.)

On a trial for murder, where a witness testified that deceased had tried to hire him to kill defendant, and admitted on cross-examination that he married his wife from a house of prostitution, the asking in good faith of the question whether she was a prostitute was not prejudicial to defendant, when the answer was excluded.—*People v. Palmer* (Mich.) 63 N. W. 656.

105 Mich. 568.

[k] (Mich.; 1895.)

Defendant in an action for lumber sold, involving the issue whether plaintiff and K. were partners, died pending an appeal from the justice to the circuit court. At the trial in the latter court, the justice (a witness for plaintiff) testified that deceased testified before him that he knew that the lumber belonged to plaintiff, and that he had made plaintiff payments on it. Held, that on cross-examination it was proper to allow the witness to state that deceased testified that he had paid the entire bill for building the house, that he let the entire job—work and materials—to K., and supposed plaintiff was in partnership with him.—*Reiser v. Portere* (Mich.) 63 N. W. 1041.

[l] (Mich.; 1895.)

The court may allow a witness to be cross-examined as to his habits.—*Johnston v. Farmers' Fire Ins. Co. of York* (Mich.) 64 N. W. 5.

[m] (Mich.; 1896.)

In ejectment to recover a strip of land which plaintiff claimed by adverse possession, in that the strip had been inclosed within his fence for over 15 years, a surveyor testified that upon making a survey of the ground 16 years before he had found the ground inclosed. Held, that it was competent to show on cross-examination that upon that survey he had located the old line of the lot, and, as so located, it did not include the land in dispute.—*Beecher v. Ferris* (Mich.) 68 N. W. 269.

[n] (Mich.; 1897.)

A witness testifying to defendant's good character may be asked on cross-examination whether he has heard of an attempt by defendant to commit suicide.—*People v. Frey* (Mich.) 70 N. W. 548.

[o] (Minn.; 1895.)

Two witnesses testified that, while walking together on the night of the homicide, they met a person in a buggy, and the facts each testified he observed were the same. Held, that it was proper to permit them on cross-examination to be questioned as to whether there was any concert between them as to their testimony, and, one of them having testified as to the features of the person in the buggy, to permit the other to be asked whether the former had before claimed to be able to recollect the features of such person.—*State v. Hayward* (Minn.) 65 N. W. 63.

62 Minn. 474.

[p] (Minn.; 1896.)

It is error to refuse to permit a witness to be cross-examined on a material point.—*Lynch v. Free* (Minn.) 66 N. W. 973.

61 Minn. 277.

[q] (Minn.; 1897.)

In an action by a borrower to recover usurious interest paid, it was in the discretion of the court whether defendant should be asked on cross-examination whether he had not made certain other usurious loans to other persons at other times.—*Murphy v. Backer* (Minn.) 70 N. W. 799.

[r] (Neb.; 1895.)

It was proper, on cross-examination of a witness testifying in reference to defendant's character, to ask whether he had heard certain reports tending to contradict his testimony on direct examination.—*Basye v. State* (Neb.) 63 N. W. 811.

45 Neb. 261.

[s] (Neb.; 1895.)

A defendant in a prosecution for producing an abortion having testified in chief that his acquaintance with the woman on whom the operation was performed was not intimate, it was proper cross-examination to show by him that he had been criminally intimate with her.—*Dixon v. State*, 64 N. W. 961, 46 Neb. 298.

[t] (S. D.; 1895.)

On cross-examination of a witness, it is competent to question him as to his interest in the subject-matter concerning which he has testified.—*Hanson v. Township of Red Rock in Minnehaha County* (S. D.) 63 N. W. 156.

[u] (Wis.; 1895.)

In an action against a street-railroad company for personal injuries received while plaintiff was alighting from a car, she claimed that the car started before she had time to alight, and a witness for defendant testified that he saw the car coming down the street, and thought it was coming too fast; that it slowed up, and plaintiff got off before it stopped. *Held*, that it was proper to permit the witness to testify on cross-examination that he previously stated to a certain person that he considered it the most careless piece of business he ever saw, and to explain that he meant the speed of the car coming down the street.—*Hardy v. Milwaukee St. Ry. Co.*, 61 N. W. 771, 89 Wis. 183.

[v] (Wis.; 1896.)

In an action by a physician for services there was no dispute as to the number of his visits or items of charges. Plaintiff testified as to the value of his services, the nature of his treatment, and that they were worth the amount charged. *Held*, that it was not error to refuse to permit defendant to cross-examine him as to the amount charged for particular visits, and what they were worth, where the court offered to permit defendant to examine him as to what he had done, and show that his services were not worth anything.—*Wurdeman v. Barnes* (Wis.) 66 N. W. 111.

92 Wis. 206.

§ 36. — Matters gone into on direct examination.

[a] (Iowa; 1895.)

Cross-examination of a witness as to matter concerning which he has not testified in his direct examination, and the answer to which would be irrelevant to any issue, is properly excluded.—*Kelly v. Stone* (Iowa) 62 N. W. 842.

[b] (Iowa; 1895.)

In an action by a wife for alienation of her husband's affections, it cannot be shown on cross-examination of plaintiff that her husband married her after having seduced her, to prevent being prosecuted therefor, and that he had no affection for her, the wife not having testified to such matter, on the ground that her going on the stand is an affirmation of the presumption of law that her husband had affection for her.—*Bailey v. Bailey* (Iowa) 63 N. W. 341.

[c] (Iowa; 1895.)

In an action on a fire insurance policy, the kind of building insured, its material and age, cannot be shown on plaintiff's cross-examination, where plaintiff had not testified on direct examination as to its value.—*Davis v. Anchor Mut. Fire Ins. Co.* (Iowa) 64 N. W. 687.

[d] (Iowa; 1895.)

Where the vendor in an alleged fraudulent bill of sale was examined by plaintiff vendee as to his execution thereof, and as to the property described therein and its value, it was proper to permit, on cross-examination, inquiries as to who was present when the bill of sale was made, the consideration for the sale, the disposition made of the vendor of the funds received therefrom, and whether at the same time he deeded land to the vendee.—*Chapman v. James* (Iowa) 64 N. W. 795.

[e] (Iowa; 1895.)

Where a witness on a trial for rape testified that the prosecutrix came to his house, and stated that she had been raped, questions as to whether she came to his house one evening to get in, when the marshal drove her away, and as to whether she had stayed there several nights, were not within the scope of cross-examination.—*State v. Case* (Iowa) 65 N. W. 149.

[f] (Iowa; 1895.)

Witness cannot be questioned on cross-examination as to matters touching which, or anything relating thereto, no evidence was given in chief.—*State v. Jundiesch* (Iowa) 65 N. W. 157.

[g] (Iowa; 1895.)

On trial of an indictment of a banker for receiving money when insolvent, where defendant, to show want of connection with the transaction, testified that, on the morning of the day the deposit was made, he left the town where his bank was located, and went to W., after promising to telephone his son, left in charge of the bank, if things did not look favorable, not to receive deposits, and that he sent that message, the court was not required to confine the cross-examination to what defendant did at W.—*State v. Eiefert* (Iowa) 65 N. W. 309.

[h] (Iowa; 1896.)

On trial for larceny of hogs, where the owner, in his direct testimony, did not in any way refer to defendant as having taken the hogs, it was improper cross-examination to ask him if he had any trouble or a personal encounter with defendant.—*State v. Brown* (Iowa) 69 N. W. 271.

[i] (Iowa; 1897.)

It is improper to cross-examine a witness as to statements made by plaintiff, where the witness has not testified in chief to any conversation with plaintiff.—*Devine v. Chicago, M. & St. P. Ry. Co.* (Iowa) 69 N. W. 1042.

[j] (Mich.; 1897.)

A cross-examination of a witness as to statements which he had made while under arrest, and testified to on his examination in chief, is proper.—*People v. Baker* (Mich.) 70 N. W. 431.

[k] (Mich.; 1897.)

In an action for injuries it was proper not to permit a physician who attended plaintiff for about three weeks to be cross-examined as to whether he knew at the time of his last visit that plaintiff was contemplating suit, where he had given no testimony as to exclamations of pain at that time, or testimony of any other character which would be affected by the fact that plaintiff contemplated suit.—*Heddle v. City Electric Ry. Co.* (Mich.) 70 N. W. 1096.

[l] (Mich.; 1897.)

It was in the discretion of the court in such case not to allow such witness to be cross-examined as to whether, during his last visits, plaintiff made pretense of her injuries being greater than they really were, in the absence of a previous showing as to what plaintiff's claims were as to her injuries.—*Heddle v. City Electric Ry. Co.* (Mich.) 70 N. W. 1096.

[m] (Neb.; 1896.)

Where, in an action on a bill or note, the defendant is examined with respect to the genuineness of the signature alone, he should not on cross-examination be required to state his opinion touching collateral or incidental matters based upon a comparison of the disputed signature with others.—*Norfolk Nat. Bank v. Job* (Neb.) 67 N. W. 781. 48 Neb. 774.

[n] (N. D.; 1896.)

The rule that the cross-examination of a witness, except as to matters affecting credibility, must be confined to the subjects to which the direct examination was addressed, does not limit the cross-examination to the particular facts to which the witness testified on direct examination, but a subject once opened may be exhausted.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

[o] (S. D.; 1895.)

A witness called by plaintiff in an action on a note, who testified solely to the execution of the note, could not be cross-examined as to the consideration of the note, failure of which was pleaded in defense.—*First Nat. Bank v. Smith* (S. D.) 65 N. W. 439.

[p] (S. D.; 1896.)

In an action for damages to plaintiff's building by an excavation by an adjoining landowner, it may be shown on cross-examination of plaintiff that the damages were in fact caused by an excavation directed by plaintiff, though the fact of such excavation was not brought out on direct examination, as such matter goes to disprove plaintiff's cause of action.—*Novotny v. Danforth* (S. D.) 68 N. W. 749.

§ 37. — As to statements made before grand jury.**(Minn.; 1894.)**

A party to an action may be questioned on cross-examination as to a statement made by him when a witness before a grand jury, when such statement is not merely impeaching, but the admission of a fact material in the case.—*Loveland v. Cooley* (Minn.) 61 N. W. 133.

59 Minn. 259.

§ 38. — Of accused.**[a] (Iowa; 1896.)**

Where defendant had testified as to quarrels and fights with deceased and his friends before the homicide, but had denied making certain threats against deceased, as brought out by the state's evidence, it was proper cross-examination to ask him if he had not, in a conversation with a third person, made threats against deceased.—*State v. Helm* (Iowa) 66 N. W. 751.

[b] (Mich.; 1895.)

The defendant, upon becoming a witness in his own behalf, is subject to the same rules of cross-examination, and the prosecution has the same right to inquire fully into his antecedents, as in the case of any other witness.—*People v. Sutherland* (Mich.) 62 N. W. 566.

104 Mich. 468.

§ 39. — Limiting extent.**[a] (Iowa; 1895.)**

The trial court is vested with a wide discretion in determining the extent of cross-examination.—*Bailey v. Bailey* (Iowa) 63 N. W. 341.

[b] (Neb.; 1896.)

In an action on a note against the maker and indorser, defendants claimed that the note had been altered, and plaintiff testified that defendants had examined the note after it became due, and made no objection to it. *Held*, it was not an abuse of discretion to refuse to permit plaintiff to be asked on cross-examination whether the attention of the defendant surety had been called to the note.—*Stough v. Ogden* (Neb.) 68 N. W. 516.

[c] (Wis.; 1897.)

A trial court has discretionary power to limit the cross-examination of a witness, and such discretion will not be interfered with unless substantial rights have been prejudiced.—*McMahon v. Eau Claire Waterworks Co.* (Wis.) 70 N. W. 829.

§ 40. Calling adversary for cross-examination.**[a] (Minn.; 1896.)**

A defendant against whom a default judgment had been entered could not be called for cross-examination by plaintiff on the trial of the issues raised by the answers of his co-defendants, under Gen. St. 1894, § 5659, providing that a party to the record, or a person for whose immediate benefit an action is prosecuted or defended, may be called for cross-examination by the opposite party, who shall not be concluded by his testimony.—*Suter v. Page* (Minn.) 67 N. W. 67.

64 Minn. 444.

[b] (Minn.; 1896.)

Where parties holding intimate domestic relations are charged with a conspiracy to defraud, great latitude should be allowed in their examination under Gen. St. 1894, § 5659, allowing a party to be examined as if under cross-examination, at the instance of the adverse party.—*Pfefferkorn v. Seefeld* (Minn.) 68 N. W. 1072.

§ 41. Redirect examination.**[a] (Iowa; 1896.)**

In an action against the surviving husband of a deceased sister, on her note, where plaintiff has testified that her mother was worth \$3,000 when she died, and that defendant's wife received nearly all of it, she may, after cross-examination as to her means of knowledge, testify that, on death of her mother, her heirs approximated her estate at \$3,000, though defendant was not present, when the approximation was made.—*Leipold v. Stotler* (Iowa) 66 N. W. 150.

[b] (Iowa; 1896.)

Where one of plaintiff's witnesses was an employé of defendant, it was not error to allow plaintiff, on redirect examination, to question the witness regarding certain conversations he had had with defendant's attorneys at the former trial, and the information he had given them respecting his knowledge of the case.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 67 N. W. 227.

[c] (Iowa; 1896.)

In an action against a railroad company, one of the witnesses for plaintiff, who had formerly been employed by the defendant, on cross-examination, was questioned in regard to his discharge. *Held* that, on redirect examination, a letter from defendant's superintendent commendatory in character was properly admitted as explaining why the witness had left defendant's employ.—*Spaulding v. Chicago, St. P. & K. C. Ry. Co.* (Iowa) 67 N. W. 227.

[d] (Minn.; 1895.)

Where plaintiff, on cross-examination, stated that he intended a writing drawn by him to be the contract between the parties, it was proper to permit him, on redirect examination, to state that he intended to put in the writing a material provision, in reference to which he had testified on direct examination, but failed to do so through oversight.—*Vaughan v. McCarthy* (Minn.) 65 N. W. 249.

63 Minn. 221.

[e] (Minn.; 1897.)

On an issue as to whether a sale of the goods in a store and the store fixtures was to defraud creditors, the purchaser testified on cross-examination that at the time of the sale he was employed elsewhere, and had to hire a clerk to manage the store. *Held*, that he could state, on redirect examination, that at the time of the purchase he expected his employment

soon to cease.—*Mix v. Edge* (Minn.) 69 N. W. 703.

[f] (Neb.; 1895.)

Though evidence of the price brought for neighboring property is inadmissible in proceedings by a railroad company for condemnation of land, if a witness is allowed to give such evidence on cross-examination he may be questioned thereon on re-examination.—*Chicago, R. I. & P. R. Co. v. Griffith* (Neb.) 62 N. W. 868.

44 Neb. 690.

[g] (Neb.; 1895.)

Where defendant's bookkeeper testified that a certain person was not defendant's agent, and on cross-examination a letter was shown, but not introduced in evidence, written by witness, and signed in defendant's name, which recited that such person was defendant's agent, it was not error, on the redirect examination, not to permit the witness to testify whether he was authorized by defendant to write the letter.—*Fremont Butter & Egg Co. v. Peters* (Neb.) 63 N. W. 791.

45 Neb. 356.

[h] (Neb.; 1895.)

Where the sheriff, as a witness for the state in a murder case, was asked, on cross-examination, whether he felt suspicious of defendant, and answered in the affirmative, it was proper to permit the state, on redirect examination, to ask him his reasons for his suspicions.—*Collins v. State*, 64 N. W. 432, 46 Neb. 37.

[i] (Neb.; 1896.)

It is permissible by way of redirect examination to introduce evidence explanatory of facts elicited by the cross-examination, although corroborative of the witnesses' testimony in chief.—*Norfolk Nat. Bank v. Job* (Neb.) 67 N. W. 781.

48 Neb. 774.

§ 42. Recalling witness.

(Iowa; 1895.)

It was not an abuse of discretion that a witness of plaintiff, who was excused without cross-examination, was recalled, after plaintiff rested, for cross-examination.—*Chapman v. James* (Iowa) 64 N. W. 795.

III. PRIVILEGE OF WITNESS—COMPELLING TESTIMONY.

§ 43. Party to action for conspiracy.

(Minn.; 1896.)

The party may be compelled to testify as fully on all matters material to the issue as any other witness, though the action is for conspiracy, which has not been established or admitted.—*Pfefferkorn v. Seefield* (Minn.) 68 N. W. 1072.

§ 44. How privilege claimed.

(N. D.; 1896.)

A witness who desires to claim his constitutional privilege of declining to answer a question, though he is also the party defendant, must make his claim in person, and under oath, and with sufficient definiteness to render his claim clear.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

§ 45. What constitutes inculpation.

(Iowa; 1896.)

During the trial defendant's brother, who greatly resembled him, took a seat by his side as a test of identity. At the request of the state the judge ordered defendant to rise for identification, against the objection of his attorney. The prosecuting witness then identified the one who stood up as the one who committed the offense. *Held*, that defendant was

not compelled to criminate himself.—*State v. Reasby* (Iowa) 69 N. W. 451.

§ 46. Cross-examination to affect credibility.

(N. D.; 1896.)

For the purpose of affecting the credibility of a witness, it is proper to ask him on cross-examination questions the answers to which may tend to degrade, disgrace, or criminate him, though he may refuse to answer any question the answer to which will tend to criminate him.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

§ 47. Cross-examination of accused.

(N. D.; 1895.)

Where an accomplice has, by his own testimony, made out a case of murder against himself, he may be asked, on cross-examination, if he expected to be hung.—*State v. Kent* (N. D.) 62 N. W. 631.

4 N. D. 577.

§ 48. Waiver of privilege—Accused testifying in his own behalf.

[a] (N. D.; 1896.)

A defendant in a criminal case who takes the witness stand in his own behalf is subject to the same rules of cross-examination that govern other witnesses; and he is required to answer any relevant question tending to convict him of the crime charged, though such answer may also tend to convict him of another crime.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

[b] (N. D.; 1896.)

A defendant in a criminal case, who becomes a witness in his own behalf, does not thereby waive his privilege to decline to answer questions the answers to which may tend to convict him of collateral crimes, when such questions are asked solely to affect his credibility.—*State v. Pancoast* (N. D.) 67 N. W. 1052.

5 N. D. 516.

[c] (Wis.; 1896.)

Where an accused voluntarily makes himself a witness, he is subject to cross-examination, as other witnesses.—*Frank v. State* (Wis.) 68 N. W. 657.

IV. CREDIBILITY AND IMPEACHMENT OF WITNESS.

Credibility of defendant's statement or testimony, see "Criminal Law," § 167.
Instructions as to credibility, see "Criminal Law," §§ 154, 166.

1. IN GENERAL.

§ 49. In general.

(Wis.; 1895.)

On an issue as to whether a conductor used unnecessary force in ejecting a passenger, it is error to charge that the testimony of "a greater number of credible witnesses whose statements are reliable, on one side, might be considered * * * more worthy of confidence and trust than the testimony of a lesser number of witnesses of equal credibility," as it does not call the attention of the jury to the relative intelligence of the witnesses, nor their opportunity to observe what took place.—*Schmitt v. Milwaukee St. Ry. Co.*, 61 N. W. 834, 89 Wis. 195.

§ 50. Credibility of unimpeached witness.

(Neb.; 1896.)

A jury is not bound to blindly accept as true all testimony which is not directly contra-

dicted or impeached.—*Murphey v. Virgin* (Neb.) 66 N. W. 652.
47 Neb. 692.

§ 51. Party testifying at instance of adversary.

[a] (Wis.; 1895.)

It is not error to refuse to charge that when a party calls his opponent as a witness he holds him out as worthy of credit, as his credibility must be considered in view of his character, intelligence, and interest in the case, and the manner in which he testifies.—*Garny v. Katz*, 61 N. W. 762, 89 Wis. 230.

[b] (Wis.; 1895.)

The fact that plaintiff called defendant as his witness does not relieve the jury of its duty to weigh the testimony of such witness, and plaintiff is not bound to hold out such witness as worthy of credit as to everything he may testify to.—*Garny v. Katz* (Wis.) 61 N. W. 762, 89 Wis. 230.

§ 52. Falsus in uno, etc.

[a] (Neb.; 1896.)

The maxim, "Falsus in uno, falsus in omnibus," applies only where a witness had knowingly and willfully testified falsely as to a matter of fact. *Buffalo Co. v. Van Sickle* (1884) 20 N. W. 261, 16 Neb. 363, followed.—*Omaha & R. V. R. Co. v. Krayenbuhl*, 67 N. W. 447, 48 Neb. 553.

[b] (Neb.; 1896.)

The jury cannot disregard the entire testimony of a witness who, in testifying, made a misstatement of a material fact, unless the false statement was willfully made; the question of intent in making it being for the jury.—*McCormick Harvesting Mach. Co. v. Seeman* (Neb.) 68 N. W. 482.

[c] (N. D.; 1895.)

The testimony of a witness who testified falsely as to a material fact in the case could not be wholly disregarded by the jury, unless they believed that he so testified intentionally.—*McPherrin v. Jones* (N. D.) 65 N. W. 685.
5 N. D. 261.

[d] (Wis.; 1895.)

An instruction that, if the jury believe that any witness has told an untruth, they may reject his entire testimony, must be confined to an untruth as to a material fact.—*Schmitt v. Milwaukee St. Ry. Co.*, 61 N. W. 834, 89 Wis. 195.

[e] (Wis.; 1896.)

An instruction to the jury that, "if you find that any witness has testified falsely regarding any material matter, you are at liberty to disregard all his testimony, except so far as may be corroborated by other evidence," was erroneous, in that it allowed the jury to disbelieve the entire testimony of a witness simply because he may have made an innocent mistake.—*Cahn v. Ladd* (Wis.) 68 N. W. 652.

§ 53. Effect of impeachment.

(Iowa; 1896.)

That a witness' moral character and reputation for truth and veracity has been impeached does not require that the jury disregard his testimony if unsupported by corroborating evidence.—*State v. Van Vliet* (Iowa) 66 N. W. 748.

§ 54. Province of jury.

[a] (Iowa; 1894.)

Where, after an indictment for seduction, prosecutrix makes an affidavit that defendant did not seduce her, and on the trial she testifies that she was induced to make the affidavit by threats and promises made by defendant, the question of her veracity is for the jury.—*State v. Bradbury* (Iowa) 61 N. W. 192, 92 Iowa, 512.

[b] (S. D.; 1894.)

While it is the right of the jury, in general, to judge of the credibility of a witness and

the probative value of his testimony, it has no right arbitrarily or capriciously to disregard testimony submitted by the court.—*Drew v. Watertown Fire Ins. Co.* (S. D.) 61 N. W. 34.

6 S. D. 335.

2. HOW WITNESS MAY BE IMPEACHED.

§ 55. Evidence admissible.

[a] (Iowa; 1895.)

Where a witness for the state testified that H., who was jointly indicted with defendant, said, in the presence of defendant and S., "Because we got the best of a railroad man, they want to drive us off the face of the earth," deceased having been a railroad man, it was not error, while S. was a witness for the defense, to exclude a question by defendant's counsel as to whether he heard H. say, in the presence of defendant and the other witness, "But, now we got the best of railroad men, they want to run us off the earth, or something like that;" it being too indefinite to establish a contradiction.—*State v. Weems* (Iowa) 65 N. W. 387.

[b] (Iowa; 1896.)

Where plaintiff is a co-partnership, the fraudulent act of one partner does not affect the credibility of the others, who were guiltless of intentional wrong.—*Gutherless v. Ripley* (Iowa) 67 N. W. 109.

[c] (Iowa; 1896.)

The fact that defendant's mother attempted to bribe the county attorney to fix the papers so that her son might escape is relevant, and may therefore be shown in contradiction of the testimony of the mother brought out by the state on cross-examination.—*State v. McKinstry* (Iowa) 69 N. W. 267.

[d] (Iowa; 1896.)

Where the sheriff testifies that he was unable to find defendant to arrest him, for the purpose of showing that defendant was secreting himself to avoid arrest, evidence that defendant's father told the sheriff that he would have defendant surrender himself the next day is admissible.—*State v. Allen* (Iowa) 69 N. W. 274.

[e] (Mich.; 1894.)

Evidence of the business relations between a party and his witness is admissible as affecting his credibility.—*Totten v. Burhans* (Mich.) 61 N. W. 58.
103 Mich. 6.

[f] (Mich.; 1894.)

A witness testified that he was employed to detect violations of the local option law, and had made a number of complaints, and been a witness in a number of cases. *Held*, that it was error not to permit defendants to show on cross-examination that A., another witness for the people, was employed for the same purpose; that the meetings between A. and the witness at various places were not accidental; that both had testified in other cases; and that A. had received pay for taking witness to different places. *Grant and Hooker, JJ.*, dissenting.—*People v. Rice* (Mich.) 61 N. W. 540.
103 Mich. 350.

[g] (Mich.; 1894.)

It was error to refuse to charge that the jury should consider the fact that such witness was a "hired witness," and that such fact should be considered in determining the credit to be given to his evidence. *Grant and Hooker, JJ.*, dissenting.—*People v. Rice* (Mich.) 61 N. W. 540.
103 Mich. 350.

[h] (Mich.; 1895.)

On a trial for forgery committed November 23, 1891, at Kalamazoo, Mich., P., a witness for defendant, testified that on that date the accused was in Detroit, and that witness borrowed money of him, giving his note therefor,

which he paid April 11, 1892, to the defendant personally, at Detroit. *Held*, that evidence that accused was in Minnesota on April 11, 1892, was competent, as bearing upon the credibility of P.'s evidence.—*People v. De France* (Mich.) 62 N. W. 709.

101 Mich. 563.

[I] (Mich.; 1895.)

Whether or not the county attorney prepared the bail bond of a witness who has testified that he is under arrest, and is out on bail, is immaterial.—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

[J] (Mich.; 1895.)

The fact that the witnesses for the state on a prosecution for selling liquors unlawfully were hired to procure evidence of violation of the law may be considered by the jury in determining the credit to be given to their evidence.—*People v. Whitney* (Mich.) 63 N. W. 765.

105 Mich. 622.

[K] (Minn.; 1895.)

The person whom it was charged defendant induced to commit the murder testified that, shortly before the commission of the crime, defendant gave him part of the contents of a bottle of whisky, but kept the bottle, and the state showed that defendant purchased such a bottle on the day of the crime. Defendant admitted the purchase of whisky, but denied that he gave any to witness, and stated that he left the bottle in the bathroom at his home, where he believed it then to be. Thereafter the defense offered to prove, by a witness who visited the bathroom after defendant testified, that a similar bottle of whisky was found in the place mentioned by defendant. *Held*, that the offer was properly rejected.—*State v. Hayward* (Minn.) 65 N. W. 63.

62 Minn. 474.

[L] (Minn.; 1895.)

The person whom it was alleged defendant procured to commit the murder testified that, after shooting deceased, she fell back in her seat in the buggy, in which she was riding with witness, and sat still. To contradict the witness, defendant offered expert evidence that a person shot as was deceased would instantly become limp. *Held*, that the evidence did not have a tendency to contradict the witness, and hence was properly excluded.—*State v. Hayward* (Minn.) 65 N. W. 63.

62 Minn. 474.

[M] (Minn.; 1895.)

Letters written by a witness to one of the parties in reference to matters involved in the suit, which tended to show a corrupt disposition to conceal or pervert the truth, for a money consideration, as to the matters to which he testified, should have been admitted to impeach the witness.—*Alward v. Oaks* (Minn.) 65 N. W. 270.

63 Minn. 190.

[N] (Minn.; 1896.)

The reception of evidence on cross-examination for the purpose of contradicting the witness is within the discretion of the trial court.—*Matthews v. Hershey Lumber Co.* (Minn.) 67 N. W. 1008.

[O] (Neb.; 1894.)

In a criminal case the state may show in rebuttal that a witness who testified for defendant was intoxicated at the time of the happening of the events about which he testified.—*Willis v. State*, 61 N. W. 254, 43 Neb. 102.

[P] (N. D.; 1895.)

As bearing on the credibility of an accomplice whose testimony shows that he committed the murder at the instigation of defendant, defendant may show that no prosecution against the accomplice has been instituted, though several months have elapsed since his confession of the crime.—*State v. Kent* (N. D.) 62 N. W. 631.

4 N. D. 577.

[Q] (Wis.; 1895.)

Testimony of a witness may be discredited by showing that he was drunk while the events to which he testified were taking place.—*Mace v. Reed*, 62 N. W. 186, 89 Wis. 410.

§ 56. Examination as to knowledge of law.

(Iowa; 1896.)

It is not an abuse of discretion to refuse permission to ask prosecutrix on cross-examination, "You know, do you not, that, in order to convict * * * [defendant], you must be under the age of thirteen years at the time the intercourse took place?"—knowledge by a witness of the law applicable to facts testified to not necessarily having any influence on the credibility of her testimony.—*State v. Forsythe* (Iowa) 68 N. W. 446.

§ 57. Time of admitting impeaching evidence.

(Mich.; 1895.)

Evidence of statements made by the state's witness on defendant's preliminary examination, for the purpose of impeachment, should be introduced after defendant's counsel has taken the case, and not upon the cross-examination of such witness.—*People v. Oblaser* (Mich.) 62 N. W. 732.

104 Mich. 579.

§ 58. Laying foundation for impeachment.

(Mich.; 1895.)

In an action by an infant for personal injuries from stepping into a hole in a sidewalk, a witness for the defense, who testified that he saw the accident, and that there was no hole where it occurred, on being asked whether, at a designated time, he met a certain person at a certain place, and, replying that he knew no such person, was again asked if he met any person at that time and place, and there stated to him that he saw the infant fall into a hole in the sidewalk, replied that he never did. *Held*, that the attention of the witness was sufficiently directed to the time, place, and person to render admissible in rebuttal evidence of the conversation had at the designated time and place with the person named.—*Strudgeon v. Village of Sand Beach* (Mich.) 65 N. W. 616.

§ 59. — Showing contradictory statements.

[a] (Iowa; 1897.)

Impeaching evidence, consisting of contradictory statements out of court, is properly excluded where no foundation is laid.—*Kreuger v. Sylvester* (Iowa) 69 N. W. 1059.

[b] (Mich.; 1896.)

In the absence of any foundation for impeachment, it was not error to exclude testimony tending to show what one of the witnesses for plaintiff had stated out of court.—*Connell v. McNett* (Mich.) 67 N. W. 344.

[c] (Neb.; 1896.)

To impeach a witness by showing a statement at variance with those made at the trial, it is necessary to call attention to such inconsistent statement, and inquire whether or not it was made by the witness at a time and place indicated.—*Davidson v. Cruse* (Neb.) 66 N. W. 823.

47 Neb. 829.

[d] (S. D.; 1896.)

Where the testimony of a witness not a party to the actor is sought to be impeached by inconsistent statements out of court, it is necessary that the witness' attention should be called to the time, place, and person to whom the alleged statements were made, and to the specific statements.—*State v. Hughes* (S. D.) 66 N. W. 1076.

§ 60. — Showing testimony on former occasion.

[a] (Iowa; 1896.)

To contradict defendant as a witness in his own behalf, statements of his on a former trial may be shown, without laying a foundation for impeachment by calling his attention to the time and place of making the statements.—*State v. Forsythe* (Iowa) 68 N. W. 446.

[b] (Mich.; 1895.)

After having called the attention of a witness for the people to his evidence on a former trial, and having asked him if he made certain statements, the defense sought to impeach him by having read the stenographer's minutes of the former trial, but the stenographer was not asked the same question as the witness sought to be impeached. *Held*, the evidence was properly excluded. *McGrath, C. J., and Montgomery, J., dissent.*—*People v. Considine* (Mich.) 63 N. W. 196.

105 Mich. 149.

[c] (Mich.; 1895.)

Depositions taken in a preliminary examination are admissible on the trial as original evidence.—*People v. Kennedy* (Mich.) 63 N. W. 405.

105 Mich. 434.

§ 61. Evidence admissible as showing contradictory statements.

[a] (Iowa.)

Where, in replevin against a sheriff, for attached property, by a purchaser before levy of the attachment, the original owner is plaintiff's witness to show the bona fides of the sale, evidence given by him on a previous examination as to the property is admissible.—(1895) *Klotz v. James*, 64 N. W. 648; (1896) *Id.*, 66 N. W. 190.

[b] (Iowa; 1896.)

Where a witness positively denies having made a certain statement, the fact that prior thereto he stated that he did not recollect having made the statement does not prevent evidence that he did make the statement from being admissible to impeach him.—*Moeller v. Karhoff* (Iowa) 68 N. W. 446.

[c] (Iowa; 1896.)

Plaintiff may discredit a witness as to facts testified to when called by defendant, by evidence of contrary statements, though earlier in the trial he has been called as a witness by plaintiff.—*Hall v. Incorporated Town of Manson* (Iowa) 68 N. W. 922.

[d] (Iowa; 1896.)

Where defendant testified that, for several hours before the assault, he had been drinking, and did not recollect the assault or that he had a razor with him, it was proper cross-examination to ask him if, on the morning after the assault, he stated to a third person that he had borrowed the razor with which he made the assault.—*State v. Clark* (Iowa) 69 N. W. 257.

[e] (Iowa; 1897.)

A copy of minutes taken in another case may be used for the purpose of cross-examining defendant's witness in a trial for murder in order to show that the witness made contradictory statements, though the minutes are not offered in evidence, and defendant's counsel is not furnished with a copy.—*State v. Cater* (Iowa) 69 N. W. 880.

[f] (Mich.; 1895.)

Evidence that the conductor of a street car, at the time of a collision, stated that the accident would not have occurred had his own motorman had charge, was admissible to impeach his testimony that the motorman who controlled the car at the time of the accident exercised proper care to prevent the injury. *Hooker and Grant, J.J., dissenting.*—*McClellan v. Ft. Wayne & B. I. Ry. Co.* (Mich.) 62 N. W. 1025.

105 Mich. 101.

4 N.W.DIG.—63

[g] (Mich.; 1897.)

When a witness, asked, for the purpose of impeachment, if he did not make certain statements, answers that he has no recollection of making them, the party asking the question may call other witnesses to prove that they were made.—*Pringle v. Miller* (Mich.) 70 N. W. 345.

[h] (Neb.; 1895.)

Statements made by a witness out of court in conflict with his testimony may be shown on cross examination.—*Fremont Butter & Egg Co. v. Peters* (Neb.) 63 N. W. 791.

45 Neb. 356.

[i] (Wis.; 1896.)

On an issue as to the fraudulent character of representations made by the debtor to plaintiff's salesman for the purpose of obtaining credit, a letter, which it was not claimed that the plaintiff ever saw, written by the debtor to another firm, making a statement to obtain credit, and differing in some respects from the statement made to plaintiff, was inadmissible for the purpose of impeaching the testimony of the debtor as to the truth of his statement to plaintiff.—*Cahn v. Ladd* (Wis.) 68 N. W. 652.

§ 62. — Testimony on former occasion.

[a] (Iowa; 1896.)

Where the owner of stolen goods testified that they were worth a certain sum, he cannot be impeached by evidence that, in a suit to recover their value, he had placed a different value on them.—*State v. Brown* (Iowa) 69 N. W. 277.

[b] (Mich.; 1895.)

A party is not conclusively bound by his testimony on a former trial, but his change of testimony is to be considered by the jury as affecting his credibility.—*Pelton v. Schmidt* (Mich.) 62 N. W. 552.

104 Mich. 345.

§ 63. Concealment of facts on former trial.

(Mich.; 1896.)

On a trial for assault, a witness for defendant testified that he witnessed the assault, which was made by one M., and not by defendant. *Held*, that it was competent to show, on cross-examination to discredit the witness, that he was present at the preliminary examination of M. and the defendant, and heard M. testify that he did not commit the assault, and permitted M. to be discharged and defendant bound over without disclosing his knowledge.—*People v. Wirth* (Mich.) 66 N. W. 41.

§ 64. Showing bias or prejudice.

[a] (Neb.; 1897.)

It is not competent to prove the bias or prejudice of one witness by the cross-examination of another witness, without having cross-examined the first witness as to his interest or prejudice.—*Davis v. State* (Neb.) 70 N. W. 984.

[b] (Neb.; 1897.)

A litigant can cross-examine a witness produced against him, to show the interest or prejudice of such witness, but the extent to which such an examination may be carried rests largely in the discretion of the court.—*Davis v. State* (Neb.) 70 N. W. 984.

§ 65. Denial of statements — Showing falsity.

[a] (Iowa; 1896.)

A witness jointly indicted with defendant for rape having testified that prosecutrix virtually seduced him and defendant, and having denied on cross-examination that shortly before the alleged rape he asked a certain person if he could not inform witness and defendant where they could obtain sexual intercourse, it was proper to permit said person, in rebuttal, to testify that said witness did ask him that question.—*State v. Philpot* (Iowa) 66 N. W. 730.

[b] (Iowa; 1896.)

In an action on a life insurance policy defendant claimed that insured committed suicide, and therefore the policy was avoided, whereas plaintiff claimed she was murdered by her husband. There was no dispute but that insured died from poison. *Held*, that for the purpose of discrediting the testimony of the husband, which tended to show suicide, it was error to admit evidence contradicting denial on his part on cross-examination of statements showing that he was desirous of suppressing the post-mortem examination of insured.—*Laird v. Equitable Life Assur. Soc. of United States* (Iowa) 67 N. W. 385.

[c] (Iowa; 1896.)

It was also error to admit evidence contradicting a denial on his part on cross-examination of having stated to his wife that if she did not stop complaining of his daughter by a former wife she would "run against a stump."—*Laird v. Equitable Life Assur. Soc. of United States* (Iowa) 67 N. W. 385.

[d] (Neb.; 1895.)

In an action for breach of marriage promise, where defendant's witness, on cross-examination, denied having said that plaintiff admitted to witness that she had led an immoral life, it was proper to permit plaintiff's witness to testify that defendant's witness had told him that plaintiff made such confession.—*Stratton v. Dole* (Neb.) 63 N. W. 875.
45 Neb. 472.

§ 66. Showing particular wrongful acts.**[a] (Minn.; 1896.)**

A witness cannot be impeached by showing particular acts of corruption or dishonesty.—*Matthews v. Hershey Lumber Co.* (Minn.) 67 N. W. 1008.

[b] (N. D.; 1896.)

It does not impair the credibility of a witness to show the commission of a collateral crime more than 20 years before the examination.—*State v. Panoast* (N. D.) 67 N. W. 1052.

§ 67. Showing former conviction of crime.**(Iowa; 1896.)**

Under Code, § 3648, providing that "a witness may be interrogated as to his previous conviction for a felony," a witness cannot be asked, on cross-examination, if he had been "arrested" for a felony.—*State v. Brown* (Iowa) 69 N. W. 277.

§ 68. Form of question for purpose of impeaching.**[a] (Mich.; 1896.)**

Where the proper foundation is laid for impeaching testimony, and the testimony is confined to contradicting the witness sought to be impeached on a point covered by his testimony, the form of the question, if not leading, is not prejudicial.—*Miller v. Jurczyk* (Mich.) 67 N. W. 898.

[b] (N. D.; 1896.)

When it is sought to impair the credibility of a witness on cross-examination by showing bad moral character, the interrogatories should be confined to specific facts, and should be so framed that the witness can squarely admit or deny.—*State v. Panoast* (N. D.) 67 N. W. 1052.

3. WHO MAY BE IMPEACHED.**§ 69. Impeaching one's own witness.****[a] (Mich.; 1896.)**

A party may contradict his own witness.—*Darling v. Thompson* (Mich.) 65 N. W. 754.

[b] (Mich.; 1896.)

Where the state is surprised by the testimony of its witness that she does not know

who the guilty persons were, she may be asked if she did not make an affidavit stating that defendant was one of them, and that she would know the other if she saw him again.—*People v. Gillespie* (Mich.) 69 N. W. 490.

[c] (N. D.; 1895.)

Where a witness disproved the case of the party who called him, to that party's surprise, he may be asked whether he did not make a statement to such party conflicting with his testimony, and which, if proved, would tend to prove such party's case.—*George v. Triplett* (N. D.) 63 N. W. 891.
5 N. D. 50.

§ 70. Contradicting matters brought out on cross-examination.**[a] (Iowa; 1894.)**

A party who, on cross-examination, develops collateral evidence, cannot contradict it.—*Swanson v. French* (Iowa) 61 N. W. 407.
92 Iowa, 695.

[b] (Mich.; 1895.)

Where, in an action for injuries from a dog bite, a doctor, who was a witness for defendant, testified that he examined plaintiff's leg after he was bitten, and discovered from the scar that there had been an ulcer on the leg before plaintiff was bitten, and plaintiff's counsel showed the witness a scar on his leg, and asked what caused it, and the witness answered that he could not tell, but it was certain that the bone was not involved, and that the scar must have been the result of a flesh wound; that he could not say whether there had been an ulcer or running sore, but that it looked as if there was suppuration; that he could not state whether the bone was injured, but that it was not seriously injured.—it was error to allow the counsel to testify that he received the wound from an ax, and that a piece of bone had been taken out, and that there was never any discharge or running sore.—*Kennett v. Engle* (Mich.) 63 N. W. 1009.
105 Mich. 693.

[c] (Mich.; 1897.)

A defendant who, in the cross-examination of plaintiff, inquires as to his past life and associations, to affect his credibility as a witness, is bound by the answers, and cannot introduce direct testimony as to such matters, the effect of which would be to raise a collateral issue.—*Kingston v. Ft. Wayne & E. Ry. Co.* (Mich.) 70 N. W. 315.

[d] (Minn.; 1895.)

On an issue in replevin whether defendant sold the property to plaintiff, plaintiff's husband testified that he purchased the property for his wife. On cross-examination he was asked whether he had not stated that he did not purchase the property, and answered in the negative. *Held*, that the evidence was material, and it was error to refuse to permit witness to be impeached by proving that he did make that statement.—*Swift v. Withers* (Minn.) 65 N. W. 85.
63 Minn. 17.

[e] (Minn.; 1897.)

A witness for defendant denied on cross-examination that he had stated at a certain time and place that he had borrowed money of defendant at a certain usurious rate. *Held*, as the question related to a collateral matter, the party asking it was bound by the answer, and could not introduce evidence to contradict it.—*Murphy v. Backer* (Minn.) 70 N. W. 799.

[f] (Neb.; 1897.)

Where a witness is cross-examined on a matter collateral to the issue, he cannot be subsequently contradicted by the person so cross-examining him.—*Johnston v. Spencer* (Neb.) 70 N. W. 982.

[g] (S. D.; 1897.)

The state, on a trial for murder, having asked defendant's witness on cross-examination whether he had not stated that, after an in-

vestigation, he was convinced that defendant killed deceased, cannot rebut his negative answer.—*State v. Davidson* (S. D.) 70 N. W. 879.

§ 71. Impeaching absent witness.

(Neb.; 1896.)

An admission of plaintiff that proposed witnesses of defendant, if time applied for should be allowed to procure their evidence, would give certain testimony, is not equivalent to an admission that such proposed testimony is indisputable.—*Burris v. Court* (Neb.) 66 N. W. 1131.

48 Neb. 179.

4. CORROBORATION OF WITNESS AND REBUTAL OF IMPEACHING TESTIMONY.

§ 72. Corroboration.

(Minn.; 1895.)

A witness for the state, who knew of defendant's intention to commit the crime, testified that he told defendant on a certain day that if he did not abandon his intention witness would report him; that thereupon defendant assaulted witness, and threatened him with harm; and that witness then went home, and got his revolver. *Held*, that it was proper to admit, in corroboration of that testimony, evidence of witness' wife that on the day mentioned her husband came home and got his revolver.—*State v. Hayward* (Minn.) 65 N. W. 63.

62 Minn. 474.

§ 73. Rebuttal of impeaching testimony.

[a] (Iowa; 1896.)

To rebut an attack on a person's character, the witness cannot be asked whether he ever heard certain other persons speak of such person's character, it not appearing where such other persons lived, or the extent of their acquaintance with the person whose character was attacked.—*State v. Allen* (Iowa) 69 N. W. 274.

[b] (Mich.; 1895.)

When defendant brought out the fact that plaintiff had been arrested for a criminal offense, it was proper, on defendant's cross-examination, on the question of animus, to ask him whether he had not caused plaintiff's arrest.—*Burt v. Long* (Mich.) 64 N. W. 60.

§ 74. Explanation of contradiction.

(Mich.; 1894.)

Where a defendant in an action alleges that his deed was delivered on a certain day, he may, when such statement is introduced to contradict him in a subsequent action, explain what he understood the term "delivery" to mean.—*Jourdan v. Patterson* (Mich.) 61 N. W. 64.

102 Mich. 602.

V. ATTENDANCE AND FEES.

Charging deposit in court with fees for service of subpoenas, see "Deposits in Court."

Fees as costs, see "Costs," § 22.

Right of accused to compulsory process for witnesses, see "Constitutional Law," § 74.

§ 75. Taking witnesses into custody.

[a] (Mich.; 1895.)

Persons detained as witnesses are held "upon civil process," under How. Ann. St. § 8941, providing that persons held on civil process shall not be confined in a room with those arrested on a criminal charge.—*In re Lewellyn* (Mich.) 62 N. W. 554.

104 Mich. 318.

[b] (Mich.; 1895.)

Although a person may, upon proper showing, be held in custody as a witness, such detention will not be permitted merely upon ex

parte affidavits.—*In re Lewellyn* (Mich.) 62 N. W. 554.

104 Mich. 318.

§ 76. Fees and mileage.

[a] (Iowa; 1895.)

Code, § 3673, providing that witnesses living more than 70 miles from the place of holding court cannot be compelled to attend, does not prohibit the granting of full mileage to a witness attending from a greater distance.—*Briggs v. Rumely Co.* (Iowa) 64 N. W. 784.

[b] (Iowa; 1896.)

The president and secretary of a corporation are not parties to an action brought by the corporation, so as to disentitle them to fees as witnesses in its behalf.—*Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller* (Iowa) 68 N. W. 443.

§ 77. — Criminal cases.

(Wis.; 1895.)

Mandamus will not lie to compel the clerk of the circuit court to issue the certificate provided for by Rev. St. § 4060, requiring such clerk, on proof by affidavit of the attendance of a witness on a criminal trial in the circuit court, to give the witness a certificate of the compensation to which he is entitled from the county, where relator, in default of a recognition for her appearance as a witness, was confined in jail during the time for which compensation was claimed, and the case was never brought to trial, and relator never appeared in court as a witness.—*State v. Greene* (Wis.) 65 N. W. 181, 91 Wis. 500.

WORDS AND PHRASES.

Parol evidence to show meaning of words, see "Evidence," § 93.

Particular words in contracts, see "Contracts," § 27.

"About," see "Adverse Possession," § 4.

"Accrue," see "Limitation of Actions," § 9 [a].

"Action arising on contract," see "Attachment," § 1.

"After the entry," see "Mortgages," § 66.

"Aggrieved," see "Appeal," § 10 [a].

"Any," see "Corporations," § 21 [a].

"Assessment or collection of taxes," see "Constitutional Law," § 54 [f].

"At any time," see "Sale," § 11 [a].

"Bankable paper," see "Contracts," § 27 [b].

"Between," see "Time," § 1 [a].

"Bodily infirmity," see "Insurance," § 136 [a].

"Carnal abuse," see "Rape," § 1 [c].

"Carriage," see "Municipal Corporations," § 29

[k].

"Charter," see "Municipal Corporations," § 40

[c].

"Children," see "Descent and Distribution," § 1.

"Contest," see "Newspapers," § 2 [c].

"Conveyance," see "Mortgages," § 31 [j].

"Corporations engaged in interstate business,"

see "Exemptions," § 21 [b].

"Disease," see "Insurance," § 136 [a].

"Disorderly house," see "Disorderly House," § 1.

"Due process of law," see "Constitutional Law,"

§ 40.

"Each end of the lines," see "Horse and Street

Railroads," § 8.

"For ordinary purposes," see "Contracts," § 27

[a].

"From and after April 1st," see "Equity," § 11.

"Great bodily injury," see "Assault and Bat-

tery," § 5 [c].

"House of his usual abode," see "Writs and No-

tice of Suits," § 7.

"If necessary," see "Railroad Companies," § 7

[a].

"Intentionally," see "Highways," § 31; "Homi-

cide," § 36 [a].

"In the same manner," see "Depositories," § 4 [d].
 "Issued," see "Writs and Notice of Suits," § 1.
 "Knowledge of the plaintiff," see "Landlord and Tenant," § 60 [a].
 "Legal representatives," see "Insurance," § 160 [c].
 "Lot," see "Homestead," § 6 [f].
 "Made and executed," see "Deed," § 3 [a].
 "Made in good faith," see "Criminal Law," § 167 [d].
 "Malice," see "Homicide," § 4 [b], [d].
 "Not less than ten days' notice," see "Time," § 2 [a].
 "On deposit," see "Banks and Banking," § 33 [f].
 "Ordinary care," see "Negligence," § 2.
 "Penalties," see "Intoxicating Liquors," § 46 [b].
 "Person," see "Counties," § 54.
 "Process," see "Insurance," § 107 [c].
 "Property," see "Descent and Distribution," § 11.
 "Pursuant," see "Depositories," § 4 [d].
 "Put in jeopardy of punishment," see "Criminal Law," § 31.
 "Rape," see "Rape," § 12 [b].
 "Reasonable doubt," see "Criminal Law," § 162 [b], [d], [f], [g], [h], [i].
 "Resident freeholders," see "Intoxicating Liquors," § 23 [a].
 "Sidewalk," see "Municipal Corporations," § 83 [f].
 "Steal," see "Criminal Law," § 109 [a].
 "Stole," see "Criminal Law," § 95 [a].
 "Subject of the action," see "Writs and Notice of Suits," § 18 [b].
 "Superintendent," see "Master and Servant," § 58 [i].
 "Surface water," see "Surface Water," § 1.
 "Swipe," see "Criminal Law," § 109 [a].
 "Temperate," see "Insurance," § 39.
 "Tenancy of the present occupants," see "Insurance," § 12 [c].
 "Text book," see "Statutes," § 10 [zz].
 "True," see "Criminal Law," § 167 [d].
 "Unjust discrimination," see "Telegraph Companies," § 1 [c].
 "Willfully," see "Highways," § 31; "Homicide," § 36 [a].
 "Within ten days after foreclosure," see "Mortgages," § 92 [c].

WORK AND LABOR.

See "Assumpsit," § 4.

Action by parent for services of child, see "Parent and Child," § 6.

Enforcing homestead against claims for labor, see "Homestead," § 11.

Recovery by servant of value of services, see "Master and Servant," § 13.

— on quantum meruit when express contract is within statute, see "Frands. Statute of," § 29.

WORKHOUSES.

Power of city to establish, see "Municipal Corporations," § 7.

WRITS AND NOTICE OF SUITS.

I. ISSUANCE, §§ 1, 2.

II. SERVICE OF PROCESS, §§ 3-19.

1. In General, §§ 3-14.

2. Substituted Service, § 15.

3. Service by Publication, §§ 16-19.

III. RETURN, §§ 20-22.

Defective process or service as ground for collateral attack, see "Judgment," § 71.

— for setting aside judgment by default, see "Judgment," § 16.

Defective process or service for vacating judgment, see "Judgment," § 160.

Notice of condemnation proceedings, see "Eminent Domain," § 13.

— of drainage proceedings, see "Drainage," §§ 4, 5.

Particular writs, see "Attachment"; "Certiorari"; "Error, Writ of"; "Execution"; "Garnishment"; "Habeas Corpus"; "Injunction"; "Mandamus"; "Prohibition, Writ of"; "Quo Warranto"; "Replevin."

Process to sustain judgment by default, see "Judgment," § 13.

Variance between summons and judgment, see "Judgment," § 5.

Waiver of objections by appearance, see "Appearance," § 6.

I. ISSUANCE.

§ 1. Of summons.

(N. D.; 1896.)

Under Comp. Laws, § 4993 (Rev. Codes, § 5354), a summons is "issued" when it is duly drawn and signed with the intention that it be served, even though it yet remains in the hands of plaintiff's attorney.—*Smith v. Nicholson* (N. D.) 67 N. W. 296.

5 N. D. 426.

§ 2. — Alias writ.

(Neb.; 1895.)

It is not necessary to refile the petition, or file a new one, in order to entitle plaintiff to the issuance of an alias summons.—*Hanna v. Emerson*, 64 N. W. 229, 45 Neb. 708.

II. SERVICE OF PROCESS.

In action before justice, see "Justices of the Peace," § 18.

— by or against railroad companies, see "Railroad Companies," § 16.

— on policy, see "Insurance," § 107.

Of writ of garnishment, see "Garnishment," §§ 14-18.

On defendant in attachment, see "Attachment," § 35.

1. IN GENERAL.

§ 3. Time.

(Wis.; 1896.)

A summons returnable August 17th, served on August 11th, is served six days before return day.—*Young v. Krueger*, 66 N. W. 355, 92 Wis. 361.

§ 4. By whom.

[a] (Mich.; 1896.)

Where the city charter provides that the city marshal shall be the chief of police of the city, and that the chief of police may serve any process which by law a constable may serve, the city marshal may serve a writ of replevin issued by a justice of the peace, and required by statute to be served by a constable.—*Fleugel v. Lards* (Mich.) 66 N. W. 585.

[b] (Mich.; 1896.)

A city marshal, who is authorized, as ex officio chief of police, to serve any process which by law a constable may serve, may serve a writ of replevin anywhere within the county.—*Fleugel v. Lards* (Mich.) 66 N. W. 585.

§ 5. — Attorney for plaintiff.

(Minn.; 1897.)

Gen. St. 1894, § 5197, which provides that "the summons may be served by the sheriff of the county where the defendant is found, or by any other person, not a party to the action," does not prohibit the plaintiff's attorney from serving the summons.—*First Nat. Bank v. Estenson* (Minn.) 70 N. W. 775.

§ 6. In what county.

(Mich.; 1895.)

Under How. Ann. St. § 7316, providing that, in an action against joint defendants, process may be served on one or more in a county other than that in which suit is brought, after service has been had on one or more of such defendants in such county, proof of service on those within the county is necessary before service can be had on one in another county.—*Allison v. Washtenaw Circuit Judge* (Mich.) 62 N. W. 152.

104 Mich. 141.

§ 7. Place of usual abode.

(Minn.; 1895.)

The term, "the house of his usual abode," as used in Gen. St. 1894, § 5199, subd. 4, relating to the service of summons, means a person's customary dwelling place or residence.—*Missouri, K. & T. Trust Co. v. Norris*, 63 N. W. 634, 61 Minn. 256.

§ 8. On corporations.

[a] (Iowa; 1895.)

Where the validity of service on a corporation is denied on the ground that it was made on one not an officer of the corporation, evidence that such person acted as secretary with the knowledge of the other officers, and was appointed by the directors to fill a vacancy in that office prior to such service, is sufficient to sustain the service.—*Perry District Fair Soc. v. Zenor* (Iowa) 64 N. W. 598.

[b] (Mich.; 1894.)

3 How. Ann. St. § 8137, providing that suits against corporations may be commenced by serving process on the presiding officer, cashier, secretary, or treasurer, "or any other officer or agent of the company," applies to railroad companies.—*Turner v. St. Clair Tunnel Co.* 61 N. W. 72, 102 Mich. 574.

[c] (Mich.; 1894.)

3 How. Ann. St. § 8147, is not repealed by 3 How. Ann. St. § 8137, providing that, whenever it is necessary to serve a process on a railroad company, it may be served on any station agent or ticket agent at any station on the line.—*Turner v. St. Clair Tunnel Co.*, 61 N. W. 72, 102 Mich. 574.

[d] (Neb.; 1897.)

Where attempt is made to serve a summons upon a corporation, and the persons served are not at the time officers of or connected with the corporation, a judgment founded thereon is void.—*Campbell Printing Press & Manufacturing Co. v. Marder, Luse & Co.* (Neb.) 63 N. W. 774.

[e] (S. D.; 1895.)

An attorney in fact for a private corporation, authorized to apply for a patent to mining ground claimed by the corporation, and to execute such papers as might be necessary for that purpose, is not a "managing agent," within Comp. Laws, § 4898, relating to service of summons on private corporations.—*Mars v. Oro Fino Min. Co.* (S. D.) 65 N. W. 19.

[f] (S. D.; 1895.)

A return of service of summons in an action against a private corporation, that the sheriff served the same on defendant "through W., attorney in fact" for defendant, was insufficient to give the court jurisdiction.—*Mars v. Oro Fino Min. Co.* (S. D.) 65 N. W. 19.

[g] (S. D.; 1897.)

An attachment issued on a summons and affidavit naming plaintiff in the title as "The Citizens' Bank," without showing its corporate or other capacity to sue, is a nullity.—*Citizens' Bank v. Corkings* (S. D.) 70 N. W. 1039.

[h] (Wis.; 1894.)

Where a domestic corporation has only one agent residing in this state, he will be presumed to be its "managing agent," within Rev. St. § 2637, subd. 10, providing that in an

action against a domestic corporation the summons may be served on its managing agent.—*Wickham v. South Shore Lumber Co.* (Wis.) 61 N. W. 287, 89 Wis. 23.

§ 9. — Foreign corporations.

[a] (Mich.; 1895.)

How. Ann. St. § 8147, providing that it shall be sufficient to serve process against any railroad company in the state upon any conductor or weighmaster, is supplemental to section 8137, providing for suits against corporations, and for the service of process therein, and is intended to facilitate service upon domestic corporations, and does not apply to service upon foreign corporations.—*Grand Trunk Ry. Co. of Canada v. Hosmer* (Mich.) 64 N. W. 17.

[b] (Mich.; 1895.)

When the cause of action did not accrue within the state, the statutes of Michigan do not provide for service of process upon foreign corporations.—*Grand Trunk Ry. Co. of Canada v. Hosmer* (Mich.) 64 N. W. 17.

[c] (Minn.; 1896.)

A motion to set aside service on a foreign corporation on the ground that the party served was not its officer or agent was properly denied, where the affidavit of such party stating in general terms that a month before service the company sold its business and thereafter had no office in the state; and that affiant resigned his office three days before service and thereafter did no business for the company, was opposed by affidavits showing that subsequent to service the business continued without apparent change, and that three days thereafter the party served executed checks of the company as manager, and the affidavit in rebuttal merely stated generally that affiant drew checks in the company's name after his agency terminated because for convenience the bank account was allowed to remain in that name after the company ceased to have an interest therein.—*Hess v. Adamant Manuf'g Co. of America* (Minn.) 68 N. W. 774.

[d] (Neb.; 1896.)

Service of summons on the managing agent in Nebraska of the business of a foreign corporation confers jurisdiction of the corporation, under Code Civ. Proc. § 59.—*Council Bluffs Canning Co. v. Omaha Tinware Manuf'g Co.* (Neb.) 68 N. W. 929.

[e] (Neb.; 1896.)

A foreign corporation which transacts business in Nebraska with citizens of that state, out of which arise claims against it, may be sued on those claims in the courts of Nebraska, provided jurisdiction can be obtained by legal service of process.—*Council Bluffs Canning Co. v. Omaha Tinware Manuf'g Co.* (Neb.) 68 N. W. 929.

§ 10. On foreign association.

(Minn.; 1896.)

Where an alternative writ of mandamus issued against a nonresident joint-stock association was directed by the court to be served upon a certain person as general agent of the company, and, on motion to quash the writ on the ground that said person, who had been served accordingly, was merely the local agent of the company, no claim was made that the company had a general manager or general agent in the state, or any officer or agent superior to said person, and all the officers named in the articles of association of the company, and all the shareholders, were nonresidents, the service was sufficient to confer jurisdiction of the company.—*State v. Adams Exp. Co.* (Minn.) 68 N. W. 1085.

§ 11. Service procured by fraud or collusion.

[a] (Minn.; 1895.)

Where the general manager of defendant, a foreign corporation, was induced to come within the jurisdiction of the court, by the fraud of plaintiff, for the purpose of obtaining

service of process on him, such service conferred no jurisdiction on the court.—*Columbia Placer Co. v. Bucyrus Steam Shovel & Dredge Co.* (Minn.) 62 N. W. 115, 60 Minn. 112; *McKinley v. Same*, *Id.*; *Anderson v. Same*, *Id.*

[b] (Wis.; 1895.)

A motion to set aside service of summons on the ground that defendant's presence in the state when service was had was procured by fraudulent contrivance is properly denied where a fraudulent contrivance is not established, or, being established, it is not shown that defendant's presence was procured by it.—*Gilbert v. Burg*, 64 N. W. 996, 91 Wis. 358.

§ 12. Acceptance of service.

[a] (Mich.; 1895.)

An indorsement on a summons, that defendant "hereby accepts service," and will allow plaintiff "to proceed with the case the same as though service had been made as commanded in said summons," is sufficient to give the court jurisdiction, though defendant was without the jurisdiction when he made such indorsement.—*Allured v. Voller* (Mich.) 65 N. W. 285.

[b] (S. D.; 1896.)

A clerk in an attorney's office, authorized to accept service of papers in cases where the attorney has been retained professionally, has no authority to accept service of summons in an action against the attorney.—*Lower v. Wilson* (S. D.) 68 N. W. 545.

§ 13. Privilege and exemption from service—Witnesses.

(S. D.; 1895.)

Comp. Laws, § 5274, providing that a witness shall not be sued in a county in which he does not reside by being served with summons in such county while going, returning, or attending in obedience to a subpoena, does not apply to witnesses from a foreign state, and hence a witness from such a state in attendance without having been subpoenaed was not liable to service of process for the commencement of an action against him.—*Malloy v. Brewer* (S. D.) 64 N. W. 1120.

§ 14. Evidence.

(Iowa; 1897.)

A judgment was rendered in 1873 against plaintiff and C. in favor of M. by a justice, and a transcript was filed in the county clerk's office. No effort was made to collect it for more than 21 years, though during much of the time plaintiff had property in the county subject to execution. Plaintiff and C. testified that they had no notice of the action, and knew nothing of it until 1895. M. testified that he was not aware of the judgment until about two years before the trial. The original notice was supposed to have been burned, and the justice had no recollection of the return of service. *Held*, that the conclusion that no notice was served was justified.—*Squires v. Jeffrey* (Iowa) 70 N. W. 730.

2. SUBSTITUTED SERVICE.

§ 15. Service out of jurisdiction.

(Neb.; 1895.)

It was no ground for quashing service of summons that neither of the defendants resided in the county wherein the action was brought, where one of the defendants was within that county at the time suit was instituted.—*Hanna v. Emerson*, 64 N. W. 229, 45 Neb. 708.

3. SERVICE BY PUBLICATION.

§ 16. Prerequisites.

(Minn.; 1897.)

Under Gen. St. 1894, § 5204, providing for the publication of the summons where defend-

ant cannot be found within the state, the filing of the return of the sheriff is not a prerequisite to such publication.—*Easton v. Childs* (Minn.) 69 N. W. 903.

§ 17. In what cases authorized.

[a] (Neb.; 1895.)

Where service by publication on a non-resident defendant is authorized only when defendant has property subject to attachment within the state (Code Civ. Proc. § 77, cl. 3), such service fails if defendant had conveyed the property attached before the levy.—*Welch v. Ayres*, 61 N. W. 635, 43 Neb. 326.

[b] (Neb.; 1895.)

Where the affidavit in attachment, filed in the county of defendants' former residence, and where property could be levied on, alleged "that said defendants have absconded, with intent to defraud creditors," and the summons was returned by the officer indorsed, "I could not find the defendants within my county," constructive service was warranted and proper.—*Smith v. Johnson*, 62 N. W. 217, 43 Neb. 754.

[c] (Neb.; 1896.)

In an action to quiet title to real estate, service by publication may be made upon a non-resident defendant who cannot be summoned in the state.—*Scarborough v. Myrick* (Neb.) 66 N. W. 867.

47 Neb. 794.

[d] (N. D.; 1896.)

Though Gen. St. Minn. 1894, § 5312, provides that no one shall be adjudged a garnishee by reason of money due defendant, unless due absolutely, garnishment of property of a defendant on which the garnishee has a lien is sufficient to give a court of Minnesota jurisdiction to render a judgment in rem against a nonresident defendant served by publication, in view of the fact that section 6842 subjects an equity of redemption to levy.—*Hartzell v. Vigen* (N. D.) 69 N. W. 203.

[e] (S. D.; 1896.)

In an action against a nonresident defendant having property within the state, an order for the publication of the summons may be granted before said property has been actually seized under attachment, and upon an affidavit which contains a statement of all the jurisdictional facts, together with evidence relating thereto sufficient to convince the court of the existence of a case authorizing a substituted service under the statute.—*Iowa State Sav. Bank v. Jacobson* (S. D.) 66 N. W. 453.

[f] (Wis.; 1896.)

A complaint verified before a person purporting to be a commissioner of deeds for the state, but using an insufficient seal, is not "duly verified," so as to authorize an order for service by publication.—*Oelbermann v. Ide* (Wis.) 68 N. W. 393.

93 Wis. 669.

[g] (Wis.; 1896.)

Under Rev. St. § 2640, authorizing an order for service of summons on a nonresident defendant by publication only on a complaint duly verified and filed, unless such complaint is properly verified the service is void, and the court does not acquire jurisdiction.—*Oelbermann v. Ide* (Wis.) 68 N. W. 393.

93 Wis. 669.

§ 18. Affidavit for publication.

[a] (Neb.; 1896.)

Plaintiff's cause of action is not required to be set forth in an affidavit for service by publication, it being sufficient if such affidavit states that defendant is a nonresident of Nebraska, and that service of summons cannot be had upon him therein, and facts showing the action to be one of those mentioned in Code Civ. Proc. § 77, in which constructive service is authorized.—*Scarborough v. Myrick* (Neb.) 66 N. W. 867.

47 Neb. 794.

[b] (N. D.; 1896.)

The words, "subject of the action," in Gen. St. Minn. 1894, § 5204, requiring a plaintiff who desires to serve summons by publication to make affidavit that the court has jurisdiction of the subject of the action, relate to the controversy between the parties, and not to property of defendant seized on attachment in aid of the action. Corliss, J., dissenting.—Hartzell v. Vigen (N. D.) 69 N. W. 203.

[c] (S. D.; 1896.)

Under Comp. Laws, § 4900, providing that, where defendant cannot be found in the state, and that fact appears by affidavit "to the satisfaction of the court," and it likewise appears that a cause of action exists, the court may order service by publication, etc., an affidavit reciting that deponent is plaintiff's attorney; that a cause of action exists in favor of plaintiff and against defendant, the grounds of which appear by the complaint annexed (such complaint being verified by the attorney on his "best knowledge, information, and belief"); that the complaint is true to the best knowledge, information, and belief of deponent; that defendant is not a resident of the state, but resides in the city of A., Minn., as deponent is informed by certain persons (naming them) who live there; that defendant, after due diligence, cannot be found within the state, he being now at A., Minn.; and that defendant has property in this state, which has been attached, etc.—is sufficient to authorize an order for publication of the summons, when questioned on collateral attack of a judgment based on such service.—Davis v. Cook (S. D.) 69 N. W. 18.

§ 19. Length of publication.**(S. D.; 1896.)**

Proof that a notice is published in a weekly newspaper for seven successive issues commencing on December 25, 1891, and concluding on February 5, 1892, is sufficient to show a publication thereof "once in each week for six successive weeks," as required by statute.—Iowa State Sav. Bank v. Jacobson (S. D.) 66 N. W. 453.

III. RETURN.**§ 20. Time of return.****(S. D.; 1895.)**

A summons for relief issued by a justice of the peace in an action for a specific sum of money, and made returnable on a legal holiday, is a nullity; and the justice has no jurisdiction to adjourn the case, or to enter judgment at the adjourned trial.—Leonosio v. Bartolino (S. D.) 63 N. W. 543.

§ 21. Sufficiency of return.**[a] (Mich.; 1894.)**

Under chancery rule 122, providing a new form of subpoena, and declaring that "there shall be underwritten a notice designating against what defendants a personal decree is asked," the subpoena and notice may be treated as one instrument, and the officer's return that he served "a copy of the subpoena" is sufficient to show service of both.—Corning v. Burton (Mich.) 62 N. W. 1040.
102 Mich. 96.

[b] (Mich.; 1896.)

Where a city marshal, as ex officio chief of police, is authorized to serve writs of replevin, a return signed by him as city marshal is sufficient.—Fleugel v. Lards (Mich.) 66 N. W. 585.

[c] (Mich.; 1896.)

In attachment before a justice, at which time garnishment proceedings were also commenced, the return of the officer on the writ that "he had the writ in his possession on the 27th day of June; that he carried the writ around for several days after he received it, and that he received it on June 25th; that he could not have served the writ on defendant between June 25th and June 27th, or on either of said days; that the writ was returned to the court after June 27th,"—does not show that the officer retained the writ in his hands and made diligent search for defendant during the time personal service might have been made, and therefore his return of substituted service on June 25th is insufficient to confer jurisdiction under 3 How. Ann. St. § 6841, providing for such service if defendant cannot be found.—Bargh v. L. R. Ermeling & Co. (Mich.) 67 N. W. 1083.

[d] (Wis.; 1896.)

A return of summons, stating that service was had on each of two defendants on different dates "by delivering to and leaving with them a certified copy thereof," shows delivery of a copy of the summons to each of them.—Keith Bros. & Co. v. Stiles (Wis.) 65 N. W. 860.

92 Wis. 15.

§ 22. Conclusiveness of return.**[a] (Iowa; 1896.)**

When service is made by a deputy sheriff and return signed by the sheriff, affidavit of defendant that the paper delivered to him as a copy of the original notice was the one made an exhibit, which did not show that the original notice was signed by plaintiff or his attorney, as it was in fact, is sufficient to overcome a recital in the return that a true copy of the original notice was delivered to defendant.—Hoitt v. Skinner (Iowa) 68 N. W. 788.

[b] Mich.; 1896.)

A return of personal service, made by a private person, may be contradicted by showing that no such service was made.—Campbell v. Donovan (Mich.) 69 N. W. 514.

[c] (Neb.; 1897.)

Extrinsic evidence is admissible to impeach the return of an officer as to service of process.—Campbell Printing Press & Manufacturing Co. v. Marder, Luse & Co. (Neb.) 69 N. W. 774.

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CONSTRUED, ETC.,

IN THE

NORTHWESTERN REPORTER,

VOLS. 61-70, INCLUSIVE.

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